VIRGINIA MARTIN,

Grievant,

v. **DOCKET NO. 05-20-220**

KANAWHA COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant Virginia Martin filed this grievance on May 5, 2005, disputing Respondent Kanawha County Board of Education's (KCBOE's) disciplinary actions against her that resulted in a written reprimand and transfer to another school. As relief, she is seeking reinstatement to the assignment from which she was transferred, and expungement of the reprimand.

Following a denial of the grievance at level two, a level four hearing was held in the Grievance Board's office on August 9, 2005. Grievant was represented by John E. Roush, Esq., counsel for the West Virginia School Service Personnel Association, and KCBOE was represented by its counsel, James Withrow. The matter became mature for decision at the conclusion of the hearing, the parties having declined the opportunity to file proposed findings of fact and conclusions of law.

Issues and Arguments

Ms. Martin disputes KCBOE's charge that she “used excessive force in disciplining a student by grabbing and squeezing the child's face.” The parties agree that this matter hinges on a factual determination that will require careful consideration of the credibility of the witnesses. Ms. Martin additionally contends that the punishment meted out, specifically the transfer, was excessive and that the incident was blown out of proportion because her principal had an existing bias against her.

Based on a preponderance of the evidence, (See footnote 1) I find the following material facts have been proven:

Findings of Fact

1. In the 2004-2005 school year, Ms. Martin was employed by KCBOE as an aide in a

kindergarten classroom at Point Harmony Elementary School (PHES), assigned to a class normally taught by Nancy Carte. P.S. (See footnote 2) was a five-year-old student in that class.

2. Lisa Menninger is a third-grade teacher at PHES who, on Friday, November 12, 2004, was escorting her students through a common corridor or passageway at the back of the classroom in which Ms. Martin was working.

3. The following Monday, Ms. Menninger reported to the PHES Principal that she had, while passing through Ms. Martin's classroom, observed Ms. Martin holding a student's face and reprimanding the student. She provided a written account of the incident in which she claimed she witnessed Ms. Martin

> holding a child's face with force. She was holding the child's face and yelling at her about running around the table. . . . She kept repeating this and pulling the child's face to look at her. The child was really uncomfortable and scared. She was holding the child's face forcefully the whole time; which was about 2 minutes total.

4. On November 17, 2004, Superintendent Ronald E. Duerring, Ed. D., informed Ms. Martin by letter that he had been “advised of an incident occurring Friday, November 12th at Point Harmony Elementary School. It is alleged that you used excessive force in disciplining a student by grabbing and squeezing the child's face. I note that another allegation of excessive force was made against you last year.” Ms. Martin was thereupon suspended with pay pending a hearing on whether she should be disciplined for the incident.

5. Following the pre-disciplinary hearing, which was held February 15, 2005, the hearing examiner recommended Grievant be issued a written reprimand and that upon her return to work, she be transferred to another school. KCBOE accepted this recommendation and reprimanded and transferred Ms. Martin

6. Ms. Martin testified that, on the day in question, she was cleaning the tables in the room while Jody Balog, a substitute teacher who was filling in for Ms. Carte, was reading to the students, all of whom were away from their tables and sitting on the floor. Ms. Martin's version of events is that she quietly asked P.S. to come back to where she was, and asked her if she had written on her table. She stated P.S. giggled and turned her head back toward Ms. Balog, at which time Ms. Martin redirected her head by placing her fingers on P.S.'s chin and turning her head. Ms. Martin had to redirect P.S. more than once while Ms. Martin told her, in whispers, that writing on the table was not properconduct. Afterwards, P.S. returned to her place on the floor with the other students, and at the

end of the day P.S. gave Ms. Martin a hug as she always did.

7. Ms. Martin was hoarse and unable to speak loudly on the day in question, and despite the fact that Ms. Balog was seated facing all the students and Ms. Martin, she did not observe Ms. Martin yelling or even speaking loudly to anyone, and she did not see Ms. Martin grabbing P.S.'s face. She did not observe any students who appeared to be upset, scared or otherwise troubled by Ms. Martin.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. (See footnote 3) KCBOE charges that Ms. Martin used “excessive force” in reprimanding P.S.

There is no dispute over KCBOE's authority to discipline an employee in the manner it did for the acts it alleges. Instead, this case turns entirely on the factual determination of whether the incident occurred as charged. Grievant admits that an incident with the student did occur, but not in the way KCBOE's witnesses allege. The difference in the accounts of the various witnesses must be weighed against each other, since there is no physical evidence of anything happening. This brings the credibility of the witnesses into question.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations arerequired. (See footnote 4) The undersigned is charged with assessing the credibility of the witnesses, and where the evidence has been submitted on the record, this is an especially difficult task, as the undersigned has not had the opportunity to observe the witness' demeanor. Nevertheless, demeanor is only one of the factors to be considered in assessing the credibility of a witness. Other factors include the witness' opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the trier of fact should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of witness' information. *(See footnote 5)*

Here, we have a combination of the types of evidence presented at level four: some of the witnesses testified in person, while the testimony of others is presented solely through the transcript of the level two hearing. Nonetheless, a determination of the reliability of each witness' testimony

must be made and then compared. "The fact that [some of] this testimony is offered in written form does not alter this responsibility." (See footnote 6)

The student “victim” of Grievant's alleged misconduct did not testify at level four, and this witness' testimony is entirely contained in the pre-disciplinary hearing transcript. The student's age is a major factor in the credibility determination, as P.S. was only five years old at the time. The level two Grievance Evaluator, who heard the child's testimony *incamera*, out of the presence of Grievant but with the parties' attorneys present, did not make a specific examination into the child's competency to testify. In *State v. Wilson*, (See footnote 7) the West Virginia Supreme Court of Appeals noted that “[t]he general rule is that a witness under the age of fourteen years is presumed not to be competent as a witness, and that such competency must be shown.” That case “speaks of the presumption against competency of a child fourteen or under. This is probably too static a rule, or at least the term 'presumption' should be read in a narrow sense to require an inquiry into competency; the burden of proving such would then be on the party offering the witness.” (See footnote 8) Also, WVRE 601 seems to eliminate the presumption, (See footnote 9) but “The competency of a child should be determined at the time the testimony is offered in evidence. Nevertheless, it is obvious that the capacity of the child at the time of the occurrence about which s/he is asked to testify enters into the consideration of competence.” (See footnote 10) In this case, in which no inquiry was made into the child's capacity to accurately relate events, the witness' competency was insufficiently established.

The level two Grievance Evaluator stated in her Decision that she was

> satisfied that each and every witness brought on by the parties was credible and truthful unless noted below. Neither the demeanor of any witness, nor the substance of any testimony suggested an inconsistency, conflict, or ulterior motive unless noted below. No evidence suggested any personal gain to be achieved by these witnesses as a result of testifying.

Contrary to what would be expected following that statement, the level two Decision noted no exceptions, which renders the Grievance Evaluator's determination unreliable, given that the testimony of the Grievant's and KCBOE's witnesses is, with respect to the material and operative facts, explicitly contradictory. In assessing the competence of P.S.'s testimony, the Respondent's attorney only made a cursory examination, and the Grievance evaluator made no enquiry. Although Grievant's attorney made no specific objection to the witness' testimony, he did question whether a child as young as P.S. understood “the solemnity of the proceedings and the consequences of what they're saying.” However, on cross examination, he did elicit testimony that created an inference that

the witness was influenced by adults participating in the investigation. Particularly, P.S. answered in the affirmative a question about whether the Principal of her school suggested to her how to describe what had happened. P.S. also testified that the principal told her, “Don't let Ms. Martin come back.” It is also noted that the student appeared to be “pre-primed” with answers favorable to KCBOE, at one point answering a question about what Ms. Martin does in the classroom with “she grabbed my chin really hard.”

After a review of the testimony of P.S. and the procedures of the level two tribunal, I find the witness' competence to testify was insufficiently tested, the demeanor of the witness is not reflected by the record or described in the level two decision, and that P.S. was susceptible to undue suggestibility. This determination extends to collateral evidence about the student's behavior, such as Ms. Martin's report that she got a hug from the student at the end of the day. There is no evidence to suggest this child possesses the judgment necessary to correlate a deviation in her usual routine with the preceding events. This witness, therefore, is not credible and any evidence derived from P.S.'s testimony is inadmissible as to materiality.

The exclusion of P.S. from KCBOE's evidentiary foundation means that its entire burden of proof must be carried by testimony of its only other eyewitness, Lisa Menninger, as rebutted by Grievant's two eyewitnesses, Grievant herself and Ms. Balog. Certain elements of the event in question, however, are admitted to by Grievant. What is clear about the incident is that on the afternoon of November 12, 2004, while Ms. Balog was reading a story to the kindergarten class, Ms. Martin reprimanded P.S. for writing on a table, and used her hand to turn P.S.'s face toward her while she was talking to the child. So far, nothing about the incident is cause for concern. What is less clear is how loud or strident the reprimand was, the student's reaction, and whether Ms. Martin used an inexcusable amount of force to keep the student's face turned in her direction.

Ms. Balog testified that she did not observe Ms. Martin causing any sort of disturbance, and that she certainly would have noticed if she had been yelling at P.S. in the manner described by Ms. Menninger. Ms. Balog believed that Ms. Martin remained seated at her desk the entire time she was reading the story to the class, but qualified that belief with the fact that her attention was on the class full of kindergartners, not on Ms. Martin. She also recalled that Ms. Martin's voice that day was low and hoarse, and didn't believe she would have been capable or yelling at a student. Ms. Balog was a one-time substitute in the class, with no ties of familiarity with Ms. Martin, and no apparent motive to

fabricate her version of events.

Ms. Menninger described herself as a friend of Ms. Martin, and she did not testify at level four, so her demeanor could not be observed by the undersigned. Ms. Menningeris a third-grade teacher who was passing through Ms. Martin's room at the time the incident occurred, and who reported the incident to the school principal. Ms. Menninger's account is both inconsistent and implausible. First, she stated Ms. Martin was “yelling” at P.S. about “running around the table.” Both P.S. and Ms. Martin testified that P.S. was called to account for writing on a table, and the undersigned can fathom no reason why it would be an advantage for Ms. Martin to provide a false reason for the conversation. In addition, Ms. Balog's testimony was that she was observing the children and did not see anything unusual, which would likely not be the case had P.S. been running around while all the other students were sitting on the carpet. While there is also no reason for Ms. Menninger to fabricate what she heard Ms. Martin saying, the fact that she did not hear it accurately calls into question the fact that Ms. Martin was yelling when she said it.

Grievant testified she used a finger or two to redirect P.S.'s face when she turned away from her during the admonishment. Ms. Menninger testified Ms. Martin had a hard grip on P.S.'s face and held it there. She said P.S. did not appear to be in pain, just embarrassed and scared. She also testified it was her belief a teacher should never touch a child. While Ms. Martin's testimony is subject to her personal bias in avoiding discipline, Ms. Menninger's testimony is at least partially implausible when compared to the testimony of Ms. Balog. Ms. Balog, who had no reason to report inaccurately, testified that on the day in question Ms. Martin was incapable of yelling due to laryngitis and if she had caused the type of commotion described by Ms. Menninger, she certainly would have noticed, given the relative positions of the actors and the activities in the classroom at the time.

It is troubling that Ms. Menninger describes herself as a “friend” or Ms. Martin and stated “I love her,” yet felt strongly enough about what she thought she saw to report it tothe principal. Ms. Martin's testimony, not surprisingly, did not reciprocate those statements. However, there is no evidence that suggests Ms. Menninger is fabricating her story or otherwise being mendacious. Instead, her lack of credibility is based on mistake or lack of opportunity to observe accurately as demonstrated by the inherent implausibility of her account. At the time she was passing through, she was escorting a group of third- graders for which she was responsible, and was paying close or special attention to one of her students who needed close supervision.

KCBOE seeks to bolster its allegations by the introduction of evidence relating to a prior offense of Ms. Martin that it believes is analogous. However, this evidence does not weigh heavily on the likelihood that Ms. Martin's actions in the current incident rose to the level of culpability that would sustain KCBOE's disciplinary measure. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. W.Va.R.Evid. 404(b)." *(See footnote 11)* While formal rules of evidence are not followed in proceedings before the Grievance Board, it makes sense to follow the same proscription in this case. Likewise, evidence consisting of Ms. Martin's performance evaluations, none of which show a shortcoming in this area, are not reliable indicators that she did not act as reported.

Also irrelevant is Grievant's assertion that the PHES Principal does not like her and blew this incident out of proportion in order to get Ms. Martin removed from the school. Aside from asking Ms. Menninger to write down her account and asking the student about it, there is no evidence the Principal had any influence on the witnesses or the decision of the KCBOE to impose the discipline it did.

While it is clear that something did happen between Ms. Martin and P.S., the evidence does not support a finding that Ms. Martin used “excessive force,” unless a position is adopted in which anytime an aide touches a student, it is “excessive force.” No reliable evidence has been presented by the party bearing the burden of proof that makes it more likely than not that Ms. Martin forcefully grabbed P.S.'s face, and held it there while she yelled at the student. In short, this case relies on the credibility of the witnesses, and there is too much ambiguity in the various accounts. Where a definitive credibility determination cannot reliably be made from the evidence related to the material facts in a disciplinary hearing, the employer cannot meet its burden of proof. If the evidence supports both sides equally, then Respondent has not met its burden. (See footnote 12)

Accordingly, this grievance must be granted. The following conclusions of law support this discussion:

Conclusions of Law

1. The employer bears the burden of establishing, by a preponderance of the evidence, the

charges upon which a disciplinary action is founded. 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). If the evidencesupports both sides equally, then Grievant has not met his burden. *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dept. of Health & Human Resources*, Docket No. 96-HHR- 371 (Oct. 30, 1996); *Pine v. W. Va. Dept. of Health and Human Resources*, Docket No. 95- HHR-066 (May 12, 1995). The undersigned is charged with assessing the credibility of the witnesses, and where the evidence has been submitted on the record, this is an especially difficult task, as the undersigned has not had the opportunity to observe the witness' demeanor. Nevertheless, demeanor is only one of the factors to be considered in assessing the credibility of a witness. Other factors include the witness' opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the trier of fact should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of witness' information. *See Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994).

3. Where a definitive credibility determination cannot reliably be made from the evidence related to the material facts in a disciplinary hearing, the employer cannot meet its burden of proof.

4. Respondent has not met its burden of proving the charges against Grievant. For the foregoing reasons, this grievance is hereby **GRANTED**. Respondent is ordered to remove any references to the written reprimand from Grievant's personnel files, and to transfer her back to Ms. Carte's classroom. It should be noted that this decision does is not intended to prevent Respondent from ever exercising its discretion to transfer Grievant for non disciplinary reasons if such transfer is necessary in the future.

Any party may appeal this decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty 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.

August 26, 2005

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

The parties agreed to submit into evidence testimony adduced at Ms. Martin's pre- disciplinary hearing. No additional evidence was presented at the level two hearing. It should also be noted KCBOE presented no additional evidence at level four.

Footnote: 2

As is customary in Grievance Board cases involving minor students, only the student's initials will be used.

Footnote: 3

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).

Footnote: 4

Jones v. W. Va. Dept. of Health & Human Res., Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dept. of Health and Human Res., Docket No. 95-HHR-066 (May 12, 1995).

Footnote: 5

See Perdue v. Dept. of Health & Human Res., Docket No. 93-HHR-050 (Feb. 4, 1994).

Footnote: 6

Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996).

Footnote: 7

157 W. Va. 1036, 207 S.E.2d 174 (1974).

Footnote: 8

State v. Carter, 168 W. Va. 90; 282 S.E.2d 277 (1981).

Footnote: 9

See State v. Stacy, 179 W. Va. 686; 371 S.E.2d 614 (1988).

Footnote: 10

Cleckley, 1-6 Handbook on Evidence for West Virginia Lawyers § 6-1(B)(2) (2005).

Footnote: 11

Syl. Pt. 1, State v. Edward Charles L., Sr., 183 W. Va. 641, 398 S.E.2d 123 (1990). (Overruled on other grounds.)

Footnote: 12

Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993).