MARGARET STICKLEY,

Grievant,

v. DOCKET NO. 95-02-573

BERKELEY COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

On December 26, 1995, Margaret Stickley, Grievant, submitted this grievance directly to Level IV, (See footnote 1) in accordance with W. Va. Code §18A-2-8, challenging her ten day suspension by Respondent, Berkeley County Board of Education. On January 17, 1996, the undersigned granted Grievant's motion for a continuance. The grievance was continued generally. Grievant desired the continuance because there were pending criminal charges involving the same incident for which she was suspended. Following a telephone conference on October 7, 1997, the parties agreed that the matter should be set for hearing. An evidentiary hearing was held on November 12 and 13, 1997, at the Berkeley County Board of Education Office, in Martinsburg, West Virginia, during which six witnesses testified. On January 6, 1998, this case became mature for decision upon receipt of Grievant's post-hearing submission. (See footnote 2) The following facts are derived from the record, and were proven by a preponderance of the evidence.

FINDINGS OF FACT

1. At all times relevant to this grievance, Grievant was a special education teacher employed by Respondent and assigned to Pikeside Learning Center (PLC).

2. Mr. Tom Edwards is Principal at PLC, and was Grievant's immediate supervisor.

3. On November 30, 1995, Grievant did not committed an assault and battery on Principal Edwards, as Respondent alleged.

4. On December 6, 1995, Mr. David Byers, a substitute teacher (who was substituting for Grievant that day), saw Student J (See footnote 3) (a mentally impaired, behavior disordered twelve

year old student) with a knife. The knife had an eight inch blade, and twelve inches in length overall.

5. Grievant did not bring a knife to school, did not place the knife in her desk, possess the knife, or know the knife was in her desk, as Respondent alleged.

6. Effective December 19, 1995, Respondent suspended Grievant by letter dated December 18, 1995 which, in pertinentpart, provides:

> You are hereby advised that, pursuant to W. Va. [Code §] 18A-2-7, (See footnote 4) you are suspended without pay for 30 days commencing December 19, 1995 and further advised that I will, at a hearing before the Berkeley County Board of Education, seek approval of the suspension and also recommend your termination pursuant to W. Va. Code [§] 18A-2-8 for willful neglect of duty, insubordination and immorality based upon your assault and battery of your immediate supervisor, Principal Edwards, on November 30, 1995 and your possession of a dangerous and deadly weapon, to wit: a knife with an 8" (inch) serrated edge and your keeping of said weapon in your desk in your classroom accessible to your special education students as discovered and reported on December 6, 1995.

7. On December 20, 1995, Grievant filed a grievance at Level IV challenging her suspension.

8. On January 4, 1996, the undersigned scheduled this grievance for a Level IV evidentiary hearing on January 16, 1996. 9. On January 11, 1996, the undersigned received a fax from Grievant's counsel which provided:

> A Level [IV] [g]rievance hearing is scheduled for January 16, 1996, at 9:00 a.m.
>
> The undersigned attorney requests a continuance on the grounds that the Grievant faces a criminal matter which will not allow her to testify at the above set level [IV] [g]rievance hearing. Erwin Conrad, Board Counsel, is in agreement.

10. By order dated January 17, 1996, this grievance was “continued generally.”

11. On January 23, 1996, Respondent during a regular board meeting voted unanimously to approve Grievant's suspension. Thefollowing notation is contained in the record:

> Motion was made by Mr. Sonnick, [and] seconded by Mr. Beckwith, to approve the suspension of Personnel Matter No. 96-02-H/P by Superintendent Bennett without pay except for ten days thereof which will be with pay and move that the suspension without pay continue until the conclusion of a hearing on the charges which are the subject of the recommendation for termination. Motion carried unanimously.

Level IV, R. Ex. #2.

12. Grievant, with counsel, participated in a hearing Respondent held on July 31, 1996, concerning not issuing her a contract for the following school year. Respondent voted against rehiring her. Grievant did not file a grievance or take any other action concerning her non-rehiring.

13. On September 24, 1996, and August 7, 1997, and pursuant to West Virginia Education and State Employees Grievance Board Procedural Rule 4.12, 156 C.S.R. 1 (1996), the undersigned notified the parties that this grievance would be dismissed unless an objection was filed within thirty days from the date of the letter. In response to both letters, Grievant's counsel objected to dismissing the grievance.

In acknowledgement of the September 24, 1996 letter, Grievant's counsel informed the undersigned that the criminal matter involving Grievant had not been settled. Respondent's counsel did not reply.

In reply to the August 7, 1997 letter, Grievant's counsel informed the undersigned that the criminal matter involving Grievant had recently been resolved, and asked that this grievance be set for hearing. Respondent's counsel responded by a letterdated October 2, 1997, and asserted that “it would appear to be a waste of time, energy and resources to schedule a hearing on the interim suspension related to the criminal charges.” However, during a telephone conference held on October 7, 1997, counsel for Respondent agreed that there were some issues in this grievance which needed to be addressed.

14. A Level IV evidentiary hearing was held on November 12 and 13, 1997.

DISCUSSION

Willful neglect of duty, insubordination, and immorality are three reasons found in the Code for which a professional educator may be suspended or terminated. W. Va. Code §18A-2-8 provides, in pertinent part:

> [n]otwithstanding 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. A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article.

Emphasis added.

To prove willful neglect of duty under W. Va. Code §18A-2-8, Respondent must establish that Grievant's conduct constituted a knowing and intentional act, rather than a negligent act. Bd. of Educ. of County of Gilmer v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990); Hoover v. Lewis County Bd. of Educ., Docket No. 93-21- 427 (Feb. 24, 1994). The second reason cited by Respondent for Grievant's suspension was insubordination. Insubordination is

usually defined by this Grievance Board as "a deliberate, willful or intentional refusal or failure to comply with a reasonable order of a supervisor." Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990), citing Gill v. W. Va. Dept. of Commerce, Docket No. COMM-88-031 (Dec. 23, 1988). See Thompson v. Logan County Bd. of Educ., Docket No. 95-23-127 (July 17, 1995). It has also been stated that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." Sexton v. Marshall Univ., Docket No. BOR2-88-029- 4 (May 25, 1988), citing Weber v. Buncombe County Bd. of Educ., 266 S.E.2d 42 (N.C. 1980). (See footnote 5) Furthermore, in order to establish insubordination, the employer must demonstrate that the employee's failure to comply with a directive was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995); Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

The third charge against Grievant is immorality. The Supreme Court of Appeals of West Virginia has determined that the termimmorality 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., 169 W. Va. 63, 285 S.E.2d 665 (1981). As discussed by the Supreme Court in Golden, a nexus between the conduct and a teacher's job duties is necessary, due to the lack of precise definition of terms like immorality, which could be subject to quite varied and subjective interpretations by boards of education. A rational nexus for suspension of a teacher exists: (1) if the conduct directly affects the performance of the occupational responsibilities of the teacher; or (2) if, without contribution on the part of school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the particular teacher to discharge the responsibilities of the teaching position. Golden, supra.

When an employee has been indicted, the suspension is based upon the indictment itself, not the conduct alleged therein, because the formal charge itself establishes reasonable cause to believe the employee engaged in the conduct. Kitzmiller v. Harrison County Bd. of Educ., Docket No. 17-88-189 (Mar. 31, 1989). However, in the instant case, no indictment has been issued, so Respondent must prove by a preponderance of the evidence that the conduct actually occurred and also that the

conduct constituted the

acts charged within the meaning of the statute. Snodgrass v.Wetzel County Bd. of Educ., Docket No. 97-52-384 (Dec. 15, 1997).

Assault and battery are two distinct and separate offenses. W. Va. Code §61-2-15(a), assault on school employees, uses the same basic wording as that found in W. Va. Code §61-2-9 (which generally defines assault), but makes it unlawful to assault a "school employee." (See footnote 6) W. Va. Code §61-2-9, in pertinent part, provides:

> If any person unlawfully attempts to commit a violent injury to the person of another or unlawfully commits an act which places another in reasonable apprehension of immediately receiving a violent injury, he shall be guilty of [assault], ...

Battery is defined generally in W. Va. Code §61-2-9. Again, the Code has a separate section for an offense (in this case a battery) against school employees. W. Va. Code §61-2-15(b), in pertinent part, provides:

> If any person commits a battery by unlawfully and intentionally making physical contact of an insulting or provoking nature with the person of a school employee or by unlawfully and intentionally causing physical harm to a school employee, he shall be guilty of [battery on a school employee], ...

In this case, Respondent failed to prove by a preponderance of the evidence any of the alleged acts (the alleged assault and battery of her immediate supervisor, Principal Edwards, on November 30, 1995, or her possession of a dangerous and deadly weapon) with which Grievant was charged.

In the instant case, there is no evidence that Grievantattempted "to commit a violent injury" on Principal Edwards, or that he had a "reasonable apprehension of immediately receiving a violent injury." Therefore, Respondent's charge of assault fails.

With respect to the alleged battery only Principal Edwards, Grievant, and Ms. Wanda Kerns, Secretary at PLC, had personal knowledge of the incident. Ms. Kerns did not see the incident because a counter obstructed her view of Grievant and Principal Edwards from the waist down, but heard Principal Edwards say something to the effect of "Ouch, you kicked me," or "Ouch, you hurt me," that he was going to see a doctor, and that he would send Grievant a bill. To which Grievant responded, "Send me a bill." Level IV, Nov. 12, 1997, Tr. at 76-87.

The Superintendent testified, to hearsay gathered from Principal Edwards, that Grievant had kicked him. Principal Edwards failed to testify not only at the Level IV hearing, but also in Magistrate

Court after he filed criminal misdemeanor charges against Grievant, which were dismissed because he failed to appear. No reason or explanation was provided for his failure to appear at the Level IV hearing (or at Magistrate Court), or why he was not subpoenaed by Respondent.

However, Grievant denied kicking Principal Edwards, (See footnote 7) and the hearsay evidence obtained from Principal Edwards is afforded no evidentiary weight by the undersigned. The undersigned finds suspect the truth and veracity of a person who fails to testify, without apparent cause, in a grievance like this one, andespecially so after the same person, after obtaining a criminal complaint, fails to testify in a criminal case, which is apparently dismissed because of his failure to appear. Respondent failed to prove by a preponderance of the evidence that Grievant committed battery on Principal Edwards.

Concerning Grievant's alleged possession of a dangerous and deadly weapon (an eight inch knife), Respondent also failed to prove its charge by a preponderance of the evidence. On December 6, 1996, Student J was seen with a knife by Mr. David Byers, who was substituting for Grievant. Grievant was not at PLC on December 6, 1996. According to Mr. Byers, Student J approached Grievant's desk, where he was sitting, with permission to get into a desk drawer (which students were allowed to get in, contained crafts, cards, crayons, etc.). No one testified seeing the knife in the desk, or being taken out of the desk. Student J stated that it came from the desk drawer. Grievant did not know anything about the knife allegedly found in her desk. She denied bringing it to school, keeping it in her desk, and knowing that it was in her desk.

Respondent failed to prove by a preponderance of the evidence that Grievant either placed the knife in the desk, possessed the knife, or knew the knife was in her desk. Because Respondent failed to prove by a preponderance of the evidence that Grievant possessed or knew there was a knife in her desk, or that she assaulted or battered Principal Edwards, the analysis stops atthis point (because there is not a basis upon which the alleged W. Va. Code §18A-2-8 violations may rest).

Respondent asserted that even if it failed to meet its burden of proof in this case, relief should be limited because it did not delay this grievance, and that all of the continuances were because of motions to continue filed by Grievant. Grievant asserts that Respondent set the events in motion by suspending her, that it was
Respondent's agent (Principal Edwards) who filed the criminal assault and battery charges against her, and that Grievant should not be penalized for exercising her constitutional right to be free from

self incrimination, which necessitated the continuances in this grievance. Respondent counters by arguing that there is no proof that it asked Principal Edwards to file criminal charges against Grievant.

Although Respondent did not seek any continuances, it never objected to any of Grievant's motions to continue. More importantly, however, Respondent could have more thoroughly investigated the circumstances surrounding this grievance, and revoked the suspension at any time. At Level IV, the Superintendent testified that he relied solely on Principal Edwards' account. Level IV, Nov. 12, 1997, Tr. at 97, 101-103 and 120. The allegations concerning the knife incident, discussed above, which was the incident which triggered the disciplinary action against Grievant, was more unsubstantiated than the charge involving Principal Edwards.

In addition to the foregoing findings of fact and narration,it is appropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

1. The employer must establish the charges in a disciplinary matter by a preponderance of the evidence. W. Va. Code §18-29-6; Arnold v. Mineral County Bd. of Educ., Docket No. 96-28-065 (Dec. 6, 1996); Bierer v. Jefferson County Bd. of Educ., Docket No. 95- 29-558 (Apr. 8, 1996).

2. A county board of education must exercise its discretion in personnel matters in a manner which is not arbitrary or capricious. Lilly v. Summers County Bd. of Educ., Docket No. 90-45- 040 (Oct. 17, 1990), citing State ex rel. Hawkins v. Tyler County Bd. of Educ., 166 W. Va. 363, 275 S.E.2d 908 (1980).

3. When no indictment has been issued, Respondent must prove by a preponderance of the evidence that the alleged conduct actually occurred, and also that the conduct constitutes the acts charged within the meaning of the statute. Snodgrass v. Wetzel County Bd. of Educ., Docket No. 97-52-384 (Dec. 15, 1997).

4. Respondent failed to prove by a preponderance of the evidence that Grievant assaulted and/or battered Principal Edwards,

or that she possessed or kept a dangerous and deadly weapon in her desk.

5. Given that back pay damages essentially are wages which Grievant would have received, and that the goal is to place the prevailing party (Grievant) in the same position she would have been, had she not been deprived of the sum owed her, and hadbenefitted from the full use of the

money during the period of deprivation, full reimbursement is not accomplished unless prejudgment interest is received. See Gribben v. Kirk, 195 W.Va. 488, 466 S.E.2d 147 (1995); Weimer-Godwin v. Bd. of Educ. Upshur County, 179 W.Va. 423, 369 S.E.2d 726 (1988).

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to remove the letter of suspension (and any related documents) from Grievant's personnel file, and to award Grievant back pay, and all other benefits she would have been entitled to pursuant to law, for the period of time she was suspended without pay, with interest.

Any party may appeal this **DECISION** to the Circuit of Kanawha County or to the Circuit Court of Berkeley 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.

DATED: February 20, 1998 _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1 Cites to the transcript of the Level IV hearing will be referred to as "Tr. at ___", with the page number appearing in the blank. Likewise, Respondent's and Grievant's exhibits will be referred to as "R. Ex. ___" and "G. Ex. ____", with the exhibit number in the blank.

Footnote: 2 The record remained open at the end of the Level IV evidentiary hearing. Respondent's counsel was given the opportunity to submit a copy of Magistrate Court records involving Grievant's alleged assault and battery if he could produce the documents by the deadline date for submittingproposed finding of facts and conclusions of law. As of the issuance of this decision, Respondent's counsel has failed to forward a copy of the above records to the undersigned.

Footnote: 3 Consistent with the Grievance Board's practice, the initials of juvenile students will be used throughout this decision in lieu of their names. Shipley v. Grant County Bd. of Educ., Docket No. 97-12-169 (Sept. 29, 1997); Edwards v. McDowell County Bd. of Educ., Docket No. 93-23-38 (June 23, 1994).

Footnote: 4 W. Va. Code §18A-2-7 does not deal with disciplinary suspensions or disciplinary terminations. The proper Code Section for suspensions and terminations which are disciplinary in nature is W. Va. Code §18A-2-8, which Respondent also cites in Grievant's disciplinary suspension letter.

Footnote: 5 It should be further noted that Sexton was affirmed in part and reversed in part by the Kanawha County Circuit Court, Docket No. 88-AA-154. It was then appealed to the Supreme Court of Appeals of West Virginia which reversed the Circuit Court's ruling, in Sexton v. Marshall Univ., 182 W. Va. 294, 387 S.E.2d 529 (1989).

Footnote: 6 Respondent did not identify how it defined assault or battery, nor does the record indicate how Grievant was charged in Magistrate Court.

Footnote: 7 Tr. at 180.