BRIAN POWELL,

Grievant,

v. **Docket No. 04-16-412**

HARDY COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Brian Powell ("Grievant") filed this grievance directly at level four, challenging a suspension without pay. After a level four hearing was scheduled, the parties elected to have this matter decided based upon the record developed at the Board of Education hearing held on November 16, 2004. This grievance became mature for consideration upon receipt of the parties' final written arguments on March 9, 2005. (See footnote 1)

The following material facts have been proven by a preponderance of the evidence of record.

Findings of Fact

___1. Grievant has been employed by the Hardy County Board of Education ("BOE") as a classroom teacher for at least five years. He is assigned to teach biology and chemistry at Moorefield High School, where he also serves as varsity football coach. He has had good evaluations throughout his employment and has not been disciplined for any reason.

2. Grievant has a nine-year-old son who attends Moorefield Elementary School. 3. On September 27, 2004, Grievant's son reported to his teacher that his father had beaten him with a belt as a result of an incident which caused him to received after- school detention on September 24, 2004. This incident occurred at Grievant's home on the evening of September 24.

4. Grievant had beaten the child on the back and shoulders with a belt, leaving several large red marks/bruises, which were still quite visible three days later. Grievant was angry because his son had said something sexually explicit to a nine-year-old female student, for which he had received

detention.

5. The principal called the Department of Health and Human Resources, because school officials are required by law to report suspected child abuse. As a result, Grievant's son and his siblings were removed from Grievant's custody for a period of approximately two months.

6. On October 13, 2004, Grievant was charged with felony child abuse with bodily injury.

7. On October 14, 2004, Superintendent Ronald Whetzel met with Grievant and advised him that he would be suspended, with pay, while the alleged child abuse issue was investigated.

8. On October 21, 2004, Grievant entered into a plea agreement, whereby he pled guilty to the misdemeanor charge of domestic battery.

9. On October 28, 2004, Superintendent Whetzel advised Grievant that he was changing the suspension to an unpaid one, and that he would be recommending to the BOE that Grievant's employment be terminated. 10. Superintendent Whetzel's recommendation of termination was based, in part, upon his mistaken belief that Grievant had a history of domestic violence. Grievant and his ex-wife had engaged in a custody dispute in Logan County in 1997, in which a final domestic violence order was issued. Under the terms of the order, Grievant was granted custody of the children, and his ex-wife was granted visitation rights. However, due to some mistakes on the part of the magistrate court, the document frequently confused the terms “respondent” and “petitioner” as they referred to the respective parties. It is clear from Grievant's explanation of the document that he was the one who was granted custody of the children, not his ex-wife. In addition, the order makes no reference to violence toward the children by either party.

11. Numerous teachers, students, and private citizens signed petitions requesting that Grievant not be terminated.

12. After hearing testimony and taking evidence at a hearing held on November 16, 2004, the BOE concluded as follows:

> While we do not condone [Grievant's] treatment of his son, we do hold our teachers to a higher standard in Hardy County. However, we do not uphold the Superintendent's recommendation for termination, but we do uphold the Superintendent's suspension without pay until a satisfactory comprehensive evaluation by a psychiatrist of our choosing determines that he is not a danger to any Hardy County school student and that he will not return back to school before January 1, 2005.

13. Grievant was evaluated by a psychiatrist and was returned to his employment effective

January 11, 2005.

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; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). The grounds upon which a Board may suspend or dismiss any person in its employment are immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance substantiated by an employee performance evaluation, or conviction on a felony charge. W. Va. Code § 18A-2-8.

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, and must be exercised reasonably, not arbitrarily and capriciously. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education." Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001). In the instant case, Respondent contends that Grievant was properly suspended for immorality and cruelty, as set forth in W. Va. Code § 18A-2-8. Conversely, Grievant argues that he was not provided notice that he was being charged with either of these offenses, and that the BOE has failed to prove that he committed either offense. He seeks reimbursement of pay and benefits during the suspension period, along with reimbursement for the psychiatric evaluation.

Cruelty is a deliberate act to inflict pain and/or suffering. Behavior which is directed toward a student, and which may include harassment, belittling, threatening, and/or grabbing, slapping, and restraining, without the need for self-defense, meets this definition. Sinsel v. Harrison Couny Bd. of

Educ., Docket No. 96-17-219 (Dec. 31, 1996). See Slack v. Morgan County Bd. of Educ., Docket No. 91-03-268 (July 13, 1991); Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990); Pinson v. Cabell County Bd. of Educ., Docket No. 06-87-100-1 (July 21, 1987). There can be no doubt that Grievant's conduct would constitute cruelty if it had been directed toward one of his own students. Because Grievant's actions unquestionably were deliberate and were intended to inflict pain upon a child, the undersigned finds that they did constitute cruelty as contemplated by W. Va. Code § 18A-2-8.

The term immorality as used in the statute "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 proper sexual behavior.'" Golden v. Bd. of Educ. of County of Harrison, 169 W. Va. 63, 285 S.E.2d 665, 668 (1981); Hayes v. Kanawha County Bd. of Educ., Docket No. 94-20-1143 (June 28, 1995). "'Immoral conduct is conduct which is always wrong. Just as one cannever be accidentally or unwittingly dishonest, immoral conduct requires at least an inference of conscious intent.' See Hayes, [supra], citing Youngman v. Doerhoff, 890 S.W.2d 330 (MOCC. 1994)." Bell v. Mingo County Bd. of Educ., Docket No. 97-29-172 (Mar. 10, 1998); Petry v. Kanawha County Bd. of Educ., Docket No.96-20-380 (Mar. 18, 1997). Beating a child over the back and shoulders with a belt, leaving physical marks, could easily be described as conduct which is wrong to most people. Accordingly, Respondent has met its burden of proving that Grievant's conduct violated the provisions of W. Va. Code § 18A-2-8.

As to Grievant's argument that he was not notified until after his termination that Respondent was alleging he engaged in immorality and cruelty, it frequently happens that a BOE does not specifically identify which of the statutory causes apply to a particular disciplinary action prior to the grievance process being initiated. In such cases, the proper focus is whether the charge of misconduct has been proven, not the label, or lack thereof, attached to such conduct. Ward v. Upshur County Bd. of Educ., Docket No. 00-49-101 (Nov. 16, 2000); 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). See Jordan v. Mason County Bd. of Educ., Docket No. 99-22-080 (July 6, 1999). In the instant case, Respondent has proven Grievant engaged in the conduct alleged, and, in fact, Grievant has never denied hitting his son.

Finally, although the incident involving Grievant's son did not occur on school property or during Grievant's working hours, Respondent contends that, nevertheless, it was necessary to discipline him for this conduct. Traditionally, in cases where a schoolemployee has been disciplined for incidents which occurred at a time and place separate from their employment, the board of education is required to establish a “rational nexus” between the alleged off-duty misconduct and the duties the employee performs. Rogliano v. Fayette County Bd. of Educ., 176 W. Va. 700, 347 S.E.2d 220 (1986); Golden v. Bd. of Educ., 169 W. Va. 63, 285 S.E.2d 665 (1981); 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 (1988). (See footnote 2) A rational nexus for suspension of a teacher exists:

(1) if the conduct directly affects the performance of the occupational responsibilities of the teacher; or (2) if, without contribution on the part of school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the particular teacher to discharge the responsibilities of the teaching position. (citations omitted)

Rogliano, supra, at 224.

In the instant case, Respondent has made no attempt to establish notoriety related to Grievant's conduct, so the only issue to be decided is whether or not this incident “directly affects the performance of [his] occupational responsibilities.” It has been held by this Grievance Board that suspension based upon an indictment alone was justified, and a rational nexus existed, when the children that the grievant had allegedly abused sexually were the same age as the students he taught. Balis v. Braxton County Bd. of Educ., Docket No. 98-04-094 (Jan. 22, 1999). Similarly, when a teacher was accused of posing in sexually explicit photographs with a minor, this was conduct deemed “inherentlyinconsistent with the teacher's position as a 'role model' expected to set a moral example for her students,” establishing a rational nexus. Hurley v. Logan County Bd. of Educ., Docket No. 97-23-024 (Apr. 14, 1997).

Teachers function as custodians, caretakers, role models, and disciplinarians of their students each day while the children are in their custody. In this case, a teacher has admittedly displayed abusive physical conduct toward a child, which could potentially be repeated in his own classroom with his own students, regardless of their ages. In addition, this conduct certainly conflicts with the example of self control and moral behavior which teachers are expected to set for their students. All

school employees are required to follow the state Department of Education's Employee Code of Conduct, which requires employees to maintain a “high standard of conduct, self-control, and moral/ethical behavior.” 126 CSR 162 § 4.2.6. Accordingly, the undersigned finds that a rational nexus existed between Grievant's off-duty misconduct with his son and his responsibilities as a classroom teacher.

Grievant has not argued that the punishment in this case should be mitigated, and has, in fact, argued that he has no burden to establish mitigation. (See footnote 3) Therefore, that issue will not be addressed. As to Grievant's being required to submit to a psychiatric evaluation, for which he was required to pay, this action must be assessed according to the arbitraryand capricious standard, as set forth above. Under these circumstances, the BOE could easily have terminated Grievant's employment for his misconduct, as recommended by the Superintendent. However, the BOE chose to be lenient in dealing with this incident, and the psychiatric evaluation was ordered as a precautionary measure to protect both Grievant and his students, and also to curb speculation regarding Grievant's fitness to work with children. Under these circumstances, the undersigned finds the evaluation to have been a reasonable measure, and Grievant should not be reimbursed for its cost.

Consistent with the foregoing discussion, the following conclusions of law are made.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

2. 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, and must be exercised reasonably, not arbitrarily and capriciously. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997).

3. The term immorality as used 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 proper sexual behavior.'" Golden v. Bd. of Educ. of County of Harrison, 169 W. Va. 63, 285 S.E.2d 665, 668 (1981); Hayes v. Kanawha County Bd. of Educ., Docket No. 94-20-1143 (June 28, 1995).

4. Cruelty is a deliberate act to inflict pain and/or suffering. Behavior which is directed toward a student, and which may include harassment, belittling, threatening, and/or grabbing, slapping, and restraining, without the need for self-defense, meets this definition. Sinsel v. Harrison Couny Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996). See Slack v. Morgan County Bd. of Educ., Docket No. 91-03-268 (July 13, 1991); Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990); Pinson v. Cabell County Bd. of Educ., Docket No. 06-87-100-1 (July 21, 1987).

5. Respondent has established by a preponderance of the evidence that Grievant's conduct constituted cruelty and immorality as contemplated by the provisions of W. Va. Code § 18A-2-8.

6. In order to discipline a school employee for acts performed at a time and place separate from his employment, a board must demonstrate a “rational nexus” between the conduct performed outside the job and the duties the employee is to perform. Golden v. Bd. of Educ., 169 W. Va. 63, 285 S.E.2d 665 (1981).

7. Respondent has established a rational nexus between Grievant's off-duty misconduct and his duties as a classroom teacher. 8. It was not arbitrary and capricious for the BOE to require Grievant to submit to and pay for a psychiatric evaluation to determine his fitness to work with children under the circumstances presented in this case.

Accordingly, this grievance is **DENIED**.

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

Date: April 4, 2005

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant was represented by counsel, Jessica M. Baker, and Respondent was represented by counsel, Kimberly S. Croyle.

Footnote: 2

This Grievance Board has recently recognized that, in cases where an employee has been charged with a felony, a rational nexus need not be established. See Dobbins v. Nicholas County Bd. of Educ., Docket No. 04-34-396 (March 9, 2005). However, that reasoning does not apply to the instant case, where Grievant was suspended for the actual conduct, not just because of the criminal charges against him.

Footnote: 3

However, it is well established that mitigation 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).