THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

CHRISTOPHER MICHAEL MOORE,
Grievant,

v. **Docket No. 2012-0741-BroED**

BROOKE COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Christopher Moore, filed this grievance on January 10, 2012, challenging a charge of insubordination and willful neglect of duty for which he was given a three-day suspension without pay. He seeks "reimbursement of lost wages plus interest as well as the removal of the letter of reprimand and anything else that has negatively impacted me and occurred due to the incident that allegedly happened." This matter was originally set for a level three hearing, but with the consent of the parties, a level two mediation session was conducted on April 18, 2012. Grievant perfected his appeal to level three on April 24, 2012. A level three hearing was conducted before the undersigned Administrative Law Judge on November 5, 2012, at the Respondent's office in Wellsburg, West Virginia. Grievant appeared in person and by representative, Owens L. Brown, West Virginia Education Association. Respondent appeared by its counsel, David F. Cross, Office of the Brooke County Prosecuting Attorney. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on December 7, 2012.

Synopsis

Grievant was suspended for three days for insubordination and willful neglect of duty. Respondent proved by a preponderance of the evidence that Grievant failed to supervise his classroom following a fire drill. As a result of lack of supervision, three students engaged in the use of synthetic marijuana in the classroom after the fire drill. Respondent met its burden of proof and established the charges that led to the discipline of Grievant.

The following findings of fact are based upon the record developed at level three.

Findings of Fact

1. Grievant has been employed as a teacher at Brooke County High School for eight years. He was employed as a history teacher for the 2011-2012 school year.

2. On November 2, 2011, a fire drill took place during the third period class which begins at 9:32 a.m. and ends at 11:06 a.m.

3. The fire drill began at 10:30 a.m. and the students were released to return to the classroom from the school's football field at 10:50 a.m.

4. At 10:55 a.m., Grievant was a short distance from his classroom. Some students from the Grievant's class entered the classroom shortly before the Grievant.

5. Grievant left the classroom unattended from 10:55 a.m. until the class was released at the end of the period at 11:06 a.m.

6. Grievant did not make arrangement for another teacher or school administrator to supervise his class.

7. While the Grievant was away from the classroom, three students in that classroom smoked synthetic marijuana.

8. This conduct by the students violated the rules of the school and resulted in their expulsion. Grievant did not offer any explanation for his absence from the classroom on November 2, 2011.

9. Respondent has adopted a policy which requires teachers to be in the classroom at all times class is being conducted.

10. On December 16, 2011, the Grievant was sent a letter by the Superintendent, Dr. Kathy Kidder-Wilkerson, informing him that he was being placed on a three-day suspension without pay as a result of the incident occurring on November 2, 2011.

11. Grievant was charged with insubordination and willful neglect of duty.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *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 determines the weight of the testimony." *Petry v. Kanawha*

County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). 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 & 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*.

W. VA. CODE § 18A-2-7 provides that "[t]he superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter." W. VA. CODE § 18A-2-8 goes on to state, in part, that:

> (a) 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.

Respondent argues that the charge of insubordination is the result of Grievant failing to abide by policy which calls for an employee to maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination.[1] Respondent argues that the charge of willful neglect of duty stems from Grievant's failure to exercise authority and maintain control of all students enrolled in his third period class.[2] Grievant argues that Respondent failed to establish by a preponderance of the evidence that Grievant willfully neglected his duties and was insubordinate.

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[1]West Virginia Department of Education Policy 5902.

[2] W. VA. CODE § 18A-5-1.

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." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *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). "[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*.

To prove a willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. *Williams v. Cabell County Bd. of Educ.*, Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ.*, Docket No. 95029-151 (Aug. 24, 1995).

Grievant failed to supervise his classroom following a fire drill on November 2, 2011. As a result of his lack of supervision, students engaged in smoking synthetic marijuana in the classroom. The students were expelled from school due to the incident. Respondent proved by a preponderance of the evidence that Grievant willfully neglected his duties and was insubordinate. In view of the violation and nature of the potential harm which could have occurred to the students, the punishment imposed was reasonable and was commensurate with the violations he committed.

The following conclusions of law support the decision reached.

Conclusions of Law

1. As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989).

2. An employee of a county board of education may be suspended or dismissed only for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a nolo contendere to a felony charge. W. VA. CODE § 18A-2-8.

3. 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." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002) (*per curiam*).

4. To prove a willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. *Williams v. Cabell County Bd. of Educ.*, Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ.*, Docket No. 95029-151 (Aug. 24, 1995).

5. Respondent has established that Grievant's conduct constituted insubordination and willful neglect of duty.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: January 18, 2013

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Ronald L. Reece
Administrative Law Judge