WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHRISTOPHER MICHAEL MOORE,
Grievant,

v. **Docket No. 2012-0741-BroED(R)**

BROOKE COUNTY BOARD OF EDUCATION,
Respondent.

DECISION ON REMAND

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 sought "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." A level three hearing was conducted before Administrative Law Judge ("ALJ") Ronald L Reece 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. Following the receipt of Proposed Findings of Fact and Conclusions of Law by the parties on December 7, 2012, ALJ Reece issued a Decision denying the grievance dated January 18, 2013.

Grievant appealed ALJ Reece's Decision to the Circuit Court of Kanawha County on March 4, 2013. On June 26, 2013, Circuit Court Judge Tod J. Kaufman reversed

ALJ's Reece's Decision, and remanded the grievance to the West Virginia Public Employees Grievance Board stating:

> The Court finds that the findings are insufficient to show that Petitioner [Grievant] willfully neglected his duties or was insubordinate. . .

Moore v. Brooke County Bd. of Educ., Cir. Ct. of Kan. County, Civil Action No. 13-AA-42 (June 26, 2013). In the "Ruling" section of his Final Order, Judge Kaufman wrote:

> After carefully reviewing decisions below, the record, and the relevant law, the Court hereby REVERSES and REMANDS THE DECISION OF THE Board below because the evidence in the record is insufficient to conclude that Petitioner was insubordinate and willfully neglected his duties. This case is DISMISSED and STRICKEN from the docket.

Id.

ALJ Reece held a telephone conference with the parties to determine if there was interest in submitting additional evidence or arguments on remand. The parties were given until November 15, 2013, to reply. On November 21, 2013, ALJ Reece entered an Order noting that all parties had agreed that they did not wish to supplement the record established at the level three hearing and that neither party wished to submit additional arguments. The matter became mature for decision with the entry of that Order and it has been reassigned to the undersigned to render a decision on remand.

Synopsis

Upon appeal, the Judge for the Circuit Court of Kanawha County ruled that there were insufficient findings in the prior decision evidence and insufficient evidence on the record to conclude that Grievant Moore was insubordinate and willfully neglected his duties. After carefully reviewing all prior decisions, the record, and the relevant law, the undersigned agrees with the Circuit Court decision. The grievance is GRANTED.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. At all times relevant to this matter, Grievant was a classroom teacher employed by Respondent, Brooke County Board of Education ("Board") to teach history at Brooke High School. When the events leading to this grievance occurred, Grievant was teaching a history class to high school juniors. Grievant had been so employed for five years, and had nine years of total classroom teaching experience.

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

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. Grievant and the School Principal were the last two people to reenter the building. Grievant was recorded on a video camera approximately fifty feet from his classroom door at 10:55 AM.[1] Grievant reached his classroom not later than 11:00 AM.[2]

5. Grievant had closed and locked the classroom door after the students left the room for the fire drill. Grievant expected that the students would be waiting in the hall when he arrived.

6. Rather than wait for the teacher to arrive with the key, one of the students used his student identification card to "jimmy" the lock and let the students into the classroom.[3]

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[1] Testimony of Timothy Pannett, Assistant Principal, Brooke High School, Center 1.
[2] Undisputed testimony of Grievant Moore.
[3] Student J.B. was the only person to testify that he personally saw how the classroom door was opened. He stated, "M.Z. opened the door. He took his name tag off and jimmied the lock."

7. Grievant reached the classroom no later than 11:00 AM.[4] Grievant entered the classroom through the front door that leads to the hallway, and exited through the back door that leads to the faculty office. Grievant hung up his coat, and went to the restroom in the faculty area, which he measured to be twenty-seven steps from the back classroom door.

8. Grievant returned to the classroom before the bell rang at 11:06 AM. When, upon his return, student J.B. asked him where he went, Grievant said, "to the bathroom."

9. Student C.C. had a small metal homemade pipe containing synthetic marijuana[5] which he started getting out before Grievant had reached the classroom. C.C. and two other students took a hit from the pipe while Grievant was out of the room. Another student went to the front of the room and turned on a fan. This entire process took two to three minutes.

10. Mr. Brindley, one of the administrators at the school, briefly walked into the classroom from the back door while Grievant was in the restroom and then left without comment.[6]

11. The three students who had smoked in Grievant's room were expelled for violating the school's rules.

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[4] Undisputed testimony of Grievant solicited during cross-examination.

[5] Neither the pipe nor any of the substance which was smoked was recovered. The only proof related to it was the three students who ultimately confessed to smoking synthetic marijuana in the classroom. One student said that it smelled like marijuana, another said it just smelled like regular smoke, while one of the students who was standing next to it, said it had no smell at all. More than one of the students gave statement or testified that they smelled smoke upon entering the room after the fire drill indicating that the smoking would have taken place before Grievant reached the classroom from the fire drill.

[6] Testimony of student J.B.

12. Grievant had not been told to never leave the students unattended, even for a short period of time. He had seen other teachers, including his department chairman, do just that from time to time throughout the school year.

13. About a month after the incident, Grievant was called to the superintendent's office and interviewed about the events of November 2, 2011. Grievant consistently stated that by that date he could not remember if he left the classroom on the day of the fire drill.

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

15. Assistant Superintendent Marty Bartz was involved in the decision to suspend Grievant for three days as a result of the incident. He testified that Grievant was suspended for "insubordination" and "willful neglect of duty" for leaving his classroom unattended. He stated that this conduct violated West Virginia State Board of Education Policy 5902, the Employee Code of Conduct ("Policy 5902") Section 4.2.3 which states that an employee must "maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination." *Id*.

16. On direct examination, Assistant Superintendent Bartz stated that he was unaware of any Board policy that specifically prohibited a teacher from leaving his classroom for a short period of time. Upon being called to testify in rebuttal, several hours later Mr. Bartz produced a Board policy which prohibited a teacher from leaving

his class unattended. Mr. Bartz admitted that he had found the policy after his initial testimony, and was uncertain of its existence until that time. This policy was not considered by the superintendent or the Board in their decision to suspend Grievant.[7]

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*.

Throughout all of the proceedings related to this grievance, Respondent, through counsel, has alleged that Grievant was guilty of insubordination and willful neglect of

[7] Mr. Bartz could not give an explanation of how Grievant may have known about the policy, when Mr. Bartz, after several years of teaching and being an administrator in the county, was not aware of it until that afternoon.

duty. No other reason or charge listed in W. VA. CODE § 18A-2-8 was offered for the disciplinary action.

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.[8] 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.[9] Grievant argues that Respondent failed to establish by a preponderance of the evidence that Grievant willfully neglected his duties and was insubordinate.

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*

[8] West Virginia Department of Education Policy 5902.
[9] W. VA. CODE § 18A-5-1 (also known as the *in loco parentis* doctrine).

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, like Assistant Superintendent Bartz, was unaware of the Board's policy related to leaving students unattended. The Board relied upon Grievant's alleged violation of Policy 5902, for its charge of insubordination. Yet it is not proven that leaving a class of eleventh graders alone for five minutes in and of itself, creates an unsafe environment that fosters substance abuse. Grievant must be judged upon his own conduct, not the misadventures of three students.[10] Both the charge of insubordination and willful neglect of duty carry an element of intent that was not proven in this case. Moreover, Judge Kaufman specifically ruled:

> The Court finds that the findings are insufficient to show that Petitioner [Grievant] willfully neglected his duties or was insubordinate. . .
>
> After carefully reviewing decisions below, the record, and the relevant law, the Court hereby REVERSES and REMANDS

[10] Yet the real reason for Grievant's discipline was revealed by Mr. Bartz in his testimony on remand when he stated: "I'll be honest with you, this is pretty lame, but we suspended him for three days because of the students involved. We talked about the decision to suspend him for three days, the letter to Mr. Moore was later written by Ms. Kidder and a copy of that was sent to me as the Assistant Superintendent." It is apparent that the suspension of Grievant had less to do with his conduct and more to do with the conduct of the students.

> THE DECISION OF THE Board below because the evidence in the record is insufficient to conclude that Petitioner was insubordinate and willfully neglected his duties. This case is DISMISSED and STRICKEN from the docket.

Moore v. Brooke County Bd. of Educ., Cir. Ct. of Kan. County, Civil Action No. 13-AA-42 (June 26, 2013). The undersigned has read and reviewed the entire record and the arguments of the parties. There is nothing in the record which is inconsistent with the facts and law upon which Judge Kaufman made his ruling. Accordingly, the Circuit Court's ruling that the evidence in the record is insufficient to conclude that Petitioner was insubordinate and willfully neglected his duties is followed on remand and the grievance is GRANTED.

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. 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.

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*). *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*.

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. The evidence in the record is insufficient to conclude that Petitioner was insubordinate and willfully neglected his duties. *Moore v. Brooke County Bd. of Educ*., Cir. Ct. of Kan. County, Civil Action No. 13-AA-42 (June 26, 2013).

Accordingly, the grievance is GRANTED. Respondent is ORDERED to pay Grievant three days of pay for the suspension, as well as statutory interest and benefits. Respondent is also ORDERED to remove all record of the disciplinary action from all files related to Grievant.

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: NOVEMBER 27, 2013

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE