THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DONNA MURPHY,

Grievant,

v. **Docket No. 06-37-480**

PLEASANTS COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Donna Murphy ("Grievant"), employed by the Pleasants County Board of Education ("PCBE") as a teacher, filed an expedited grievance to level four on December 21, 2006, after she was suspended, without pay, for the remainder of the school year. For relief, Grievant requested immediate reinstatement, back pay, benefits, and any other appropriate relief. At the request of the parties, a level four hearing was conducted in the PCBE's meeting room in St. Marys, West Virginia, before Chief Administrative Law Judge Paul Marteney on February 26, 2007. Grievant appeared and was represented by Wray V. Voegelin, Esq., of Cassidy, Myers, Cogan & Voegelin, L.C. PCBE Superintendent, Dr. Joe Super, appeared on behalf of PCBE, which was represented by Rebecca Tinder, Esq., of Bowles, Rice, McDavid, Graff & Love, LLP. Additionally, John E. Roush, Esq., of the West Virginia School Service Personnel Association, appeared on behalf of two witnesses. The grievance became mature upon receipt of proposed findings of fact and conclusions of law filed by the parties on March 16, 2007. Subsequent to the resignation of Judge Marteney, the grievance was reassigned to the undersigned on August 15, 2007.

The following findings of fact are derived from a preponderance of the credibleevidence admitted at the level four hearing, and at the pre-disciplinary hearing held before PCBE.

Findings of Fact

1. Grievant has been employed as a teacher by PCBE for approximately six years, and has been assigned as a Special Education teacher at St. Mary's Elementary School since the 2004-2005

school year. Grievant holds certifications in the areas of behavioral disorders, learning disabilities, and mentally impaired.

2. During the 2006-2007 school year, Grievant had three students in her classroom. Two of the students, B.F. and T.C., are profoundly mentally impaired, while the third student was placed in the classroom for “behavioral reasons.” Both B.F. and T.C. exhibit violent outbursts (tantrums).

3. On or about November 28, 2006, a parent of a student who is not in Grievant's classroom reported to Dr. Super that she witnessed Grievant strike T.C. about the head while near the bus alley at school.

4. On November 30, 2006, Dr. Super suspended Grievant, with pay, pending the outcome of an investigation.

5. Dr. Super's investigation led to a conclusion that the allegation of the incident on November 28 was unsubstantiated. However, statements made by the two aides assigned to Grievant's classroom revealed information regarding prior incidents in which Grievant patted/smacked the students on the buttocks and legs.

6. By letter dated December 8, 2006, Dr. Super memorialized a conversation of that date in which he notified Grievant that the suspension was converted to “withoutpay” status, and that he would recommend to PCBE that she be suspended without pay from the date of the decision through and including June 30, 2007.

7. PCBE approved Dr. Super's recommendation following a predisciplinary hearing on December 20, 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). (See footnote 1) "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.”

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).

In the present grievance, Dr. Super charges Grievant with violation of *W. Va. Code* § 18A-5-1(e), and the Pleasants County Board of Education and the West Virginia Board of Education Employee Codes of Conduct, which prohibit corporal punishment of any pupil by a school employee. At hearing, Dr. Super characterized Grievant's alleged actions as insubordination, cruelty, and immorality. Grievant denies that she ever used corporal punishment in her classroom.

W. Va. Code § 18A-5-1(e) states, “[c]orporal punishment of any pupil by a school employee is prohibited.”

Respondent does not cite a specific section of the West Virginia Board of Education “Employee Code of Conduct” set forth in Policy 5902, but Section 4.2.3. requires that employees “maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination.” Respondent did not provide a copy of the Pleasants County “Employee Code of Conduct,” but it would likely include a similar provision. Respondent additionally did not cite a specific section of the State Board of Education Policy 2419, “Regulations for the Education of Exceptional Students,” as having been violated; however, exceptional students are included in the statutory prohibition regarding corporal punishment. Dr. Super characterizes corporal punishment to be insubordination, immorality, and cruelty. Presumably, the insubordination charge references the statutory and Employee Code of Conduct violations. 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 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).

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 that 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).

"Immorality is an imprecise word which means different things to different people, but in essence it also connotes conduct 'not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior.'" *Kennard v. Tucker County Bd. of Educ*., Docket No. 01-47-591/628 (Mar. 12. 2002); *Golden v. Bd. of Educ. of County of Harrison*, 169 W. Va. 63, 67, 285 S.E.2d 665, 668 (1981); *Snodgrass v. Wetzel County Bd. of Educ.*, Docket No. 97-52-384 (Dec. 15, 1997); *Harry v. MarionCounty Bd. of Educ*., 203 W. Va. 64; 506 S.E.2d 319 (1998). "'Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires at least an inference of conscious intent.' *See Hayes v. Kanawha County Bd. of Educ.*, Docket No. 94-20-1143 (June 28, 1995), (*citing Youngman v. Doerhoff*, 890 S.W.2d 330 (Mo. 1994))." *Kennard supra; Wahl v. Mineral County Bd. of Educ*., Docket No. 98-28-175 (Sep. 14, 1998).

Cruelty is a deliberate act to inflict pain and/or suffering. Behavior which is directed toward a student, and which may include harassment, belittling, threatening, and/or grabbing, slapping, and restraining, without the need for self-defense, meets this definition. *Sinsel v. Harrison Couny Bd. of Educ*., Docket No. 96-17-219 (Dec. 31, 1996). *See Slack v. Morgan County Bd. of Educ*., Docket No. 91-03-268 (July 13, 1991); *Adkins v. Cabell County Bd. of Educ*., Docket No. 89-06-656 (May 23, 1990); *Pinson v. Cabell County Bd. of Educ*., Docket No. 06-87-100-1 (July 21, 1987).

Dr. Super relied upon the statements of the two classroom aides as the basis for the suspension. Both aides stated that they observed Grievant smack or slap a child on the buttocks or upper thigh. Although many terms were used, encompassing a wide range of actions, from patting to slapping to smacking, there is no disagreement that it was with an open hand, and appears to have been a single swat. Ms. Haddox recalled seeing Grievant hold the child's hand while engaging in the action.

Grievant does not specifically deny that she may have smacked the children on the rear, but insists that she did not engage in the use of corporal punishment. The evidence establishes that Grievant smacked the students on the bottom with an open hand. Although it may have been executed with a minimal amount of force, the intent of the action was to stop the behavior the student was exhibiting, and would technically constitute corporal punishment, notwithstanding the fact that Grievant did not consider the act disciplinary, and did not intend to hurt the children.

Grievant's actions were improper, however, under the circumstances of this case, a full semester's suspension is excessive. *See Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). Mitigation of a penalty is considered on a case by case basis. *Conner v. Barbour County Bd. of Educ*., Docket No. 95-01-031 (Sept. 29, 1995); *McVay v. Wood County Bd. of Educ*., Docket No. 95-54-041 (May 18, 1995). 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).

Grievant has been employed by PCBE for six years and has received good evaluations throughout that time. There is no indication that she has previously been subject to discipline. There is no evidence that Grievant hurt the children, or intended to hurt them. An investigation subsequently completed by the Department of Health and Human Services found there had been no maltreatment. Because Grievant's actions are correctable, they are more accurately characterized as “incompetence,” rather than insubordination, cruelty, or immorality. Therefore, a two-week suspension, and placementof Grievant on an improvement plan to assist her in developing and utilizing alternative methods of responding to the students, would be more appropriate in this case.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal 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.

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

3. "Corporal punishment of any pupil by a school employee is prohibited." *W. Va. Code* § 18A-5-1(e).

4. PCBE has proven that Grievant engaged in an action which would constitute corporal punishment.

5. A lesser disciplinary action may be imposed when mitigating circumstances exist. 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).

6. Mitigation is appropriate in this case because the discipline imposed was disproportionate to the specific facts of the offense.

Accordingly, the grievance is **GRANTED** to the extent that the suspension is reduced to two weeks, and Grievant be placed on a plan of improvement to assist her in developing and utilizing alternative methods of responding to the students.

Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. *W. Va. Code* § 29-6A-7 (1998)(repealed) (*but see Executive Order No. 2-07*, May 8, 2007). 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: SEPTEMBER 27, 2007

_____SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.In 2007, the Legislature abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.