DAVID WILLIAMS,

Grievant,

v. **Docket No. 98-20-321**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

On August 24, 1998, David Williams (Grievant) submitted this grievance directly to Level IV, in accordance with W. Va. Code § 18A-2-8, challenging his dismissal by Respondent Kanawha County Board of Education (KCBE). Following a series of continuances, each of which was granted for good cause shown, a brief Level IV hearing was conducted in this Grievance Board's office in Charleston, West Virginia, on April 28, 1999. (See footnote 1) During the Level IV hearing, the parties agreed to have the matter adjudicated upon the record developed at Grievant's pre-termination hearing. The parties further agreed on a briefing schedule, which was subsequently extended on multiple occasions by mutual consent. After an exchange of briefs, this matter became mature for decision upon expiration of the time limit for Respondent's reply brief on October 7, 1999. Consistent with this Grievance Board's practice and the requirements of W. Va. Code § 18-29-4(d)(2), this disciplinary matter has been advanced on the docket for an expedited decision.

BACKGROUND

Grievant was employed by KCBE as a Custodian I at John Adams Junior High School (JA) in Charleston, West Virginia. By correspondence dated March 12, 1998, KCBE Superintendent Jorea Marple advised Grievant he was being suspended with pay, pending an investigation into a number of allegations. That correspondence apprized Grievant of the charges against him as follows:

> I am advised of several serious allegations concerning your actions as a Custodian I assigned to John Adams Junior High School. Specifically, it is alleged that:

1. On or about March 4, 1998 you approached student [N.M.] (See footnote 2) in the hallway during seventh period and asked the student when she would go out with you, what it would take for her to sleep with you and to give you head.

2. It is also alleged that you had previously given [N.M.] cigarettes, offered to get marijuana for her, and given her a scented candle as a Christmas present. You attempted to hug and kiss her when you gave her the candle. After Christmas you made inappropriate comments to her such as “Hey, beautiful”, “Hey, sweetheart” and “When are we going out?”.

3. Prior to the school’s Valentine Dance you asked [N.M.] to lie to her grandparents about attending the dance and to instead go out with you.

4. Last fall you remarked to student [S.G.] that you liked her “tight blue shorts where your butt hangs out”. You are also alleged to have given cigarettes to [S.G.] last school year. You also asked her for her phone number and to go out with you.

5. You have offered cigarettes to student [Sa.H.], said “Hello, beautiful” to her, winked at her and were observed to have put cigarettes in other girls’ pockets.

6. You have asked student [St.H.] for her address, phone number and weekend plans. You have walked behind the student and placed your hands on her shoulders. You asked her if she ever smoked weed and offered to smoke it with her.

7. You told student [K.B.] that you “can get her off with one finger” and then hugged her and rubbed her shoulder. You told her that you had driven by her house and that you know where she lives now.

8. You asked student [M.A.] if you could take her out, what were her weekend plans and asked for her telephone number. She observed you last year leaving a cigarette in the restroom for another student who had asked you for a cigarette.

I note that you were reprimanded by Principal Thomas Kidd by letter dated December 5, 1995 for giving cigarettes to students. The above allegations indicate that you may have continued to do so subsequent to that reprimand.

> You are suspended with pay effective March 9, 1998 pending further investigation and a hearing. You will be notified of the date and time of the hearing. You may be present with counsel or other representative. Testimony will be taken under oath and recorded by mechanical means. You may call witnesses, present evidence and cross-examine any witnesses called against you.
>
> You are not to enter upon any school property and are not to contact any students while suspended.

J Ex 1 at L IV. After Superintendent Marple's foregoing notification to Grievant, a hearing was conducted before Karen Williams (See footnote 3) regarding the allegations in the notice. Ms. Williams issued a written decision on August 13, 1998, sustaining the charges, and recommending that Grievant's employment be terminated. J Ex 2 at Level IV. On August 13, 1998, Superintendent Marple notified Grievant she was recommending termination of Grievant's employment to KCBE. On August 21, 1998, Grievant was notified by KCBE's Director of Employee Relations, William H. Courtney, that KCBE voted to terminate Grievant's employment on August 20, 1998. J Ex 2 at Level IV. This appeal to Level IV followed.

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

W. Va. Code § 18A-2-8 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 Grievant's suspension and led to his termination, KCBE

did not specify which of the specific causes in the statute it was relying upon to support this disciplinary action. However, KCBE argued at Level IV that Grievant's conduct constituted immorality, insubordination, and willful neglect of duty. In such cases, the proper focus is whether the charge of misconduct has been proven, not the label attached to such conduct. Bradley v. Cabell County Bd. of Educ., Docket No. 99-06-150 (Sept. 9, 1999); Willis v. Jefferson County Bd. of Educ., Docket No. 96-19-230 (Oct. 28, 1998); Russell v. Kanawha County Bd. of Educ., Docket No. 90-20-415 (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).

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. Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995); 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).

As previously noted, KCBE has the burden of proving the charges in this disciplinary action by a preponderance of the evidence. 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).

The parties' witnesses presented substantially different versions of the events which gave rise to this grievance. In order to determine which version of events more closely depicts the actual events that transpired, it will be necessary to assess the credibility of certain witnesses. Moreover, where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinationsare 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 Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR-066 (May 12, 1995). See generally, Harper v. Dep't of the Navy, 33 M.S.P.R. 490 (1987).

Inasmuch as the witnesses to these events did not appear before the undersigned Administrative Law Judge, there has been no opportunity to consider the witnesses' demeanor as a factor in assessing credibility. Nonetheless, a witness' opportunity or capacity to perceive and communicate, reputation for honesty, and attitude toward the action may still be considered. Reynolds v. W. Va. Dep't of Admin., Docket No. 99-ADMN- 049 (Sept. 1, 1999). Likewise, 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 may still be factored into the process of determining credibility. Browning v. Mingo County Bd. of Educ., Docket No. 96- 29-154 (Sept. 30, 1996). See Lanham v. W. Va. Dep't of Transp., Docket No. 98-DOH-369 (Dec. 30, 1998); 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 Systems Protection Board 152-53 (1984). Accord ingly, it will be necessary to discuss certain aspects of this matter in detail.

N.M., a 15-year-old ninth grade student at JA, testified that Grievant offered her cigarettes one day after school in early November 1997. In addition, she recounted how Grievant hugged her, kissed her on the forehead, and asked her if she wanted to go outwith him. According to N.M., Grievant also asked her if she smoked marijuana, but did not offer any to her.

N.M. further described an incident on the day before Christmas break in December 1997, when she was leaving school after making some small gift items in home economics class, and Grievant asked her if she made one for him. N.M. proceeded to give Grievant one of the hand-made gifts from her bookbag, and Grievant gave her a scented candle and hugged her. When N.M. returned to school after Christmas break, she related that Grievant would repeatedly ask her, “when are we going to go out.” On at least one occasion, Grievant followed her to her locker where he initiated another conversation about dating him. N.M. recalled that when she declined to go out with him, he responded: “What about just having sex with me?” When N.M. replied, “why would I have sex with you,” Grievant allegedly countered with “well, what about just giving me some head?” At that point, N.M. stated that she told Grievant to get away from her because his conversation was disgusting.

Subsequent to the incident described above, N.M. described another situation where Grievant asked her if she was going to the Valentine Dance at JA. When N.M. indicated she was planning on attending the dance, N.M. asserted that Grievant suggested she tell her grandparents she was attending the dance, but meet him instead. Subsequent to this incident, N.M. sought guidance from a teacher about what she should do about these incidents, and the teacher reported N.M.'s complaint to the School Counselor.

Another 9th grade JA student, S.G., testified that Grievant gave her cigarettes on four or five occasions during the 1996-97 school year. S.G. was present when Grievantgave cigarettes to some of her friends, and she specifically asked Grievant for cigarettes on at least two occasions. S.G. also described an incident during volleyball season in the 1997-98 school year when Grievant allegedly walked past her while she was talking on the telephone, and commented, “I like the shorts better when your butt hangs out of the bottom.” He also made some reference to her blue underwear. According to S.G., Grievant would have to have seen her changing in the locker room, in order to know she was wearing blue underwear.

S.G. further reported other occasions during the 1997-98 school year when Grievant asked her out, and asked her for her phone number. S.G. specifically recalled Grievant asking her when they were going to go out on one occasion after he fixed her locker. S.G. also stated Grievant attempted to hug her on one occasion. S.G. declared she stopped coming to school for a while, because Grievant's conduct made her nervous.

Sa.H., a 14-year-old ninth grade student at JA, testified that sometime after October 1997,

Grievant offered her cigarettes on two occasions, one of which occurred near the school cafeteria when another student, S.G., was present. In addition, she recalled seeing Grievant give cigarettes to other students, putting them in their pockets.

Another 14-year-old ninth grade JA student, St.H., recounted how Grievant had engaged her in conversation at school, asking about her weekend plans, where she lived, whether or not she drank, and solicited her phone number. Usually, another JA student, K.B., was present when these conversations took place. St.H. also professed to have overheard Grievant tell K.B. that he knew where K.B. lived. She further testified to having observed Grievant hugging K.B., and another JA student, M.A. K.B., also a 14-year-old JA ninth grader, stated she was talking to Grievant when he motioned to her to come closer and he told her, “I can get you off with one finger.” According to K.B., only she and Grievant were present when this incident took place. K.B. also recounted how Grievant had put his arm around her on occasion, and she did not think much of it, until one time he began rubbing her side. She also recalled Grievant mentioning that he had driven by her house, and he knew where she lived. In addition, she was present when Grievant wished M.A. “good luck” before the homecoming court was selected, and kissed M.A. on the forehead.

M.A., a 15-year-old ninth grade student at JA, described how Grievant had asked her for her phone number, and wanted to know when they were going out together. She also reported Grievant offered her cigarettes on one occasion, placing them in the girls' bathroom for her friend, C.B., to retrieve. She likewise described the incident where Grievant gave her a hug, and kissed her on the head.

N.M. was the first person to report Grievant to the school authorities at JA. Only after an investigation into her allegations got underway, and rumors began to circulate, did any of the other witnesses come forward to lodge their complaints against Grievant, or describe the activities they had seen.

Grievant testified in his own behalf at the pre-termination hearing. He has been employed by KCBE for five and one-half years. He was a Custodian at J.E. Robins Elementary School for three years before transferring to JA. He has been married for 24 years, and has 4 daughters, ages 17 to 22. While at JA, Grievant was assigned to the night shift. Thus, he usually worked from 3:15 to 11:15 p.m. Because JA classes end at 3:00 p.m., Grievant normally has only limited contact with students while working that shift.

Grievant indicated that he did not know N.M. by name, but had encountered her in the hallway after school when he accused her and another student of theft from a teacher's purse. Grievant categorically denied giving cigarettes to N.M., or engaging in any of the sexually suggestive conversations which N.M. attributed to him. Grievant claimed that the incident with the candle was completely different from the scene described by N.M. Grievant testified that he had received the candle as a gift from someone else at JA whom he did not care for, and when N.M. walked by, he simply “tossed” the candle to her and said, “Merry Christmas.” According to Grievant, N.M. just laughed and went on her way with the candle. Another JA Custodian, Howard Darby, generally corroborated Grievant's claim that N.M. had attempted to use them for an alibi in the stolen purse incident, and specifically supported Grievant's version of events regarding giving the candle to N.M.

Grievant recalled having seen S.G. at school, but did not know her name, and had only spoken to her in terms of “hi” and “bye” like any other student in the school. He denied making any comment to S.G. while she was on the phone, or making any comment to her about her clothing or her appearance at any time. Grievant otherwise denied all of the other allegations, essentially claiming that the students were fabricating claims in order to support the allegations made by their friends.

On December 5, 1995, Grievant's immediate supervisor, JA Principal Thomas Kidd, issued a written reprimand to Grievant for giving cigarettes to a student. The reprimandnoted that “it is to your credit that you admitted it was a mistake.” Grievant did not grieve this reprimand.

Ordinarily, when an employee fails to file a timely grievance challenging an earlier disciplinary action, the merits of that action cannot be challenged in a subsequent grievance proceeding. See Aglinsky v. Bd. of Trustees, Docket No. 97-BOT-256 (Oct. 27, 1997); Jones. v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Nicholson v. Logan County Bd. of Educ., Docket No. 95-23-129 (Oct. 18, 1995). However, Grievant testified at his pre-termination hearing regarding the merits of the reprimand, contending a student had taken cigarettes which fell out of his pocket by accident. In rebuttal, KCBE presented testimony from JA Principal Kidd who recalled that Grievant admitted he had given cigarettes to students, which was why the written reprimand contained a specific statement to that effect.

Although this testimony is irrelevant to the question of whether Grievant was properly reprimanded, because that issue cannot be raised before the undersigned Administrative Law Judge, it is relevant to the issue of Grievant's credibility. In that regard, the undersigned notes that Grievant's

testimony regarding the facts surrounding this previous disciplinary action is inconsistent with Principal Kidd's memory of the event, as well as the written record which documented the misconduct. Accordingly, the undersigned finds Grievant's version of that particular incident is not credible, and Grievant's credibility on other disputed issues is tainted by this misrepresentation.

Grievant claimed to have reported his suspicions regarding N.M. and another student being involved in the pre-Christmas 1997 missing purse incident to JA AssistantPrincipal Chester Adkins. Mr. Adkins testified that he recalled the incident involving Ms. Carney's missing purse, and the purse being located in a bathroom by Grievant and another Custodian, Howard Darby. However, he had no recollection of either Grievant or Mr. Darby reporting that N.M., or any other particular student, might have been involved in the theft.

After carefully reviewing Mr. Adkins' testimony in its entirety, the undersigned Administrative Law Judge finds no evidence to support Grievant's claim that he previously reported his suspicions regarding N.M.'s possible involvement in the stolen purse incident. This is simply not the kind of information that an administrator such as Mr. Adkins would be likely to forget, particularly when he remembered other details surrounding the incident. Further, there was no evidence that Mr. Adkins, or anyone else, ever actively investigated N.M. as a suspect in the matter of the stolen purse. Therefore, the undersigned concludes that it is more likely than not that Grievant has embellished his version of events regarding the stolen purse to suggest some motive for N.M. to fabricate her allegations.

Mr. Darby similarly claimed to have reported his suspicions regarding N.M. to Mr. Adkins, although he admits that he did not know N.M., or many JA students by name. It is possible that he did have a conversation with Mr. Adkins, but his allegations were so nebulous that they provided no basis to investigate N.M.'s involvement. Mr. Darby also related that a faculty member, Robert Frostic, was present when Grievant tossed the candle to N.M. However, Mr. Frostic was called a witness by KCBE and stated that he had no recollection of any events involving Grievant, other than discussing matters relating to computers. Further, Mr. Frostic indicated that he was rarely in the vicinity of the janitor'sstation at JA where this incident allegedly took place. Accordingly, it is concluded that N.M.'s testimony was generally consistent with other witnesses, except Grievant and Mr. Darby. Because the version of events depicted by Grievant and Mr. Darby was contradicted in significant aspects by the testimony of Mr. Frostic and Mr. Adkins, who are otherwise disinterested witnesses, N.M.'s

version of events surrounding the exchange of gifts is found more credible.

Mr. Darby additionally claimed to have made a comment to K.B. that he could get her to come over to him with one finger by simply motioning toward her with a finger. This testimony was presented to refute K.B.'s recollection of Grievant's sexually suggestive, if not obscene, gesture and comment. Although this incident may have taken place at some point as Mr. Darby claims, it is so different from the situation K.B. described where only Grievant was present, that it does not effectively refute K.B.'s otherwise credible version of events. Given that Mr. Darby's testimony in behalf of Grievant was otherwise contradicted by credible witnesses, K.B.'s testimony is accepted as the more credible version of events.

Grievant also testified about a run-in he had with a teacher at JA, Ms. Eye, involving his efforts to intervene on behalf of a male student who was being verbally chastised by Ms. Eye. Grievant stated that another faculty member warned him to “watch his back” once he got on the wrong side of Ms. Eye by taking up for a student. Curiously, there was no credible evidence that any of Grievant's accusers ever discussed their testimony or any of these alleged incidents with Ms. Eye. Some of the witnesses barely knew who she was. Once again, the established facts do not support Grievant's theory that there was someconcerted effort by either faculty or students to wrongfully accuse him of sexual harassment and other misconduct.

Ultimately, the undersigned Administrative Law Judge is persuaded that Respondent's witnesses provided the more credible version of the disputed events. These witnesses were generally consistent with each other, and had no apparent motive to act in collusion with each other to fabricate claims against Grievant. The conduct which these witnesses credibly described included making unsolicited and suggestive comments of a sexual nature, improper hugging and touching of female students, and asking for sexual favors. In the circumstances presented, KCBE established by a preponderance of the evidence that Grievant engaged in a pattern of prohibited sexual harassment. See 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). These proven allegations are sufficient, standing alone, to warrant Grievant's termination.

KCBE also established, by a preponderance of the credible evidence of record, that Grievant offered and provided cigarettes to JA students who were then less than 18 years of age. Such conduct constitutes a misdemeanor prohibited under W. Va. Code § 16-9A- 2. In addition, Grievant

was previously reprimanded for similar misconduct. The reprimand specifically notes that giving cigarettes to minors is “a violation of law and Kanawha County Board policy.” Although Grievant contested certain aspects of this reprimand, it is certain that Grievant was on specific notice that such conduct would not be tolerated. Nonetheless, the evidence indicates that he proceeded to violate this policy and statute on more than one occasion. This is sufficient to establish Grievant's culpabilityfor insubordination and willful neglect of duty in violation of W. Va. Code § 18A-2-8. See Jude v. Mingo County Bd. of Educ., Docket No. 96-29-136 (July 29, 1996); Conner, supra; Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994).

Grievant contends that the penalty of dismissal is unduly harsh. In assessing the particular penalty imposed by a county board, this Grievance Board will consider whether the punishment imposed was clearly excessive in light of the employee's past work record, as well as the clarity of existing rules or prohibitions regarding the situation in question, and any mitigating circumstances, all of which must be determined on a case-by-case basis. Maxey, supra; 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). In the instant matter, termination is not disproportionate to the proven offenses of immorality, insubordination, and willful neglect of duty. See Harry, supra; Maxey, supra. Given that Grievant was previously reprimanded for misconduct in 1995, the decision to terminate his employment in the circumstances presented was not arbitrary and capricious or an abuse of the school board's discretion in such matters.

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 Kanawha County Board of Education (KCBE) as a Custodian I at John Adams Junior High School (JA).

2. Grievant's immediate supervisor was Thomas D. Kidd, Principal of JA. 3. On December 5, 1995, Principal Kidd issued a written reprimand to Grievant for giving cigarettes to a student. Grievant admitted to Principal Kidd that such conduct was a “mistake.” This reprimand was not grieved.

4. Sometime in November 1997, Grievant hugged and kissed N.M., a 15-year- old ninth grade

student, on the forehead. Grievant also offered her cigarettes and inquired if she smoked marijuana. Grievant further asked N.M. to go out with him.

5. On another occasion between approximately November 1997 and March 1998, Grievant asked N.M. if she would have sex with him or if she would engage in oral sex. On another occasion sometime in February 1998, Grievant asked N.M. if she would meet him instead of attending the JA Valentine's Day dance.

6. On multiple occasions during the 1996-97 school year, Grievant gave cigarettes to S.G., a ninth grade JA student. S.G. also witnessed Grievant giving cigarettes to her friends. On one occasion during the 1997-98 school year, Grievant walked by S.G. and told her, “I like the shorts better when your butt hangs out the bottom,” while further commenting on her blue underwear which were not visible.

7. On one occasion Grievant attempted to hug S.G. In addition, he asked her out and requested her phone number on multiple occasions.

8. Grievant offered cigarettes to Sa.H., a 14-year-old JA ninth grade student, on two occasions. On one of those occasions, S.G. was present when Grievant offered cigarettes. Sa.H. also observed Grievant giving cigarettes to other JA students. 9. On one occasion, Grievant hugged M.A., a 15-year-old ninth grade student, and kissed her on the forehead, while wishing her “good luck” in the JA Homecoming Queen competition. This incident was observed by two JA students, St.H. and K.B.

10. Grievant asked M.A., a 15-year-old JA student, when they could go out together. He also asked M.A. for her phone number and offered her cigarettes on one occasion, placing cigarettes in the bathroom for her friend, C.B., to retrieve.

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). KCBE established by a preponderance of the evidence that Grievant engaged in conduct toward a number of female students attending John Adams Junior High School which constituted acts of immorality under W. Va. Code § 18A-2-8.

4. Insubordination and willful neglect of duty are other causes in W. Va. Code § 18A-2-8 for which an education employee may be disciplined. Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995); 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. 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).

7. Grievant's actions in providing cigarettes to minor junior high school students in violation of state law and local school board policy, after having previously been reprimanded for similar misconduct, constituted insubordination and willful neglect of duty prohibited under W. Va. Code § 18A-2-8. See Jude v. Mingo County Bd. of Educ., Docket No. 96-29-136 (July 29, 1996); Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994).

8. Ordinarily, when an employee fails to file a timely grievance challenging an earlier disciplinary action, the merits of that action cannot be challenged in a subsequentgrievance proceeding. See Aglinsky v. Bd. of Trustees, Docket No. 97-BOT-256 (Oct. 27, 1997); Jones. v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996).

9. Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing

rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis. McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995).

10. Given Grievant's relatively brief tenure of less than six years as a school service personnel employee, and his previous written reprimand for giving cigarettes to junior high school students on school property, dismissal from employment was not an unduly harsh penalty for the offenses proven. See McVay, supra; Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). See also Conner v. Barbour County Bd. of Educ., 200 W. Va. 405, 489 S.E.2d 787 (1997).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha 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: October 20, 1999

Footnote: 1

Grievant was represented by Timothy J. LaFon of Ciccarello, Del Giudice & LaFon. KCBE was represented by its General Counsel, James W. Withrow.

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

Apparently, Grievant and Ms. Williams are not related.