RICHARD NIEHAUS,

Grievant,

v. **DOCKET NO. 99-25-276**

MARSHALL COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Richard Niehaus (Grievant), is employed by Respondent, Marshall County Board of Education (MCBE), as a teacher at Sherrard Junior High School (Sherrard). Grievant alleges that Sherrard Principal Michael Burk violated Sherrard's visitation policy and evaluated him unfairly. Following an informal conference on December 16, 1998, this grievance was denied by Principal Burk (Burk), on April 13, 1999. A Level II hearing was held on April 28, 1999, with Grievant represented by Owens Brown of the W. Va. Education Association, and MCBE represented by Howard E. Seufer, Esq. The grievance was denied at Level II, by Superintendent Nick P. Zervos, on July 6, 1999. As authorized by W. Va. Code § 18-29-4(c), Level III proceedings were waived. The parties agreed that the grievance could be submitted at Level IV based upon the record developed at the lower levels. The parties were given until August 20, 1999, to submit proposed findings of fact and conclusions of law, (See footnote 1) and this grievance became mature for decision on that date. The facts in this matter are undisputed. Accordingly, the following Findings of Fact areestablished by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant is an eighth-grade teacher at Sherrard.

2. On December 2, 1998, a student's father came to Sherrard for a conference with Burk. The conference was held in a room near Burk's office. The father was civil and the meeting went well.

3. As he left the meeting, the father asked Burk if he could meet briefly with Grievant, to

discuss an incident of the previous day, in which Grievant had escorted the father's son to the principal's office for discipline.

4. The father gave no indication that he had a complaint about Grievant, or felt any hostility towards him.

5. By coincidence, Grievant was then walking past Burk's office. Burk asked Grievant if he could meet briefly with the father, and he agreed. Burk left, and the two men met.

6. Within five minutes, Burk returned to his office and found the father upset with Grievant. The father told Burk that Grievant had yelled at him and left the meeting without finishing it. Burk summoned Grievant from his classroom.

7. When Grievant returned to the office, he and the father began raising their voices and waving fingers at each other.

8. Burk told them that this was not a professional way to handle the conversation, and asked them to step into his office.

9. Grievant told Burk that he did not want to talk further with the father, and thatsuch a conference would be in violation of Sherrard's Classroom Visitation Notification Policy.

10. Burk insisted that the conference continue, and the matter was soon resolved.

11. Burk did not know that the father would confront Grievant.

12. Burk's actions violated Sherrard's Classroom Visitation Notification Policy.

13. Following an informal grievance conference, Burk acknowledged that he had not made appropriate arrangements for an administrator to be present at the conference.

14. At a subsequent faculty senate meeting, Burk acknowledged his error, discussed the incident, and sought the consensus of the faculty on whether school policies should be enforced “to the letter of the law,” or should be applied more flexibly.

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DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. A preponderance of the evidence is

defined as “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 proved is more probable than not.” Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id. Grievant alleges that Burk violated Sherrard's visitation policy and evaluated him unfairly when he told Grievant that shouting was not a professional way to handle the conversation with the father. As relief, he seeks written apologies to both himself and the faculty senate, and that a letter be placed in Grievant's file stating that Burk was completely wrong in his actions and is remorseful. Grievant also sought to amend his grievance at Level II to include a claim of retaliation, based upon Burk's discussion with the faculty senate on whether school policies should be enforced “to the letter of the law,” or should be applied more flexibly.

When a Grievant seeks to add a new claim to his grievance, the following statutes govern:

> Once a grievance has been filed, supportive or corroborative evidence may be presented at any conference or hearing conducted pursuant to the provisions of this article. Whether evidence substantially alters the original grievance and renders it a different grievance is within the discretion of the grievance evaluator at the level wherein the new evidence is presented. If the grievance evaluator rules that the evidence renders it a different grievance, the party offering the evidence may withdraw same, the parties may consent to such evidence, or the grievance evaluator may decide to hear the evidence or rule that the grievant must file a new grievance. The time limitations for filing the new grievance shall be measured from the date of such ruling. W. Va. Code § 18-29-3(j).

Similarly, "[a]ny change in the relief sought by the grievant shall be consented to by all parties or may be granted at level four within the discretion of the hearing examiner." W. Va. Code § 18-29-3(k).

The West Virginia Supreme Court of Appeals and this Grievance Board have consistently held that a grievance may not be granted at Level IV unless the claim uponwhich relief was awarded was developed at the lower levels. Hess v. W. Va. Dep't of Health and Human Resources, 189 W. Va. 357, 432 S.E.2d 27 (1993); Nebel v. Bd. of Trustees/W. Va. Univ., Docket No. 97-BOT-422 (May 8, 1998).

The record in this grievance shows no decision by any grievance evaluator, and no consent by the

parties, to incorporate the retaliation issue into this grievance. The record also contains scant discussion of evidence related to the grievant's new claim. Accordingly, Grievant's claim of retaliation will not be considered.

With respect to Grievant's allegation that Burk violated Sherrard's visitation policy, Sherrard's Classroom Visitation Notification Policy states:

> 1. When a parent phones or writes to the Principal or Guidance Counselor concerning a complaint with a classroom teacher, the office will notify the Teacher and present as much information as known. The matter will be turned over to the teacher for resolution. The parent will be advised that the teacher's preparation period is the designated time for meeting with the teacher.
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> 2. If a conference is requested, the Teacher will be given advanced (sic) notice of a conference scheduled for the next day's preparation period. The Teacher may contact the parent prior to the conference if desired.
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> 3. If the parent requests a classroom visit, the Teacher will be given advanced (sic) notice with the visitation scheduled for at least, the next day of classes. The visitation will be scheduled at a time that allows the least interruption to the learning process.
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> 4. If, informally, a teacher and parent can not come to a resolution, an informal conference will be scheduled with the Principal to assist in the resolution.
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> 5. A formal conference will be scheduled if a resolution is not obtained in steps One through Five. This conference willbe with the parent, teacher, and principal.

It is clear to the undersigned that Burk's actions violated Sherrard's Classroom Visitation Notification Policy, as Burk followed virtually none of the procedures set forth in this policy when he arranged for Grievant to meet with the father (a meeting that Grievant clearly consented to). (See footnote 2) However, the relief sought by Grievant is not available from this Grievance Board.

Relief, in order to be available, "must bear some rational relationship to the harm done[,]" and

apologies do not meet this test. Hall v. W. Va. Div. of Corrections, Docket No. 89-CORR-687 (Oct. 19, 1990). See Carney v. W. Va. Div. of Rehabilitation Services, Docket No. VR-88-055 (Mar. 28, 1990) (relief not available when it would have no practical effect other than to justify the grievant's point of view in a controversy); Bentz v. W. Va. Div. of Vocational Rehabilitation Services, Docket No. VR-88-057 (Mar. 28, 1989) (de minimus relief held to be unavailable); Zban v. Cabell County Bd. of Educ., Docket No. 06-87- 010/011/012/021/033 (July 31, 1987) (if neither party is willing to rise above their differences or take the steps necessary to resolve them, it serves no useful purpose to find one more culpable than another). Quite simply, in order to sincerely apologize an individual must feel regret. A compelled apology would have no meaning, and creates the possibility that the recipient or a third party will challenge the apology as not being sufficiently sincere. See Brown v. Mercer County Bd. of Educ., Docket No. 98-27-113 (July30, 1998). The same reasoning applies to Grievant's request that Burk express remorse.

Finally, Grievant's contention that Burk unfairly evaluated him when he told Grievant that shouting was not a professional way to handle the conversation with the father must also be rejected. Such a remark is not an evaluation within the meaning of West Virginia Board of Education Policies 5300 and 5310. See Jones v. Braxton County Bd. of Educ., Docket No. 97-04-311 (Apr. 28, 1998). Burk's comment was also appropriate, as Grievant, a professional, had a greater responsibility than the father to act appropriately. Brown, supra; Grooms v. Raleigh County Bd. of Educ., Docket No. 90-41-482 (Apr. 30, 1991).

This grievance arose from coincidence, miscommunication, and an apparent personality conflict between Grievant and Burk. However, the grievance process is very poorly suited to resolve this type of grievance. As much as the undersigned might like to order both Grievant and Burk to put this incident behind them, and work together in a professional manner for the benefit of the students at Sherrard, there is no enforcement mechanism which would ensure such a result. Sebolt v. Logan County Bd. of Educ., Docket No. 96-23-423 (June 17, 1998). One can only suggest, and hope.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In a non-disciplinary grievance, the grievant has the burden of proving his grievance by a

preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ.,Docket No. 33-88-130 (Aug. 19, 1988).

2. Any change in the relief sought by a grievant shall be consented to by all parties or may be granted at level four within the discretion of the hearing examiner. W. Va. Code § 18-29-3(k).

3. Grievant may not amend this grievance at Level IV by the addition of a retaliation claim.

4. The remedy of apology is not available from this Grievance Board. Hall v. W. Va. Div. of Corrections, Docket No. 89-CORR-687 (Oct. 19, 1990). See Carney v. W. Va. Div. of Rehabilitation Services, Docket No. VR-88-055 (Mar. 28, 1990); Bentz v. W. Va. Div. of Vocational Rehabilitation Services, Docket No. VR-88-057 (Mar. 28, 1989); Zban v. Cabell County Bd. of Educ., Docket No. 06-87-010/011/012/021/033 (July 31, 1987).

Accordingly, this grievance is **DENIED**.

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

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ANDREW MAIER **ADMINISTRATIVE LAW JUDGE**

Dated: October 4, 1999

Footnote: 1

This grievance was transferred, for administrative purposes, to the undersigned administrative law judge, on July 27, 1999.

Footnote: 2

The undersigned accepts Burk's explanation that his actions were without malice towards Grievant, and that he only arranged the meeting as he did so that the father would not have to miss another day of work.