SUSAN MARL,

Grievant,

v. DOCKET NO. 06-25-112

MARSHALL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Susan Marl ("Grievant"), employed by the Marshall County Board of Education ("MCBE") as a teacher, filed a level one grievance on March 21, 2006, challenging a one- day suspension. For relief, Grievant seeks compensation for the day, and expungement of all documents relating to the suspension from her record. James Asplund, Principal of Sherrard Junior High School, lacked authority to grant the requested relief. Grievant then filed an appeal directly to level four. An evidentiary hearing was conducted in the Grievance Board's Wheeling office on June 6, 2006. Grievant was represented by Owens Brown of the West Virginia Education Association, and MCBE was represented by Richard S. Boothby, Esq., of Bowles Rice McDavid Graff & Love, LLP. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before June 22, 2006.

The following facts have been derived from a preponderance of the credible evidence offered at the pre-disciplinary hearing before MCBE, and at level four.

Findings of Fact

1. Grievant has been employed by MCBE for twenty-seven years, and was assigned as an eighth-grade teacher at Sherrard Junior High School at all times pertinent to this grievance. 2. The Valentine's Day issue of the local newspaper printed a number of photographs of children, as submitted by their friends and families. Generally, the photos were of pre-school children, but included children up to the age of sixteen. K.S., an eighth grade student taught by Grievant, was one of those students, as his grandmother annually places photos of all her grandchildren in this special section. (See footnote 1)

3. The photo of K.S. appears to be a standard school photo of his head and shoulders, under which is his full name, and the names of his parents and grandparents.

4. On February 16, 2006, Grievant saw the photo of K.S., and asked the school librarian to make approximately ten, enlarged copies. Grievant posted three copies in her classroom, and two of her students were to place a number throughout the school on lockers. Grievant thought that K.S. would find this funny.

5. Shortly thereafter, students passing through the halls while changing classes saw the picture, and made unwelcome comments to K.S., such as calling him "Grandma's little boy."

6. K.S. voiced his concern to Principal Asplund, who immediately instructed the students to remove the photos and throw them away.

7. K.S.'s mother advised Principal Asplund by letter dated February 17, 2006, that she "did not give anyone at SJHS [her] permission to copy and display a picture of [K.S.] with the intent to cause harm to him," and requested that disciplinary action be taken. 8. That same day, Grievant sent a letter to K.S. and his mother stating: "Iapologize for letting the students display [K.S.'s] picture in the school. No harm or embarrassment was intended and I am sorry if this occurred."

9. The parent was not satisfied with this letter, and proceeded to secure legal counsel.

10. MCBE Superintendent Alfred Renzella notified Grievant by letter dated February 24, 2006, that she would be suspended without pay for one school day. MCBE later ratified the suspension on March 14, 2006.

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.

MCBE asserts that Grievant violated the Employee Code of Conduct when she failed to exhibit professional behavior, thereby engaging in insubordination. Grievant concedes that she engaged in the cited behavior, but asserts it was only meant as a joke, and she had no

intent to harm K.S.

***W. Va. Code* § 18A-2-7 states that "[t]he superintendent, subject only to approval of the board, shall have authority to . . . suspend school personnel." In turn, *W. Va. Code*§18A-2-8 identifies the types of conduct 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. . . .

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 Employee Code of Conduct, W. Va. C. S. R. §126-162-4 requires all West Virginia school employees to:

4.2.1. exhibit professional behavior by showing positive examples of preparedness, communication, fairness, punctuality, attendance, language, and appearance.

4.2.2. contribute, cooperate, and participate in creating an environment in which all employees/students are accepted and are provided the opportunity to achieve at the highest levels in all areas of development.

4.2.3. maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination.

4.2.4. create a culture of caring through understanding and support.

4.2.5 immediately intervene in any code of conduct violation, that has a negative impact on students, in a manner that preserves confidentiality and the dignity of each person.

4.2.6. demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior.

4.2.7. comply with all Federal and West Virginia laws, policies, regulations and procedures.

"It has been held by this Grievance Board that an employee who violates [the Employee Code of Conduct] by failing to '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, [and] self-control[,]' has engaged in insubordinate conduct as contemplated by *W. Va. Code* § 18A-2-8. *Domingues v. Fayette County Bd. of Educ*., Docket No. 04-10-341 (Jan. 28, 2005)." *Booth & Ware v. Randolph County Bd. of Educ*., Docket No. 04-42-418 (Mar. 28, 2005). MCBE has proven that Grievant was insubordinate when she acted in a manner contrary to the Code of Conduct.

The argument that Grievant's suspension is excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994). *See Austin v. Kanawha County Bd. of Educ*., Docket No. 97-20-089 (May 5, 1997). Mitigating circumstances are generally defined as conditions which support areduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. *Pingley v. Div. of Corr*., Docket No. 95-CORR-252 (July 23, 1996). Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation," and the undersigned will not substitute her judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ*., Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ*., Docket No. 97-06-150 (Oct. 31, 1997).

Grievant credibly testified that based on her past interactions with K.S., she posted the

pictures as a joke, believing he would laugh about it, but never intending to harm him in any way. Principal Asplund and Superintendent Renzella both testified they believed Grievant had no intent to harass or humiliate K.S. Nevertheless, Superintendent Renzilla determined the severity of the act, the reaction of the student, and the letter from the mother supported the suspension.

The mother's concern for her son is understandable, and certainly teachers should never embarrass students. It is also clear that Grievant did not intend to embarrass S.K., and has now learned that humor is a very delicate area in which reactions are not always consistent with intentions. It is extremely unlikely that Grievant will engage is such action again. Given her long, previously unblemished career, a suspension in this case was excessive.

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).

2. A board of education may suspend 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. *W. Va. Code* §18A-2-8.

3. An employee who violates the Employee Code of Conduct by failing to exhibit professional behavior, maintain an 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, and self-control, has engaged in insubordinate conduct as contemplated by *W. Va. Code* § 18A-2-8. *Domingues v. Fayette County Bd. of Educ*., Docket No. 04-10-341 (Jan. 28, 2005). *Booth & Ware v. Randolph County Bd. of Educ*., Docket No. 04-42-418 (Mar. 28, 2005).

4. MCBE has proven that Grievant acted contrary to the Code of Conduct which constitutes insubordination.

5. The argument that Grievant's suspension is excessive given the facts of the situation,

is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). 6. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994). *See Austin v. Kanawha County Bd. of Educ*., Docket No. 97-20-089 (May 5, 1997).

7. A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. *Pingley v. Div. of Corr*., Docket No. 95-CORR-252 (July 23, 1996).

8. Considering the nature of the offense, and the likelihood that it will never occur again, mitigation is appropriate in this case.

Accordingly, this grievance is GRANTED, and MCBE Ordered to remove all documentation from Grievant's file referring to the suspension, and to pay her for the lost wages and benefits. MCBE may place a letter of reprimand in Grievant's file as an alternative disciplinary measure, if it so chooses.

Any party may appeal this decision to the Circuit Court of Kanawha or Marshall County. Any such appeal must be filed within thirty (30) days of 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.

DATE: JUNE 29, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 ***Consistent with Grievance board practice, the student will be referred to only by his initials.***