THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BENNY JENKINS,
Grievant,

v. **Docket No. 2008-1760-CONS**

JEFFERSON COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Benny Jenkins ("Grievant") initiated this grievance on March 17, 2008, following the imposition of an unpaid suspension by his employer, the Jefferson County Board of Education ("the Board"). On June 3, 2008, he filed a second grievance, resulting from the Board's non-renewal of his probationary contract, and the two grievances were consolidated. A level three hearing was conducted telephonically by the undersigned on January 23, 2009.[1] Grievant appeared with his counsel, John E. Roush of the School Service Personnel Association, and the Board was represented by its General Counsel, Amy S. Brown. This matter became mature for consideration upon receipt of the parties' fact/law proposals on February 24, 2009.

Synopsis

Grievant, a probationary custodian, was placed on a plan of improvement for several months during the 2007-2008 school year. He was also suspended twice for misconduct.

[1]Grievant was unable to travel to Westover to the Grievance Board's office because of financial issues, so the parties agreed that he and all other witnesses and parties located in Charles Town, West Virginia, could appear by telephone.

This grievance resulted from an unpaid 10-day suspension that was imposed as a result of an altercation Grievant had with a teacher he had been warned to avoid, due to previous unpleasant encounters between them. Shortly after the suspension, Grievant was notified that his probationary contract had not been renewed for the upcoming school year, which is also at issue in this grievance.

Evidence clearly established that Grievant was given numerous opportunities to improve his work, relationships, and attitude, to no avail. The suspension for insubordination was appropriate under the circumstances, and Respondent's decision not to renew his contract was reasonable.

Findings of Fact

1. Grievant began work as a regular custodian for the Board in the fall of 2006 after having been employed as a substitute custodian during the previous school year.

2. In April of 2006 Grievant was assigned to Jefferson High School ("JHS"). Throughout the first year of this assignment, Grievant received favorable evaluations.

3. During the summer months, all custodians at JHS work during the day, and a large portion of their work involves stripping and waxing the floors in the school, section by section.

4. Tim Sites is the Assistant Principal of JHS and supervises the custodians. Beginning in the summer of 2007, he started receiving complaints from the other custodians that Grievant was "not a team player," that he complained constantly, and some requested that they not have to work with him.

5. In August of 2007, Mr. Sites noticed that, in one hallway that had been stripped and newly waxed, there were areas where the floor was discolored and the wax

had been “eaten through” by some substance. Review of the school’s security tapes revealed images of Grievant using a spray bottle of floor stripper, intentionally spraying it up and down the hallway. Administrators met with Grievant and his representative, Terry Young of the local service personnel association, and reviewed the videotape. Grievant was suspended for five days, and he did not grieve or otherwise challenge the suspension.

6. In early September of 2007, Mr. Sites discussed several incidents with Grievant during which Grievant had been in areas to which he was not assigned and had unpleasant encounters with coworkers and teachers. Grievant also had failed to perform custodial duties in several areas he was assigned to clean. Mr. Sites gave Grievant a checklist of specific duties he was to perform in each area, which were to be completed on a daily basis.

7. Grievant received a performance evaluation from Mr. Sites on September 11, 2007, and there were three areas of deficiency cited: completes required tasks with a minimum of supervision, is cooperative and willing to work as part of a team, and resolves problem situations with minimal assistance from supervisor.

8. Mr. Sites discussed the evaluation with Grievant and explained the reasons for the deficient ratings. Grievant was not completing his work, complaining to other custodians, and borrowing other custodians’ equipment without permission. Grievant was advised that an improvement plan was to be developed and implemented within five days of the evaluation.

9. Mr. Sites appointed an improvement team which included himself, Terri Young, Donnie Dawson (from the maintenance department), Dale Shaffer (Coordinator of Human Resources) and Bill Askew (human resources administrator).

10. After a meeting of the team, an improvement plan dated September 14, 2007, was adopted, to be in place for a period of 60 days. The plan included the following provisions:

> -- Grievant was provided with a daily checklist for all his duties, to be filled in as duties were completed, with a goal of completing 90% of his duties in a satisfactory fashion.
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> -- Grievant was to stay in his assigned area and use only the equipment and supplies provided for use in that area.[2]
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> -- Grievant was instructed to take direction from Mr. Sites and/or the head custodian, Mr. Sayler, and not to discuss complaints about his work with other staff.

11. On the evening of Friday, September 21, 2007, Grievant arrived at work and discovered a memorandum left in his mailbox by Mr. Sites regarding a teacher's complaint that Grievant had neglected to remove the trash from her room twice that week. Upon receiving the memo, Grievant telephoned Mr. Sites' home at 11:20 p.m.[3] After being advised by Mr. Sites' wife that he was asleep, Grievant proceeded to complain to her about the situation which gave rise to the memo and spoke rudely before hanging up.

12. On September 24, 2007, Mr. Sites sent Grievant a letter discussing the phone call Grievant made to his home, advising him that it was clearly not an emergency, his rude behavior was unacceptable, and he could have discussed the issue with Mr. Sites the following week at work. He advised Grievant that his conduct violated the terms of the improvement plan, due to the stated concerns regarding his ability to deal with problem

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[2]Each area of the building has a supply closet containing the custodial supplies and equipment, so there would be no need for one custodian to go to another custodian's closet to obtain these items.

[3]Grievant's shift was from 11:00 p.m. until 7:00 a.m.

situations appropriately, and his specifically having been directed to address concerns to the appropriate superior.

13. An improvement team meeting was convened on October 1, 2007, during which the phone call to Mr. Sites' home was discussed. Grievant was advised that contacting Mr. Sites at home should only be done during true emergencies, and examples were given. Grievant was also reminded not to enter the central office prior to 8:00 a.m., which had apparently happened on other occasions; two female employees who were there alone during early hours were uncomfortable with Grievant's presence. Grievant was warned that failures to follow the directives given by the team would result in disciplinary action, including potential dismissal.

14. At the conclusion of the initial improvement plan, the team decided to extend the plan for another thirty days. Grievant's daily checklist of assigned and completed tasks had not been consistently submitted by Grievant and/or signed by his supervisor, so the team believed more consistent monitoring was needed. Also, Grievant had been complaining that his assigned area for cleaning was too large, so he was allowed to trade assignments with another custodian at JHS.

15. After being reassigned, Grievant continued to complain that the area was too large for him to clean, although the custodian previously assigned there had no problems cleaning it efficiently and had no similar complaints.

16. In January and February of 2008, Grievant had a series of unpleasant encounters with a teacher, Debbie Thomas. Ms. Thomas arrives early for work, so she was one of very few teachers to interact with Grievant, because his shift ended at 7:00 a.m.

17. On January 22, 2008, Mr. Sites sent Grievant a letter advising him that, for

the previous five nights, several classroom floors were not cleaned under the desks, and he reminded Grievant he had been instructed to move the desks and sweep the area under them. Garbage had been found on floors that Grievant had not picked up. He also reminded Grievant to lock all classroom doors, stating that Ms. Thomas had complained her work room, where expensive video equipment was stored, had been left open. She had also reported that Grievant had been unpleasant with her, and Mr. Sites advised Grievant not to have discussions with teachers.

18. On January 31, 2008, Mrs. Thomas again advised Mr. Sites that Grievant had left her work room door open. When she asked Grievant about it, he was rude, and later confronted her in front of two other teachers by saying "Your door is locked" in a rude and disrespectful tone.

19. After having been advised to avoid confrontation with Ms. Thomas and being moved, and having been told many times to stay in his assigned area, Grievant went to Ms. Thomas' classroom and started a discussion with her on February 27, 2008, by telling her that he was not cleaning her room anymore.[4] Again, Grievant was unpleasant. Mrs. Thomas reported the incident to Mr. Sites, threatening to file harassment charges against Grievant.

20. On March 11, 2008, Grievant was suspended without pay for ten days for willfully disregarding directives from his supervisor, as a result of his confrontation with Ms. Thomas.

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[4]Apparently, Grievant made this statement in a snide and/or mocking tone, attempting to convey to Ms. Thomas that, because he had been moved, she could not continue to "make trouble for him."

21. During the second improvement plan, Mr. Sites went through Grievant's assigned area at 6:15 a.m. on a daily basis, looking at the checklist to see what had been completed. For the period of January 8, 2008, through March 3, 2008, Mr. Sites kept a daily log of his observations of Grievant's work.

22. Grievant was given a brand new vacuum cleaner in early January, due to complaints about his old one. He continued to complain that the equipment was inadequate.

23. After having been told to use his own equipment, Grievant was seen on security tapes taking another custodian's mop ringer and replacing it with his broken one. When confronted, Grievant denied taking it, but after being shown the videotape, he made excuses for taking it. Other custodians continued to complain about Grievant "borrowing" their equipment without permission and talking to them while they were trying to do their work.

24. After having his vacuum replaced and complaining about it, Grievant was given an upright vacuum, which he later claimed was stolen. Although there were two vacuums available in the "tank room" (the central supply closet), he did not use them and did not vacuum during that time period. He continued to complain about inadequate and broken vacuums and did not vacuum on several occasions as a result, often refusing to vacuum because of the "inadequate" equipment.

25. Grievant continued to complain about having to pick up paper and trash off the floors and did not clean under desks. During his testimony at level three, he complained about students being messy and throwing trash everywhere that he was expected to clean up.

26. All of the improvement team members walked through Grievant's assigned area in late January, and all observed garbage on floors. Throughout the monitoring of the second plan, Mr. Sites frequently observed floors that had not been mopped and garbage that had not been picked up.

27. By letter dated April 30, 2008, from Mr. Shaffer, Grievant was advised that at the April 28, 2008, board meeting, he had not been recommended to be rehired for the 2008-2009 school year.

28. Grievant requested written reasons for his not being rehired, and by letter dated May 15, 2008, Mr. Askes advised him that he had not successfully met the conditions of his plan of improvement.[5]

Discussion

The 10-day suspension is clearly a disciplinary matter, in which case the Respondent bears the burden of proving its allegations by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "The 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 & Human Res.*, Docket No. 92- HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

An employee of a county board of education may be suspended or dismissed only for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty,

[5]Grievant also requested a hearing on the non-renewal, but the parties agreed to forego that hearing and bring all matters to the Grievance Board at the level three hearing.

unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to 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, 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)." *Graham v. Putnam County Bd. of Educ.*, Docket No. 99-40-206 (Sep. 30, 1999).

Grievant's version of his problems with Ms. Thomas was that, on the occasion she accused him of leaving her work room door open, she had left it open herself and gone to talk to the principal.[6] Grievant contended that another teacher, Anthony Washington, witnessed this, but Mr. Washington testified that he had no recollection whatsoever of the incident. As to the final incident, after Grievant had been reassigned, he testified that he was walking past her room and the door was open, so he said to her "Pardon me," and she replied "I don't have a damn thing to say to you." After first testifying that he ignored her and went on his way, Grievant then said that he did make the statement about not being responsible for Ms. Thomas' area anymore, and then walked on down the hall.

Clearly, the other evidence in this case conflicts with Grievant's testimony. 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).

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[6]Although there were two incidents of this nature, Grievant contends that he only knew of one.

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*.

Grievant's testimony is not credible. His statements completely ignore the fact that he had been told on several occasions to stop interacting with coworkers and teachers, specifically Ms. Thomas. Therefore, it does not make sense that Grievant would even approach Ms. Thomas at all, much less to make a statement to her -- for no apparent reason -- about no longer being assigned to her area. Although Ms. Thomas did not testify, it is quite believable that, because he was angry about her complaints, Grievant would approach her in an antagonistic manner. Moreover, Grievant's contention that Ms. Thomas herself was responsible for leaving the door open was not even supported by the witness whom Grievant claimed was there at the time.

Although not specifically characterized as such, Grievant's behavior toward Ms. Thomas, after having been told to avoid her, could be characterized as insubordination.

"It is not the label a county board of education attaches to the conduct of the employee . . . that is determinative. The critical inquiry is whether the board's evidence is sufficient to substantiate that the employee actually engaged in the conduct." *Allen v. Monroe County Bd. of Educ.*, Docket No. 90-31-021 (July 11, 1990); *Duruttya v. Mingo County Bd. of Educ.*, Docket No. 29-88-104 (Feb. 28, 1990). Insubordination has been defined as the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors/So. W. Va. Community College*, 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 following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid. *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). *See Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Riddle v. Bd. of Directors/So. W. Va.Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989).

Grievant was given a clear directive to avoid Ms. Thomas and had even been removed from cleaning her area of the school. Despite these actions, even as he himself has admitted, he approached her and began a confrontation. Although Grievant has inexplicably argued that he was not responsible for the confrontation, the evidence clearly proves the contrary, and he violated a direct order from his supervisor. Accordingly, his conduct was insubordinate. Grievant has not argued mitigation; however, It does not appear that a ten-day suspension for his conduct, especially in view of all the other

difficulties Respondent was having with Grievant not taking direction and not doing his job, could be characterized as excessive.

Although Grievant has argued otherwise, the nonrenewal of a contract is not a termination and is not a disciplinary matter; thus, an employee whose contract was not renewed has the burden of proof by a preponderance of the evidence. *McClain v. Jackson County Bd. of Educ.*, Docket No. 04-18-182 (Feb. 28, 2005); *Loundman-Clay v. Higher Educ. Policy Comm'n*, Docket No. 02-HEPC-013 (Aug. 29, 2002); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). The West Virginia Supreme Court of Appeals held in *Baker v. Hancock County Bd. of Educ.*, 207 W. Va. 513, 543 S.E.2d 378 (2000), that the nonrenewal of a probationary contract at the end of the school year, even for cause, is governed by West Virginia Code § 18A-2-8a, and West Virginia Code § 18A-2-8 does not apply.[7] Even if the reasons for non-renewal are disciplinary in nature, a probationary employee is not entitled to any protections beyond those provided for in West Virginia Code § 18A-2-8a. *See Baker, supra*; *Meredith v. Mercer County Bd. of Educ.*, 00-27-247 (Jan. 31, 2000); *Burrows v. Wood County Bd. of Educ.*, Docket No. 96-54-281 (Oct. 24, 1996).

West Virginia Code § 18A-2-8a provides:

> The superintendent at a meeting of the board on or before the first Monday in May of each year shall provide in writing to the board a list of all probationary teachers that he recommends to be rehired for the next ensuing

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[7]However, if a board of education wishes to dismiss a probationary employee for disciplinary reasons prior to the end of the school year, then it must proceed under West Virginia Code § 18A-2-8. *Cordray v. Wood County Bd. of Educ.*, Docket No. 90-54-267 (Jan. 31, 1991).

> school year. The board shall act upon the superintendent's recommendations at that meeting in accordance with section one of this article. The board at this same meeting shall also act upon the retention of other probationary employees as provided in sections four and five of this article. Any such probationary teacher or other probationary employee who is not rehired by the board at that meeting shall be notified in writing, by certified mail, return receipt requested, to such persons' last-known addresses within ten days following said board meeting, of their not having been rehired or not having been recommended for rehiring.
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> Any probationary teacher who receives notice that he has not been recommended for rehiring or other probationary employee who has not been reemployed may within ten days after receiving the written notice request a statement of the reasons for not having been rehired and may request a hearing before the board. Such hearing shall be held at the next regularly scheduled board of education meeting or a special meeting of the board called within thirty days of the request for hearing. At the hearing, the reasons for the nonrehiring must be shown.

County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Syl. Pt. 3, *Dillon v. Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986). *See Rogers v. Logan County Bd. of Educ.*, Docket Nos. 99-23-196/246 (Nov. 16, 2002). West Virginia Code § 18A-2-8a gives broad discretion to the county board when determining whether or not to rehire a probationary employee, and to prove his case, Grievant must establish the board's decision to not renew his contract was arbitrary and capricious. *Beheler v. Logan County Bd. of Educ.*, Docket No. 98-23-276 (Dec. 11, 1998). *See Miller v. Bd. of Educ.*, 190 W. Va. 153, 437 S.E.2d 591 (1993); *Pockl v. Ohio County Bd. of Educ.*, 185 W. Va. 256, 406 S.E.2d 687 (1991); *Rogers, supra.*

The evaluation of a personnel decision under the arbitrary and capricious standard entails close examination of the process used to make the decision. Considerable

deference must be afforded the professional judgment of those who made the decision. *Cowen v. Harrison County Bd. of Educ.*, 195 W. Va. 377, 465 S.E.2d 648 (1995). *Baird v. Kanawha County Bd. of Educ.*, Docket No. 95-20-445 (Sept. 16, 1996). "In applying the 'arbitrary and capricious' standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision and whether there has been a clear error of judgment. *Bowman Transp. v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974); *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. *Bowman, supra*, at 286." *Hill and Cyrus v. Kanawha County Bd. of Educ.*, Docket No. 96-20-362 (Jan. 30, 1997). "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. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

Respondent's decision not to renew Grievant's contract cannot be characterized as remotely unreasonable in any fashion, nor was it arbitrary and capricious. Grievant was given many, many opportunities to improve his work and his attitude, to no avail. He was

consistently uncooperative and difficult and did not improve the quality of his work, despite much coaching and many concessions to his complaints. Mr. Sites went above and beyond what many people in his situation would have done by going to the school at 6:15 every morning to monitor Grievant's progress, spending hours documenting his observations and supplying Grievant with new equipment on several occasions. It is quite understandable that Respondent did not desire to continue Grievant's employment.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In a disciplinary matter, the employer bears the burden of proving its allegations by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. An employee of a county board of education may be suspended or dismissed only 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. W. VA. CODE § 18A-2-8.

3. "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)." *Graham v. Putnam County Bd. of Educ.*, Docket No. 99-40-206 (Sep. 30, 1999).

4. In order to establish insubordination, the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid. *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). *See Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Riddle v. Bd. of Directors/So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989).

5. Respondent established by a preponderance of the evidence that Grievant was insubordinate, justifying the ten-day suspension without pay.

6. The nonrenewal of a probationary contract at the end of the school year, even for cause and if disciplinary in nature, is governed by West Virginia Code § 18A-2-8a, and West Virginia Code § 18A-2-8 does not apply. *Baker v. Hancock County Bd. of Educ.*, 207 W. Va. 513, 543 S.E.2d 378 (2000).

7. West Virginia Code § 18A-2-8a gives broad discretion to the county board when determining whether or not to rehire a probationary employee, and to prove his case, Grievant must establish the board's decision to not renew his contract was arbitrary and capricious. *Beheler v. Logan County Bd. of Educ.*, Docket No. 98-23-276 (Dec. 11, 1998). *See Miller v. Bd. of Educ.*, 190 W. Va. 153, 437 S.E.2d 591 (1993); *Pockl v. Ohio County Bd. of Educ.*, 185 W. Va. 256, 406 S.E.2d 687 (1991); *Rogers v. Logan County Bd. of Educ.*, Docket Nos. 99-23-196/246 (Nov. 16, 2002).

8. Respondent's decision not to renew Grievant's probationary contract was not arbitrary and capricious, nor was it unreasonable under the circumstances.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: March 4, 2009

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DENISE M. SPATAFORE
Administrative Law Judge