MELBA BLACK,

Grievant,

v. **Docket No. 05-49-436**

UPSHUR COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Melba Black ("Grievant"), employed by the Upshur County Board of Education ("UCBE") as an Aide, filed a grievance directly to level four, as is permitted by *W. Va. Code* § 18A-2-8, on December 5, 2005, after she was suspended for the remainder of the school year. Grievant alleges violations of *W. Va. Code* §§18A-2-7, 18A-2-8, and 18A-2-12a, as well as West Virginia Board of Education Policy No. 5300. For relief, Grievant seeks reinstatement, compensation for all lost wages, with interest and benefits, and expungement of all documentation from her personnel file relating to the suspension. An evidentiary hearing was held on April 4, 2006, in the Grievance Board's Elkins office. Grievant was represented by John E. Roush, Esq. of the West Virginia School Service Personnel Association, and UCBE was represented by Howard E. Seufer, Jr., Esq., of Bowles Rice McDavid Graff & Love, LLP. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on May 12, 2006.

The following facts are derived from a preponderance of the credible evidence made part of the record at level four.

Findings of Fact

1. Grievant was first employed by UCBE as a substitute aide in 1997. She has worked as a regular employee during portions of several years, and was employed on a full-time basis at Union Elementary School for the 2005-2006 school year.

2. Grievant is assigned to a two-student special education classroom, and primarily works with a ten-year-old female student identified as "SL". (See footnote 1) The student has multiple handicaps, partly to having a portion of her brain removed as a result of cancer. SL's speech is limited to only one or two words at a time, but she also uses sign language. SL acts out physically at times, and

exhibits considerable resistance to attempted restraint.

3. On November 14, 2005, SL was acting out, *i.e.,* throwing a temper tantrum, when Grievant commented to teacher Gabrielle Rhodes that SL should be taken “to the woodshed.”

4. During her second tantrum on November 14, Ms. Rhodes explained to SL that she could either get up and do her work, or do it the next day instead of recess. She then advised Grievant that they were going to ignore SL and let her have her choice, a technique that had been successful in the past.

5. Shortly thereafter, Ms. Rhodes heard Grievant say, “I told you if you pinched me, I would pinch you.” Then SL yelled “ouch” and “hurt.” Ms. Rhodes immediately took SL to the time-out room and summoned Principal Roy Pettit.

6. Principal Pettit observed that the tops of SL's hands were red, marked and scratched, with some loose skin she was attempting to pick off. Upon her arrival at home,SL's mother observed the marks and asked if she had bitten herself. SL responded, “No, Black scratched.”

7. Later in the day, Grievant telephoned SL's mother, and apologized for the scratches which she said was an accident. Grievant also offered to resign from her employment.

8. UCBE Superintendent Charles Chandler suspended Grievant effective November 15, 2005. During a regularly-scheduled meeting on November 29, 2005, Dr. Chandler recommended that Grievant's employment be terminated.

9. Following a hearing on the recommended termination, UCBE declined to dismiss Grievant, but voted to suspend her, without pay, for the remainder of the 2005- 2006 school year. Grievant was also required to complete an anger management class prior to her return.

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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner

of testifying[; this] determines the weight of the testimony." *Petry v. Kanawha County Bd. ofEduc*., Docket No. 96-20-380 (Mar. 18, 1997). *See Black's Law Dictionary*, 5th ed. at 1064. In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

UCBE asserts that Grievant acted deliberately in inflicting the scrapes to SL's hands, loosening skin and bringing blood to the surface, thereby engaging in cruelty. Further mitigation of the discipline is opposed by UCBE, noting that the recommended termination was already lessened to a suspension. Grievant admits that she was responsible for the scratches on SL's hands, but denies that the injuries were intentional. Grievant testified that the accident occurred when she “grabbed” SL to keep her away from another student. Grievant argues that a suspension for longer than seven months was excessive, especially since the “offense” occurred while restraining a student to safeguard another child in the room. Grievant also argues that disciplinary actions must be based on evaluation, and she should have been given an improvement period.

W. Va. Code §18A-2-8 identifies the types of conduct that can result in disciplinary action and provides, in pertinent part:

Notwithstanding any other provisions of law, 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 guilty plea or a plea of nolo contendere to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article.

It is not necessary for a board of education to identify an employee's offenses by the exact terms utilized in *W. Va. Code* § 18A-2-8, as long as the required written noticeof charges specifically identifies the alleged acts of which the employee is accused. *Jordan v. Mason County Bd. of Educ*., Docket No. 99-26-080 (July 6, 1999).

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). Because Grievant admits to having scratched the child, it is necessary to evaluate her credibility as to whether or not the action was intentional.

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. Dep't of Health & Human Res*., Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res*., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ*., Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp*., Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness.Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999); *Perdue, supra*.

UCBE's witnesses provided a consistent description of the marks on LS, *i.e.* there were multiple, red scratches on the tops of both hands. While accidents can and do happen, this description is not consistent with an accident. Further, Grievant's prior statements regarding the woodshed and pinching indicate that she is not opposed to physical punishment. Finally, Grievant offered to resign immediately. This could be an indication that she was aware of her wrongdoing. In this instance, Grievant's explanation is not credible, and UCBE has proven that she engaged in action constituting cruelty as contemplated by *W. Va. Code* § 18A-2-8.

The argument Grievant's suspension is excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to

the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employeewas advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ*., Docket No. 93-45-105 (Mar. 31, 1994). *See Austin v. Kanawha County Bd. of Educ*., Docket No. 97-20-089 (May 5, 1997).

Mitigation of a penalty is considered on a case by case basis. *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). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. *Pingley v. Div. of Corr*., Docket No. 95-CORR-252 (July 23, 1996).

This Grievance Board has held 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 Res./Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996).

The undersigned cannot find that the suspension, albeit extraordinarily long, was excessive given Grievant's harm to a student in her care. Additionally, UCBE has already mitigated the damages by reducing the recommended termination to a suspension. No further mitigation is warranted in this case. Finally, Grievant was not entitled to an evaluation and a plan of improvement rather than a suspension. *W. Va. Code* §18A-2-8, provides that “[a] charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article.” Grievant was not charged with unsatisfactory performance, although it would have also been appropriate.

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

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. *W. Va. Code* §18A-2-8 authorizes a board of education to suspend or dismiss any person in its employment at any time for a number of reasons including cruelty, but this authority cannot be exercised in an arbitrary and capricious manner. *W. Va. Code* §18A-2-8. *See Lanehart v. Logan County Bd. of Educ*., Docket No. 95-23- 235 (Dec. 29, 1995).

3. 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). 4. UCBE has met its burden of proof by a preponderance of the evidence and demonstrated Grievant is guilty of cruelty under *W. Va. Code* § 18A-2-8.

5. An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, 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).

6. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ*., Docket No. 93-45-105 (Mar. 31, 1994). *See Austin v. Kanawha County Bd. of Educ*., Docket No. 97-20-089 (May 5, 1997).

7. "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 Res./Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996). 8. Given the charge proven against Grievant, the penalty is not

disproportionate or excessive, nor is the penalty arbitrary and capricious. *See Lanehart v. Logan County Bd. of Educ*., Docket No. 95-23-235 (Dec. 29, 1995); *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, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha or Upshur 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: JUNE 26, 2006

_____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 *This is consistent with Grievance Board practice to identify students only by their initials.*