ROY PETRY, JR.,

Grievant,

v.

DOCKET NO. 96-20-380

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Roy Petry, Jr., filed this grievance on September 3, 1996, pursuant to W. Va. Code §§ 18-29-1, et seq., protesting his dismissal from the Kanawha County Board of Education ("Board") by letter dated August 29, 1996. (See footnote 1) Hearing was held on December 10, 1996, and the parties submitted proposed findings of fact and conclusions of law on January 16, 1997, at which time this case became mature for decision. The following narrative will be supplemented by appropriate findings of fact and conclusions of law.

Early on the morning of May 13, 1996, Forrest Mann, Principal of Dupont Junior High School ("Dupont"), received a telephone call from a man who identified himself as R.M.'s (See footnote 2) father. The man was extremely angry and told him Grievant had put his hands onhis daughter and he was coming to the school. Principal Mann invited the man to come to the school and talk to him about the allegations. A short time later, the man called back and wanted to know if R.M. had come to the office. Principal Mann again asked the man to come to the office and told him he needed to get himself under control. Principal Mann testified the man was out of control on the telephone, with voice raised, and making threatening remarks towards Grievant.

The man arrived at the school and Principal Mann took him into his office immediately. The man continued in a loud and boisterous manner, and the Principal told him he would be happy to discuss the situation with him, but he needed to get himself under control. At that time of the day, the office

was very busy with teachers, administrators, substitutes, and students coming in and out. Principal Mann was very concerned that the man would “break” out of his office. It was a very tense situation.

Principal Mann recalled that R.M. had come to his office earlier and asked whether her parents were there. They were not at that time, but he told her her father had called, and when he arrived, he would send for her. Once R.M.'s father arrived, he sent for her to come to the office, at about which time her mother arrived. Once R.M. arrived, the “emotion” picked up again, and Principal Mann had to caution her father again to get himself under control. Several times while R.M. was telling Principal Mann her story, her father would interrupt, making it very difficult for R.M. to complete the telling of her story. Principal Mann wrote down what R.M. told him, and had her review and initial the statement. At some point, R.M.'s father was “paged” and there was a telephone conversation with him and the state police. Apparently, they had already been alerted by him to come to the school. During the conversation with R.M., the state police did arriveat the school, and informed Principal Mann they had been called by R.M.'s father. The police also took a statement from R.M. regarding her allegations.

Grievant was called to the office by Principal Mann on May 13, the day R.M. made the allegations against him. Principal Mann told him of the allegations and took a written statement from Grievant. Following that, Principal Mann sent Grievant home with pay pending further investigation. Grievant was never questioned by the state police or arrested as a result of these allegations.

The day after meeting with R.M. and her parents, Principal Mann called a meeting of the faculty to inform them allegations had been made against Grievant, he had been suspended with pay, and to tell them it was extremely important to keep channels open to any other students who may have information. At the same time, he wanted them to “squelch” any rumors and to direct students with information to the office. He also told them they were not to seek out students or try to solicit information regarding Grievant.

On May 15, 1996, Superintendent Jorea Marple suspended Grievant with pay pending an investigation of certain allegations made against him by R.M. as follows:

1. On Friday, May 10, you asked the student to come to your desk and sit in a chair beside you. You placed your left hand on her chair and then moved it until it was touching her right buttocks. You also “walked” your fingers up the outside of her right leg.

2. Approximately three weeks ago you leaned over the same student's desk and brushed her breasts with your elbow.

3. At a track meet last year you made reference to another girl having a "bigger front or chest" than did RM when giving her track uniform to another student.

R. Ex. 6.

Over the next few days, Principal Mann received additional complaints from other students, which he forwarded to the Superintendent. Subsequently, on May 30, 1996, Superintendent Marple provided Grievant with an amended notice of pre-termination hearing, noting that further investigation resulted in additional allegations by several other students, as follows: (See footnote 3)

. . .

3. During the Spring of 1996, on several occasions, you placed your hand on the upper leg of student J.B. and left it there for a period of time when she would sit next to you during your math class in the area of your desk. On occasions when J. requested to go to the bathroom you replied "You can go only if I can go with you." (See footnote 4)

4. During the 1995-96 school year, on approximately ten occasions, you placed your hand on the leg of student A.S. On several of the most recent occasions the touching occurred further up the student's thigh. On April 25, 1996, during homeroom, in your classroom, you asked A. if she was wearing a skirt. You requested that she move away from your desk and turn around. You then made the statement "Who are you trying to impress?" At this point you reached out and attempted to touch A.'s leg.

. . .

6.

> During the Spring of 1996, on several occasions, you rubbed the back of student K.H. while she was at your desk seeking help with her math. This touching activity was in the areas of the bra strap and the buttocks. . . .

This letter informed Grievant that his pre-termination hearing was rescheduled for June 19, 1996. R. Ex. 6. Following a two-day hearing culminating on August 12, 1996, the Superintendent's designee recommended Grievant's dismissal, and Superintendent Marple informed Grievant the Board had voted to accept her recommendation for dismissal on August 29, 1996.

The incident which triggered the investigation of Grievant occurred as follows. Dupont has “arena” style scheduling. The students have a schedule form, and in the Spring students go from teacher to teacher in the library, signing up for classes, and basically walk their schedule through for the next year. In addition to regular scheduling, if students are failing, they are called to the scheduling arena to rework their schedules for the next year. These students are normally called over the intercom. In the Spring of 1996, Grievant was in charge of calling the students who were failing to the library to change their schedules. During this process, he became aware that R.M., who was failing his class, was also failing English, and he had to call her to the library.

When R.M. came into the room, she was upset and accused Grievant of embarrassing her in front of the whole school by calling her name over the intercom. Petry, LIV, Tr., p. 138. She told him she did not need to be there, and he informed her she was failing two subjects. She told him she was bringing up her English grade, and she had Ms. Gregg for English. Grievant approached Ms. Gregg about R.M., and about that time Principal Mann came into the room. They discussed how upset R.M. was, and Principal Mann suggested they let her go back to her room, and not make a schedule for her that day. Grievant and Ms. Gregg discussed what they could do to help R.M., noting someextenuating circumstances regarding R.M.'s home life, and they both decided to do whatever they could to help her pass.

The next day in class, Grievant called R.M. to his desk to tell her what he had discussed with Ms. Gregg, and to try to alleviate her fears of failing and to help her pass. R.M. was sitting in the chair beside Grievant and he leaned over to tell her this information, not wanting to further embarrass her by having students hear the subject of their conversation.

R.M. was a 9th grader in the 1995-96 school year, and was in Grievant's sixth period pre-algebra class. R.M. was getting failing grades in Grievant's class, and in fact, ended up with a “D”. R.M. recalls being called over the intercom to come to the library to make out another schedule. It appears

that everyone knows that when someone is called to make out a schedule, they are failing. Despite this common knowledge, R.M. testified it did not upset her when she was called, that she deserved the grade she got from Grievant, and that she did not care what other people thought. She stated that, at the library, she talked to Grievant and Ms. Gregg about her grades, and the teachers informed her they felt she was doing better in their classes, so she did not have to make out another schedule.

R.M. recalled Grievant calling her to his desk in May 1996, to tell her something, and while sitting next to him behind the desk, she alleged he “walked his fingers” up her leg, resting his hand on the side of her buttocks. She does not recall what Grievant was discussing with her. She testified she did not say anything to Grievant at the time, nor did she get up to move, because it would have been embarrassing in front of the class. Grievant's classroom is set up in a traditional classroom setting, with Grievant's desk at thefront of the room facing the students, whose chairs are lined up in row-by-row fashion. There are two additional chairs besides Grievant's behind the desk. G. Ex. 1.

Grievant was also R.M.'s track coach during the Spring 1995 season. R.M. alleged that, while handing out track jerseys the year before, Grievant told her another girl had a bigger chest than she. R.M. told her mother about this incident at the time. R.M. also alleged that once when she raised her arm to ask a question while taking a test, Grievant came to her desk and while he was bending down to help her, he brushed his elbow against her chest. R.M. did not tell anyone about this incident until she reported the May 1996 incident.

R.M. told her mother about the May 1996 incident. R.M.'s parents are divorced. R.M. does not recall whether her mother told her to tell Principal Mann about the incident. Nevertheless, the next day, R.M.'s mother and father came to the school, and R.M. was called to the office, and she told Principal Mann about the incident. At that time, she also told him of the other two incidents. Meanwhile, R.M.'s father had called the state police and they arrived at the school about the same time. R.M. went home that day. When she returned the next school day, rumors were already around the school, and several students asked her about the incident. She, in turn, asked some of the students, including A.S. and J.B., whether Grievant had ever touched them.

At the beginning of the 1995-96 school year, A.S., then an 8th-grade student at Dupont, volunteered to go to Grievant's classroom during the first, or homeroom period, to serve as a homeroom assistant, helping him grade papers and such. Approximately five to seven students were

normally in Grievant's classroom at that time along with A.S. A.S. went to Grievant's classroom every day during the 1995-96 school year, until approximatelyApril 25, 1996. According to A.S., beginning the first week of the 1995-96 school year, Grievant would sometimes pat her on the right knee, while she was sitting or standing beside him behind his desk. This happened “off and on” during the remainder of the school year. Sometime in November 1995, A.S. testified Grievant began placing his hand on her inner right thigh and squeezing for a couple of seconds. This touching made her uncomfortable and she would move away when he did it. She estimated Grievant squeezed her thigh 9 or 10 times between November and April. She never told Grievant to stop or that she felt uncomfortable.

On April 25, 1996, A.S. was in Grievant's classroom during the homeroom period as usual. She was wearing a skirt that day, and while she was standing in front of Grievant's desk, he asked if she was wearing shorts under the skirt, asked her to “turn around” and to come over to him. She moved to the edge of his desk and he asked her who she was trying to impress. She said Grievant reached out his hand, but he did not touch her. A.S. testified she felt “very uncomfortable” after that incident and did not return to Grievant's classroom the remainder of the school year. This incident will be discussed later in greater detail.

M.W. was an 8th grader at Dupont during the 1995-96 school year. (See footnote 5) She did not have Grievant for any classes, but served as a teaching assistant, and would go to Grievant's classroom during fourth period every day. There usually was an entireclassroom of students present during that period. She also accompanied A.S. to Grievant's classroom during homeroom period every day. M.W. was with A.S. on April 25, 1996, the day Grievant asked A.S. whether she had shorts on under her skirt. M.W. heard Grievant ask A.S. some questions and saw him reach for her leg, but does not recall if he actually touched her. M.W. testified that she and A.S. did not go to Grievant's room every day after that, but did go back a couple of times. M.W. testified she started going to her own homeroom, and A.S. just said she did not want to go there anymore. M.W. testified Grievant would pat her on the knee sometimes, but she did not feel uncomfortable, nor feel that it was inappropriate.

A.S. heard rumors of R.M.'s allegations against Grievant, and heard that Grievant had been arrested and was going to jail. Shortly thereafter, Coach Wallace, a gym teacher, approached A.S. and M.W. in the hall and asked if they ever had any physical contact with Grievant, as he knew they

spent a lot of time in Grievant's classroom. Coach Wallace told them if they did not go to the office on their own, he would go and report their names. After that, A.S. and M.W. went to the vice-principal and Principal Mann, and told them their stories.

J.B. was a 9th grader at Dupont during the 1995-96 school year, and had Grievant for first period math class. J.B. would sit beside Grievant at his desk whenever she needed help or just wanted to talk to him. Grievant was J.B.'s favorite teacher and she sat beside him all the time. J.B. testified about a month after school started, Grievant started putting his hand on her knee sometimes, or sometimes put his arm around her chair. This typeof touching occurred frequently. J.B. did not feel uncomfortable, nor did she feel Grievant meant anything by this touching, or that it was inappropriate. (See footnote 6)

K.H. was a 7th grader at Dupont during the 1995-96 school year, and had Grievant for seventh period pre-algebra class. K.H. testified that towards the end of the 1995-96 school year, Grievant began rubbing her back and shoulders when she was seated next to him behind his desk. She felt uncomfortable but did not say anything to Grievant. At the end of the 1995-96 school year, K.H. and her family went on a trip to Arizona. When she returned, K.H. heard the rumors about Grievant's alleged inappropriate touching of R.M, and heard he had been arrested for sexual harassment. K.H. went to the office and told the school counselor, Mr. Ramsey, that Grievant had touched her also. K.H. was doing poorly in Grievant's class and got D's and E's all year.

LouAnn Huxley has been employed by the Board as a special education teacher for 11 years at Dupont. She has had students included in Grievant's classroom for the past three years, and has sat in on Grievant's classroom during those students' instruction time. She testified the door to Grievant's classroom is at the front of the room, and if you were looking in from the hallway, you could see a clear side view of Grievant's desk, including the chairs behind the desk. She said Grievant always kept his door open.

Cindi Bailey, a teacher at Dupont for 17 years, testified regarding Grievant's activities and reputation at the school. She testified that Grievant sponsors the ninth grade trip, raising the money, and making the reservations. Grievant also would raise money to ensure that students who could not pay would be able to go on the trip. Grievant was theschool's athletic director and organized all the athletic events. Grievant helped Principal Mann with discipline at the school. Grievant chaperoned dances, helped with fund raising, and basically, did anything that ever was asked of him. Ms. Bailey

testified the students all love Grievant, with a very few exceptions. She has seen students walk down the hall with him, linking their arms in his, and students have told her that Grievant is their favorite teacher.

Ms. Bailey observed that Grievant was a “very touchy person”, who would put his arm around your shoulder while speaking, or pat you on the back. Ms. Bailey observed J.B.'s interaction with Grievant many times, indicating J.B. would go up to Grievant and throw her arms around him, telling him he was her favorite teacher. Ms. Bailey testified she never saw Grievant engage in anything she would describe as inappropriate touching.

Principal Mann testified he views his role in dealing with student complaints of this nature to consist of writing down what students tell him, forwarding the statements to the Superintendent, and then to let the “appeal system or whatever . . . verify the actual truthfulness of what the person was saying.” Mann, LIV Tr., p. 97. Principal Mann made no independent determination whether R.M. was telling the truth, nor did he attempt to question her in an attempt to verify her statements. Principal Mann followed the same procedure with the other students who came forward, and then turned over the statements to the Superintendent. Principal Mann also called Grievant to the office and he voluntarily gave a written statement, which coincides with Grievant's testimony at level four regarding the May 1996 scheduling incident with R.M. G. Ex. 4.

Principal Mann testified that some touching of students is proper and is the best way to show that you care about them, therefore bolstering their self-esteem. Heacknowledged that touching some areas of the body would be inappropriate and believes any teacher or professional would know the difference between appropriate and inappropriate touching. Principal Mann characterized Grievant as a caring teacher. Principal Mann offered no opinion whether he believed the allegations against Grievant were true.

Grievant testified on his own behalf at level four. Grievant did not recall the incident R.M. described as brushing his elbow across her chest at all. Grievant denied touching K.H. on her bra strap or near her buttocks. Grievant denied squeezing A.S.' inner thigh. Grievant recalled asking A.S. who she was trying to impress the day she wore the skirt, because A.S. normally wore jeans, and rarely wore a skirt. He stated he and A.S. would talk about her boyfriends and who she liked and so forth. The comment was just part of the day-to-day bantering that went back and forth between Grievant, A.S., and other students. Regarding the comment about whether she was wearing shorts

under the skirt, Grievant explained that A.S. had come to him previously in distress because she realized boys were looking up her skirt. He advised her that if she was going to wear short skirts, she should wear shorts under them. Grievant denied trying to reach out and grab A.S.' leg.

With regard to the track jersey incident reported by R.M., Grievant recalled there was a shortage of jerseys that year. Grievant testified that even the smaller girls liked to wear large and extra-large jerseys, and he informed them that if a bigger girl needed a jersey, they would have to give up their large jerseys. This happened, and he told R.M. she needed to give her jersey to another girl because she needed a bigger top than R.M. Grievant denied telling R.M. the other girl had a bigger chest. Finally, with regard to the scheduling incident, A.H., a then-8th grader at Dupont, provided the following testimony. A.H. was sitting beside R.M. in the library the day she was called over the intercom to change her schedule. He testified he heard R.M. say, with regard to Grievant, “[t]hat fat ass isn't going to fail me one way or the other, no matter what I have to do.” A.H., LIV Tr., p. 72. He believes this incident occurred several days before R.M. made the charges against Grievant. When A.H. heard about the charges, he reported what he overheard to Principal Mann. It does not appear Principal Mann took A.H.'s statement into account at all, given his testimony that he leaves the ultimate decision making to the Grievance Board. R.M. denied making the statement A.H. attributed her, along with her denial that she was upset about failing Grievant's class.

Arguments

Because this is a disciplinary action, the Board must prove the allegations against Grievant by a preponderance of the evidence. W. Va. Code § 18-29-6. The Board alleges it has met its burden of proof that Grievant engaged in acts of “immorality” under W. Va. Code § 18A-2-8. Neither the Board's suspension letter nor dismissal letter specifically assigned a basis allowed by Code § 18A-2-8, but it is assumed it is relying on the ground of “immorality” based on the above alleged incidents. Grievant denies all of the allegations of inappropriate touching made against him. (See footnote 7) Grievant does not challenge the sufficiency of the notice of termination. W. Va. Code § 18A-2-8 states in pertinent part:

> [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 contendre to a felony charge. . . .

The term “immorality” as used in the statute

> 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.”

Golden v. Bd. of Educ. of County of Harrison, 285 S.E.2d 665, 668 (W. Va. 1981). “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), aff'd, Circuit Court of Kanawha County, Civil Action No. 95-AA-171 (Oct. 24, 1995), citing, Youngman v. Doerhoff, 890 S.W.2d 330 (Mo. 1994).

A preponderance of the evidence is evidence which is 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 witnesses, but by the greater weight of all evidence, which does not necessarily mean the greater number of witnesses, but opportunity for knowledge, information possessed, and manner of testifying determines the weight of testimony. Black's Law Dictionary, 5th Ed., p. 1064. “If the evidence is evenly balanced between the parties, there can be no recovery” by the party bearing the burden of proof. Adkins v. Smith, 142 W. Va. 772 (1957). The witnesses in this case, including Grievant, did not appear to be anything other than “forthright in their testimony.” Board of Educ. of the County of Mercer v. Wirt, 453 S.E.2d 402, 412 (W. Va. 1994). That is, there is no doubt the witnesses believed the events occurred to which they testified. With that in mind, addressing each of the allegations brought forward by the Board, the undersigned first agrees with the hearing examiner in Grievant's pre-termination hearing that, “the remark to R.M. about a uniform and the contact with her chest may have been innocent enough, as may some pats on the knee.” (August 23, 1996, decision rendered by Patricia Petty). There is simply insufficient evidence to prove by a preponderance of the evidence that those two incidents reported by R.M. were anything but an innocuous remark regarding jersey sizes, and an inadvertent brushing of the chest by Grievant while bending down to help R.M. with her test. Further, the pats on the knee testified to by A.S., M.W., and J.B., by themselves, do not appear to be anything but innocent touching on the part of Grievant, and M.W. and J.B. testified that they did

not feel uncomfortable, nor did they feel the touching was inappropriate. Apparently, even A.S. did not feel uncomfortable with Grievant until he allegedly began squeezing her inner right thigh. This is not to say that the Grievant did not use poor judgment in these situations, for failing to perceive that the otherwise innocent pats on the knee could be construed as something with a more sexual content, or “immoral.” While Grievant may have been a “touchy” individual, he should have been more aware that the nature of his touching could be found offensive to some of his students.

With regard to A.S.' allegations that Grievant began squeezing her inner right thigh sometime in November 1995, the undersigned questions why she continued to visit Grievant in his classroom and sit beside him if this touching made her feel souncomfortable. Yet A.S. continued to return to Grievant's classroom until April 1996, and it appears a few times after that, and the incident that allegedly caused her to stop going to Grievant's room had nothing to do with touching. Rather, A.S. apparently became angry at Grievant for his teasing her about her skirt. Again, the undersigned does not condone Grievant's touching of these girls on the knee, and does not disbelieve A.S. that Grievant may, from time to time, have squeezed her leg. However, the undersigned finds no evidence that this touching was sexual in nature or in any way was an attempt to solicit sexual favors from A.S. Given A.S.' age at the time, and the fact that she was not required to be in Grievant's classroom, but rather volunteered to go there, leads the undersigned to believe that whatever touching occurred between Grievant and A.S. was not so offensive to her as to cause her to be “very uncomfortable”; otherwise, it seems only logical that she would have ceased going to Grievant's classroom earlier. With regard to the incident about A.S. wearing a skirt, the undersigned finds that exchange to be part of the ongoing banter and teasing that apparently existed between Grievant and his students, and does not connote some immoral, sexual conduct on the part of Grievant.

Furthermore, with respect to A.S. and M.W., the undersigned cannot overlook the fact that they were in essence coerced to make allegations against Grievant by Coach Wallace. Telling them that if they did not report any physical contact they had with Grievant, he would report their names to the office, left these girls with no choice. They had to go the office to say that Grievant touched them, at which point this touching had to be “bad” touching; otherwise, they would not have been forced to report it. Although A.S. testified she “probably” would have gone to the office on her own, there is no way to determine whether this would have occurred absent Coach Wallace's action. Which leads to the most serious allegation, that of Grievant “walking” his fingers up R.M.'s leg and resting his

hand on her buttocks. R.M. alleges Grievant inappropriately touched her; Grievant contends that, at most, he leaned over and placed his hand on the edge of her chair, and maybe inadvertently touched her. It is a question of one person's testimony against another's. In R.M.'s favor, the chairs were situated behind Grievant's desk, so the students in the room could not observe what was going on. However, in Grievant's favor, testimony established that his door was always open, and any passerby would have had a clear view of the area behind Grievant's desk from the doorway. Thus, one questions whether Grievant would risk touching a female student in the manner R.M. alleges, with the knowledge that anyone in the hallway would be able to see him.

The evidence presented by Grievant, and especially the testimony of A.H., demonstrates that R.M. was extremely angry at Grievant for failing her and calling her over the intercom. Despite this testimony, though, R.M. denied being upset with Grievant for failing her, and for calling her over the intercom. She also denied making the comments about Grievant testified to by A.H. Further, the fact that Principal Mann had to intervene on scheduling day because of R.M.'s distress and decided R.M. could make out her schedule another day, serves to verify that R.M. must have been very upset. R.M. did fail 9th grade and was held back for another year. Thus, in this situation, weighing one person's testimony against another's, where all else is evenly balanced, this evidence of possible motivation on R.M.'s part to embellish what was otherwise an innocent or even inadvertent touching tips the scales in favor of Grievant, as R.M. has demonstrated the ability to be less than truthful when testifying about these events. Thus, the undersignedbelieves Grievant touched R.M. when he leaned over and put his hand on her chair. She does not believe he “walked” his fingers up her leg, or placed his hand on her buttocks.

Further, Grievant was involved in many activities in the school, including coaching girls' sporting events. Grievant testified he often drove students to the sporting events when they had no transportation. Yet, despite the notoriety of Grievant's alleged conduct, no other student athlete approached the administration, other than R.M. It would seem that if Grievant were interested in inappropriately touching students in a sexual manner, he would certainly have more opportunity to do this as a coach or in a car. Yet the only reports of inappropriate touching allegedly occurred in Grievant's classroom, with other students present, and the door to the classroom open.

These cases are very difficult to decide. The undersigned cannot find that the incidents reported by A.S., M.W., J.B., K.H., and R.M. rise to the level of immorality, or inappropriateness, which justifies

the immediate dismissal of a teacher with an excellent teaching record, and many years of service with the school. As noted above, the undersigned believes Grievant used poor judgment in his interaction with the students. However, dismissal is too harsh a penalty for poor judgment in this case.

It is well-settled that a county board of education must exercise its statutory authority to dismiss tenured employees reasonably and in a manner which is not arbitrary or capricious. See, e.g., Rovello v. Lewis County Bd. of Educ., 381 S.E.2d 237 (W. Va. 1989). If the action is challenged, the county board must prove, by a preponderance of the evidence, that the employee engaged in the conduct complained of, and that the punishment imposed was commensurate with the offense. Perkins v. Greenbrier County Bd. of Educ., Docket No. 94-13-019 (Aug. 12, 1994). The West Virginia Supreme Court of Appeals has generally declined to assign specific definitions to the "causes" for which county board of education employees may be dismissed. In most cases, it has taken the broader approach of assessing and weighing the various facets of the disciplinary action including the seriousness of the employee's conduct, the actual or potential harm to the school system, and the employee's work history to determine if, overall, the county board exercised its discretion to discharge reasonably. The Court has focused on the nature of the employee's conduct rather than the label attached to it, and, when warranted, modified the punishment imposed. See, Bd. of Educ. of the County of Gilmer v. Chaddock, 398 S.E.2d 120 (W. Va. 1990); Surber v. Mingo County Bd. of Educ., Docket No. 96-29-015 (Dec. 30, 1996).

The undersigned is of the belief that Grievant exercised very poor judgment in his interactions with his students, which led to serious allegations being leveled against him. While this conduct does not constitute "immorality" under W. Va. Code § 18A-2-8, it does border on incompetency or unsatisfactory performance. "A charge of incompetency or unsatisfactory performance does not have to be based solely on a teacher's ability and capabilities in imparting information to [his] students. It may also include any aspect of [his] position that a county board may reasonably expect [him] to perform, such as appropriate interaction with students, classroom discipline, and other duties as assigned." Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996). In this instance, some of Grievant's conduct was inappropriate, warranting some disciplinary action. However, his previously unblemished work history with the Board also favors mitigation. The speculation and rumours which resulted in the school following R.M.'s allegations were in no part

brought on by Grievant, but rather, by an angry parent, thearrival of the state police at the school, and Grievant's subsequent immediate suspension. Any damage to the school which resulted from the resulting notoriety cannot be said to be the responsibility of Grievant. With respect to the students involved in this case, with the exception of K.H., none of them will be attending Dupont in the upcoming school year. Thus, there will be no cause for any interaction between Grievant and those students, and the Board can ensure that K.H. does not have Grievant for any classes in her last year at Dupont.

As for Grievant, while it appears he is a caring teacher who enjoys the company of his students, he should take this decision as a strong warning to curtail the level of his involvement, both physically and socially, with his students in order to avoid the possibility of this situation arising again.

Findings of Fact

1. Grievant did, from time to time, pat A.S., M.W., and J.B. on the knee while they were sitting or standing next to him behind his desk, and may have even squeezed their knees from time to time.

2. Grievant told R.M. she needed to give her track jersey to another girl because the other girl needed a larger top.

3. Grievant did ask A.S. whether she was wearing shorts under her skirt, and who she was trying to impress. Grievant did not reach out to grab A.S. leg during that conversation.

4. Grievant did, from time to time, rub K.H.'s shoulders and back while he was talking to her at his desk. 5. Grievant did not “walk” his fingers up R.M.'s leg or rest his hand on her buttocks, although he may have inadvertently touched her while leaning over to talk to her about her grades.

6. Grievant's actions described above were not sexual in nature, or an attempt to gain sexual gratification from the students.

Conclusions of Law

1. County boards of education must prove the charges that are relied upon to support disciplinary action against its employees by a preponderance of the evidence. W. Va. Code § 18-29-6.

2. The authority of a county board of education to suspend or dismiss a teacher under W. Va. Code § 18A-2-8, must be based upon the causes listed therein and must be exercised reasonably,

not arbitrarily or capriciously. Parham v. Raleigh County Bd. of Educ., 453 S.E.2d 374 (W. Va. 1994).

3. "Immorality" is defined as "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." Golden v. Bd. of Educ. of County of Harrison, 285 S.E.2d 665 (W. Va. 1981).

4. "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), aff'd, Circuit Court of Kanawha County, Civil Action No. 95-AA-171 (Oct. 24, 1995), citing, Youngman v. Doerhoff, 890 S.W.2d 330 (Mo. 1994). 5. A preponderance of the evidence is evidence which is 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. Black's Law Dictionary, 5th Ed., p. 1064.

6. The Board has proven by a preponderance of the evidence that Grievant patted A.S., M.W., and J.B. on the knee, squeezed A.S.' leg from to time, rubbed K.H.'s back, and possibly touched R.M. somewhere on the leg while leaning toward her.

7. The Board has not proven by a preponderance of the evidence that those actions were "immoral" as contemplated by W. Va. Code §18A-2-8, or that Grievant possessed conscious intent of a sexual nature in touching the students as noted above.

8. "A charge of incompetency or unsatisfactory performance does not have to be based solely on a teacher's ability and capabilities in imparting information to [his] students. It may also include any aspect of [his] position that a county board may reasonably expect [him] to perform, such as appropriate interaction with students, classroom discipline, and other duties as assigned." Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996).

9. A county board of education must exercise its statutory authority to dismiss tenured employees reasonably and in a manner which is not arbitrary or capricious. See, e.g., Rovello v. Lewis County Bd. of Educ., 381 S.E.2d 237 (W. Va. 1989).

10. When assessing and weighing the various facets of the disciplinary action including the seriousness of the employee's conduct, the actual or potential harm to the school system, and the employee's work history, the West Virginia Supreme Court has focused on the nature of the

employee's conduct rather than the label attached to it and,when warranted, modified the punishment imposed. See, Bd. of Educ. of the County of Gilmer v. Chaddock, 398 S.E.2d 120 (W. Va. 1990); Surber v. Mingo County Bd. of Educ., Docket No. 96-29-015 (Dec, 30, 1996).

Accordingly, this grievance is **GRANTED** in part. The Board is hereby **ORDERED** to reinstate Grievant, with back pay, to his former position at Dupont Junior High School, and to remove the dismissal letter from his personnel file. However, the suspension letter shall remain and constitute a warning letter to Grievant regarding his conduct with students, and the Board shall impose on Grievant a 30-day suspension, without pay, to be credited against the time Grievant has been off work without pay.

Any party may appeal this decision to the Circuit Court of Kanawha County and 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

_____

MARY JO SWARTZ

Administrative Law Judge

Dated: March 18, 1997

Footnote: 1

A disciplinary hearing was held on June 19 and August 12, 1996, before Patricia Petty, the Superintendent's designee for the School Board.

Footnote: 2

As is our traditional practice, we avoid using the name of individual students in cases involving sensitive facts.

Footnote: 3

The letter contained several allegations not contained in the above narrative. However, the Board provided no witnesses or testimony regarding those allegations, including the individuals who allegedly made them. Therefore, the undersigned will not consider those allegations, nor will she give the unsupported allegations any weight in rendering her

decision in this matter.

Footnote: 4

No testimony was elicited from J.B. at level four regarding the "bathroom" comment; therefore, that allegation also will be given no weight in this decision.

Footnote: 5

M.W. did not testify at level four. The undersigned initially ruled that the students' parents were not to accompany them into the level four hearing, but subsequently changed her ruling. Before the reversal could be communicated to the students and their parents, M.W. and her father left the proceeding. The parties agreed to submit M.W.'s testimony from the disciplinary hearing for consideration in this decision. The remainder of the transcript from the disciplinary hearing was not submitted into the record.

Footnote: 6

As noted earlier in this decision, no testimony was elicited from J.B. regarding the allegation that Grievant offered to go to the bathroom with her.

Footnote: 7

Grievant was never asked directly whether he patted the girls' on the knee. He was only asked directly about the incidents described above. Thus, Grievant never admitted or denied that he engaged in innocent touching such as patting knees, or putting his arm around students' shoulders. Of course, in a disciplinary matter, a grievant is not required to testify and Grievant's failure to volunteer any information other than that specifically asked cannot be taken against him.