JONATHON BRADLEY,

Grievant,

v. **Docket No. 99-06-150**

CABELL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

On April 19, 1999, Jonathon Bradley (Grievant), submitted this grievance directly to Level IV, in accordance with W. Va. Code § 18A-2-8, challenging his suspension and demotion by Respondent Cabell County Board of Education (CCBE). Following a continuance for good cause shown, a Level IV hearing was conducted in this Grievance Board's office in Charleston, West Virginia, on July 13, 1999. (See footnote 1) At the conclusion of that hearing, the parties agreed on a briefing schedule, and this matter became mature for decision on August 23, 1999, following receipt of the parties' written post-hearing arguments.

DISCUSSION

Grievant was employed by CCBE as one of four Assistant Principals assigned to Huntington High School (HHS). On April 14, 1999, CCBE Superintendent David L. Roach notified Grievant that he was being suspended, and he was recommending that the suspension be continued for the remainder of the 1998-1999 school year, further recommending that Grievant be demoted to a classroom teaching position for the 1999- 2000 school year. The notice provided the following pertinent details regarding the charges against Grievant:

> I am in receipt of a report authored by Principal Jerry Lake, dated March 19, 1999. Mr. Lake's report recited certain allegations that have been made against you. Specifically, it has been alleged that on or about February 23, 1999 at approximately 12:15 p.m., in the vicinity of your office, you commented on the color of student [S.M.]'s (See footnote 2) panties; then, approached her from behind and pulled up her panties from the waist band.

> It has also been alleged that approximately one week later, you commented to the student: “You have on the same green underwear you had on last week,” and, that you have on several occasions made inappropriate statements to the student concerning her appearance and have remarked: “You don’t know what you do to me.” These allegations have been corroborated by several witnesses. Through your attorney, Mr. Harry L. Hager, you have denied the above-stated allegations.
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> These charges, if true, constitute a violation of our Sexual Harassment Policy. Based upon the serious nature of these charges, I hereby suspend you from your employment by the Cabell County Board of Education, without pay, effective immediately, for the remainder of your 1998-99 employment term.
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> At a meeting of the Cabell County Board of Education on May 4, 1999, I will recommend to the Board of Education that it ratify this suspension; that it further direct that you be reassigned as a classroom teacher with a corresponding salary and contract term beginning with the 1999-2000 school year.
>
> This matter remains under investigation by my office. I reserve the right to end the suspension, and to recommend, if circumstances warrant, that the Board terminate your employment.

J Ex 1.

Following a hearing before CCBE on May 11, 1999, the county board voted to approve the disciplinary actions recommended by Superintendent Roach for the reasons contained in the above-quoted notice. Grievant challenges CCBE's decision.

In disciplinary matters, the employer bears the burden of establishing the charges 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); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). A preponderance of the evidence is evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proven is more probable than not. It may not be determined by the number of witnesses, but by the greater weight of all evidence presented, which means that such factors as opportunity for knowledge, information possessed, and manner of testifying determines the weight accorded to testimony rather than the greater number of witnesses. See Black's Law Dictionary 1344-45 (4th ed. 1968); Petry v. Kanawha County Bd. of Educ., Docket No. 96- 20-380

(Mar. 18, 1997). Moreover, the authority of a county board of education to dis cipline 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 provides, in pertinent part:

> [A] board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a plea of nolo contendere to a felony charge.

In the correspondence which proposed and affirmed Grievant's suspension and demotion, CCBE did not specify which of the specific causes in the statute it was relying upon to support this disciplinary action. However, CCBE argued at Level IV that Grievant's conduct constituted immorality and insubordination. In such cases, the proper focus is whether the charge of misconduct has been proven, not the label attached to such conduct. Willis v. Jefferson County Bd. of Educ., Docket No. 96-19-230 (Oct. 28, 1998); Russell v. Kanawha County Bd. of Educ., Docket No. 9-20-415 (Jan. 24, 1991).

The term “immorality” in W. Va. Code § 18A-2-8 connotes conduct “not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially not in conformity with the acceptable standards of acceptable sexual behavior.” Golden v. Bd. of Educ., 169 W. Va. 63, 285 S.E.2d 665 (1981). Conduct which constitutes prohibited sexual harassment is included within the proscription against immorality in W. Va. Code § 18A-2-8. Harry v. Marion County Bd. of Educ., 506 S.E.2d 319 (W. Va. 1998); Willis, supra.

Insubordination involves the “willful failure or refusal to obey reasonable orders of a superior entitled to give such order.” Riddle v. Bd. of Directors, 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, the employer must not only demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, but that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Jones v. Mingo County Bd. of Educ., Docket No. 95-29-151 (Aug 24, 1995); Conner

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

At the time of the alleged incidents, CCBE had adopted a Cabell County Schools Harassment/Violence Policy which explicitly prohibited sexual harassment in the following terms:

> B. **Sexual harassment** consists of unwelcome sexual advances, requests for sexual favors, sexually motivated physical conduct and other inappropriate verbal or physical contact or communication of a sexual nature, made by any school employee to a student, when made by any school employee to another school employee, when made by any student to another student, or when made by a student to a school employee when:
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> 1. Submission to such conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining or attaining employment or obtaining education;
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> 2. Submission to or a rejection of such conduct is used as a basis for academic or employment decisions affecting a person's employment or education;
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> 3. Such conduct has the purpose or effect of substantially interfering with a person's academic or professional performance or creating an intimidating, hostile or offensive employment or educational experience;
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> 4. An intimidating, hostile, or offensive employment or educational environment (one in which unwelcome sexually-oriented jokes, innuendoes, obscenities, pictures/posters or any action with sexual connotation makes a student or employee feel uncomfortable); or
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> 5. Any aggressive, harassing behavior in the work-place or school that affects working or learning, whether or not sexual in connotation, and is directed toward an individual based on their gender.
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> 6. Sexual harassment may include, but is not limited to, the following:
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> a. Unwelcome verbal harassment or abuse in matters pertaining to sexuality;
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> b. Unwelcome pressure for sexual activity;

c. Unwelcome, sexually motivated or inappropriate patting, pinching, touching, or other physical contact;

d. Unwelcome sexual behavior or words, including demands for sexual favors accompanied by threats (implied or overt) concerning an individual's employment or educational status; or

e. Unwelcome sexual behavior or words, including demands for sexual favors accompanied by promised (implied or overt) of (sic) preferential treatment with regard to employment or educational status;

f. Unwelcome behavior, verbal or written words or symbols directed at an individual because of gender;

g. The use of authority to emphasize the sexuality of a student in a manner that prevents or impairs the student's full enjoyment of educational benefits, climate or opportunities.

R Ex 2 (emphasis in original).

Although some facts pertinent to this matter are not in dispute, the description of the specific events which generated this disciplinary action presented by Respondent'switnesses was diametrically opposed to Grievant 's testimony regarding the same events. In these circumstances, where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Maxey v. McDowell County Bd. of Educ., Docket No. 97-33-208 (Apr. 30, 1998); Hurley v. Logan County Bd. of Educ., Docket No. 97-23-394 (Dec. 11, 1997). See Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR-066 (May 12, 1995). See also Harper v. Dep't of the Navy, 33 M.S.P.R. 490 (1987). Some factors to consider in assessing the credibility of a witness include the witness' demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the trier of fact should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or

nonexistence of any fact testified to by the witness, and the plausibility of the witness' information. Haddox v. Mason County Bd. of Educ., Docket No. 98-26-283 (Nov. 30, 1998). See Perdue v. Dep't of Health & Human Resources, Docket No. 93-HHR-050 (Feb. 4, 1994). See generally, Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit System Protection Board 152-53 (1984). Consistent with these standards, certain aspects of the witnesses' testimony will be considered in detail.

It is undisputed that as of February 1999, S.M., the alleged victim of Grievant's alleged misconduct, was a female student in her Junior year at HHS. S.M. was assigned to Grievant's office as an “Office Assistant.” Office Assistants at HHS are selected from applicants who wish to enroll in this program to receive class credit and a grade. S.M.worked with three other Office Assistants and two Secretaries in an office area where Grievant and another HHS Assistant Principal, Lonnie Lucas, had their private offices.

On the day of the incident (See footnote 3) at issue, S.M. was standing in the outer office leaning over the counter that walled off the Secretary's desks, talking with Grievant's Secretary, Geraldine Haugen, and two other Office Assistants, K.C. and M.R. K.C. was standing immediately to S.M.'s left, while M.R. was across the counter from K.C., and Ms. Haugen was to the right of K.C. near her desk. Grievant was wearing green cargo-style pants with a draw string in front, and a cream-colored long-sleeve knit top. Apparently, some skin between the top of her pants and the bottom of her knit top was exposed when she was leaning on the counter.

According to S.M., Grievant walked up behind her, put his hand down the back of her pants, and pulled up her underwear. S.M. could not recall what or if Grievant said to her when he did this, but he was not admonishing her for inappropriate attire. K.C. testified that Grievant put his hand in S.M.'s pants, and pulled up S.M.'s underwear while stating, “you shouldn't be wearing those clothes.” M.R.'s recollection of the incident was that she saw Grievant put his hands down the back of S.M.'s pants, and heard him make some comment about the color of her underwear. Ms. Haugen reported that she observed Grievant put his hand in S.M.'s pants and pull up her underwear. She could not specificallyrecall what Grievant said, but was certain he was not telling her she was dressed inappropriately.

After the incident, K.C. became aware that S.M. changed the time she went to lunch in order to avoid being in the office while Grievant was present. M.R. also recalled that S.M. took lunch at a

different time to avoid Grievant. Similarly, Ms. Haugen observed S.M. trying to keep as much distance as possible between herself and Grievant, in an effort to avoid Grievant after the incident.

S.M. testified that about a week or so after the incident, Grievant spoke to her, stating “it's nice to know that you've changed your underwear.” S.M. recalled that on numerous occasions prior to the incident, on virtually a daily basis since she became an Office Assistant working around Grievant, he had made comments that made her feel uncomfortable and embarrassed. S.M. recalled such comments as, “how am I supposed to concentrate and do my work when you're in here,” “when you don't wear baggy clothing, I can't concentrate,” and, in comparing S.M. to another student in the office, “she doesn't do to me what you do to me.”

S.M. maintained that Grievant's comments were made in a flirtatious vein, and made her feel uncomfortable. Although S.M. recalled that Grievant had occasionally commented on her clothing or appearance in the hallway during the first semester, she did not perceive those comments as being sexual in nature. After she became an Office Assistant working around Grievant, the comments became more pervasive. S.M. declared she could not walk past Grievant without him making some suggestive comment to her. K.C. reported that she had overheard one comment by Grievant to S.M. which she recalled as, “you don't know what you do to me when you wear that type of clothing.” M.R. similarly related that she had heard Grievant tell S.M., “you don't know what you do to me” and “I can't concentrate on my work.” K.C. and M.R. agreed that Grievant appeared to be flirting with S.M. Ms. Haugen also testified that she had heard some of Grievant's comments to S.M., including “you do something to me,” “you turn me on,” and “it's hard for me to work in this situation with you in here.” Ms. Haugen also overheard Grievant tell S.M., about a week after the panty-grabbing incident, “you still have on the same green underwear you had on last week.”

Grievant testified on his own behalf, denying that he ever touched S.M., or her clothing in any fashion. He recalled having said something to S.M. about the way she was dressed on the way from the hallway to his office, at a time when there were other students or employees present. According to Grievant, he simply told S.M. “your panties are showing” or “your pants are too low,” and instructed her to pull up her pants. Grievant acknowledged that if he used the word “panties,” that was inappropriate, and it would have been better to handle the counseling privately. He denied making any of the other alleged statements to S.M.

Grievant has been employed by CCBE for approximately 23 years. He became an Assistant

Principal at the old HHS about 4 years ago and moved to the new HHS 1 year later. Prior to these allegations, Grievant's record as a teacher and administrator was unblemished by any misconduct, and he was highly regarded by his peers and supervisors. Charles Buell, who previously served as HHS Principal and Grievant's immediate supervisor for several years, praised Grievant's performance.

Grievant recalled that he had known S.M. since she was a student at a Middle School where he taught before becoming Assistant Principal at HHS. Grievant testified that S.M. did a “fine job” as an Office Assistant and he “never had any problems” with her. When asked what grade he would have given S.M. for the Office Practice class, Grievant immediately responded that he would have given her an “A” for the course. (Grievant did not give her a grade as she was reassigned to the supervision of another Assistant Principal on March 8, 1999, after Grievant was officially notified that he was being investigated for sexual harassment.)

Carolyn Newman, Secretary to Assistant Principal Lucas, was working in the same administrative support area with Ms. Haugen when the incident allegedly occurred. She testified in behalf of Grievant that she did not observe any unusual activity consistent with the allegations made by S.M. and the other witnesses. However, she acknowledged that she normally stays focused on her work, and would not have noted such an incident in any event. Moreover, she credibly described how she observed S.M. looking upset on one occasion when S.M. told her she was trying to avoid Grievant. When S.M. told her the reason she was keeping her distance from Grievant, Ms. Newman referred S.M. to Assistant Principal Lucas. (See footnote 4) Ms. Newman's description of S.M.'s apprehensive attitude toward Grievant was consistent with the observations of S.M. shortly after the incident asrecounted by K.C., M.R., and Ms. Haugen. In addition, S.M.'s father, a physician, testified regarding changes in S.M.'s personality at home following the incident. See Stewart v. Cartessa Corp., 771 F. Supp. 876 (S.D. Ohio 1990).

It is impossible to reconcile Grievant's version of events with the scene described by S.M., K.C., M.R., and Ms. Haugen. A witness does not mistakenly convert an offhand comment about someone's pants being too far below the waist into visibly sticking a hand in those pants and grabbing their underwear. Aside from Grievant's prior impeccable record, the sheer audacity of such an action, in the presence of otherwise credible witnesses, creates an initial impression of improbability. Nonetheless, somebody is not being truthful about this situation, and the undersigned is persuaded

that somebody is Grievant.

In observing the testimony of the witnesses, there was no indication from their demeanor that any of the witnesses for either party was being less than truthful. Any inconsistencies among their various recollections of the events at issue were not significant, given that eyewitnesses rarely describe the same scene in a completely identical manner. See Jordan v. Mason County Bd. of Educ., Docket No. 99-26-080 (July 6, 1999). M.S.' demeanor was fully consistent with a reluctant witness who did not want to testify against Grievant any more than she wanted to be a victim of sexual harassment. M.S. likewise appeared sufficiently intimidated by Grievant's apparent authority as an Assistant Principal that she might well have endured Grievant's actions indefinitely had Ms. Haugen not reported what she had observed to Principal Lake. Although M.R. and K.C.had overheard Grievant's improper comments to S.M., and recognized that they were plainly wrong, they were not willing to come forward unless S.M. initiated a complaint.

Grievant candidly acknowledged that he never had any problems with S.M. This is entirely consistent with the testimony of Ms. Newman, Ms. Haugen, K.C., and M.R. who all testified they never heard Grievant admonish or criticize S.M. about wearing inappropriate attire. Indeed, S.M. appears to have been a good student, with no disciplinary problems. Further, no witness, except Grievant, ever observed S.M. out of compliance with the dress code for students or Office Assistants in the slightest degree. Additionally, the S.M. vividly described by Ms. Newman as a fearful young girl intent on staying away from Grievant is fully consistent with a victim of unlawful sexual harassment, not an adolescent whose feelings have been hurt by someone criticizing their clothing. See generally, Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

Accordingly, the undersigned Administrative Law Judge is persuaded that the events described by S.M., K.C., M.R., and Ms. Haugen accurately portray Grievant's conduct as an Assistant Principal at HHS in February 1999. While Grievant's version of events would not constitute sexual harassment, the conduct and comments described by CCBE's witnesses unquestionably represent behavior which a reasonable person would find offensive or humiliating, and which would tend to interfere with that person's work or studies. See Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993); Laneheart v. Logan County Bd. of Educ., Docket No. 97-23-088 (June 13, 1997). Therefore, CCBE demonstrated by a preponderance of the credible evidence that Grievant engaged in the acts alleged in the charges which led to his suspension and demotion. As previously discussed, conduct which

involves prohibited sexual harassment also constitutes immorality as defined under W. Va. Code § 18A-2-8. Willis, supra. See Harry, supra. Such conduct is prohibited by multiple provisions in CCBE's sexual harassment policy. Grievant's conduct was shown to be deliberate and intentional, not inadvertent, accidental, or resulting from a simple misunderstanding. Grievant's post-hearing argument that S.M. tacitly consented to any comments which might have been made is inconsistent with his testimony that no such conversations took place. Moreover, there was no credible evidence to suggest that S.M. engaged in any flirtatious behavior or wore provocative clothing which could reasonably be construed as inviting improper comments. See Meritor, supra.; Burns v. McGregor Elec. Indus., 955 F.2d 559 (8th Cir. 1992); Wilson v. Wayne County, 856 F. Supp. 1254 (M.D. Tenn. 1994). Therefore, CCBE has also demonstrated that Grievant's conduct was insubordinate because it involved a deliberate violation of an explicit rule established by CCBE to regulate staff conduct. See Willis, supra.

Grievant contends CCBE violated the Administrative Procedures which are incorporated into CCBE's harassment policy because he was not immediately notified of S.M.'s allegations after the accusation of an inappropriate touching incident was reported to Child Protective Services. See R Ex 3. It is well settled that "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). However, an allegation that an employer failed to follow a specific procedural requirement in accomplishing a disciplinary action is an affirmative defense, and Grievant has the burden of establishing the facts to support such allegation by a preponderance of the evidence. In addition, Grievant must show that the procedural error, more likely than not, influenced the outcome. Otherwise, if the same result would have inevitably been reached, the procedural violation will be considered as “harmless error.” Dadisman v. W. Va. Div. of Rehabilitation Serv., Docket Nos. 98-RS-023/040 (Mar. 25, 1999). See Vosberg v. Civil Serv. Comm'n, 166 W. Va. 488, 275 S.E.2d 640 (1981); McFadden v. W. Va. Dep't of Health & Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995). See generally Parker v. Defense Logistics Agency, 1 M.S.P.B. 489 (1980).

Approximately a week or more after the incident, on or about February 23, 1999, Ms. Haugen reported the incident she observed between Grievant and S.M. to HHS Principal Leo Lake. On the following day, February 24, 1999, Principal Lake went to Grievant's office while Grievant was out of the office on lunch duty. During that visit, Principal Lake spoke with S.M., K.C., and M.R. The three

students briefly described the events involving S.M. and Grievant. Principal Lake took no further action until the following week, when he again contacted S.M. to ascertain whether she wanted to file a formal complaint against Grievant. S.M. was apprehensive about possible repercussions from such a complaint, and asked to speak with her mother. Subsequently, on March 8, 1999, Principal Lake met with S.M., her parents, and their attorney.

Immediately following that meeting, Principal Lake notified Child Protective Services, apprized Grievant of the allegations, and reported the incident to CCBE on its required form as a "Suspected Violation of the Harassment/Violence Policy." As a result of the meeting on March 8, 1999, Grievant was given an opportunity to provide a written account of his actions to Principal Lake. Grievant subsequently met with CCBE SuperintendentRoach to present his side of the story, and was allowed to present evidence and testimony in a hearing before the county board on May 11, 1999.

Grievant contends CCBE failed to follow the provisions in its Cabell County Harassment Policy Administrative Procedures which provide:

> Employees and students shall report alleged acts of harassment or violence in a ***timely*** manner to the principal, assistant principal, a counselor, the Title IX Coordinator, a teacher or the first level supervisor who is ***not*** involved in the allegations.

Reporting:

> Notify verbally one of the people mentioned in the first paragraph. You may want to keep a written record of dates, times, places, witnesses and descriptions of each incidence. This will aid in the investigation.

Investigation:

> 1. The principal or principal's designee, administrative assistant or a designee will investigate the incidents. The complainant, the individual(s) against whom the complaint is filed, and others who have knowledge of the incident or circumstances giving rise to the complaint will be interviewed. *Use form 1 to record pertinent information. For written statements of all involved use form 2.*
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> 2. When a staff member is accused by a student of inappropriate touching:
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> a. Call Child Protective Services.

b. Tell the staff member of the accusation. Ask them not to discuss it with anyone until Child Protective Services conducts an investigation.

c. After twenty-four hours, begin your investigation. Follow the investigative steps at the beginning of these procedures.

R Ex 3 (emphasis in original). Grievant's contention that Principal Lake's delay in initiating his investigation into Grievant's alleged misconduct constitutes harmful procedural error is without merit. It is nothing more than speculation that any information that was lost when over two weeks passed before any of the potential witnesses were asked to memorialize their recollection of the incident would have been more beneficial to Grievant's position than the Respondent's. Moreover, it appears that Principal Lake substantially complied with the policy, once S.M. confirmed that she wanted to make a formal complaint against Grievant.

Likewise, Principal Lake's failure to interview all potential witnesses was not shown to be a detriment to Grievant. For example, Ms. Newman was not interviewed and testified at the Level IV hearing that she knew nothing of the events alleged, except for S.M.'s sincere concern about keeping away from Grievant, evidence which corroborated CCBE's witnesses. In these circumstances, Grievant was not prejudiced by any violations of CCBE's written procedures, and none of the argued violations created harmful error in the context of this disciplinary action. See Dadisman, supra; Rodak v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-536 (June 23, 1997); Shoemaker v. W. Va. Dep't of Transp., Docket No. 95-RMA-238 (Sept. 29, 1995).

Grievant makes a variety of arguments contending that CCBE violated his rights to due process. Nonetheless, he was given two opportunities to informally respond to the allegations before he was suspended, and he had written notice of the charges and a full hearing before the county board before his suspension and demotion were approved. In the circumstances presented, Grievant received more than the minimal pre-termination due process required under applicable law. See Bd. of Educ. v. Wirt, 192 W. Va. 568, 453S.E.2d 402 (1994); Bell v. Mingo County Bd. of Educ., Docket No. 97-29-172 (Mar. 10, 1998); Jones v. Nicholas County Bd. of Educ., Docket No. 92-34-305 (July

28, 1993).

Finally, Grievant suggests that the punishment imposed was unduly harsh, given that this was a "one time incident." Grievant conveniently disregards the fact that S.M. and other witnesses testified that Grievant directed unwelcome and inappropriate comments toward a 17-year-old student on virtually a daily basis before this matter was reported to his supervisor. In any event, an allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense, and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. Conner, supra. See Domingues v. Fayette County Bd. of Educ., Docket No. 91-10-426 (Sept. 30, 1992); Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

As an Assistant Principal, Grievant may be held to a higher standard of conduct, because he is properly expected to set an example for students and employees under his supervision, and to enforce the school board's proper rules and regulations, as well as implement the directives of his superiors. See Wiley v. W. Va. Div. of Natural Resources, Docket No. 96-DNR-515 (Mar. 26, 1998); Hunt v. W. Va. Bureau of Employment Programs, Docket No. 97-BEP-412 (Dec. 31, 1997). See generally, Douglas v. Veterans Admin., 5 M.S.P.B. 313 (1981). Grievant has not demonstrated any basis for holding that CCBE abused its considerable discretion when it suspended and demoted him, given theoffenses of immorality and insubordination established by a preponderance of the evidence. See Harry, supra.

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate in this matter.

FINDINGS OF FACT

1. Grievant was employed by the Cabell County Board of Education (CCBE) as an Assistant Principal at Huntington High School (HHS).

2. Grievant has been employed as a professional educator and administrator for approximately 23 years. Prior to February of 1999, he had an unblemished employment record, and was highly regarded by his supervisors and peers.

3. In February 1999, S.M. was a 17-year-old Junior at HHS. At the beginning of the second

semester of the 1998-99 school year, S.M.'s application to serve as an Office Assistant for class credit was accepted and she was assigned to Grievant's Office Practice class during the “third block” or third class period of the instructional day at HHS, a period of approximately 90 minutes which overlaps the lunch hour.

4. Shortly after S.M. began serving as an Office Assistant and continuing on virtually a daily basis through the middle of February, Grievant made comments to S.M. regarding her appearance, stating “you don't know what you do to me when you wear that type of clothing,” “how am I supposed to concentrate and do my work when you're in here,” “when you don't wear baggy clothing, I can't concentrate,” and “you turn me on.” 5. Some of these comments were overheard by K.C. and M.R., two female HHS students who similarly served as Office Assistants with S.M. during the third block. In addition, certain comments were overheard by Grievant's Secretary, Geraldine Haugen.

6. Sometime near the middle of February 1999, S.M., K.C., M.R., and Ms. Haugen were in the administrative area outside Grievant's office and an adjacent office assigned to Lonnie Lucas, another HHS Assistant Principal. S.M. was leaning against a counter that walls off the Secretary's desks, facing Ms. Haugen. K.C. was on the same side of the counter as S.M., standing immediately to S.M.'s left. M.R. was on the same side of the counter as Ms. Haugen, standing to Ms. Haugen's left. Grievant walked up behind S.M., reached his hand down the back of her pants and grasped her underpants, pulling them up and making some comment about her underwear. This incident was observed by K.C., M.R. and Ms. Haugen.

7. As a result of Grievant's comments, and particularly after the incident described in Finding of Fact Number 6, above, S.M. made an effort to avoid Grievant, changing the time she went to lunch so she would not be in the office while Grievant was present. This effort to avoid Grievant was observed by K.C., M.R., and Ms. Haugen. In addition, Carolyn Newman, Assistant Principal Lucas' Secretary who worked in the same office area, observed S.M.'s apprehension of Grievant and counseled her to report what happened to Mr. Lucas.

8. S.M.'s father, a physician, observed a change in S.M.'s personality and demeanor at home which he attributed to the harassment S.M. was receiving from Grievant. 9. Approximately one week after the incident described in Finding of Fact Number 6, above, Ms. Haugen overheard Grievant tell S.M., “you still have on the same green underwear you had on last week.”

10. A few days after the incident described in Finding of Fact Number 6, above, Grievant told

S.M., “it's nice to know that you've changed your underwear.”

11. S.M. felt humiliated and embarrassed by Grievant's actions described in Finding of Fact Number 6, above. Grievant's comments to S.M. described in Findings of Fact Number 4, 9 and 10, above, made S.M. feel uncomfortable. S.M. did not respond to Grievant's comments, either to indicate they were offensive, or to encourage him to continue making such statements.

12. Approximately one week or more after the incident described in Finding of Fact Number 6, on or about February 23, 1999, Ms. Haugen went to HHS Principal Leo Lake and reported the incident.

13. On or about February 24, 1999, Principal Lake went to Grievant's office while Grievant was out of the office on lunch duty and spoke with S.M., K.C., and M.R. The three students related the incident described in Finding of Fact Number 6, above, discussed some of the suggestive comments Grievant had made to S.M., and confirmed that S.M. was the only person who was being subjected to these unwanted actions.

14. Approximately one week later, Principal Lake again contacted S.M. to determine whether she wanted to initiate a formal complaint against Grievant for sexual harassment. S.M. indicated that she wanted to speak to her mother before making a decision. 15. On March 8, 1999, Principal Lake met with S.M., her parents, and an attorney representing S.M.'s family. During that meeting, S.M. agreed to initiate a complaint against Grievant.

16. On March 8, 1999, shortly after the meeting described in Finding of Fact Number 15, above, Principal Lake notified Child Protective Services, told Grievant of the allegations, and completed a form reporting S.M.'s complaint to CCBE.

17. Principal Lake investigated S.M.'s complaint by interviewing K.C., M.R. and Ms. Haugen. He provided Grievant an opportunity to respond to the allegations in writing, and Grievant responded through his attorney, denying any misconduct.

18. After receiving Principal Lake's report, CCBE Superintendent David Roach met with Grievant to give him an opportunity to present his side of the story. Grievant again denied touching S.M. or making any improper comments, acknowledging only that he had corrected S.M. for wearing inappropriate clothing in the office, and conceding that he should have handled that incident in a more formal manner.

19. At all times pertinent to this grievance a Cabell County Schools Harassment/Violence

Policy was in effect which prohibited sexual harassment, including “inappropriate verbal or physical contact or communication of a sexual nature, made by any school employee to a student.” The policy explicitly prohibits “unwelcome verbal harassment or abuse in matters pertaining to sexuality,” “unwelcome, sexually motivated or inappropriate patting, pinching, touching, or other physical contact,” and “unwelcome behavior . . . directed at an individual because of gender.” R Ex 2. 20. On April 14, 1999, Superintendent Roach notified Grievant that he was suspending Grievant immediately, and recommending to CCBE that the suspension remain in effect for the remainder of the 1998-99 school year, and that Grievant be demoted and reassigned to a classroom teaching position for the following school year. J Ex 1.

21. On May 11, 1999, CCBE conducted a hearing on the charges and voted to approve Superintendent Roach's disciplinary action. J Ex 2.

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; Froats v. Hancock County Bd. of Educ., Docket No. 91-15-159 (Aug. 15, 1991); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

2. Immorality is one of the causes listed in W. Va. Code § 18A-2-8 for which an education employee may be disciplined. Woo v. Putnam County Bd. of Educ., Docket No. 93-40-420 (June 2, 1994), aff'd 202 W. Va. 409, 504 S.E.2d 644 (1998). See Rovello v. Lewis County Bd. of Educ., 181 W.Va. 122, 381 S.E.2d 237 (1989).

3. Immorality connotes conduct which is “not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked, especially, not in conformance with the acceptable standards of proper sexual behavior,” as defined in Webster's Dictionary. Golden v. Bd. of Educ., 169 W. Va. 63, 285 S.E.2d 665 (1981). Accord, Rosenburg v. Nicholas County Bd. of Educ., Docket No. 34- 86-125-1 (Aug. 4, 1986). CCBE properly determined that Grievant's conduct toward astudent assigned to his Office Practice class constituted acts of immorality under W. Va. Code § 18A-2-8.

4. Insubordination is another of the causes in W. Va. Code § 18A-2-8 for which an education employee may be disciplined. Jones v. Mingo County Bd. of Educ., Docket No. 95-29-151 (Aug 24,

1995).

5. Insubordination includes “willful failure or refusal to obey reasonable orders of a superior entitled to give such order.” Riddle v. Bd. of Directors, Docket No. 93-BOD- 309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989).

6. A county board of education may properly discipline an employee who violates the board's sexual harassment policy. Harry v. Marion County Bd. of Educ., 506 S.E.2d 319 (W. Va. 1998); Willis v. Jefferson County Bd. of Educ., Docket No. 96-19-230 (Oct. 28, 1998).

7. CCBE properly determined that Grievant's conduct as an Assistant Principal which directly contravened multiple provisions in its policy prohibiting sexual harassment constituted insubordination under W. Va. Code § 18A-2-8. Id.

8. Where a grievant is alleging that the employer committed a procedural error in regard to a particular disciplinary action, in addition to demonstrating that the error actually occurred, it must also be shown that the error influenced the outcome. Otherwise, if the same result would have inevitably been reached, the procedural violation will be treated as “harmless error.” Dadisman v. W. Va. Div. of Rehabilitation Serv., Docket Nos.98-RS-023/040 (Mar. 25, 1999). See generally, Parker v. Defense Logistics Agency, 1 M.S.P.B. 489 (1980).

9. Grievant failed to demonstrate harmful procedural error in regard to CCBE's alleged failure to follow procedures for investigating complaints of sexual harassment which include allegations of inappropriate touching as contained in its written policy prohibiting sexual harassment. See Dadisman, supra; Rodak v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-536 (June 23, 1997).

10. Grievant received all the due process to which he is entitled in the context of a suspension and demotion for one or more of the causes specified in W. Va. Code § 18A- 2-8. See Bd. of Educ. v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994); Bell v. Mingo County Bd. of Educ., Docket No. 97-29-172 (Mar. 10, 1998).

11. An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. Conner v. Barbour County Bd. of Educ., Docket No. 94- 01-394 (Jan. 31, 1995). See Martin v. W. Va.

Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

12. Despite Grievant's previously unblemished record during more than 23 years as a teacher and administrator, CCBE did not abuse its discretion or act arbitrarily and capriciously in deciding to suspend Grievant's employment for nearly three months, andto demote him to a teaching position, based upon Grievant's proven immoral and insubordinate conduct. See Harry, supra; Beverlin, supra.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell 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. 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. 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: September 9, 1999

Footnote: 1

CCBE was represented by counsel, Howard Seufer and Kimberly Croyle, with Bowles Rice McDavid Graff & Love. Grievant was represented at the Level IV hearing by counsel, Harry L. Hager, with Hager & Heilmann, but he filed his post-hearing brief pro se.

Footnote: 2

Consistent with the practice of this Grievance Board, the students' names have been replaced with initials in this document, as well as throughout this decision. See, e.g., Edwards v. McDowell County Bd. of Educ., Docket No. 93-33-118 (July 13, 1994); Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994).

Footnote: 3

Although CCBE alleged that these events took place on or about February 23, 1999, a preponderance of the credible evidence of record indicates that the incident happened one or two weeks earlier, but was not reported to an administrator

until about February 23, 1999.

Footnote: 4

There was no evidence that S.M. reported the incident to Mr. Lucas. Neither party called Mr. Lucas as a witness at Level IV.