DAVID L. JONES,

Grievant,

v.

DOCKET NO. 98-04-154

BRAXTON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, David L. Jones, filed this grievance directly to Level IV on May 11, 1998, pursuant to W. Va. Code § 18A-2-8, challenging his suspension without pay by the Braxton County Board of Education ("Board"), effective May 6, 1998 through the end of the 1997- 98 school term (approximately a one month suspension). A hearing was held before the Board on May 19, 1998 at which time the Board affirmed, by a 3-2 vote, the decision of the Superintendent to suspend Grievant until the end of the 1997-98 school term. A Level IV hearing was scheduled before the undersigned Administrative Law Judge (ALJ) for June 15, 1998, with a pre-hearing telephone conference to take place on June 3, 1998. The hearing and pre-hearing conference were continued for good cause shown at the request of Respondent and with the consent of the Grievant. The matter was rescheduled for hearing on July 24, 1998, with the pre-hearing conference to take place on July 20, 1998. The hearing and pre-hearing conference were again continued for good cause shown, this time at the request of the Grievant. A pre-hearing conference was finally held on August 14, 1998, followed by a Level IV hearing in the Grievance Board's Elkins, West Virginiaoffice on August 24, 1998. (See footnote 1) The case originally became mature for decision on or about October 28, 1998,

following receipt of a copy of the March 19, 1998 Board minutes and the parties' proposed findings of fact and conclusions of law. In a letter dated November 6, 1998, however, counsel for Grievant moved to exclude certain evidence presented at the Level III hearing before the Board. Respondent's counsel submitted her reply to said motion on November 16, 1998. The motion was subsequently denied and the case was submitted for decision.

ISSUE

The issue is whether the Board proved, by a preponderance of the evidence, that Grievant engaged in sexual harassment of female students in violation of its Sexual Harassment Policy, and whether that conduct constitutes immorality or willful neglect of duty under W. Va. Code § 18A-2-8, and whether the decision to suspend Grievant for a period of approximately one month without pay was arbitrary and capricious.

DISCUSSION

Grievant denies the allegations against him. Grievant further asserts his approximately one month suspension without pay was too severe, and arbitrary and capricious.

Because this is a disciplinary action, the Board must prove the allegations against Grievant by a preponderance of the evidence. W. Va. Code § 18-29-6. Hayes v. Kanawha County Bd. of Educ., Docket No. 94-20-1143 (June 28, 1995).

The Superintendent's suspension letter, dated May 6, 1998, stated that Grievantwas being suspended for “immoral conduct that violates our sexual harassment policy.” Jt. Exhibit 1. More specifically, the Superintendent alleges that Grievant made “lewd sexual comments . . . in the presence of students, i.e., 'blowing off,' 'women would be on top,' 'girls like it better on top,' 'sucking face,' 'more than a mouthful is too much,' 'got it from his wife every night,' and touching on the leg a student referred to as K. H..” (See footnote 2) The Board alleges such conduct constitutes sexual harassment. Grievant states the incidents either never took place as described by the students, or they were taken out of context by the students. Grievant apparently does not challenge the sufficiency of the notice of suspension.

W. Va. Code § 18A-2-8 states in pertinent part:

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

The authority of a county board to suspend or dismiss a teacher under this section must be based upon the just causes listed and must be exercised reasonably, not arbitrarily or capriciously. Rovello v. Lewis County Bd. of Educ., 381 S.E.2d 237 (W. Va. 1989); Beverlin v. Bd. of Educ., 216 S.E.2d 554 (W. Va. 1975). If the action is challenged, the county board must prove, by a preponderance of the evidence, that the employee engaged in the conduct complained of, and that the punishment imposed was commensurate with the offense. Perkins v. Greenbrier County Bd. of Educ., Docket No. 94-13-019 (Aug. 12, 1994).The issue is whether the Board has proven by a preponderance of the evidence that Grievant engaged in sexual harassment as defined in its Policy, and/or whether his conduct constitutes immorality or willful neglect of duty as defined in W. Va. Code § 18A- 2-8.

Sexual Harassment

The first allegation is that the grievant is guilty of sexual harassment of students and, therefore, can be suspended under W. Va. Code § 18A-2-8. The Board's Sexual Harassment Policy (Policy) prohibits "any form of sexual harassment," which is defined as follows: (See footnote 3)

A. SEXUAL HARASSMENT

Sexual harassment consists of unwelcome sexual advance (sic), requests for sexual favors, sexually motivated physical conduct or other verbal or physical conduct or communication of a sexual nature when:

Submission to the conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining or retaining employment, or of obtaining an education; or

Submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's employment or education; or

That conduct of communication has the purpose or effect of substantially or unreasonably interfering with an individual's employment or education; or creating an intimidating, hostile, or offensive employment or education environment.

The Policy does not specifically define a "hostile or offensive employment or educationalenvironment. ” It does, however, explicitly list examples of sexual harassment, which may include:

1. a. Unwelcome verbal harassment or abuse of a sexual nature

   b. Unwelcome pressure for sexual activity

   c. Unwelcome touching, patting, physical contact

   d. Unwelcome sexual behavior or words with demeaning implications or gestures

   e. Unwelcome sexual behavior or words including demands for sexual favors, accompanied by implied or overt threats concerning an individual's 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 that student's full enjoyment of educational benefits, climate, or opportunities(;)

2 2.

Unwelcome sexual flirtations, advances, or propositions from a member of the same or opposite sex;

3 3.

Verbal or written comments about an individual's body;

4 4.

Sexually degrading word(s) or actions used to imitate, describe an individual or to refer to some aspect of the individual's behavior, appearance, attitude or conduct;(sic)

Admin. Hearing Ex. 3.

The Policy designates the Title IX Coordinator as the sexual harassment investigator. The Title IX Coordinator, upon receiving a complaint of sexual harassment, will investigate. The investigating party “shall provide a written report which should summarize the allegation, describe the basis for the investigator's conclusions and set forth any recommended actions.” Admin. Hearing Ex. 3. The Policy also provides that a substantiated harassment charge against any employee of the Board shall subject that employee to "appropriate disciplinary action based on the results of the investigation.” Id. The Board's Titl IX Coordinator investigated the charges and recommended Grievant besuspended

for three to five days.

It should also be noted that the State Board of Education has legislative rules prohibiting racial, sexual, religious/ethnic harassment and violence which would apply to the instant case. 126 CSR 18 (1997). The definition of sexual harassment in that policy is, however, virtually identical to that found in the Board's policy. The State Board's policy also lists examples of sexual harassment, most of them similar to those found in the Board's policy. Id.

In rendering a decision in this case, one must first determine whether the Board has proven by a preponderance of the evidence that Grievant engaged in sexual harassment as defined in either the State's or the Board's Policy. During Parent/Teacher Conferences held on December 9, 1997, the parents of three different students approached James Lambert, Principal at Braxton County High School (BCHS), to discuss concerns they had with Grievant, including “what they felt could be sexual related comments made by (the Grievant) in class.” Admin. Hearing Ex. 5. In response to the parents' complaints, the matter was turned over to the Title IX Coordinator and it was decided, with the consent of the Grievant, that a written, informal survey, called the “Braxton County High School Student Parent Report” (Report), would be completed by most of the Grievant's students, in order to better determine what actually occurred in Grievant's classroom.

Approximately sixty-five (65) students took part in the survey. They were asked questions dealing with whether or not there was any improper behavior or activities on the part of the Grievant. More specifically, they were asked to respond to the following questions:

13 13.

Have you observed any students in Mr. Jones' class make vulgarcomments/gestures?

14.

If so, how did he respond?

15.

Have you ever heard Mr. Jones make comments that could be considered verbal harassment of a sexual nature? If so, describe.

16.

Have you ever heard Mr. Jones make challenging comments to individuals about getting him fired? (See footnote 4)

A summary of the students' responses to questions thirteen (13) through sixteen (16) were made a part of the record. Admin. Hearing Ex. 5. (See footnote 5)

A review of the student's responses indicates the following. As it pertains to question Number 13, 60% of the students recall a fellow student making a vulgar comment/gesture in Grievant's class, although several students said these acts occurred without Grievant even being aware of the remark or gesture. In the responses to question No. 14, the students note that Mr. Jones' reactions to the comments or gestures ranged from giving a student detention or sending them to the office, to either ignoring or joking about the comment. The severity of the response apparently varied depending upon the circumstances and severity of the act. Mr. Jones' reactions to these comments, while maybe inconsistent, do not appear that unusual. It is generally recognized that teachers have some reasonable discretion in how they control and discipline their classroom.

The students' responses to question No. 15 are more indicative of a problem. Although many of the students' answers indicate they were not offended or bothered byGrievant's remarks, it is clear that more than 50% of the students witnessed Grievant making a gesture or remark on at least one occasion which they considered to be sexual in nature. A closer review of the responses to the survey, the testimony of the witnesses and the evidence as a whole indicates the vast majority of the students witnessed the same two or three incidents. The incidents were, generally speaking: 1) a fraction problem in which a discussion of whether the male example or female example should be on the top of the equation; 2) a student's reference to a bra, in which Grievant allegedly replied that “more than a mouthful was too much”; and 3) an incident or two in which the Grievant was alleged to have made a “hand gesture” indicating masturbation or talked about “getting some.”

While only a small portion of the students surveyed were present at either the Administrative Hearing or the Level IV Hearing, there is no reason to believe the results of the survey and the students' remarks are inaccurate and, therefore, should not be given some credence. As has often been stated in Grievance Board decisions, formal rules of evidence are not applied in the grievance proceedings under W. Va. Code § 29-6A-6, except for the rules of privilege recognized by law. Hearsay evidence is generally admissible and the issue is generally one of weight rather than admissibility. Seddon v. W.Va. Dept. of Health/Kanawha-Charleston Health Dept., Docket No. 90-H-115 (June 8, 1990); Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996).

Factors which may be used when allocating weight to hearsay evidence include: the availability of persons with first-hand knowledge to testify at the hearing; whether the declarants' out-of-court statements were in writing, were signed or were in affidavit form; the agency's explanation for failing to obtain signed or sworn statements; whether thedeclarants were disinterested witnesses to the events and whether the statements were routinely made; the consistency of the declarants' accounts with other information in the case, their internal consistency, and their consistency with each other; whether corroboration for the statements can otherwise be found in the agency's records; the absence of contradictory evidence; and the credibility of the declarants when they made the statements attributed to them. Borninkhof v. Dept. of Justice, 5 M.S.P.B. 150 (1981).

In a case of alleged sexual harassment, however, the factual circumstances should also carry great weight. The analysis of such allegations requires a close examination of the credibility and motives of the witnesses. Much of the evidence directed against Grievant involves comments that seem ambiguous and could be interpreted in different ways. One can also assume that often comments, regardless of how seemingly benign, are often interpreted by teens, particularly teen-age males, in a sexual connotation. However, Grievant is an experienced teacher and should know how his comments would be taken by students. It is clear a majority of Grievant's students believed his comments to be inappropriate for the classroom, and they were bothered by those comments.

Grievant denies his actions contained any sexual motivation, nor did he intend to intimidate or embarrass any students. Grievant alleges the comments were taken out of context, and that the definitions contained in the Board's policy center primarily around conduct which is sexually motivated, and thus that must be an element of the conduct in order for it to be deemed sexual harassment. Nevertheless, Grievant's interpretation is too strict; one does not have to be a predator to engage in sexual harassment.

Grievant's conduct could reasonably fall under the example in the Board's Policy of "unwelcome sexual behavior or words with demeaning implications or gestures." Thedefinition of sexual harassment does not necessarily apply to what the perpetrator of the conduct believes, but instead what the victim believes.

While it is hard not to be somewhat sympathetic to a teacher faced with the occasional rowdy and abusive behavior from students, teachers' emotions and attempts at humor must not be allowed to dictate their actions. Although the students apparently provoked most of the alleged incidents, the

Grievant, a professional, had a greater responsibility than the students to act appropriately. Grooms v. Raleigh County Bd. of Educ., Docket No. 90-41-482 (Apr. 30,1991); Brown v. Mercer County Bd. of Educ., Docket No. 98-27-113 (July 31, 1998).

Further, while a single or isolated incident of offensive sexual conduct will not always create an abusive or hostile environment, one must look at the totality of the circumstances, including the nature of the advance, the context in which it occurred, and the status of the offender versus the status of the victim. EEOC Policy Guidelines on Sexual Harassment, 8 Fair Empl. Prac. Man. (BNA) 405:6689 (Mar. 19, 1990); Harris, supra.

In applying these principles, and looking at the totality of the circumstances, I find the Grievant's comments in his classroom to have been inappropriate and in violation of the Board's Policy concerning sexual harassment. I, therefore, find that the Board has proven by a preponderance of the evidence that Grievant engaged in conduct which created a hostile or offensive learning environment for some of his students, a violation of the Board's Sexual Harassment Policy.

In addition to the issues described above, however, there are three more allegations which quickly need to be addressed. First, there is an alleged incident involving the“tapping” of a female student's leg. Grievant testified he did briefly tap the one student, K.H., on the leg to get her to move her desk over on one occasion. While the tap was probably not good judgment on the part of the Grievant, this single incident does not reach the level of sexual harassment. With regard to this allegation, I have to agree with Grievant. I cannot conclude from the Board's evidence that Grievant's conduct toward K.H., in that instance, amounts to sexual harassment. The evidence presented as to the nature of the touching, i.e., exactly where it happened, the duration of the touching, or the amount of pressure applied by Grievant, shows that the tap was very brief (less than a second), and would be difficult to describe as sexual. Other than the inference raised by the Board, there is no indication that Grievant inappropriately touched K.H. in connection with this incident.

With respect to allegations, apparently not raised until after Grievant was suspended, from another student, L.R., and her mother, that Grievant looked at the daughter “inappropriately” during a parent-teacher conference and that Grievant was looking “down the top” of the same student's dress while she was taking a test, Grievant denies both charges. Grievant states he did nothing more than look over the student's shoulder to make sure she was not cheating and the Board has not proven by a preponderance of the evidence to the contrary. There is also no clear evidence Grievant did

anything improper during the parent-teacher conference.

Immorality

___The Board maintains that Grievant's violation of its Sexual Harassment Policy constitutes "immorality" under W. Va. Code § 18A-2-8 and thereby gives the Board the authority to suspend Grievant. In Golden v. Board of Education of County of Harrison, 169 W. Va. 63, 285 S.E.2d 665 (19), the Supreme Court of Appeals of West Virginia attemptedto define "immorality " within the meaning of W. Va. Code § 18A-2-8. The Court stated that:

> Immorality is an imprecise word which means different things to different people, but in essence it also connotes conduct "not in conformity with the 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 proper sexual behavior.

Id. at 668.

The Court also found in Harry v. Marion County Board of Education, 1998 W. Va. Lexis 88 (Sup. Ct. 1998), that "by proscribing comments of a sexual nature and sexually harassing conduct in its sexual harassment policy," a Board of Education reiterates that immorality, as contemplated by W.Va. Code § 18A-2-8, is inappropriate, and by authorizing suspension or termination for such conduct, the policy has tracked what is authorized by W.Va. Code § 18A-2-8. Id. In essence, the Court concluded in Harry that a Board's sexual harassment policy authorizing suspension or termination for violation of the policy conforms to, and is appropriate under, W.Va. Code § 18A-2-8. Id. Therefore, Grievant's suspension on the grounds for immorality under W. Va. Code § 18A-2-8 is proper.

Willful Neglect of Duty

The Board also alleges in its post-hearing brief that Grievant's violation of its Sexual Harassment Policy constitutes willful neglect of duty under W. Va. Code § 18A-2-8. Although the West Virginia Supreme Court of Appeals has not formulated a precise definition of "willful neglect of duty," it does encompass something more serious than incompetence and imports "a knowing and intentional act, as distinguished from a negligent act." Bd. of Educ. of the County of Gilmer v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990). Hence, in order to prove willful neglect of duty under W. Va. Code § 18A-2-8, the employer must establish that the employee's conduct constituted a knowingand intentional act, rather than a negligent act. Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996); Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994); Hoover v. Lewis County Bd. of Educ.,Docket No. 93-21-427 (Feb. 24, 1994).

"'Willful neglect of duty' may be defined as an employee's intentional and unexcusable failure to perform a work-related responsibility." Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990). While the Board's Sexual Harassment Policy had been communicated to Grievant before the incidents in question and his conduct in these matters may have been inconsistent with that Policy, primarily based on the Grievant's testimony, I find the Board has failed to prove by a preponderance of the evidence the Grievant intentionally, knowingly and without excuse violated the Board's Policy. While it is a close call, I am satisfied that Grievant's conduct cannot reasonably be characterized as "willful neglect of duty."

Arbitrary and Capricious

Having reached the above conclusions, the single question remaining is whether the Board acted arbitrarily and capriciously in suspending Grievant until the end of the school year, and whether said penalty was clearly excessive. The West Virginia Supreme Court has stated that:

> Not only does W. Va. Code § 18A-2-8, authorize termination of employment for immorality, of which sexual harassment may be considered a species, but the Supreme Court of the United States has indicated that sexual harassment is a significant concern and that a school board, which receives federal funds, and which tolerates such conduct, violates federal law, specifically Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681- 1688 (Title IX).

Harry, supra. Further, the Court found, citing Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992), that "toleration of such conduct by individuals in charge of the educational system can justify the imposition of monetary damages on the school board under Title IX. Harry, supra.

It is clear that a Board of Education has a duty to protect the students in its charge and to rectify conduct which clearly can constitute violation of federal law. As a consequence, misconduct by a school employee which can be characterized as sexual harassment, and which might harm its students, is a substantial concern and can constitute a basis for the suspension or termination of the offending employee's employment.

The question does arise, however, whether the Board's decision to suspend Grievant for approximately thirty days, without pay, and ignore the recommendation of the Title IX Coordinator to suspend Grievant for only three to five days was too severe under the circumstances. (See footnote 6) "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). See Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See also Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997).

This Grievance Board has held that a lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined asconditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and include consideration of an employee's long service with a history of otherwise satisfactory work performance. Pingley v. Div. of Corrections, Docket No. 95-CORR-252 (July 23, 1996).

Grievant has argued that an approximately thirty-day suspension was an unduly harsh penalty. An allegation that a particular disciplinary measure is disproportionate to the offense proven or otherwise arbitrary and capricious is an affirmative defense, and Grievant bears the burden of demonstrating that the penalty was clearly excessive or reflects an abuse of agency discretion, or an inherent disproportion between the offense and the personnel action. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Thompson v. W. Va. Dep't of Health & Human Serv., Docket No. 94-HHR-254 (Jan. 20, 1995). See Martin v. W. Va. State Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989); Schmidt v. W. Va. Dep't of Highways, Docket No. DOH-88-063 (Mar. 31, 1989).

This Grievance Board has also held, however, that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

Obviously, Grievant's various use of words with sexual connotations or possibly consisting of “double meanings” in the presence of students was inappropriate and inviolation of the Board's Harassment Policy. While not condoning Grievant's actions, it is the undersigned's opinion, as previously stated, that the majority of Grievant's remarks were not intended to cause discomfort for the students, but were meant as a “joking,” albeit still inappropriate, response to suggestive or vulgar remarks originally made by the students themselves. Further, there was no evidence introduced to

indicate any problems with Grievant's teaching performance prior to this year, nor that he was warned his remarks were clearly inappropriate and causing students to feel uncomfortable in his classroom prior to the launching of this investigation and his subsequent suspension.

Nevertheless, the record lacks any evidence that the Board's action was malicious, and Grievant's wrongdoing merits a sanction. While I may not totally agree with the length of the punishment meted out by the Board, they are to be given significant discretion in these decisions and I am reluctant to substitute my opinion for that of the Boards. I find the Board's imposition of an approximately thirty-day suspension for violation of their sexual harassment policy and immorality was not such an excessive penalty as to be arbitrary and capricious or an abuse of discretion. See Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994); Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991).

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

FINDINGS OF FACT

1. Grievant is employed by the Board as a math teacher at Braxton County High School.

2. During the 1997-98 school year, the Board had in place a “Braxton County SchoolHarassment Policy.” The policy outlines what would be considered improper for teachers of students to engage in as it pertains to sexual harassment issues. Sexual harassment training is required of all Board employees and Grievant has completed the training.

3. Grievant was suspended on May 6, 1999 for alleged “immoral conduct” in violation of the Board's Sexual Harassment Policy, specifically for making “lewd sexual comments” in the presence of students.

4. Grievant made remarks on a two or three occasions which were, or could be construed as, relating to sexual matters.

5. Grievant's remarks were not intended to cause discomfort for the students, but were meant as a “joking,” albeit still inappropriate, response to suggestive or vulgar remarks originally made by the students themselves.

6. Grievant tapped one student's leg very briefly in an effort to get her to move her desk, but not for any significant length of time and not in a sexual manner.

7. There is no evidence there were any problems with Grievant's teaching performance prior to this year, nor is there evidence he was warned his remarks were clearly inappropriate and caused students to feel uncomfortable in his classroom prior to the launching of this investigation and his subsequent suspension.

CONCLUSIONS OF LAW

1. Pursuant to W.Va. Code 18-29-6, the burden of proof in disciplinary matters rests upon the employer. The standard of proof is by a preponderance of the evidence. Hayes v. Kanawha County Bd. of Educ., Docket No. 94-20-1143 (June 28, 1995).

2. Under W.Va. Code 18-29-6, the formal rules of evidence shall not be applied in grievance proceedings and hearsay evidence is generally admissible. The weight accordedto hearsay evidence depends on several factors. The hearsay evidence in this case is entitled to some weight because it was corroborated by some direct evidence and a showing was made that certain direct testimony of all the students would have been impractical.

3. "'The authority of a county board of education to suspend a teacher under W.Va. Code (1931), 18A-2-8, as amended, must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously." DeVito v. Board of Education of Marion County, 169 W.Va. 53, 285 S.E.2d 411 (1981); Fox v. Board of Education of Doddridge County, 160 W.Va. 668, 236 S.E.2d 243 (1977); Syllabus Point 3, Beverlin v. Board of Education of Lewis County, 158 W.Va. 1067, 216 S.E.2d 554 (1975).

4. The Board has proven by a preponderance of the evidence that Grievant made inappropriate comments of a sexual nature on more than one occasion in the presence of students, thereby violating the Board's Policy addressing sexual harassment, specifically that paragraph which describes sexual harassment as "unwelcome sexual behavior or words with demeaning implications or gestures."

5. Misconduct by a school employee which can be characterized as sexual harassment can constitute a basis for suspension of the offending employee on the grounds of immorality.

6. The Board failed to prove the alleged acts of misconduct involving students K.H. and L. R. by a preponderance of the evidence.

7. The Board has failed to prove by a preponderance of the evidence the Grievant intentionally, knowingly and without excuse violated the Board's Policy and, therefore, was guilty of "willful neglect

of duty." 8. The Grievance Board is empowered to fashion relief which is "deemed fair and equitable" in the circumstance of a particular case. W.Va. Code 18-29-5(b). The authority to mitigate the punishment imposed on a school employee is encompassed by the statute. Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994); Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991).

9. When considering whether to mitigate the punishment, factors to be considered include whether the penalty is clearly disproportionate to the offense proven. Parham v. Raleigh Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1991).

10. Grievant's conduct as set forth above has, however, interfered with the performance of students at Braxton County High School and has created a hostile, and/or offensive educational environment as described and prohibited by the Board's Policy.

11. The Board's imposition of an approximately thirty-day suspension for violation of their sexual harassment policy and immorality was not such an excessive penalty as to be arbitrary and capricious or an abuse of discretion. See Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994); Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991).

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Braxton County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be preparedand transmitted to the appropriate court.

Dated: February 19, 1999

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R. K. Miller

Administrative Law Judge

Footnote: 1 *1 Grievant was present, in person, and with his legal counsel, Todd Twyman. Respondent was represented by its counsel, Claudia W. Bentley.*

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

Footnote: 3 *3 I would suggest the Board may wish to closely examine how their Harassment Policy reads. I found it to be unclear, with several typographical and grammatical errors and inconsistencies.*

Footnote: 4 *4 It is not clear what relevance, if any, question 16 has to the matter at hand, although it was made a part of the record. There is some indication Grievant may have had a prior dispute with the Board, however, no evidence was introduced on this matter, therefore, it will not be addressed in this decision.*

Footnote: 5 *3 It is not known by this Administrative Law Judge why questions one (1) through twelve (12) were not made part of the record, nor is it known exactly what those questions were.*

Footnote: 6 *Although the record does not reflect Grievant's salary, the loss of over one month's salary is a significant penalty.*