**CHARLES JORDAN,**

**Grievant,**

**v.** **Docket No. 99-26-080**

**MASON COUNTY BOARD OF EDUCATION,**

**Respondent.**

# D E C I S I O N

**Grievant, Charles Jordan, received a thirty day suspension from the Mason County Board of Education ("MCBOE"), grieves this action as unduly harsh, and avers the charges against him were not proven. His Statement of Grievance asserts:**

> **Board was arbitrary and capricious when suspending Grievant for 31 days without pay. Disciplinary action was not consistent with prior actions of the Board. Evidence relied upon by the Board was without merit. The Grievant was denied due process of law. Violation of W. Va. Code §[§] 18A-2-7, 18A- 2-8. Seeking compensation for lost pay with interest.**

**A pre-suspension hearing was held on January 26, 1999, with Grievant present, testimony taken, and Grievant given an opportunity to respond. (See footnote 1) After the presentation of this evidence, the Mason County Board of Education ("MCBOE" or "Board") voted to accept Superintendent Larry Parsons' recommendation for Grievant to receive a thirty day suspension. Subsequently, Grievant appealed to Level IV on February 25, 1999. (See footnote 2) A LevelIV hearing was held on April 22, 1999. (See footnote 3) This case became mature for decision on June 7, 1999, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 4)**

## Issues and Arguments

**Although Grievant did argue he did not commit the alleged offenses, or that the acts he committed were just "horseplay", the main thrust of Grievant's argument is that the penalty was too severe given the alleged acts and the history of discipline typical for such offenses in**

**Mason County. Grievant also raised the issue of a violation of his due process rights in his Statement of Grievance. At Level IV, this argument concerned the Board's failure to specify which of the offenses listed in W. Va. Code § 18A-2-8 that he had committed.**

**Respondent argues the discipline was fair, and there have been no cases in Mason County similar to Grievant's. Respondent also averred that MCBOE has never had a teacher found to have committed the number and type of offenses committed by Grievant. Respondent avers Grievant is guilty of insubordination, willful neglect of duty, cruelty, and intemperance in the treatment he meted out to the fifth grade students in his charge. Respondent also maintains Grievant received even more due process than he was entitled to during the in-depth pre-suspension hearing. It also argues the offenses were specifiedin the letter of suspension; and thus, the specific W. Va. Code § 18A-2-8 labels do not have to be identified, if the actions upon which the suspension is based is clearly stated.**

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

## Findings of Fact

**1. Grievant has been a teacher for over twenty-five years. At the time of his suspension he was employed as a fifth grade teacher at Ashton Elementary.**

**2. On November 4, 1998, Grievant was passing out project display boards to his class. These project display boards are the ones students typically use for their social studies and science projects, and are 36 inches high, 24 inches wide folded, and 48 inches wide unfolded.**

**3. Prior to handing each project display board to a student, Grievant placed the project display board on the head of T. C.,** (See footnote 5) **and either bounced or lightly hit him on the head with it each time.**

**4. T. C. did not like this, and when Grievant started to place the sixth or seventh project display board on his head, T. C. ducked so the board would not make contact. Grievant then swatted at T. C. with the side of the board toward the right side of T. C.'s head. In a effort to get away from this swat, T. C. jerked his head to the left and hit his head on the metal part of a desk. 5. This contact with the chair hurt enough to make T.C., a fifth grade boy, cry in front of his peers.**

**6. Grievant then either asked T.C. if he was all right or told him he was all right.**

**7. Sometime in the evening, T.C. told his Grandmother, who is his guardian, about the incident and complained that his head hurt.**

**8. T.C.'s mother took him to the emergency room for treatment. X-rays were taken and no problems were seen. T.C. was sent home with a Head Injury Sheet** **(See footnote 6)** **and directions to take Tylenol for the pain.**

**9. T.C.'s mother came to school the next day to complain to Principal Tom Nunnery about T.C.'s treatment at the hands of Grievant. Principal Nunnery took statements from both the mother and T.C., and then called Assistant Superintendent George Miller, who is in charge of personnel matters, for further directions. T.C.'s mother also called Superintendent Larry Parsons to complain about her son's treatment. Super. Ex. No. 5.**

**10. Assistant Superintendent Miller directed Principal Nunnery to get a statement from the Grievant and from T.C.'s class.**

**11. Because Grievant was home on sick leave, Principal Nunnery called him at home, told him he had received a compliant, and directed Grievant to write his view of the incident.**

**12. Grievant turned in the following statement to Principal Nunnery:**

> **On 4 Nov 98, I was passing out display boards to the students. I was laying the boards on [T.C.'s] head while the other students picked them up.**
>
> **[T.C.] bent over real quick and I didn't know it at the time, and hit his head [on the chair] beside of him.**
>
> **I noticed that he was holding the side of his head and asked him what was wrong. He told me that he had hit his head on the chair beside him.**
>
> **I couldn't see any mark on his head and asked him if he was allright (sic), he shook his head and said yes.**

**Super. Ex. No. 7.**

**13. Principal Nunnery interviewed T.C.'s class on November 5, 1998, the day after the**

**incident. The students confirmed Grievant had placed the project display boards on T.C.'s head as he passed them out, that T.C. ducked and hit his head on a chair, and that the contact hurt T.C. enough that he cried. There were varying opinions of how hard Grievant placed the project display boards on T.C.'s head, how many times he placed the project display boards on T.C.'s head before he ducked, whether Grievant hit T.C. on the side of the head with a project display board after he ducked, and whether Grievant laughed at T.C. or not. The students did not believe Grievant intended to hurt T.C. Super. Ex. No. 5.**

**14. Principal Nunnery asked if there were any other problems in the classroom. Several students complained that Grievant kicked boys' desks while they were in them, called students names, and talked about kids on welfare. Super. Ex. No. 6.**

**15. Principal Nunnery reported the results of these discussions. 16. On November 6, 1998, Superintendent Parsons directed Ms. Linda Rollins, Coordinator of Psychological Services, and Assistant Superintendent Miller to investigate the matter and report back to him in two weeks. Super. Ex. No. 18.**

**17. Principal Nunnery was directed to visit Grievant's classroom frequently during this time.**

**18. Assistant Superintendent Miller and Ms. Rollins conducted an in-depth investigation, and filed their report with Superintendent Parsons on November 20, 1998. Super. Ex. No. 19.**

**19. During this investigation, they interviewed many children from both of Grievant's classes, interviewed parents and Grievant, received written statements taken by Principal Nunnery, talked to the other fifth grade teacher, looked at notes and written reprimands Grievant had received in the past, and examined Grievant's personnel file and prior Improvement Plan.**

**20. Ms. Rollins and Assistant Superintendent Miller concluded their report with the following sentence: "there is a preponderance of evidence that suggests Mr. Jordan, with very poor judgement and lack of sensitivity caused [T.C.] to be injured physically and embarrassed in his classroom of November 4, 1998." They found "insufficient evidence that there was any malicious intent or intent to harm on the part of Mr. Jordan in this particular incident." Ms. Rollins and Assistant Superintendent Miller also found there was "sufficient evidence to indicate that he has chronically displayed unprofessional behaviors through his belittling**

**remarks and actions and lack of respect toward students." They senta copy of their report to the West Virginia Department of Health and Human Services as this agency was investigating the incident as well. Super. Ex. No. 19.**

**21. In February 1981, Grievant received an "Employee Effectiveness and Analysis Report" from his then principal, Immogene Moore, concerning his treatment of children.** **(See footnote 7)** **Parents had complained that Grievant had "hit [B] in the leg causing a bruise; skinned [B's] finger; on Thursday grabbed him by the neck and set (sic) him down; when grading papers asked [B], 'How in the hell can you grade papers and watch someone else?'" The parents further complained "[B] was afraid of him (Grievant) and didn't want to come to school." Grievant was directed to "Have no swearing at or in the presence of students" and "No 'horseplaying' with <u>any</u> students." Super. Ex. No. 23.**

**22. Grievant responded to this report and admitted he had engaged in the identified activities. He stated, "I do play with the boys and I play rough, maybe sometimes to (sic) rough." He admitted he grabbed B by the neck because he did not do as he wastold, and agreed that sometimes he swore in front of the students. Grievant also indicated in this written response that if there were a problem it, "stems from [B's] home not [B]." Super. Ex. No. 23.**

**23. Grievant received another "Employee Effectiveness and Analysis Report" in May 1981 from Principal Moore concerning his language in the classroom, specifically a parental complaint that he had called his class "damn jackasses". Grievant responded he did not believe he used the word damn, but did admit he told the class, "There are some people in this class that don't have the sense of a jackass." Super. Ex. No. 22.**

**24. On May 23, 1990, Principal Nunnery wrote Grievant stating he had again had complaints about Grievant's language in the classroom, and noting this was not an isolated incident. Principal Nunnery reported he had received several complaints over the course of the year and noted the complaints centered on swearing and calling students "dumb" and "stupid". Principal Nunnery recalled he had spoken to Grievant about this behavior on three separate occasions, and Grievant had responded by either denying the behavior or stating he was just being himself. Principal Nunnery also pointed out that although Grievant denied the behavior, the complaints persisted and directed Grievant that if this behavior was occurring, it**

**must stop. Principal Nunnery informed Grievant that if similar complaints were received in the future, he would refer the matter to the Superintendent. Principal Nunnery reminded Grievant his duty as a teacher was "to set a good example and to be a positive role model." Super. Ex. No. 17.**

**25. On March 5, 1993, Principal Nunnery again wrote Grievant about his behavior in the classroom. Principal Nunnery noted he had again received complaints, andGrievant was "being accused by your sixth grade students of verbal and physical conduct toward them in violation of WV Code of Conduct for teachers." Principal Nunnery stated he had conducted an investigation and interviewed students in all three of Grievant's classrooms. Principal Nunnery noted Grievant admitted to some of these accusations, but denied others. After discussions with the Curriculum Director and the Superintendent's office it was decided to write Grievant a letter "stating that this behavior toward children will not be tolerated." The letter went on to state this was not the first time Principal Nunnery had written to Grievant about allegations of this nature. Principal Nunnery attached a copy of the Teachers Code of Conduct to refresh Grievant's memory as to the proper behavior and called Grievant's attention to "numbers 1, 4, 5, 6, 7 and 9." Principal Nunnery also noted any further proven instances of this type would be dealt with according to "Mason County and State of West Virginia policies."** (See footnote 8) **Super. Ex. No. 11.**

**26. On February 9, 1993, Sara Stricklen, Educational Diagnostician, wrote Principal Nunnery to complain about Grievant's insulting and inappropriate behavior toward her. She reported he refused to fill out Special Education papers on one of his students, and told Ms. Stricklen, Special Education was just a "joke" and kids were just put in Special Education when they were too lazy to work. Ms. Stricklen noted the attitude displayed byGrievant did not foster a "cooperative spirit" and asserted "<u>every</u> educator should be helping <u>every</u> child learn and succeed." Super. Ex. No. 12.**

**27. Principal Nunnery wrote Ms. Stricklen on February 10, 1993, and apologized for Grievant's behavior, reported it did not reflect the attitude of the school, and assured her such behavior would not be repeated. A copy of this letter was sent to Grievant. Super. Ex. No. 13.**

**28. On May 10, 1993, Grievant received an unsatisfactory evaluation and was placed on an Improvement Plan. Grievant was unsatisfactory in the following areas: "Classroom**

**Climate" and "Professional Work Habits". Super. Ex. No. 15.**

**29. On August 24, 1993, Grievant wrote a response to the evaluation and the Improvement Plan, noting his disagreement with Principal Nunnery's assessment and his belief that it was unfair and unjust. Grievant did not grieve either this evaluation or the Improvement Plan. Super. Ex. No. 16.**

**30. Grievant's evaluations, since that time, have been satisfactory in the above-identified areas.** **(See footnote 9)**

**31. After Superintendent Parsons received the report on the investigation, he reviewed the materials and sought legal advice to ensure the discipline would be properly conducted.**

**32. On December 14, 1998, Superintendent Parsons sent Grievant a letter notifying him of his thirty-day suspension for the following reasons:**

> **A preponderance of the evidence has shown:**
>
> **On November 4, 1998[,] as you passed out cardboard for science projects, you placed several pieces of cardboard (flat side) on the top of the head of a fifth grade student, [T.C.] , as he sat at his desk and as individual students picked them up one by one. After several boards were placed on the student's head, he ducked with the probability of another board contracting him edgewise on the right side on his head, he subsequently hit the left side of his head on the back of a student chair to the left of him. This poor judgement and lack of sensitivity caused the student to be injured physically and embarrassed in his classroom on November 4, 1998.**
>
> **A preponderance of the evidence has shown:**
>
> **At various times during the 1998-1999 school year[,] you have made belittling and inappropriate verbal remarks toward or about students such as "dumb, dumb," "welfare must have run out of money 'cause he didn't have a pencil or paper,[']" "hussie," (sic) "stupid," "knot head," fat boy," "idiot," and "big butt."**
>
> **A preponderance of the evidence has shown:**
>
> **You have displayed behavior control problems as substantiated by kicking students[’] desks while they were seated in them.**

> **A preponderance of the evidence has shown:**
>
> **At various times during the 1998-1999 school year[,] you have inappropriately made physical contact with various students in the form of kicking, hitting on the head and digging your fingers in to the shoulder of students.**
>
> **This reflects a chronic display of unprofessional behavior through belittling remarks and actions and a lack of respect toward students. In your professional history there is back up evidence that supports this action.**

**Super. Ex. No. 1.**

**33. Both the Teachers Code of Conduct and the Mason County Teacher's Job Description contain statements requiring a professional educator to treat students fairly, promote a safe and positive environment of mutual respect, adjust constructively to frustrating situations, and to use non-destructive interactional skills with students. Super. Ex. Nos. 24 & 25.**

**34. At times, Grievant inappropriately grabbed students, called students hurtful names, cursed under his breath, and kicked students' desks while they were in them. These behaviors were intentional acts, and Grievant had been repeatedly warned these behaviors were inappropriate.**

**35. Grievant resigned his position sometime after his pre-suspension hearing, and the parties stipulated this resignation had nothing to do with the events of this grievance, and wanted this stipulation clearly noted in this Decision.**

## 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 oftestifying[; 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 raised by Grievant will be discussed one at a time.**

**I. Due Process**

**The first issue to address is Grievant's due process argument that the Board failed to specify which of the offenses listed in W. Va. Code § 18A-2-8 he had committed. 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).**

**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 permanentdeprivation.” 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 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)).**

**Accordingly, a tenured employee is entitled to a pre-suspension hearing, not a full adversarial hearing, and an opportunity to respond to the charges. Buskirk at Syl. Pt. 3; W. Va. Code. An employee is also entitled to written notice of the charges and an explanation of the evidence. Wirt, supra. In other words, a pre-suspension hearing, explanation of the evidence, and an opportunity to respond is all the due process that MCBOE is required to provide and did so. Id. at Syl. Pt. 3; See W. Va. Code §18A-2-8.**

**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.**

**Grievant's argument about Respondent's failure to provide required due process is without merit. Grievant was given all necessary due process protections by MCBOE. The suspension letter clearly stated the specific charges against Grievant, revealed the results of the investigation, and identified the behaviors for which he was to receive a thirty-day suspension. The fact that these charges were not placed in the exact wording of W. Va. Code § 18A-2-8 is of no moment. The information received by Grievant was sufficient to place him on notice of the charges, and the proper focus is whether the charge of misconduct is proven, not the label attached to such conduct. 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).** (See footnote 10)

**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 fact that[some of] this testimony is offered in written form does not alter this responsibility." Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996).**

**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.**

**As would be expected, the majority of the witnesses were fifth grade students. Several parents testified as well. Grievant chose not to testify, as was his right pursuant to W. Va. Code § 18-29-6 ¶ 5. The majority of evidence offered by Grievant, as rebuttal, came from students in both of his 1998-1999 classrooms. Grievant also presented the evidence of Rose Withers, a Title I teacher, who was in Grievant's class for two half hour periods each day. She indicated she had never seen Grievant do anything of an abusive or demeaning nature.**

**The student witnesses understood and were able to tell the undersigned Administrative Law Judge the difference between the truth and a lie, and knew they were to tell only the truth, and what they had personally seen and heard. All the studentwitnesses were capable of perceiving and communicating, and their accounts were plausible. There was no demonstration of bias. The undersigned Administrative Law Judge had an opportunity to observe all witnesses, and found no problem with their demeanor. There was no discussion of the witnesses's honesty or lack thereof. Students who testified at both the pre-suspension hearing and the Level IV hearing gave consistent testimony. These fifth graders were clear about what they saw and what they did not see, and what they did not remember.**

**The students' accounts of the project display board 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 did. They also disagreed on what these actions meant, how they were intended, and the severity of the actions. The statements of the students all agreed that Grievant placed the project display boards on T.C.'s head, T.C. finally ducked, to get away from these boards, and hit his head and hurt it on the side of the desk next to him. This injury was enough to make T.C. cry. Students also reported the things Grievant had personally done to them, and the things they had actually seen Grievant do to other students.**

**Almost all the witnesses also confirmed Grievant had kicked desks with students in them. They thought Grievant may have taken this action because the desks were dirty or because the students in them were not paying attention. Most had heard Grievant call students by inappropriate names; such as, idiot, stupid, or dumb. Some students had heard Grievant curse under his breath and say words; such as, hell, ass, and damn. Others confirmed Grievant laid hands upon some of the boys in the classroom. The students who had been touched or grabbed by Grievant were unclear how this behavior was meant and were clearly confused by it. For example, when Grievant put L. E. in a headlock, he did not know if they had done something wrong, or if Grievant was "horsing around" and got too rough. Other times, the boys knew they were being punished. For example, L.E. knew the tape was put on his mouth because he talked too much. Certainly the majority of the boys felt Grievant treated the boys and girls differently and that girls were favored by Grievant. There were no reports of "horsing around" with the girls, and no female students reported Grievant had hurt them. Students who did not receive this type of treatment from Grievant were much more likely to call the behavior "horsing around" or kidding than the students who were on the receiving end of his grabbing and name-calling.**

**Even the students called by Grievant, and ones it was clear liked and missed Grievant in their classroom, reported he kicked desks, sometimes laid hands on the boys, and called students names. These students reported these actions were in fun, and not meant to hurt anyone. One female student reported that Grievant frequently called her a "hussy", but this label did not bother her. On questioning, the witness revealed (thank goodness) she did not know what the term meant. If this child had known that this term means "an immoral woman"**

**or a "slut" perhaps it might have been a different situation for her.**

**Several parents reported the behavior of their individual children changed drastically while they were in Grievant's classroom. These children complained about Grievant's treatment of others, complained of being sick frequently, and frequently asked the officeto call their parents to come and pick them up. By the time of the pre-suspension hearing, these parents testified they felt guilty because they had not listened to their children and because they failed to take action sooner.**

**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 he was accused.**

**III. Merits of the case and burden of proof**

**The next issue to decide is whether Grievant's behavior substantiates the charges against him. The undersigned Administrative Law Judge finds the behavior of Grievant can be viewed under the following charges of W. Va. Code § 18A-2-8: insubordination, willful neglect of duty, and cruelty.** **(See footnote 11)**

**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). 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 CountyBd. of Educ, Docket No. 94-01-394 (Jan 31, 1995). (Cf. Rogliano v. Fayette County Bd. of Educ., Docket No. 94-10-164 (Oct. 25, 1994), where it was determined that "Grievant was given ample opportunity and notice that disciplinary action would be taken against him . . . ."). "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).**

**Grievant knew what type of behavior was expected of him in regard to his interactions with the students in his charge. The Teachers' Code of Conduct and the Job Description for a teacher instructed Grievant on what types of actions were acceptable. The letters and written reprimands he received clearly notified Grievant what types of actions were inappropriate and would not be allowed. Grievant's decision to disregard the explicit directions given to him by all these documents constitutes insubordination. Additionally, Grievant was on notice that continued violations of the policies would result in disciplinary action, because Grievant's prior principal, as well as Principal Nunnery, had informed Grievant that such behavior was unacceptable. Thus, MCBOE has established Grievant knowingly violated policies and his 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 anegligent 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 what conduct was expected of him, and his actions constituted knowing and intentional acts. Grievant kicked desks, called students demeaning names, cursed under his breathe, and grabbed students. Additionally, the incident with T.C. occurred, and the evidence demonstrates Grievant intentionally and repeatedly placed the project display boards on T.C.'s head. Surely, a teacher with twenty-five years of experience could foresee that a fifth grade boy would not sit idly by, but would eventually take some type of action to prevent this uncomfortable, and probably embarrassing, behavior. It is understood Grievant probably did not intend to cause physical injury to T.C., but the results of his unthinking actions did cause personal and emotional distress. MCBOE has proven the offense**

**of willful neglect of duty. See Brown, supra.**

**C. Cruelty**

**The charge of cruelty has not been addressed frequently by the Grievance Board. Previously this Board has applied the Webster's New World Dictionary's definition of the word: "deliberately seeking to inflict pain and suffering; enjoying other's suffering; without mercy or pity." Second College Ed., (1984) (cited in Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990)). A fourth grade teacher's "continued practice of physical and emotional abuse" by name-calling, placing his hands on students, angry outbursts, and threatening behavior has been found to constitute cruelty. Pinson v. Cabell County Bd. of Educ., Docket No. 06-87-100-1 (July 21, 1987).**

**In Nida v. Boone County Bd. of Educ., Docket No. 91-03-268 (July 13, 1991), and Slack v. Morgan County Bd. of Educ., Docket No. 92-32-420 (June 23, 1993), this Grievance Board did not find teachers guilty of cruelty who threw "plastic" chairs, kicked furniture, raised their voices, and knocked things over, as these actions were not directed toward a student, and the teacher had not "harassed, chastised or belittled the students in front of their peers." Slack at 7. Overall, it appears cruelty must contain an intent to act or "disposition to inflict pain or suffering." The American Heritage Dictionary, 2d College Ed. (1991); Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996).**

**In the instant case, Grievant's behavior falls within the definition of cruelty. His behavior was intentional, and he grabbed, belittled, and cursed students. The fact that these acts caused emotional as well as a degree of physical harm was revealed through the testimony of students and their parents, and are very similar to the charges found to constitute cruelty in Pinson. MCBOE has proven this charge.**

**IV. Mitigation/Severity of Penalty**

**The argument that Grievant's thirty day suspension is excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel**

**evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997). Mitigation of a penalty is considered on a case by case basis. Conner v. Barbour County Bd. of Educ., Docket No. 95-01-031 (Sept. 29, 1995); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. Pingley v. Div. of Corrections., Docket No. 95-CORR-252 (July 23, 1996). This Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative LawJudge will not substitute her judgement for that of the employer. Tickett v. Cabell County Bd. of Educ., Docket No. 97-06-233 (Mar. 12, 1998); Huffstutler, supra.**

**In assessing the above-cited factors and considering the proper standard of review, the undersigned Administrative Law Judge finds, that while Grievant's evaluations were satisfactory during the last portion of his tenure with MCBOE, Grievant knew his actions were against MCBOE's policies and the Teachers' Code of Conduct. Grievant was repeatedly warned that continuation of these types of actions would result in disciplinary action. This is especially true when the actions taken by Grievant caused harm to the students entrusted to his care, and Respondent demonstrated Grievant continued to violate known policies after repeated warnings. Further, although Grievant alleged the discipline he received was**

**disproportionate to the discipline received by others in similar situations, he did not prove this assertion. Grievant did not point to any other professional educator in Mason County who was similarly situated and received different treatment. This penalty cannot be found to be excessive.**

**The above-discussion will be supplemented by the following Conclusions of Law.**

**Conclusions of Law**

**1. An employer must establish the charges in a disciplinary matter by a preponderance of the evidence. W. Va. Code §18-29-6; Nicholson v. Logan County Bd. of Educ., Docket No. 95-23-129 (Oct. 18, 1995); Froats v. Hancock County Bd. of Educ., Docket No. 91-15-159 (Aug. 15, 1991).**

**2. A county board of education possesses the authority to terminate an employee, but this authority cannot be exercised in an arbitrary and capricious manner. W. Va. Code §18A-2-8; See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995).**

**3. It is not necessary for a board of education to identify an employee's offenses by the exact terms utilized in W. Va. Code § 18A-2-8, as long as the required written notice of charges specifically identifies the alleged acts of which the employee is accused.**

**4. Insubordination, willful neglect of duty, cruelty, and incompetency are among the causes listed in W. Va. Code §18A-2-8 for which an education employee may be disciplined. See, Jones v. Mingo County Bd. of Educ., Docket No. 95-29-151 (Aug. 24, 1995); Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).**

**5. Insubordination includes "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).**

**6. "Insubordination encompasses more than an explicit order and refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." Nicholson, supra; Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 20, 1988), aff'd 182 W. Va. 294, 387 S.E.2d 529 (1989).**

**7. 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. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). 8. 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).**

**9. Although the West Virginia Supreme Court 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." Chaddock, supra.**

**10. "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); Daniel v. U.S. Postal Serv., 16 M.S.P.R. 486 (1983); Davis v. Smithsonian Inst., 13 M.S.P.R. 77 (1983).**

**11. Cruelty is a deliberate act to inflict pain and/or suffering. Behavior which is directed toward a student, and which may include harassment, belittling, threatening, and/or grabbing, slapping, and restraining, without the need for self-defense, meets this definition. Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996). See Slack v. Morgan County Bd. of Educ., Docket No. 91-03-268 (July 13, 1991); Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990); Pinson v. Cabell County Bd. of Educ., Docket No. 06-87-100-1 (July 21, 1987).**

**12. MCBOE has met its burden of proof and demonstrated Grievant was guilty of insubordination, willful neglect of duty, and cruelty. 13. When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See**

**Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997).**

**14. It is proper to review an employee's past performance evaluations, Improvement Plans, and disciplinary actions and warning letters, as well as the reoccurrence or continuation of identified problems when deciding whether the disciplinary action was appropriate. This review can establish an employee was on notice of his inappropriate behavior, and that a continuing pattern of behavior is present which has proven not correctable. See Williams v. Cabell County Bd. of Educ., Docket No. 95-06-325 (Oct. 31, 1996).**

**15. Given Grievant was clearly informed of the applicable policies, and was repeatedly placed on notice that his behaviors were unacceptable, the penalty is not disproportionate or excessive nor is the penalty arbitrary and capricious. See Lanehart, supra; Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994); Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991).**

**16. Grievant did not prove that a similarly situated employee had been treated differently or more favorably than he was treated.**

**Accordingly, this grievance is DENIED.**

**Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). 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 by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. Theappealing 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: July 6, 1999**

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***Footnote: 1***

***Exhibits from the pre-suspension hearing will be denoted as Super. Ex. No. ---.***

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***Footnote: 2***

***Respondent argued this grievance was not timely filed to Level IV, as this appeal was not received by the Grievance Board until February 25, 1999. Grievant maintained the grievance was filed in a timely manner, and that the grievance was filed with the Grievance Board at the same time as the appeal was sent to Respondent by certified mail. This appeal was received by the Board on February 3, 1999. Grievant noted it did not send the appeal to the Grievance Board by certified mail, and when a hearing was not scheduled in a timely manner, Grievant's attorney, Ms. Jennifer Ransbottom, called to find out why. She was informed the grievance was never received. Ms. Ransbottom then sent the second appeal letter. Given Ms. Ransbottom's representations, this Motion to Dismiss was not granted, and the Level IV hearing proceeded with the taking of testimony.***

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***Footnote: 3***

***Respondent kindly provided the undersigned Administrative Law Judge with a non- certified transcript of the proceedings at Level IV. After comparing this transcript with the tapes of the Level IV hearing for the first couple of pages and finding multiple errors and inaudibles, the undersigned Administrative Law Judge did not utilize this transcript.***

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***Footnote: 4***

***Grievant was represented by Attorney Jennifer Ransbottom and by Susan Hubbard from the West Virginia Education Association, and MCBOE was represented by Attorney Kimberly Croyle.***

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***Footnote: 5***

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

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***Footnote: 6***

***This type of sheet contains directions for the follow-up care of a head injury.***

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***Footnote: 7***

***The entire record of the pre-suspension hearing was admitted by agreement of the parties at Level IV, Joint Exhibit 1. After the start of the Level IV hearing, Grievant's counsel objected to a number of the exhibits included in this previously admitted record, as they had not been contained in Grievant's Central Office personnel file, but were in Grievant's supervisor's (Principal Nunnery) employee file. These documents were admitted to show a pattern of behavior over many years, and to demonstrate Grievant was on notice that certain types of behavior were not acceptable. Grievant had received copies of each of these documents at the time they were placed in his file.***

***It is noted that not all letters received by an employee are required to be placed in his Central Office personnel file, and it is acceptable for a supervisor to maintain a file of the correspondence he sends his supervisee over the years. The real issue is whether an employee was aware of these documents, had been given***

***an opportunity to respond to them, and whether he had been given an opportunity to improve. Here, Grievant knew of each of these documents, as he received copies of them. Thus, it is acceptable for them to be used to demonstrate Grievant had knowledge of which of his behaviors toward students were not acceptable in terms of his interaction with students.***

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***Footnote: 8***

***It is noted for the record and in the interest of clarity, that the incidents referred to in this letter have nothing to do with another incident relating to Grievant's behavior toward another student, the details of which were cited in an April 26, 1993 letter from Principal Nunnery to Grievant. This letter and the accompanying suspension were grieved by Grievant, and these records were expunged from Grievant's personnel file. This incident was received as Superintendent's Exhibit 14 during the pre-suspension hearing. This incident and the accompanying documents were not utilized in any way by the undersigned Administrative Law Judge in reaching this Decision.***

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***Footnote: 9***

***Principal Nunnery noted Grievant's 1996-1997 evaluation was unsatisfactory, but this assessment had to do with Grievant's failure to meet his identified goals and not behavior toward students. This unsatisfactory evaluation was not considered by the undersigned Administrative Law Judge in writing this Decision.***

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***Footnote: 10***

***MCBOE stated it was not necessary for it to label the charges, as it was up to the courts and the Grievance Board to identify them pursuant to W. Va. Code § 18A-2-8. However, in its post-hearing submissions, MCBOE argued Grievant's behavior constituted insubordination, intemperance, willful neglect of duty, and cruelty.***

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***Footnote: 11***

***The undersigned Administrative Law Judge does not find Grievant to be guilty of intemperance.***