MANUEL DOMINGUES

Grievant,

v. **Docket No. 04-10-341**

FAYETTE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Manuel Domingues, filed this grievance against the Fayette County Board of Education ("FCBOE" or "Board") over his three-day suspension. His Statement of Grievance says:

> Grievant was suspended for 3 days[;] an arbitrary and capricious decision by the BOE
>
> RELIEF SOUGHT: Grievant seeks reinstatement of 3 days pay plus 10% interest and any and all benefits.

As this was a suspension, the grievance was filed directly to Level IV. A Level IV hearing was held on November 16, 2004, and this case became mature for decision on December 13, 2004, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. At the time of the incident, Grievant was employed as an Assistant Principal for

the summer program at Oak Hill High School. Grievant has been an administrator formany years and also served as Superintendent with FCBOE for one year. He is currently serving as Principal at East End Elementary.

2. Fred McClain was the Principal at Oak Hill High School.

3. On July 29, 2004, Grievant, who is a diabetic, did not feel well so he decided to eat some of the vegetables brought in that morning by another teacher. Grievant selected a cucumber and asked Principal McClain where he could find a knife to cut the cucumber. Principal McClain showed Grievant the keys to the locked kitchen. Grievant got a paring knife and started cutting the cucumber.

4. During this time, Carol Learmonth, a teacher taking a computer course at Oak Hill High School, reported a theft of a bottle of water from the vending machines by a student.

5. Principal McClain and Ms. Learmonth went to look for the student, and Grievant, who would be assuming Principal McClain's duties as Principal of the summer school at Oak Hill High School, asked to go along to watch how Principal McClain dealt with discipline during the summer.

6. Grievant walked down the hall cutting and eating the cucumber and remarked he wished he had some salt to go with his vegetable.

7. Ms. Learmonth pointed out the student, a boy in the fifth/sixth grade math class.

8. MA was called out into the hall, denied the charge, was confronted by Ms. Learmonth, and spoken to by Principal McClain. (See footnote 2) 9. During this time, MA's teacher, Norma Travis, came out into the hall because she heard voices.

10. The student was leaning against the lockers in the hall and appeared nonchalant. Grievant felt MA did not understand the gravity of the situation and decided to speak to him as well. He stepped toward MA, and then told MA he could be charged with theft, if the vending company decided to press charges. While telling MA this,

Grievant pointed at MA with his right hand using his right index finger and the knife. He also shook his hand/finger while making his point.

11. After MA returned to the classroom, Grievant noted the knife in his hand and told the adults there that he hoped he had not scared the child.

12. MA sobbed for the rest of the class and was unable to do any of the assigned work. He told Ms. Travis he was going to tell his mom the principal had threatened him with a knife.

13. Grievant called Superintendent Helen Whitehair and reported the incident. MA's mother called Superintendent Whitehair and reported the incident. An investigation ensued by both FCBOE and the police.

14. No charges were brought by the police.

15. Grievant was called to Superintendent Whitehair's office to bring the reports he had gotten from the police. No report indicated Grievant had actually intended to threaten MA.

16. After receiving the data, Superintendent Whitehair recommended Grievant be suspended for three days, August 5 - 7, 2004, for inappropriate and unprofessional conduct toward MA. 17. Grievant was given the opportunity to present his case to FCBOE, but decided not to proceed with this hearing, in part because he knew he was up for the principalship at East End Elementary, and was afraid a hearing before FCBOE would hurt his chances.

18. On September 7, 2004, FCBOE ratified Grievant's three day suspension and Superintendent Whitehair's recommendation that Grievant be placed as the Principal at East End Elementary.

Issues and Arguments

Respondent asserts it suspended Grievant for inappropriate and unprofessional conduct toward MA. Respondent avers Grievant violated FCBOE policies and the State

Board of Education Policy 5902, the Employees' Code of Conduct. Further, Respondent maintains Grievant was well aware of these policies and their prohibitions, and maintains Grievant was insubordinate. (See footnote 3)

Grievant argues he may only be suspended for the conduct listed in the W. Va. Code § 18A-2-8, and his behavior does not meet the definitions for any of these acts. Grievant notes he had no intent to threaten or injure the student in any way; his only intent was to eat something so he would no longer feel sick. Grievant also asserts the child did not feel threatened.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd.of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.; See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

The issues and charges raised by the parties will be discussed one at a time.

I. Credibility

While the majority of the facts were not in dispute, Grievant asserted MA was not upset by the events in the hall, and Grievant pointing the knife at him. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va.Dep't of Health & Human Res., Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Res., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Res./Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. (See footnote 4) See Holmes v. Bd. of Directors/W. Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

The resolution of MA's reaction to the events in the hall is simple. The other witnesses were not with MA after the discussion in the hall, and Ms. Travis was. There is no reason not to believe her testimony that MA was very upset and sobbing. Additionally, MA told Ms. Travis he was going to tell his mother about the incident, and he did, eventhough it meant discussing the circumstances surrounding the event. His mother called about the incident the next day. (See footnote 5)

Further, Grievant's assertions that he did not know he had the knife are not believed. Grievant knew he had the knife in his hand when he left the office to observe Principal McClain, he knew he had the knife in his hand as he walked down the hall and ate the cucumber, he knew he had the knife in his hand after the student went back in the classroom, but then states he did not know he had the knife in his hand when he pointed at the child with it. (See footnote 6) Grievant either knew or should have known he had the knife.

II. Merits of the case

The next issues to decide are whether FCBOE has proven the charges of Grievant's inappropriate and unprofessional conduct toward MA, and whether violation of State Board of Education Policy 5902, the Employees' Code of Conduct, is related to W. Va. Code § 18A-2-8. The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code §18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975). W. Va. Code § 18A-2-8 identifies the types of action that can result in disciplinary action and provides, in pertinent part:

> Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article.

While violation of a state Board of Education Policy is not included in the above list, Grievant's behavior can be viewed as insubordination. "It is not necessary for a board of education to identify an employee's offenses by the exact terms utilized in W. Va. Code

§ 18A-2-8, as long as the required written notice of charges specifically identifies the alleged acts of which the employee is accused." Jordan v. Mason County Bd. of Educ., Docket No. 99-26-080 (July 6, 1999).

The State Board of Education's Employee Code of Conduct, 126 C. R. S. 162, defines an employee at § 4.1 to include "all school personnel employed by a county board of education whether employed on a regular full-time basis or otherwise. . . ." Additionally, this Policy, at § 4.2.1, directs all West Virginia school employees to "exhibit professional behavior by showing positive examples of preparedness, communication, fairness, punctuality, attendance, language, and appearance," at § 4.2.3. to "maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination," at § 4.2.4. to "create a culture of caring through understanding and support," and at § 4.2.6. to "demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior." Respondent asserts Grievant is guilty of insubordination, and Grievant avers he is not. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." Butts v. Higher Educ. Interim Governing Bd., 569 S.E.2d 456 (W. Va. 2002)(per curiam). See Riddle v. Bd. of Directors, So. W. Va. Community College, Docket No. 93- BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." Butts v. Higher Educ. Interim Governing Bd., 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). See Riddle, supra; Webb, supra. "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." Butts, supra.

An employer can establish insubordination by demonstrating a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dep't, Docket No. 90-H-128 (Aug. 8, 1990).

Respondent has met its burden of proof. Grievant, as a long-term administrator and certainly as a Superintendent, would be aware of the Employee Code of Conduct, and its mandates. Grievant violated this Code when he pointed a knife at MA and shook it. While it is clear Grievant did not intend to harm or threaten the child, he did.

Grievant also did not "exhibit professional behavior," "maintain a[n] environment, free from harassment [and] intimidation," "create a culture of caring through understanding and support," or "demonstrate responsible citizenship by maintaining a high standard of conduct, self-control." 126 C.S.R. 162. While the undersigned Administrative Law Judge believes Grievant did not intend to harm the child, his behavior was unprofessional and inappropriate.

Additionally, it must be noted that in this day and age when a young student can be suspended because her mother packed a paring knife in her lunch box, that this incident involving a principal "non-threateningly" pointing a knife a student required action by a board of education.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis

County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, andmanner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id. See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

2. W. Va. Code § 18A-2-8 identifies the types of behaviors for which a board may suspend or dismiss an employee. These behaviors are identified as: "Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge. . . ."

3. The State Board of Education's Employee Code of Conduct at 126 C. R. S. 162 directs all West Virginia school employees to "exhibit professional behavior," "maintain a safe and healthy environment, free from harassment [and] intimidation," "create a culture of caring through understanding and support," and "demonstrate responsible citizenship by maintaining a high standard of conduct, self-control."

4. Insubordination "includes, and perhaps requires, a wilful disobedience of, or

refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." Butts v. Higher Educ. Interim Governing Bd., 569 S.E.2d 456 (W. Va. 2002)(per curiam). See Riddle v. Bd. of Directors, So. W. Va. Community College,Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989).

5. Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle, supra; Webb, supra.

6. In order to establish insubordination, an employer must demonstrate a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

7. Respondent established Grievant was insubordinate as he was aware of the Employees Code of Conduct and violated it when he pointed a knife at MA.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Fayette County. Any such appeal must be filed within thirty (30) daysof receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: January 28, 2005

Footnote: 1

Grievant was represented by Anita Mitter from the West Virginia Education Association, and FCBOE was represented by Richard Boothby, Esq. from Bowles Rice McDavid Graff and Love.

Footnote: 2

In keeping with the Grievance Board's usual practice the student will only be referred to by initials.

Footnote: 3

Other assertions by Respondent will not be addressed as the undersigned Administrative Law Judge does not find Grievant was guilty of immorality.

Footnote: 4

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).

Footnote: 5

The undersigned Administrative Law Judge would think educators should know this type of event would be upsetting for a fifth grader. There were three adults in the hall accusing him of theft, telling him he could get in trouble, and one of them pointed a knife at him. While it was certainly true MA should not have stolen the water, it is also true this type of confrontation would be troubling to him.

Footnote: 6

It is noted Grievant did not mention/admit in his statement that he had the knife in his hand when he pointed at MA, but then confusingly stated he hoped he had not "scared the child". Accordingly, it is noted this statement is less than complete. Resp. Ex. 6.