WAYNE HEDRICK,

Grievant,

v. DOCKET NO. 98-36-188

PENDLETON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

On May 8, 1998, Wayne Hedrick, Grievant, was suspended for ten (10) days without pay by Pendleton County School Superintendent R. Paul Clayton, because he was alleged to have "inappropriately grabbed a student by the shirt collar in an attempt to remove the student from the classroom." Respondent, Pendleton County Board of Education (PCBOE), met to discuss ratification of Grievant's suspension at its June 1, 1998 meeting. On June 3, 1998, Grievant was officially informed, in writing, that the PCBOE affirmed Superintendent Clayton's prior decision to suspend Grievant. Grievant then submitted his grievance directly to Level IV, (See footnote 1) in accordance with W. Va. Code §18A-2-8, challenging his ten-day suspension by Respondent. Grievant seeks to be fully compensated for all lost wages, benefits, and accrued interest due to his suspension, and further seeks to have the suspension expunged from his record.

On June 30, 1998, the undersigned granted Grievant's motionfor a continuance for good cause shown, and the hearing was rescheduled. An evidentiary hearing was held on August 17, 1998, at the Grievance Board's offices in Elkins, West Virginia. Grievant was represented by his legal counsel, Jessica Baker, and Respondent was represented by its counsel, Kimberly Croyle. On September 29, 1998, this case became mature for decision upon receipt of the parties' post-hearing submissions.

The following facts are derived from the record, and were proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant has been employed as a teacher for twenty-one (21) years by Respondent. Tr. P.

37.

2. At all times relevant to this grievance, Grievant has been assigned as a math teacher at Franklin Junior High School. Tr. P. 37.

3. On April 21, 1998, one of Grievant's students, T.S., (See footnote 2) appeared for class without paper, pencils, or books. Tr. P. 37.

4. Grievant instructed T.S. to leave the classroom to obtain paper, pencils, and books. Tr. P. 37.

5. Grievant heard voices in the hallway outside his classroom approximately five (5) minutes after T.S. left the classroom.

6. Upon investigating the disturbance, Grievant found T.S.outside his door without the objects he was told to retrieve and told the student to go to the office. Tr. P. 37.

7. T.S. did not respond to Grievant's command. Tr. P. 37.

8. After repeating his request to T.S. and again receiving no response, Grievant asked the student if “he needed help going to the office,” to which T.S. replied “yes”; whereupon, Grievant grasped the student by the shirt collar and proceeded to walk him two or three steps toward the office. Tr. P. 37.

9. The incident was witnessed by Lannie Harper, head teacher at Franklin Junior High School. Mr. Harper and the Grievant testified, and all other evidence supports, that Grievant was not angry or out of control in his dealings with T.S., nor apparently was the student in fear or felt threatened in any way. Tr. P. 21.

10. Mr. Harper and the Grievant both testified that, to their knowledge, there was no “hands off” policy in existence at Franklin Junior High School, either in writing or otherwise

11. Effective May 9, 1998, Superintendent Clayton suspended Grievant by letter dated May 8, 1998 which, in pertinent part, provides:

> You are hereby suspended from your employment, without pay, for a period of 10 employment days, to begin immediately . . .
>
> I am taking this action for these reasons: During a confrontation with a male student on the afternoon of April 21, 1998, you inappropriately grabbed the student by the shirt collar in an attempt to remove the student from the classroom. Part of this action was witnessed by another teacher at Franklin High School. During a conference between yourself and me (also including your legal counsel and my assistant), you admitted this had happened.

DISCUSSION

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

There are specific, and limited, reasons found in the Code for which a professional educator may be suspended or terminated. W. Va. Code §18A-2-8 provides, in pertinent part:

> [n]otwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article.

Until the Level IV hearing of this matter, the record was unclear as to which provision of W. Va. Code §18A-2-8 provided the grounds for Grievant's suspension. The record does not contain any written correspondence, indicating which, if any, of the eight aforementioned causes was the reason(s) for Grievant's suspension. There is also no evidence Grievant was otherwise informed of the statutory cause for his suspension prior to the hearing of this matter. At the hearing, the testimony of Superintendent Clayton was that he suspended the Grievant under W. Va. Code § 18A-2-8 for “insubordination.” This was the only statutory reason under W. Va. Code § 18A-2-8 given by Respondent for Grievant's suspension. Insubordination has been defined by this Grievance Board as "a deliberate, willful or intentional refusal or failure to comply with a reasonable order of a supervisor." Reynolds v. Kanawha- Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990), citing Gill v. W. Va. Dept. of Commerce, Docket No. COMM-88-031 (Dec. 23, 1988). See Thompson v. Logan County Bd. of Educ., Docket No. 95- 23-127 (July 17, 1995). It has also been stated that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988), citing Weber v. Buncombe County Bd. of Educ., 266 S.E.2d 42 (N.C. 1980). (See footnote 3) Furthermore, in order to establish insubordination, the employer must demonstrate that the employee's failure to comply with a directive was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995); Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

The evidence shows that Respondent's only formal policy, written or otherwise, concerning the touching of students, was the Board of Education's Handbook (BOE Handbook). A review of the BOEHandbook reveals only one relevant section applicable to the case at hand. Section **P.5.10 - Racial, Sexual, Religious, Ethnic Harassment & Violence, paragraph G** states that:

> Assault is:
>
> > 1. An act done with intent to cause fear in another of immediate bodily harm or death;
> >
> > 2. The threat to do bodily harm to another with present ability to carry out the threat.

With the limited exception of the above-referenced paragraph, it appears Respondent has no specified “hands off” policy, written or otherwise that would apply to the matter at hand. Although there was some testimony presented by Respondent that the Grievant was once verbally “warned” a few months earlier by Principal Charles Hedrick regarding the “touching” of students, it is not clear the incident precipitating the “warning” ever actually took place, nor does it appear, based on the testimony, that the discussion between Principal Hedrick and the Grievant could reasonably be considered a warning, order or directive to refrain from touching students in the future. Grievant denies both the prior incident and that he was warned by Principal Hedrick to not touch students in the future. I find the Grievant's testimony to be credible on this issue. Respondent has not shown that Grievant knowingly and intentionally refused to obey a directive, explicit or implicit, and has failed to meet their burden of proof on this issue.

The testimony in the case at the Level IV hearing also indicates that Respondent believed Grievant to have committed a possible assault of the student and, therefore, was insubordinate in disobeying the various state statutes and Board of Educationpolicies prohibiting the assault of another. Since no criminal charges were pursued, Respondent must prove by a preponderance of the evidence that the conduct actually occurred and also that the conduct constituted the acts charged within the meaning of the statute. Snodgrass v. Wetzel County Bd. of Educ., Docket No. 97-52-384 (Dec. 15, 1997).

W. Va. Code §61-2-9, the statute which codifies assault, in pertinent part, provides:

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

Both Grievant and Mr. Lannie Harper, another teacher and the only witness to the incident, testified that Grievant's actions primarily consisted of a brief tugging of the student's shirt collar and were not forceful or done in anger. While the undersigned obviously does not condone the use of physical violence or inappropriate physical touching of students by a teacher, Grievant's actions appear to have been much more benign and definitely do not reach the level of “assault” as defined by the aforementioned statute, nor as defined in the BOE Handbook. Further, the *in loco parentis* doctrine contained in West Virginia Code § 18A-5-1,does not prohibit the spanking by hand, the physical seizure and removal of unruly students from the classroom. Syllabus Pt. 4,Smith v. West Virginia State Board of Education,170 W. Va. 593, 295 S.E.2d 680 (1982).

Respondent fails to prove by a preponderance of the evidencethe Grievant's alleged act would constitute an assault. There is no evidence that Grievant attempted, nor intended, “to commit a violent injury” to the student, or that the student had a “reasonable apprehension of immediately receiving a violent injury.” Respondent also failed to prove Grievant's actions were such as to constitute “cruelty” or “intemperance” under W. Va. Code §18A-2-8. Therefore, Respondent's charge of insubordination by committing an assault also fails.

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

CONCLUSIONS OF LAW

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

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

3. When no indictment has been issued, Respondent must prove by a preponderance of the evidence that the alleged conduct actually occurred, and also that the conduct constitutes the acts charged within the meaning of the statute. Snodgrass v. Wetzel County Bd. of Educ., Docket No. 97-52-384 (Dec. 15, 1997). 4. Respondent failed to prove by a preponderance of the evidence that

Grievant was insubordinate, cruel, or assaulted a student.

5. Given that back pay damages essentially are wages which Grievant would have received, and that the goal is to place the prevailing party (Grievant) in the same position he would have been, had he not been deprived of the sum owed him, and had benefitted from the full use of the money during the period of deprivation, full reimbursement is not accomplished unless prejudgment interest is received. See Gribben v. Kirk, 195 W.Va. 488, 466 S.E.2d 147 (1995); Weimer-Godwin v. Bd. of Educ. Upshur County, 179 W.Va. 423, 369 S.E.2d 726 (1988).

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to remove the letter of suspension (and any related documents) from Grievant's personnel file, and to award Grievant back pay, and all other benefits he would have been entitled to pursuant to law, for the period of time he was suspended without pay, with interest. Any party may appeal this **DECISION** to the Circuit of Kanawha County or to the Circuit Court of Pendleton County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.DATED: January 29, 1999

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R.K. MILLER ADMINISTRATIVE LAW JUDGE

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

Footnote: 2 Consistent with the Grievance Board's practice, the initials of juvenile students will be used throughout this decision in lieu of their names. Shipley v. Grant County Bd. of Educ., Docket No. 97-12-169 (Sept. 29, 1997); Edwards v. McDowell County Bd. of Educ., Docket No. 93-23-38 (June 23, 1994).

Footnote: 3 It should be further noted that Sexton was affirmed in part and reversed in part by the Kanawha County Circuit Court, Docket No. 88-AA-154. It was then appealed to the Supreme Court of Appeals of West Virginia which reversed the Circuit Court's ruling, in Sexton v. Marshall Univ., 182 W. Va. 294, 387 S.E.2d 529 (1989).