CAROL GRAHAM,

Grievant,

v. **Docket No. 99-40-206**

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Carol Graham, filed this grievance against the Putnam County Board of Education ("PCBOE" or "Board") over her suspension for insubordination, willful neglect of duty, and incompetency. Her Statement of Grievance says:

> Violations of WV Code 18A-2-7, 18A-2-8 and due process with regard to grievant's suspension from West Teays Elementary School. Further violations of WV Code 18-29-3(h), 18-29-2(p).
>
> RELIEF SOUGHT: To be reinstated with all references to suspension removed from her personnel files and compensation for any loss of wages and benefits due.

As this was a suspension, the grievance was filed directly to Level IV. A Level IV hearing was held on June 28, 1999, and this case became mature for decision on July 23, 1999, after receipt of the parties' proposed findings of fact and conclusions of law.

(See footnote 1)

Issues and Arguments

Grievant argues she was not insubordinate, did not willfully neglect her duty, and did not demonstrate incompetency. She also argues she did not receive proper due

process, as she was not given a hearing of any type before the Board voted to accept theSuperintendent's recommendation for suspension. She further avers her suspension was an act of reprisal for filing an harassment grievance against her principal. Grievant also maintains she should not be placed on an Improvement Plan when she returns to work and requests her sick leave back. (See footnote 2)

Respondent argues it has demonstrated Grievant engaged in the alleged acts and refused to comply with her supervisor's reasonable request for assistance. Respondent notes Grievant knew of the board of education meeting to suspend her, chose not to attend, and sent her husband to the meeting. Her representative was present as well. Neither spoke against the suspension. Thus, all her due process rights were met. Respondent asserts Grievant never responded in any way to the letter informing her Superintendent Sam Sentelle would recommend her suspension at the Board meeting. Respondent also notes the plans for disciplinary action against Grievant were well under way when she filed her harassment grievance, and the reason for Grievant's suspension was not because she filed a grievance, but because of her misconduct.

Discussion of events surrounding this disciplinary action

At the time of the events leading to Grievant's suspension, Grievant was employed as the Assistant Principal at West Teays Elementary School ("WTS"), and Bruce Faulknerwas her direct supervisor and the Principal. The story of these events comes from various eyewitness' accounts, and as usual, these stories varied. Grievant's and Mr. Faulkner's stories differ, at times dramatically. As needed, these stories will be discussed, and it is clear that there are credibility issues. In attempting to arrive at what "really" happened, the undersigned Administrative Law Judge gave more credence to the neutral witnesses, as Grievant and Mr. Faulkner have a history of a problematic working relationship, and have been counseled by various administrators to resolve these problems.

The events leading to Grievant's suspension occurred at WTS on April 2, 1999, the Friday before Spring Break. A new behaviorally disordered ("BD"), first grade student, C, had been at the school for one week. (See footnote 3) The child had been transferred because the parents disapproved of a breach of confidentiality at his prior school. Earlier on this day, in the afternoon, C had been acting out, and Grievant, who is certified in BD, had assisted his teacher, Bob Opperman.

After school, C's aunt came to pick him up, and as he went out the door he pulled away from her and ran. After a dangerous chase through traffic and involving numerous helpful employees, including Mr. Faulkner, the student was caught and returned to the school. His teacher, Mr. Opperman, restrained the student in the classroom while Mr. Faulkner attempted to contact the parents. After the child had calmed down some, the aunt again tried to take the child home, but he again became combative and agitated. During this time, C was very loud; screaming, kicking, and knocking things about. Mr. Faulkner then decided it would be necessary for one of his parents to come to the school and pick up C.

He also called on the intercom for the Grievant and the aide, Dianne "Honey" Carruthers, to come to the office, so they could assist Mr. Opperman with C, and also serve as witnesses to the events. Also during this time, Mr. Faulkner assisted Mr. Opperman with the child, and occasionally watched C while Mr. Opperman took a break. Mr. Faulkner was also arranging with the parents by whom and when the child would be picked up.

Ms. Carruthers responded quickly to the call for assistance, but Grievant did not. Grievant testified she did not hear the page; nor did she hear C screaming and kicking. It is noted that all other witnesses testified C was very loud and could be heard throughout the area. When Grievant did not appear, Mr. Faulkner asked several individuals if they had seen Grievant. Mr. Faulkner then went to Grievant's office, knocked on the door, and Grievant opened it. Grievant was in conference with a

substitute teacher, Karen Ashworth. He informed her he needed her "now" to assist with a situation. (See footnote 4) He is unsure whether he explained the situation in any more detail than this simple statement. However, Cindy Fleming, a secretary, remembers Mr. Faulkner saying "I need you in Mr. Opperman's room because of a situation with a student." Grievant told Mr. Faulkner she was in a conference and wanted to know if he could handle the situation. Mr. Faulkner stated he was on the phone. Grievant looked at the phone, saw no lights, and told him he was not on the phone. Mr. Faulkner then stated he was "busy" and needed her to deal with the situation. Grievant was correct that Mr. Faulkner was not on the phone at the time he talked to her, but he was waiting for a return call from the father. Grievant asked if he could take care of the situation for a minute or so, until she was through with the conference. Mr. Faulkner said he wanted or needed her to come now. Grievant informed Mr. Faulkner she would be right there, and Mr. Faulkner left. Grievant testified she shut the door and continued with her conference. It was unclear from the testimony whether Grievant locked the door or it locked when she shut it. Grievant's testimony was unclear and Ms. Ashworth stated Grievant locked the door after Mr. Faulkner left the first time.

After approximately five minutes, when Grievant had still not appeared, Mr. Faulkner returned to her office. (See footnote 5) Grievant's door was locked, and Mr. Faulkner used his key to gain entry. Grievant attempted to close the door on him, and when he would not remove his foot so she could close the door, she said, "What's going on here? Do I need to call 911." Ms. Ashworth indicated Grievant told Mr. Faulkner to move his foot, and if he didn't Grievant stated she would call 911. Ms. Fleming remembers Mr. Faulkner's tone of voice as tense and stressed, but not loud. She also testified Grievant said, "No, I can't come I'min conference," and that Mr. Faulkner restated the fact he needed her and he wasn't leaving until she came.

Grievant stated Mr. Faulkner shoved the door into her, and Mr. Faulkner said he was not leaving until she came. Mr. Faulkner was upset and "nicely" (according to Grievant)

asked Ms. Ashworth to leave. Grievant requested Ms. Ashworth to stay, Mr. Faulkner again asked Ms. Ashworth to leave, and she did . Grievant left soon thereafter.

Grievant testified she had "never seen anyone [act] like Mr. Faulkner", and she did not want Ms. Ashworth to go because she was afraid Mr. Faulkner was going to hit her. Ms. Ashworth was also frightened by Mr. Faulkner's tone and mannerisms, but did not indicate she thought Mr. Faulkner was going to hit anyone.

All witnesses indicate it was clear Mr. Faulkner wanted Grievant to come right away. Grievant declared Mr. Faulkner always tells her he needs her right away, always yells at her, and often the situation is not that pressing.

As Grievant was coming down the hall after the second visit from Mr. Faulkner, she was observed and overheard by Carolyn Rogers, a first grade teacher. Ms. Rogers had voluntarily stayed outside the door of C's classroom, in case C should attempt to run away again. Ms. Rogers saw Grievant upset and "stomping" down the hall toward Mr. Opperman's classroom while she stated, "He's such a dunderhead. Can't he do anything by himself?" (See footnote 6) Grievant then went into Mr. Opperman's classroom, and Ms. Rogers left. Ms. Rogers stated Grievant had been very good to her, and she was shocked and disappointed by her behavior.

By the time Grievant arrived in Mr. Opperman's classroom, C had calmed down quite a bit. Grievant asked Mr. Opperman two times, "Do you need me?" in an unpleasant voice. Since he did not really need her at this time, he said "No." He knew Mr. Faulkner was going to ask Grievant to come and help, and he believed her irritation and tone of voice was because she did not want to do what Mr. Faulkner had asked her to do. He was aware of Grievant's "dislike" of Mr. Faulkner, as she had discussed it with him several times. He found Grievant's remarks of this nature to be unprofessional, that the battle with Mr. Faulkner was not good for her, and this conflict affected the school. Mr. Opperman indicated that under other circumstances he would have welcomed Grievant's help as she works well with troubled children.

Grievant believed she asked Mr. Opperman nicely if he needed her, as she is always "a polite person". Grievant indicated she still did not have any idea why Mr. Opperman might need her, and she did not ask Mr. Opperman, even when she saw he was still in his classroom with the aide and C, who she had helped with earlier in the day when he became so upset.

Grievant went directly to find Mr. Faulkner and said something like, "Mr. Opperman does not need me, now what's your problem?" Her voice was raised and irritated. Mr.Faulkner informed her he needed her as a witness; he did not yell. (See footnote 7) Several employees testified they had never heard anyone speak to Mr. Faulkner in such a manner, and they believed this behavior was unprofessional and wrong.

Grievant returned to Mr. Opperman's classroom, and instructed the aide to leave. (See footnote 8) She averred she still did not know why she was there, but if she was supposed to be a witness, she would be a witness. Grievant still had not asked Mr. Opperman what the situation was, and she testified she still did not know what to observe, and why she needed to be observing the situation.

When Grievant returned to the room C kicked, hit, and attempted to bite her. (See footnote 9) After he calmed down, Grievant then took C to make a phone call, not get a drink of water as other witnesses stated. She did not know who C called, nor did she ask, as she did not think this was her business. Mr. Opperman did not remember Grievant returning to the room after he told her he did not need her. He remembered only Mr. Faulkner, himself and Major Sims, WTS's diagnostician, remaining until the father came to pick up the boy. Mr. Sims had arrived shortly before the father, as he had been called by his wife, a teacher at the school. Mr. Opperman indicated he thinks he should remember Grievant if she stayed, because she is a very proactive person and would speak up in this type of situation.

Mr. Faulkner indicated Grievant left some time after she took the boy for a drink of water, and that she was not there when the father arrived. He did not know when she

left, as she did not tell him, nor did she ask permission to leave. Grievant stated she was the only one with the boy when his father arrived and "grabbed" C. She released the child to the father, and stated she knew this was the child's father because the child called him Dad. Grievant explained she talked to Mr. Sims about a sore on the child's back, and she saw both Mr. Faulkner and Mr. Sims when the child was in the bathroom with the father. She did not recount whether she spoke to them at this time. Screams were coming out of the bathroom, and the father was strongly scolding the child.

Grievant left, returned to her office, and cleaned out her desk because she did not plan on returning after Spring Break because of her high stress level. She did not tell Mr. Faulkner she was leaving, nor did she inform him of her plans not to return.

Mr. Sims stated Grievant was with the child, Mr. Opperman and Ms. Carruthers when he arrived. Mr. Opperman left the room once and found out the father was on the way. He heard Grievant talking to C, and after the father arrived and had the child in the bathroom, Grievant told Mr. Sims to tell the father about C's rash. Mr. Sims's focus at thistime was the bathroom, because he was listening to make sure this upset father was not harming the child. He knows Grievant was not there when the father left with the child, and is unsure when Grievant left the room.

Mr. Faulkner stated Grievant could have left when he and Mr. Sims were in the hallway, and only Mr. Opperman, Mr. Sims, and Mr. Faulkner were there when the father left. The four of them had a long conversation about what had happened. Mr. Faulkner called the Director of Special Education before he left that day to inform her of the incident.

The next week was Spring Break, and sometime during this week, or the Monday after Spring Break, A J, C's paternal grandmother and Grievant's friend, called Grievant to ask her to take C under her wing, as he was now at Grievant's school. (See footnote 10) Ms. J did not know of C's problem at school the prior Friday. Grievant was "hysterical" during this conversation, and Ms. J spent her time trying to calm Grievant down.

Grievant informed her about her bad day at school on April 2, 1999. Grievant told her Mr. Faulkner had forced his way into her office, shoved the door into her, and she was afraid he might strike her. She stated she went to where Mr. Faulkner wanted her to go, and there was this tiny little boy with all these adults. Grievant ran to the child and hugged him, and he kicked her.

With this information, Ms. J believed the child was her grandson, although Ms. Jenkins maintains Grievant had not told her the child's name. Ms. J then went to her son with the information she had, and asked if C had problems at school the previous Friday. The son confirmed the problems, but was very upset that Grievant had told his mother of this situation. The son believed Grievant had revealed the child's name during the conversation, even though Ms. J told him Grievant had not.

On April 26, 1999, C's parents came to WTS for an IEP (See footnote 11) meeting for C. The father was very upset, and told Mr. Faulkner about Grievant's revealing information about his child to his mother. C's father still believed Grievant told Ms. J the name of the child involved in the incident. The father reminded Mr. Faulkner there had been previous problems with confidentiality, and that was one of the reasons why C was transferred. The father asked Mr. Faulkner to wait a few days before he took any further action.

Grievant stated she requested a medical leave of absence on or about April 12, 1999, and this was granted. This letter was not submitted into evidence, but it appears what really happened was Grievant asked to use her medical leave for her illness. Since Grievant ran out of medical leave on or about May 19, or 20, 1999, she has not requested any further type of leave, and Assistant Superintendent Hatfield stated Grievant's status was now in "limbo". Grievant is currently in a non-pay situation, but has not received a formal leave of absence, as she has never requested one. Grievant indicated she did not know she could or should request a leave of absence, and had received no directions from PCBOE to request one.

Upon his return to school after Spring Break, Mr. Faulkner also discussed the incident and Grievant's behavior with Robert Hull, Director of Early Childhood Education and his supervisor. (See footnote 12) Earlier in the semester, Mr. Hull had been placed at the school to assist Grievant and Mr. Faulkner in interacting with each other, and to help them develop a positive working relationship. Later, Mr. Faulkner discussed the situation with Superintendent Sentelle, who asked him to document the situation. Pursuant to Superintendent Sentelle's directions Mr. Faulkner wrote the letter of May 7, 1999. Also, at some point in time, Assistant Superintendent Harold Hatfield, Director of Personnel, was involved as a sounding board. Jack Welton, Assistant Superintendent of Curriculum and Instruction and Mr. Hull's supervisor, was also party to these discussions.

On May 10, 1999, Superintendent Sentelle sent Grievant a certified letter stating, "I regret that I must recommend to the Board of Education your suspension from duty pursuant to West Virginia Code Sections 7 and 8, Article 2, Chapter 18A, for incompetency, insubordination and willful neglect of duty." Superintendent Sentelle indicated the particulars were in Mr. Faulkner's letter, which he attached to his letter. He cited Grievant's failure to help when asked, the possibility of danger to the child, and her discussion of the events with Ms. J. Since Grievant had not returned to work since the incident, Superintendent Sentelle stated, "This suspension is a disciplinary action which is in effect concurrently with your indefinite medical leave. At such time as you return to active duty, your supervisor is directed to complete your professional evaluation and develop a formalplan of improvement." Thus, Grievant's suspension was to be with pay. (See footnote 13) Superintendent Sentelle indicated Grievant could file a grievance within five days of receipt of the Board's action.

Grievant testified she did not know at which Board meeting PCBOE would consider Superintendent Sentelle's recommendation to suspend her. She testified a teacher called her and told her of a Board meeting on May 17, 1999. She sent her husband to this meeting, but did not go herself because, "I couldn't take it." Grievant's representative

was also aware of the plans to suspend Grievant, and she also attended this Board meeting. Neither Grievant's husband nor Ms. Hubbard asked to address the Board, and PCBOE voted 5-0 to accept Superintendent Sentelle's recommendation. Superintendent Sentelle sent Grievant a second certified letter dated May 19, 1999, informing her of the Board's action. A grievance form was attached, and Grievant was again reminded of her right to file a grievance within five days of her receipt of the letter. This grievance was filed on May 21, 1999.

Mr. Faulkner testified he believed Grievant was insubordinate and willfully neglected her duty in the April 2, 1999 incident, but he did not believe Grievant was incompetent. He did believe Grievant has been incompetent at times in her interaction with others, but not on that day. Although Grievant testified she had "No, never" had a problem with asupervisor before, and had always received overall excellent evaluations, she later agreed she had received an unsatisfactory rating in the area of effective communication from her former supervisor and principal on her June 1997 evaluation. Grievant stated this evaluation was unfair, and she would have filed a grievance if she had known she could. Grievant did grieve her unsatisfactory 1998 evaluation by Mr. Faulkner. This grievance was granted, and her evaluation was redone.

Grievant also testified at some length that she did not know why Mr. Hull had been assigned to WTS, but he had told her it was not because of her. Grievant stated she was at the August 17, 1998 meeting when Superintendent Sentelle told Mr. Hull he would be relocated to WTS. The purpose of this meeting was to encourage Grievant and Mr. Faulkner to develop improved methods of professional interaction. Assistant Superintendent Hatfield indicated Mr. Hull was there to assist Mr. Faulkner and Grievant to develop a better working relationship and to ensure the school was working smoothly. Grievant and Mr. Faulkner were directed to write a plan of interaction, not talk badly about each other to others, and to attend the principal's academy.

Grievant explained her allegation that the suspension was an act of reprisal only

related to her harassment grievance which is currently held in abeyance. (See footnote 14)

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). "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[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. 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 and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.; See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

The issues and charges raised by Grievant will be discussed one at a time.

I. Due Process

The first issue to address is Grievant's argument that she was given insufficient due process, when the Board failed to give her a pre-suspension hearing on the charges.

The West Virginia Supreme Court in Board of Education of the County of Mercer v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994), determined what due process is required to terminate a continuing contract of employment. However, the due process rights

afforded an individual for less than a termination, or "a temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation." Waite v. Civil Serv. Comm'n, 161 W. Va. 154, 241 S.E.2d 164 (1978) (citing North v. Bd. of Regents, 160 W. Va. 248, 233 S.E.2d 411 (1977)). Prior to a thirty-day suspension without pay, Waite, a civil service employee, had a sufficient property interest to require notice of the charges and an opportunity to present her side of the story to the decision-maker. Waite at 170. Further, the West Virginia Supreme Court of Appeals has recognized that "due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985) (citing Clark v. W. Va. Bd. of Regents, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). "What is required to meet procedural due process under the Fourteenth Amendment is controlled by the circumstances of each case." Barker v. Hardway, 238 F. Supplement . 228 (W. Va. 1968); see, Buskirk, supra; Edwards v. Berkeley County Bd. of Educ., Docket No. 89-02-234 (Nov. 28, 1989).

It is a well-settled principle of constitutional law, under both the State and Federal Constitutions, that an employee who possesses a recognized property right or libertyinterest in his employment may not be deprived of that right without due process of law. (See footnote 15) Buskirk, supra; Waite, supra; Clark, supra. "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494, (1985), citing, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Because Grievant's suspension did not result in the loss any salary, she was not deprived of a property interest. Additionally, because Grievant's suspension was based charges of insubordination, incompetence, and willful neglect of duty as they

related to one specific instance, these charges would not foreclose employment opportunities or seriously damage Grievant's standing in the community. Waite, supra. Thus, it appears Grievant's property interest and liberty interest were not seriously impaired by the suspension. However, the charges against Grievant are of a serious nature, and some due process protections should be afforded. The question here was whether the protection afforded Grievant were sufficient.

It has previously been held that a full-blown hearing is generally not required before an employee may be terminated, but that employee has the minimum pre-deprivation right to at least have an opportunity to respond to the charges either orally or in writing. Loudermill, 470 U.S. at 542 (Emphasis added). (See footnote 16) An employee is also entitled to written notice of the charges and an explanation of the evidence. Wirt, supra. In other words, notice of the charges, explanation of the evidence, and an opportunity to respond is all the due process that PCBOE is required to provide. Id. at Syl. Pt. 3; See W. Va. Code §18A-2- 8. This fact is especially true, given that Grievant was suspended not terminated and the suspension was not intended to result in a loss of compensation. It should be remembered that the purpose of a pre-suspension hearing or opportunity to respond is to assure that there are reasonable grounds to support the suspension. Gilbert v. Homar, 520 U.S. 924, (1997); Loudermill, supra. (See footnote 17)

Grievant's argument about Respondent's failure to provide required due process presents an interesting case. Grievant was informed, in writing, of the charges against her as Superintendent Sentelle's letter specified the charges, and Superintendent Sentelle attached Mr. Faulkner's letter, which gave specifics, to his own certified letter. The suspension letter clearly stated the specific charges against Grievant, and identified the behaviors for which she was to be suspended. Gillespie v. Kanawha County Bd. of Educ., Docket No. 90-20-496 (June 6, 1991), citing Russell v. Kanawha County Bd. of Educ.,Docket No. 90-20-415 (Jan. 24, 1991). See Brown v. Mercer County Bd. of Educ., Docket No. 98-27-113 (July 30, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket

No. 97- 06-150 (Oct. 31, 1997).

Although it would have been preferable for Superintendent Sentelle to tell Grievant the date of the Board meeting, it is noted that such meetings are held on a regular basis and pursuant to a posted schedule. It would also have been preferable if Superintendent Sentelle had expressly informed Grievant she could address the Board prior to her suspension, either orally or in writing, if she so chose. However, Grievant knew when the meeting was _ she sent her husband. When asked why she did not attend the meeting she stated, "I couldn't take it", not "I wasn't sure if this was the right meeting." Grievant knew her suspension would be voted on, and she did not want to be there when it happened. (See footnote 18) Thus it appears Grievant was afforded an opportunity, but chose not to avail herself of this opportunity. Grievant's representative was also at the meeting, and she also knew Grievant was to be suspended. What is unclear is why these two individuals, who were in attendance, did not speak on her behalf or at least request a hearing at a later date when Grievant felt she would be able to "take it." It is unclear why Grievant did not write or call Superintendent Sentelle to give her side of the story. It should be noted thatGrievant is a long-term administrator, and is expected to be cognizant of the disciplinary process, or least know who to call if she had questions or concerns. (See footnote 19)

Grievant has testified Mr. Faulkner's letter was "all lies" and she was waiting to see if the Board would do the "right thing". It is unclear how the Board could be expected to do the "right thing" or know Mr. Faulkner's letter was "all lies" when Grievant never communicated this information to PCBOE.

II. Credibility

An Administrative Law Judge is charged with assessing the credibility of the witnesses that appear before her. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

The United States Merit System Protection Board Handbook ("MSPB Handbook") is helpful in setting out factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984). Some factors to consider in assessing a witness's testimony are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Id. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3)the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id.

The undersigned Administrative Law Judge had an opportunity to observe all witnesses, and found some to be more credible than others. As Grievant and Mr. Faulkner had a history of a poor relationship, both of these individuals' testimony was initially treated as suspect as it could be considered to be biased. However, it must be noted that the majority of Mr. Faulkner's testimony was supported by the testimony of neutral witnesses. Almost all the witnesses, including Grievant, at times, confirmed some of the statements in Mr. Faulkner's letter. Further, some of Grievant's testimony was just not plausible or believable. Only the Grievant indicated the other witnesses were lying when they did not agree with her.

Grievant's demeanor during the hearing was disruptive and counter-productive, and supported the charges against her. See Maxy v. McDowell County Bd. of Educ., Docket No. 97-33-208 (Apr. 30, 1998). The undersigned Administrative Law Judge had to go off the record numerous times to warn her that she must not speak out of turn, must not make comments and faces at the witnesses, must listen to the question and answer what was asked, and she could not ask questions of other parties. Grievant was directed to speak through her representative, and finally informed that if she did not contain herself, she would, unfortunately, be required to leave her own grievance hearing. (See

footnote 20) The witnesses' accounts of the incident varied on specific points, as is typical of eyewitness testimony, but the witnesses agreed on the key points of what happened, and what Grievant and Mr. Faulkner did and said. Overall, the undersigned Administrative Law Judge finds the majority of the testimony received from all witnesses to be truthful and supportive of the fact that Grievant engaged in the behavior of which she was accused. Mr. Faulkner asked Grievant to come right away and assist with a potentially dangerous and difficult situation in which she had expertise, and she did not. She was loud, confrontive, and spoke to Mr. Faulkner in an unprofessional manner.

III. Merits of the case

The next issue to decide is whether PCBOE has proven the charges of insubordination and willful neglect of duty. The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code §18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

W. Va. Code §18A-2-8 identifies the types of action 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. 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.

A. Insubordination One of the charges against Grievant is insubordination. Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." 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). This Grievance Board has previously recognized 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)). In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and 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). Insubordination can be shown through an employee's "blatant disregard for the authority" of his second-level supervisor. Sexton, supra at 10.

This view of insubordination is consistent with the treatment accorded insubordination by arbitrators in the private sector. The scope of insubordination as an offense was addressed extensively in Burton Manufacturing Co. v. Boilermakers Local 590, 82 Lab. Arb. (BNA) 1228 (1994) (Holley, Arb.). There, Arbitrator Holley noted:

> In general, if an employee refuses to obey an order or defies the authority of Management, he is guilty of insubordination. This is a serious offense and may justify disciplinary measures, including discharge. An employee may be charged with insubordination not only if he willfully disobeys an order, butalso if he . . . uses abusive, threatening, or profane language in speaking to Management; or assaults a representative of Management.

Burton, supra at 1234 (citing Trotta, Arbitration of Labor-Management Disputes 282-283 (1974)).

An employee's belief that management's decisions are incorrect, absent a threat to the employee's health or safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. Lilly v. Fayette County Bd. of Educ., Docket No.

97-10-084 (Feb. 11, 1998). See Parker v. W. Va. Dep't of Health and Human Resources, Docket No. 97-HHR-042B (Sept. 30, 1997). See generally, Meckley v. Kanawha County Bd. of Educ., 181 W. Va. 657, 383 S.E.2d 839 (1989) (per curiam). "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) (citing Meads v. Veterans' Admin. 36 M.S.P.R. 574 (1988)). Additionally, an employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . . ." McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992) (citing In re Burton Mfg. Co., 82 L.A. 1228 (Feb. 2, 1984)).

"Few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first[,] and expresses his disagreement later." Hundley v. W. Va. Div. of Corrections, Docket No. 96-CORR-399 (Oct. 27, 1997): See Maxey v. W. Va. Dep't of Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995). "Generally, an employee must obey a supervisor's order and then take appropriate action to challenge the validity of the supervisor's order." Reynolds, supra. "An employee may not disregard adirect order of a superior based upon the belief that the order is unreasonable." McKinney, supra. "Essentially, an employer can meet its burden [of proof] by showing that the person giving the order had the authority to do so, and that the order did not require the employee to act illegally or place himself or co-workers at unnecessary risk." Surber v. Mingo County Bd. of Educ., Docket No. 96-29-15 (Dec. 12, 1996). See Hundley, supra; Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995).

Mr. Faulkner was Grievant's supervisor, and as such he had the authority to give Grievant a reasonable order which she should be expected to obey. Grievant knew Mr. Faulkner wanted her to come right away, he was clear in this, and she did not come as she said she would. The reason she may have been reluctant to do so is because Mr.

Faulkner had apparently demanded her presence immediately in the past, when there was no crisis. However, this does not excuse Grievant from not following her supervisor's orders as long as to do so would not impair her health or safety. It is obvious in this situation that it would not. A belief that a supervisor's orders are unfair or incorrect does not relieve an employee of carrying out the directions. Certainly, an employee may file a grievance later, but at the time of the request or demand, the employee is required to do what he or she is told. In this situation, it is evident that all concerned could have benefitted from Grievant's help, and Grievant's refusal to assist, as well as her non-helpful manner, made a difficult situation more stressful. Mr. Faulkner was trying to work out arrangements with the parents, a service employee was required to work overtime, and Mr. Opperman was clearly stressed by the situation and would have benefitted from some additional professional assistance. Also by her actions, Grievant "manifest[ed] disrespect toward supervisory personnel which undermine[d] their status, prestige, and authority . . . ." McKinney, supra. It is apparent Grievant and Mr. Faulkner do not get along, and indeed Mr. Faulkner could have been nicer in the way he interacted with Grievant that day. Still, for Grievant to call him a dunderhead and yell at him in front of others, was inappropriate and insubordinate. Thus, PCBOE has established Grievant knowingly violated policies, failed to comply with her supervisor's directions, and was insubordinate.

B. Willful Neglect of Duty

Respondent must also prove a charge of willful neglect of duty by a preponderance of the evidence. Arbaugh v. Putnam County Bd. of Educ., Docket No. 90-40-437 (May 22, 1991). Although the West Virginia Supreme Court of Appeals has not formulated a precise definition of “willful neglect of duty”, it does encompass something more serious than incompetence and imports “a knowing and intentional act, as distinguished from a negligent act.” Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990). Hence, to prove willful neglect of duty, the employer must establish

that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Chaddock, supra.

The same reasoning stated in the insubordination discussion applies to this charge. Grievant clearly knew Mr. Faulkner wanted her assistance. It is also difficult to believe Grievant was totally unaware of C's loud, acting out behavior. The undersigned Administrative Law Judge also finds it curious that Grievant never asked anyone what was going on and why she was needed, especially since she had worked with this samedistressed child only a few hours earlier. Grievant's actions constituted knowing and intentional acts. She knew she was needed, said she would be right there, locked her door, and continued her conference. PCBOE has proven the offense of willful neglect of duty. See Brown, supra.

C. Incompetence

The undersigned Administrative Law Judge does not find Grievant to be guilty of incompetence. Little to no evidence was presented on this issue, and Mr. Faulkner, Grievant's supervisor, testified he had not found Grievant to be incompetent in this situation.

IV. Reprisal

Grievant's claim of reprisal will be addressed next. It is important to examine the definition of the word, and the elements necessary to prove the charge. Reprisal is defined in W. Va. Code § 18-29-2(o) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;

2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (W. Va. 1986); Gruen v. Bd. of Directors/Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

Grievant has established a prima facie case of reprisal. Chronologically, her suspension was approved after she filed her grievance for harassment. However, Respondent has successfully rebutted Grievant's argument. Discussions of disciplinary action against Grievant began the week after Spring Break, around April 15, 1999, before Grievant filed her grievance. The matter was discussed by many supervisors and went up the chain of command. When discussed with Superintendent Sentelle, he requested a letter documenting the events he had been told orally. He received this letter on May 7, 1999, and disciplinary action was taken shortly thereafter. Although the

timing would at first appear to sustain Grievant's contention, there was no evidence submitted to furtherthis contention. Some time passed before Superintendent Sentelle heard and reviewed all the evidence, and then he acted. It is not unusual for a superintendent to examine and weigh the information, as well as discuss the situation with his administrative staff, before he decides what the correct action would be. The length of time that passed, and the duration of the suspension are not related to Grievant's filing of her harassment grievance, as the suspension given to Grievant does not appear to be disproportionate to the act. Indeed, it was not even a suspension without pay, and the fact that she is currently in non- pay status has nothing to do with her suspension, but is related to her medical problems.

V. Other issues

Other issues need to be addressed in this decision. First, Grievant is needs to clarify her status with PCBOE, and to decide whether she wishes to request a medical leave of absence. As an administrator, one would think she would be aware of the need to address such issues with her employer.

Second, although it would appear that PCBOE never thought Grievant would be away from work this long when it tied her suspension to her return to work, it is clear this suspension must have a definite end date. The issue is one of equity. Here, where the parties have not set a length for the suspension, the undersigned is required to examine the issue logically, and fashion an equitable remedy that meets the requirements of the statute. W. Va. Code § 18-29-5(b) states an administrative law judge may "provide such relief as is deemed fair and equitable in accordance with the provisions of this article . . ." Accordingly, Grievant's suspension will last only till the end of the 1998 - 1999 schoolyear. This time period would be about three weeks or approximately fifteen days, and this length would not be arbitrary and capricious as compared to Grievant's misconduct.

Third, when Grievant's health has recovered sufficiently for her to return to work, an

evaluation should be completed for the 1998 - 1999 school year. PCBOE is directed to have another administrator, such as Mr. Hull, assist Mr. Faulkner is writing and presenting this evaluation. Since the charges of insubordination and willful neglect of duty have been sustained, PCBOE's decision for an Improvement Plan is upheld, and the provisions and precautions for additional administrative assistance should apply to the writing and administering of the Improvement Plan.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. At the time of the events surrounding this grievance, Grievant had ten years of experience as an Assistant Principal and four year of experience at WTS.

2. Mr. Faulkner had 19 years of experience as a principal, and had been at WTS for two years. Grievant was at WTS when Mr. Faulkner came, and she assisted him in his orientation to the school and staff.

3. Grievant and Mr. Faulkner have a poor working relationship, and she believes he mistreats her.

4. On April 2, 1999, Grievant failed to follow the reasonable orders issued by her supervisor. These orders would not have endangered Grievant's health and safety and should have been followed. 5. Although Grievant did not verbally refuse to come when requested, her refusal was clear by her actions.

6. Grievant spoke to Mr. Faulkner in a loud, rude, and unprofessional manner in front of other staff and faculty. Grievant also questioned his authority and his directions to her in front of employees at WTS.

7. Grievant called Mr. Faulkner a "dunderhead."

8. Grievant left school without asking Mr. Faulkner's permission. While this act would normally not be a problem, in this instance Mr. Faulkner had directed Grievant to

witness the situation and had not indicated Grievant could leave.

9. Grievant told Ms. J about a confidential incident which occurred at school, in sufficient detail to allow her to discern the student involved was probably her grandson. The sharing and giving of this type of student information to a person not entitled to receive it, was a breach of confidentiality.

Conclusions of Law

1 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).

2 2. The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code §18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. Bell v. Kanawha CountyBd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

3 3. W. Va. Code §18A-2-8 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 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.

4 4. Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." 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).

5 5. 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)).

6 6. An employee's belief that management's decisions are incorrect, absent a threat to the employee's health or safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. See Parker v. W. Va. Dep't of Health and Human Resources, Docket No. 97-HHR-042B (Sept. 30, 1997). See generally, Meckley v. Kanawha County Bd. of Educ., 181 W. Va. 657, 383 S.E.2d 839 (1989) (per curiam).

7 7. "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) (citing Meads v. Veterans' Admin. 36 M.S.P.R. 574 (1988)).

8 8. An employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . . ." McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992) (citing In re Burton Mfg. Co. 82 L.A. 1228 (Feb. 2, 1984)).

9 9. "Few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later." Hundley v. W. Va. Div. of Corrections, Docket No. 96-CARR-399 (Oct. 27, 1997). See Maxey v. W. Va. Dep't of Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995); McKinney, supra; Reynolds, supra.

10 10. "Essentially, an employer can meet its burden [of proof] by showing that the person giving the order had the authority to do so, and that the order did not require the employee to act illegally or place himself or co-workers at unnecessary risk." Suber

v. Mingo County Bd. of Educ., Docket No. 96-29-15 (Dec. 12, 1996). See Hundley, supra; Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995).

11 11. In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitutethe defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

12 12. To prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990).

13 13. "Willful neglect of duty," encompasses something more serious than incompetence and imports "a knowing and intentional act, as distinguished from a negligent act." Chaddock, supra.

14 14. Reprisal is defined in W. Va. Code § 18-29-2(o) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it."

15 15. To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

> 1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;
>
> 2) that he/she was subsequently treated in an adverse manner by the employer or an agent;
>
> 3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

> 4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or
>
> 5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989) and Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (W. Va. 1986); Gruen v. Bd. of Directors/Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997).

16. If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

17. Respondent has met its burden of proof by a preponderance of the evidence and demonstrated Grievant was guilty of insubordination and willful neglect of duty on April 2, 1999.

18. Respondent did not meet its burden of proof and demonstrate Grievant was guilty of the charge of incompetence.

19. Grievant established a prima facie case of retaliation or reprisal.

20. Respondent successfully rebutted the prima facie case of retaliation when it demonstrated the action taken against Grievant was not related to the filing of a grievance, but was related to the acts committed on April 2, 1999. 21. Grievant did not establish PCBOE's actions resulted in a failure to provide sufficient due process for her suspension, especially since she was not deprived of any monetary compensation

as the result of this action. See Gilbert v. Homar, 520 U.S. 924, (1997); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494, (1985); Board of Education of the County of Mercer v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994); Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985); Clark v. W. Va. Bd. of Regents, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981) Waite v. Civil Serv. Comm'n, 161 W. Va. 154, 241 S.E.2d 164 (1978); North v. Bd. of Regents, 160 W. Va. 248, 233 S.E.2d 411 (1977).

22. Grievant's suspension for the April 2, 1999, events should run to the end of the 1998-1999 school year. This would include any additional days Grievant would have served under her contract.

Accordingly, this grievance is **DENIED**. However, Respondent is directed to follow the directions given in the body of the decision as regards to the evaluation and Improvement Plan. Grievant is also needs to inform PCBOE of her current health status, and whether she wishes to receive a medical leave of absence.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of the Putnam County. Any 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. However, the appealing party is required byW. 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.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: September 30, 1999

Footnote: 1

Grievant was represented by Susan Hubbard from the West Virginia Education Association, and PCBOE was represented by Attorney James Grafton.

Footnote: 2

It should be noted that little to no evidence was presented on the sick leave issue by Grievant and thus, it will not be considered by the undersigned Administrative Law Judge. For example, the doctor's excuse for her absence was not placed into evidence by Grievant, and although she indicates she was stressed, this self-serving statement standing alone would be insufficient to return numerous days of sick leave to Grievant even if she establishes her suspension was incorrect. This requested relief would seem more appropriate to the grievance on harassment, which is being held in abeyance pending the outcome of this grievance.

Footnote: 3

In keeping with prior decision of this Grievance Board, minors and their relatives will be identified only by their initials. See Jones v. Preston County Bd. of Educ., Docket No. 99-39-017 (Mar. 16, 1999).

Footnote: 4

Grievant's testimony was that Mr. Faulkner pounded on the door, and yelled his request to her. Ms. Fleming, Mr. Faulkner, and Ms. Ashworth testified Mr. Faulkner knocked. The other witnesses remember Mr. Faulkner asking, not yelling.

Footnote: 5

Grievant indicates the time period between visits was approximately 30 seconds. Other witnesses related the time between trips to Grievant's office was from five to ten minutes.

Footnote: 6

Ms. Rogers was questioned about whether Grievant was making the statements about Mr. Faulkner or someone else. Her testimony was there are only a few men at the school, and she knew Grievant was speaking about Mr. Faulkner. This testimony was unrebutted. It is also noted that faculty and staff at WTS were aware of the disagreementsbetween Mr. Faulkner and Grievant. Further, Grievant and Mr. Opperman were friends.

Footnote: 7

Grievant testified she did not yell, but Mr. Faulkner did. This testimony does not fit with all other witnesses.

Footnote: 8

Grievant strongly pointed out that Mr. Faulkner, in his letter to Superintendent Sentelle indicates he told Ms.

Carruthers to leave. On cross examination, Ms. Carruthers indicated she could also have asked Mr. Faulkner's permission before she left. Ms. Carruthers also indicated she did not know if Grievant told her to leave the first or second time she came into the room. Additionally, this point does not appear to be one that has any effect on the interplay between Grievant, and the behavior which resulted in her suspension.

Footnote: 9

Grievant also testified that when she returned to the room the gray haired lady was gone. Since no one else mentioned this woman it is unclear who she could be and why she was there. It is possible Grievant was somewhat confused about the events of the day, and the gray-haired lady was C's aunt who had left earlier.

Footnote: 10

Apparently Grievant worked or works for Ms. J as a realtor.

Footnote: 11

Individual Education Plan.

Footnote: 12

Grievant's representative, Ms. Hubbard also called Mr. Hull about the incident on behalf of Grievant sometime shortly after Spring Break.

Footnote: 13

On, or about May 20, 1999, Grievant ran out of sick leave, and since that time has been off the payroll. However, the suspension did not cause her to be off the payroll, as the May 10, 1999 letter clearly states the suspension is in effect concurrent with her medical leave of absence. According to this letter, Grievant could have returned to work the day she received the letter notifying her of the suspension, if she had been released by her doctor.

Footnote: 14

Grievant has filed several grievances over her failure to be considered for principal positions because of this disciplinary action, and her need to successfully complete an Improvement Plan upon her return to employment. Grievant indicated she had not been released to return to work, and that she did not really want to be a principal as she loved WTS and did not wish to leave.

Footnote: 15

The parties did not raise an issue as to whether Grievant possessed a property or liberty interest in her employment.

Footnote: 16

In Scragg v. West Virginia State College, Docket No. 93-BOD-436 (December 30, 1994), when a tenured employed was terminated for just cause, without a hearing, any notice of the charges, or no indication of possible disciplinary action, the termination was upheld, but the employer was directed to pay the grievant until he received a Level II hearing. Here,

Grievant has not been deprived of any compensation.

Footnote: 17

In Homar, the suspension was without pay, and the Supreme Court of the United States found Homar's arrest and the subsequent filing of charges against him were reasonable grounds to support the charges.

Footnote: 18

It is also possible that Grievant believed if she did not attend the Board meeting she would be able to get her suspension overturned on the procedural ground of failure to grant due process.

Footnote: 19

See Wall v. Putnam County Board of Education, Docket No. 98-40-457 (June 7, 1999), for a detail discussion of a similar set of factors involving a suspension.

Footnote: 20

It should be noted that Grievant's representative attempted to be helpful in dealing with Grievant's behavior and outbursts.