WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MARTHA BAILEY,
Grievant,

v. **Docket No. 2011-0070-KanED**

KANAWHA COUNTY BOARD OF EDUCATION,
Respondent.

D E C I S I O N

Grievant, Martha Bailey, filed a grievance against Kanawha County Board of Education ("KCBE"), Respondent, protesting her dismissal from a teaching position at Dunbar Primary School. The July 19, 2010 grievance statement provides:

> Per the attached letter of July 15, I was wrongfully discharged. The finding that I engaged in willful neglect of duty is not supported by, and is contradicted, by the record. Step 3 hearing is requested per 18A-2-8(c).

The relief sought:

> Reversal of the discharge, reinstatement, back pay and all benefits.

By correspondence dated February 3, 2010, Grievant was advised that allegations had been made concerning her conduct, including the allegations that Grievant engaged in certain acts of inappropriate conduct, consisting primarily of mistreatment of students by making inappropriate physical contact with students and making inappropriate remarks to students. Further, Grievant was advised that a hearing would be held in order to receive evidence relating to whether or not the Superintendent should recommend disciplinary action against Grievant. A Pre-disciplinary Hearing was held at level one on February 11, 2010 and March 16, 2010, regarding the allegations of Grievant's misconduct. Grievant was present in person with Felicia Law, West Virginia Education Association, and legal counsel Andy Katz, Attorney-at-Law for the evidentiary hearings. Kanawha County

Schools and Grievant presented testimony and evidence.[1] The decision issued on May 13, 2010 by the designee Hearing Examiner Pam Padon recommended the employment of Grievant be terminated. Thereafter, Ronald E. Duerring, Ed.D., Superintendent of Schools concurred and adopted the findings and conclusion as his own. Grievant was advised by letter dated May 17, 2010, of her suspension without pay and that the Superintendent of Schools intended to recommend to the Kanawha County Board of Education that Grievant's employment be terminated. Superintendent Duerring recommended that Grievant be terminated from employment and the Board of Education voted to approve the Superintendent's recommendation. Grievant was advised by letter dated July 15, 2010, that Respondent KCBE voted at its July 14, 2010 meeting to terminate her employment. Grievant appealed.

A level three hearing was held before the undersigned Administrative Law Judge (ALJ) on November 17, 2010, in the Grievance Board's Charleston office. Grievant appeared with legal counsel Andy Katz of Katz Working Family Law Firm. Respondent KCBE was represented by its General Counsel, James W. Withrow.[2] This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about January 31, 2011. Both parties submitted fact/law proposals.

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[1] Kanawha County Schools presented the testimony of Elizabeth Mills, Stephanie Blake, Rebecca Wilson, Teresa Smoot, Ruby Stalnaker, Lori Ray, Jane Roberts, Gloria Gibbs, Jennifer Marinacci and Kay Lee. Grievant called Jeff Bishop and James Stockton as witnesses, as well as testifying on her own behalf. A transcript of the pre-disciplinary hearings with a total of sixteen exhibits was submitted as evidence of record at Level III.

[2] At the Level III hearing Respondent presented the testimony of Ruby Stalnaker, Teresa Smoot, Lori Ray, Rebecca Wilson, Gloria Gibbs, Jane Roberts and Jeane Ann Herscher. Grievant, by Counsel called Jeff Bishop and James Stockton as witnesses, as well as testifying on her own behalf. Grievant offered four additional exhibits at the Level III hearing, and Respondent offered one additional exhibit to supplement the record.

Synopsis

Grievant was suspended and ultimately terminated by Kanawha County Board of Education, Respondent, from her position as a kindergarten teacher at Dunbar Primary School. Grievant has previously been on an improvement plan and suspended for inappropriate employee behavior. Grievant, by Counsel, contends her termination should be overturned in that there is insufficient credible evidence that Grievant committed a disciplinary offense. Respondent maintains Grievant has demonstrated conduct which constituted cruelty, insubordination and willful neglect of duty.

An employee of a county board of education may be suspended or dismissed for immorality, incompetency, cruelty, insubordination, willful neglect of duty or unsatisfactory performance of duties. Respondent, by a preponderance of the evidence, met its burden of proof and established that Grievant's conduct violated applicable professional standard. Grievant has not established Respondent's disciplinary action was unlawful, arbitrary and/or capricious. Respondent proved the charges against Grievant and demonstrated cause for termination of her employment. This grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was employed by Kanawha County Schools for approximately twenty-six (26) years and has thirty (30) years of overall teaching experience.

2. Grievant was most recently employed by Respondent as a kindergarten teacher at Dunbar Primary School. Grievant had been assigned to Dunbar Primary for approximately fifteen (15) years.

3. Kay Lee is the Principal at Dunbar Primary School. Ms. Lee has held the position at Dunbar Primary for eight years and has been a principal in the Kanawha County School system for approximately forty-three years.

4. Principal Lee is of the opinion that Grievant did not like to have students in her class who are underachievers. Principal Lee avoids placing students in Grievant's class who are special needs or have behavior problems.

5. Grievant encourages parents of students from "good" backgrounds to request their children to be placed in her class.

6. Prior to the instant grievance, Grievant was aware that there were concerns with her attitude at school.[3]

7. On or about May 29, 2009, Grievant received a performance evaluation. As a part of that evaluation, Grievant was rated unsatisfactory in several areas.[4] The evaluation, among other attributes, notes "all students are not treated in a fair and

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[3] Grievant was suspended on December 16, 2008. A hearing was scheduled for January 22, 2009. That hearing never took place, Grievant and Respondent reached an agreement whereby Grievant agreed to utilize the Employee Assistance Program, relinquish all leadership roles at the school, and to meet with Jane Roberts, Assistant Superintendent for Elementary Schools and Principal Lee. Grievant did not further grieve her suspension and Grievant returned to school on January 26, 2009.

[4] Grievant is proficient at classroom instruction. Historically, Grievant's students have shown academic improvement under her tutelage, this point is not contested. Prior to the end of the 2008-2009 school year, Grievant's work as a teacher had been evaluated, positively.

equitable manner," "…some students have been held out of P. E. for punishment for not being finished with class work and a student was put outside the classroom door without supervision for punishment." Resp. Ex. 3.

8. Subsequent to the Grievant's evaluation, a plan of improvement was prepared and dated June 9, 2009. Grievant was placed on an Improvement Plan for the 2009-2010 school year to address deficiencies in the areas of Classroom Climate, Communication, and Professional Work Habits. The plan of improvement was applicable to the 2009-2010 school year, specifically running from August 21, 2009, to January 15, 2010.

9. Grievant filed a grievance contesting the unsatisfactory evaluation and plan of improvement. The issues were adjudicated and persuaded through the grievance process before the West Virginia Public Employees Grievance Board. The grievance was denied by a 2010 level three decision authored by Administrative Law Judge Wendy A. Elswick, *Bailey v. Kanawha County Bd. of Educ.*, Docket No. 2009-1594-KanED (Jan. 19, 2010).[5] Resp. Ex. 4. Grievant did not appeal this decision.

10. Jane Roberts is currently employed as the Assistant Superintendent for Elementary Schools, this is her fourth year in the position. Prior to serving in her current position, she has been employed by Respondent for a period as a Principal (12 years), a Curriculum Specialist for Elementary Schools, and as a kindergarten teacher. Ms. Roberts has been employed with Kanawha County Schools for approximately thirty-one years.

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[5] The undersigned takes judicial notice of *Bailey v. Kanawha County Bd. of Educ.*, Docket No. 2009-1594-KanED (Jan. 19, 2010).

11. Since the beginning of the 2009 school year, among other duties, Assistant Superintendent Roberts had been working with Principal Lee on Grievant's improvement plan. The improvement team met monthly.

12. Grievant's 2009-2010 improvement plan, among other corrective actions, provided that Grievant is to treat students in a fair and equitable manner and Grievant was expected to comply with the West Virginia Employee Code of Conduct. Further, the improvement plan specified that, "[i]f satisfactory performance is not attained, Ms. Bailey will be recommended for dismissal and termination." Resp. Ex. 3.

13. The West Virginia Board of Education Policy for Employee Code of Conduct states that all school employees shall:

> Exhibit professional behavior by showing positive examples of preparedness, communication, fairness, punctuality, attendance, language, and appearance.
>
> Contribute, cooperate, and participate in creating an environment in which all employees/students are accepted and are provided the opportunity to achieve at the highest levels in all areas of development.
>
> Maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination.
>
> Create a culture of caring through understanding and support.

14. During the fall of 2009 Assistant Superintendent Roberts received additional complaints pertaining to Grievant.[6]

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[6] Previously Ms. Roberts had received bullying complaints from co-workers of Grievant's along with various other complaints from both the school counselor and the school nurse. Grievant was suspended on December 16, 2008. Grievant did not grieve her suspension. Ms. Roberts and Principal Lee met with the staff on January 23, 2009, and advised that it was their hopes that the environment would improve, and they encouraged staff members to put any ill feelings toward Grievant behind them and to begin anew. Grievant returned to school on January 26, 2009.

15. In November, Elizabeth Mills came to Ms. Robert's office and requested that her son be transferred from Dunbar Primary School. On the transfer request Ms. Mills noted that she had concerns about physical abuse of students. Ms. Roberts discussed Ms. Mills' concerns with her. Ms. Mills described that she had been in the classroom several times and observed students being jerked by the arm and being kept from recess. Ms. Roberts approved the transfer of the student.

16. Assistant Superintendent Roberts contacted Principal Lee to discuss the concerns raised. Principal Lee advised Ms. Roberts that she too had received another letter of complaint pertaining to Grievant. This was a correspondence from Teresa Smoot, the guardian of a student in Grievant's class. Resp. Ex. 9.

17. The next day Ruby Stalnaker spoke to Principal Lee about her concerns regarding Grievant and prepared a letter outlining those concerns. Resp. Ex. 10.

18. Assistant Superintendent Roberts was made aware of three complaints pertaining to Grievant in a relatively short span of time by Ms. Smoot, Ms. Miller and Ms. Stalnaker. The dates of the correspondence from the individuals span a period of time in excess of a month between one another, but Respondent's collective knowledge of the complaints was within days of November 19, 2010.

19. Teresa Smoot is the grandmother and guardian of M.S.[7] Student M.S. was enrolled in Dunbar Primary School during the Fall of 2009. M.S. was assigned to Grievant's classroom. M. S. began having problems and expressing that he did not want to go to school.

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[7] Consistent with the Grievance Board's practice, this student and all minors will be referred to by their initials in this decision.

20. Ms. Smoot's letter to Principal Lee requested that M.S. be transferred to another class. Ms. Smoot characterized M. S.'s experience as "ineffective, traumatizing and critically discouraging." Ms. Smoot believes that M. S.'s experiences caused additional behavior problems for M. S.

21. Ms. Smoot and her sister came to see Principal Lee with their complaints regarding Grievant. Ms. Smoot expressed her belief that Grievant was unfair to the children, the children weren't given time to do their work and that Grievant yelled at them.

22. Elizabeth Mills is the mother of T. M. T. M. was a kindergarten student at Dunbar Primary School assigned to Grievant's classroom. T. M. attended Dunbar Primary from the beginning of the 2009-2010 school year until November 18, 2009. During the time period T. M. attended Dunbar Primary he was five years old.

23. T. M. is a "hyper" child with attention concerns. Grievant frequently contacted Ms. Mills to come to the school when Grievant was experiencing difficulty dealing with the child.

24. Ms. Mills advised the Dunbar Primary School via Principal Lee and Grievant that T. M. suffers from a condition that requires him to take stool softeners. At certain times T. M. is not able to anticipate his need to go to the bathroom adequately. Ms. Mills observed T. M. request to go to the restroom and being told by Grievant to wait, on more than one occasion. On at least one of those occasions, T. M. was not able to wait and soiled his pants. On other occasions Ms. Mills has observed that T. M. has come home in different clothing than the ones he wore to school.

25. T. M. was not permitted to attend physical education classes on numerous occasions.[8] Ms. Mills discussed this with Grievant more than once and brought it up at a Student Assistance Team meeting, which Grievant attended.

26. Ms. Mills discussed with Grievant that she should not try to restrain or hold T.M. down. These actions only made her son react worse.

27. Ms. Mills observed other students in Grievant's class being physically restrained.[9] On one occasion Ms. Mills observed Grievant holding T. M.'s arms down on the table. Ms. Mills observed Grievant dragging a student out of the classroom by the arms while the student was sitting on the floor. Ms. Mills requested that her son be transferred to another school.

28. During the fall of 2009, Ruby Stalnaker also went to see Principal Lee about the things her son was telling her were happening with other students. Ms. Stalnaker described children's hands being slapped and other inappropriate discipline.

29. Ruby Stalnaker is the mother of T. F. Student T. F. is five years old and was in Ms. Bailey's kindergarten class during the Fall of 2009. Ms. Stalnaker wrote a letter to the Principal of the school, regarding what her child reportedly observed in Grievant's classroom. Ms. Stalnaker testified twice regarding this information.

30. Ms. Stalnaker's correspondence indicated that students were being grabbed on the upper portions of the arms and shaken. Resp. Ex. 10. The justification for the

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[8] During the Fall of 2009, Ms. Bailey was on a plan of improvement for not permitting students to attend physical education classes, among other things.

[9] T. M. indicated to his mother that Grievant had on occasion physically restrained him outside of his mother's presence.

conduct varied, e.g., talking instead of doing an assignment. Reportedly, students T., M. and W., were shaken and their cheeks were squeezed in order to make them be quiet.

31. Student T. F. was fearful of Grievant. Ms. Stalnaker was of the opinion that T. F. had been negatively affected by seeing other students treated in such a manner.

32. After Grievant was suspended, T. F.'s attitude towards school changed and he was no longer reluctant to go to school.

33. After these additional allegations concerning Grievant's abuse of students arose, Respondent instructed Jeane Ann Herscher to investigate the complaints about Grievant's actions with students.

34. Previously, in response to some prior complaints received, the West Virginia Department of Health and Human Resources (DHHR) investigated Grievant's conduct toward specific children and issued a report dated January 26, 2009. The investigation was primarily focused on three identified students and specific allegations of inappropriate treatment. The information gathered during the course of the investigation did not support a finding that Grievant had committed the specified allegations of abuse and neglect. Gr. Ex. 10.

35. In response to new allegations of inappropriate behavior, Ms. Herscher interviewed several students at Dunbar Primary School including M. S., T. F., W. S., K. C. and T. M. Each of the students reported either observing or being the subject of physical mistreatment by Grievant.

36. Ms. Herscher prepared a written report to the Superintendent of Schools and a copy of the report was admitted into the record. Resp. Ex. 11.

37. For a period of approximately twelve years, Gloria Gibbs was a teacher's aide at Dunbar Primary School. Ms. Gibbs was assigned to Grievant's classroom. Ms. Gibbs was intimidated and bullied by Grievant. She sought and received a transfer to another classroom for the 2009-2010 school year.[10] Ms. Gibbs testified regarding Grievant's conduct as a kindergarten teacher and Grievant's interaction with students.

38. Ms. Gibbs is afraid of Grievant and testified of events that transpired after securing a transfer from Grievant's classroom.[11] Ms. Gibbs is of the opinion that Grievant has and is inclined to take aggressive actions towards co-workers who Grievant believes have betrayed her. Ms. Gibbs testified consistently throughout the numerous proceedings.

39. Grievant was suspended in 2008 due primarily to complaints from the staff at Dunbar Primary. Grievant was permitted to return to school in January of 2009. When Grievant returned to school she told Ms. Gibbs that she would get back at the staff who complained about her even "if it took twenty years."

40. During the 2008-2009 school year, a student in Grievant's classroom soiled his pants frequently. Sometimes Ms. Gibbs would wash his clothes and other times she would just change his clothes and put the soiled ones in a plastic bag to go home.

41. While Grievant was suspended in 2008, that student reportedly did not have any "accidents." After Grievant returned to school in January of 2009, Grievant told Ms.

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[10] Prior to the 2009-2010 school year, Ms. Gibbs met with Principal Lee, Assistant Superintendent Roberts and Superintendent Duerring and advised them that she could no longer work with Grievant. A position became available in another classroom at Dunbar Primary School and Ms. Gibbs was placed in that position.

[11] Ms. Gibbs provided details of Grievant's interactions with one student prior to the 2009-2010 period where Grievant jerked the student out of her chair and smacked the child on her hand, on more than one occasion.

Gibbs that she was being blamed for the accidents and that no one could know what was happening. Ms. Gibbs continued to wash the student's clothing without telling anyone. One day the school nurse saw Ms. Gibbs put the clothes in the washing machine.

42. Ms. Gibbs told Grievant about the nurse seeing the clothing. Grievant said that they couldn't do that anymore. After that the student was put on the bus twice with soiled pants and on two occasions the student's underwear was removed and thrown away.

43. Ms. Gibbs did not initially report this activity to anyone because she was afraid of Grievant.

44. Teacher's aide Gibbs and Grievant's classrooms adjoined one another in 2009-2010. Ms. Gibbs could sometimes hear Grievant screaming through the wall in her classroom.

45. Rebecca Wilson is a Title I teacher assigned to Dunbar Primary School. Ms. Wilson provides additional support for students in reading and math. Ms. Wilson worked in Grievant's classroom, along with the other kindergarten classrooms, during the 2008-2009 school year. Ms. Wilson observed Grievant's treatment of students during a time period, which is prior to the instant facts.

46. Ms. Wilson observed Grievant place a student outside of the classroom with no supervision. Ms. Wilson also saw Grievant restrain the student and jerk the student up by her arm because she was not sitting correctly. Ms. Wilson observed Ms. Bailey hitting a student on the bottom when he wasn't sitting correctly.

47. Ms. Wilson was intimidated by Grievant, and generally did what Grievant told her. Ms. Wilson did not report her observations of Grievant's actions because she was intimidated by Grievant.

48. There is a difference in the atmosphere in Grievant's classroom and the other kindergarten classrooms. The other kindergarten classes are not as overbearing or as tense as Grievant's room.

49. Grievant was observed and acknowledges taking students' papers from them and tearing them up and throwing them away if the work was not completed to Grievant's satisfaction.

50. Grievant was observed taking shoes from students' feet and slinging the shoes across the room. This could occur if a student played with his or her shoes or shoe laces.[12]

51. Lori Ray is a Title I math and reading teacher at Dunbar Primary School. Ms. Ray has approximately 29 years of teaching experience. Ms. Ray was in Grievant's classroom twice a week during the 2009-2010 school year.

52. Ms. Ray was in Grievant's classroom and observed Grievant interact with a male student, W., who had pulled the sleeves of his shirt down over his hands.

53. Grievant became angry and grabbed the shirt and quickly and abruptly pulled the shirt off over the student's head. The student reacted by attempting to cover himself with his arms and ran to the back of the classroom.

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[12] Citing testimony of Grievant's former teacher's aide, Gloria Gibbs. Grievant acknowledges that she would sometimes remove students' shoes, but denied ever throwing them.

54. Ms. Ray asked W. if he was okay, and W. responded that “I hate school.”

55. On another occasion, Ms. Ray was teaching a small group. Ms. Ray saw Grievant walk past a female student, K. C., who was seated in a chair, and put her hands on the student’s back and push the student’s upper body down.

56. Ms. Ray does not believe that using force is an appropriate way to deal with students, particularly kindergarten students.

57. Ms. Ray described the atmosphere in Grievant’s classroom as authoritarian and unpredictable, and she believes that this has a negative effect on the students.

58. Ms. Ray noticed a huge change in the atmosphere in Grievant’s classroom during Grievant’s absence. The children were more relaxed and their behavior was better.

59. Stephanie Blake teaches physical education at Dunbar Primary School. She has taught at the school for approximately nine years.

60. Ms. Blake keeps daily attendance records for students in her class. When Ms. Blake becomes aware that a student is present at school but does not come to her class, she makes a notation of that on the record. On numerous occasions during the 2009-2010 school year several of Grievant’s students were held out of physical education as a punishment or because they did not complete their work, and Ms. Blake documented these instances.

61. Grievant is stern and direct with the children in her care. Grievant’s classroom was a domain she controlled with self-awarded impunity.

62. The February 3, 2010 notice to Grievant signed by Kanawha County Superintendent of Schools Ronald E. Duerring stated, in relevant part, that;

> Specifically it is alleged that:

1. You have used excessive physical force on several occasions with your students, including:
   a) squeezing student KC's face and shaking her;
   b) shaking and grabbing student MS by the finger and arm;
   c) shaking, grabbing and pulling student WS by the arm;
   d) holding student TM down, shaking him and withholding gym time for him;
   e) shoving student TM down on his back, resulting in a bruise on his back;
   f) taking student KC's head and shoving it forcefully to the ground while the student was seated in a chair; and
   g) pulling a shirt off WS's head and throwing it to the ground.
2. You withheld restroom privileges from student TM who was taking a medication that required more frequent breaks;
3. You yelled and made demeaning and inappropriate comments to students, including telling student TF that if he ever forgot his money for the book fair again, you would throw his money in the trash;
4. You took student papers and threw them away;
5. You took students' shoes away from them;
6. You continued to not permit students to go to physical education despite being advised that students are required to attend physical education;
7. You attempted to conceal the fact that one of your students was soiling his pants. You instructed your aide not to disclose the child was soiling his pants and on at least one occasion placed the student on the bus without changing his pants; and
8. You created an atmosphere in the classroom that caused children to be afraid for their personal safety and hindered learning.

Resp. Ex 1.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). An employee of a county board of education may be suspended or dismissed 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. "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 is a veteran teacher. Nevertheless, allegation of inappropriate conduct arose pertaining to Grievant's classroom demeanor and conduct with children in her kindergarten classroom. Respondent characterized Grievant's actions as cruel, insubordinate and willful neglect of duty. Grievant challenges the veracity of the claims against her and contends that Respondent and several of the witnesses were biased and predisposed against her. Grievant's Counsel challenges the sufficiency of Respondent's evidence to support the grounds stated and avers Grievant's dismissal should be overturned.

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. of Educ.*, Docket No. 96-20-380 (Mar. 18,

1997). *See Black's Law Dictionary*, 5th ed. at 1064. 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 and 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*.

I. Credibility

It is concluded that interactions and events of significance transpired during the 2009-2010 school year at Dunbar Primary School in Kanawha County, West Virginia, between Grievant and kindergarten students in her charge. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations is beneficial if not 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). In the circumstances of this case, assessment of several of the witnesses' testimony is deemed prudent. Relevant events were testified to by adults, who witnessed specific 2009-2010 interactions between students and Grievant, in addition to information relayed by minors.[13] Further, it is also recognized that adult witnesses testified to events

[13] It is recognized that five-year-olds do not testify before this body. Bolstering testimony or other evidence was also presented tending to lend greater reliability, than not, to the information reported by minors to their respective parents or guardian. Such testimony will be taken into consideration in assessing the probability of similar if not identical events transpiring.

between Grievant and students that they had personally witnessed transpire in previous school years. The incidents were similar, if not identical, to the 2009-2010 incidents reported by minors to their respective parents or guardian.

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*.

The undersigned finds Grievant is less than candid with regard to her testimony that she is incapable of raising her voice. Statements of others with limited awareness of the factual relevance noted Grievant yelled[14] and further it has been provided that Grievant can be heard yelling at the children through the wall of her room, in the adjoining classroom. Grievant has a vested interest in the instant subject matter; her testimony was not persuasive regarding key elements of the allegations. Grievant attempts to wrap herself in a blanket of half truths as a buffer from the reality of her actions. This was demonstrated previously in her attempt to manipulate her aide's recollection of information for the DHHR January 2009 investigation. *See* Gloria Gibbs Testimony, March 16, 2010

[14] Stephanie Blake, Teresa Smoot, Gloria Gibbs, Principal Lee; "I've heard her scream at children."

Predetermination Hearing Transcript. Grievant's actions in the presence of adults toward children undermine the reliability of her blanket denials.

It is disingenuous for Grievant to assert the alleged problems with her behavior are due to prejudice and envy. Grievant's perception of her greater goodness is not shared by all. Grievant's nature can be caring and extremely nurturing, but that is not the the whole picture. Credible testimony of witnesses strongly provides that Grievant was controlling and vengeful. Adult co-workers were fearful of Grievant. Grievant's projected attitude that she knows what is best is more villainous than she was inclined to verbally communicate. Grievant's testimony regarding her tolerance and willingness to go the extra mile for all her students was not persuasive. The portrait that Grievant verbally paints of herself did not dispel known facts and suspected truths. Grievant is extremely aware of class and social standing, children she determines worthy are treated differently than students she considers problematic. The undersigned determines Grievant's testimony to be unreliable and less than credible.

Teacher aide, Gloria Gibbs provided information of past and relevant conduct of Grievant. As an individual who was in the presence of Grievant for approximately twelve years, she had unique knowledge of Grievant's classroom conduct. Ms. Gibbs provided consistent, clear testimony about several different events involving Grievant, none of which sounded contrived. She was candid with her comments but not vicious; she provided first-hand perceptions and acknowledged her own actions. Ms. Gibbs was under Grievant's control and admits she was intimidated by her. Ms. Gibbs further testified to yelling by Grievant at students during 2009-2010. The attitude and conduct of Grievant toward co-workers is a matter of record. *Bailey v. Kanawha County Bd. of Educ.*, Docket No. 2009-

1594-KanED (Jan. 19, 2010) Resp. Ex 4. Notwithstanding, it was not apparent that Ms. Gibbs was attempting to get pay back or harbored unrealized ill-will toward Grievant. It was evident that Ms. Gibbs wanted the best for current and future kindergarten children in attendance at Dunbar Primary. The undersigned finds the testimony of Ms. Gibbs to be consistent, plausible and credible.

Jane Roberts, Assistant Superintendent for Elementary Schools, received complaints about Grievant. Ms. Roberts testified of her actions and the information she received from various sources. Her testimony regarding Grievant was presented in a concise and direct manner. Ms. Roberts and Principal Lee were members of Grievant's Improvement Team and had been actively participating with Grievant to assist her in meeting identified performance goals. Grievant avers that Principal Lee is biased against her.[15] This was not evident by the documented deeds of the Principal or the transcript of her testimony. This ALJ is aware it has been previously acknowledged that

> Principal Lee and Grievant do not have a good working relationship. Principal Lee has been aware of the conflicts between Grievant and other staff, and has not addressed the issues until Ms. Roberts began providing Principal Lee with direction on how to handle the situation. Principal Lee is an administrator and is paid to handle personnel issues. She should have been more proactive in dealing with the chaos Grievant created in the school environment.

Resp. Ex. 4. It is conceivable that Principle Lee was inclined to believe the initial reports. Nevertheless, Principal Lee engaged in the appropriate actions, contacting and communicating with administrative personnel. Investigating the veracity of the allegations was proper. The individual actions of Assistant Superintendent Roberts and Principal Lee

[15] Grievant is of the belief and contends, in part, these charges are being brought because of bias on the part of Principal Lee.

of communicating with outspoken and concerned parents is not inappropriate. Further, such behavior is not evidence of nefarious motives. Commissioning an investigation into the facts of the matter is prudent and conscientious administrative behavior. In review of the cited factors to assess witness testimony, the undersigned finds the testimony of Assistant Superintendent Roberts and Principal Lee to be credible.

Jeane Ann Herscher, Investigator, testified before the undersigned in support of the February 2, 2010 investigative report commissioned in the Fall of 2009. Ms. Herscher interviewed five of Grievant's former students with the permission of and/or in the presence of their parent or guardian on December 2, 2009. The report, Resp. Ex. 11, details the information gathered. The age of the students, their ability and/or willingness to disclose reliable information was of concern. Ms. Herscher provided insight, explanation and quality assessment assurances of the information present in the report. There was a "significant amount of reporting indicating that physical contact of varying sort has been used by [Grievant] with students" and "this is bolstered by observations of Title I employee and previously reported incidents of other employees." Resp. Ex. 11. The undersigned finds the testimony of Investigator Herscher to be credible as to what was reported and the manner in which the information was collected. The veracity of the information is assessed in association with creditable collaborated testimony of record.

Individual guardians and parents of students in Grievant's kindergarten class contacted school officials. Those parents/guardians are: Elizabeth (Beth) Mills, mother of TM; Teresa Smoot, grandmother and guardian of MS; and Ruby Stalnaker, mother of TF. Each had concerns regarding information which was being relayed and/or what one

or more had specifically witnessed transpiring in Grievant's class.[16] The information testified to by each was similar in nature. Further, and perhaps more revealing than not, was the similarity of the actions reported by the minors to acts witnessed by adults at various times. The conduct reported, including not permitting students to go to the restroom, throwing papers away, taking off their shoes and throwing them, yelling at students, jerking students by the arm, pushing and pulling of students and knowingly permitting a student to leave school with soiled pants. The majority of these acts were not solely relayed by kindergarten students but were also witnessed by adults, at one time or another.[17] The testimony of the various guardians was delivered in a calm and straight-forward demeanor. Each attempted to clarify their individual event of concern. Further, Ms. Stalnaker testified that she saw Grievant shake a student and squeeze the cheeks of other students. Ms. Mills, who was in Grievant's class more than any other parent who testified, provided that she witnessed two different students being dragged from the classroom by their arms, while they were sitting on the floor.

The undersigned finds the testimony of Title 1 teachers Lori Ray and Rebecca Wilson, coupled with Gloria Gibbs, to be reliable information with regard to past classroom conduct of Grievant.[18] Further it is prudent and deemed credible that the information

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[16] Written documents were obtained from each. Resp. Ex. 8, 9, and 10.

[17] Lori Ray teaches Title I math and reading at Dunbar Primary school and had occasion to be in Grievant's classroom during the 2009-2010 school year on a regularly scheduled basis. Rebecca Wilson, a Title 1 teacher at Dunbar Primary had occasion to be in Grievant's classroom during the 2008-2009 school year to teach math. As Grievant's former teacher aide, Gloria Gibbs was in Grievant's class on a regular basis.

[18]Ms. Wilson witnessed Grievant restrain a student and jerk the student up by her arm because she was not sitting correctly.

described in the respective guardians' 2009 correspondence were similar in setting, in nature and provided information virtually identical to events described by adult teacher aides and co-workers of Grievant, who had occasion to be in Grievant's class.

II. Merits

Teachers function as custodians, caretakers, role models, and disciplinarians of their students each day while the children are in their custody. 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.

The undersigned has been presented with a unique situation. The charges against Grievant are serious and damaging. Further, some of the allegations were predicated upon information relayed by children. It is recognized that not all, but some of the allegations specified in the February 3, 2010 notice letter originated due to hearsay information.[19] However, testimony of record was not limited to hearsay information. Dragging students by the arm, throwing students' papers away, slinging students' shoes

[19] Historically, this Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (1997); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-8-115 (June 8, 1990).

across the room and permitting a student to go home with soiled pants are among the myriad examples of inappropriate and unacceptable conduct of which Grievant has engaged. These actions and the context of the deeds were witnessed and testified to by adults.

To prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. *Williams v. Cabell County Bd. of Educ.*, Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ.*, Docket No. 95-29-151 (Aug. 24, 1995); *Hoover v. Lewis County Bd. of Educ.*, Docket No.93-21-427 (Feb. 24, 1994). Willful neglect of duty encompasses something more serious than incompetence. *Bd. of Educ. v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120, 122 (1990); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996). Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. *Adkins v. Cabell County Bd. of Educ.*, Docket No. 89-06-656 (May 23, 1990).

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); and *Powell v. Hardy County Bd. of Educ.*, Docket No. 04-16-412 (April 4, 2005). Grievant's actions in not permitting a student

to go to the restroom, throwing students' papers away, taking off student's shoes and throwing them across the room, yelling at students, jerking students by the arm, pulling a student's shirt off, holding a student down without cause, pushing a student and knowingly permitting a student to leave school with soiled pants, were sufficiently knowing and intentional as to exceed mere negligence or oversight. The fact that these acts caused primarily emotional rather than physical harm to the young students does not make Grievant's conduct any less cruel. *Jordan v. Mason County Bd. of Educ.* Docket No. 99-26-080 (July 6, 1999). Grievant's actions were deliberate.

Grievant cares about children and the learning process. It is uncontested that Grievant is proficient in presenting lesson material to students. Grievant is adamant that the reason she is there [a teacher] is to effect positive achievement and anything less than the student's best is unacceptable. This is problematic if achieved by intimidation, fear and abuse. Grievant advises parents that meeting the standard is usually not sufficient in her class. Grievant was a professional educator and an effective motivator but her conduct had to be in accordance with applicable codes of conduct.

Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Education*, Docket No. 26-89-004 (May 1, 1989). In order to establish insubordination, the employer must not only demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, but that the employee's failure to comply was sufficiently knowing and intentional as to constitute the defiance of authority inherent in a charge of insubordination. *Jones v.*

Mingo County Bd. of Education, Docket No. 95-29-151 (Aug 24, 1995); *Conner v. Barbour County Bd. of Education*, Docket No. 94-01-394 (Jan. 31, 1995).

Under Kanawha County Schools' policy and West Virginia Board of Education Policy 5902, a teacher is required to demonstrate the following attributes:

> 4.2.1. exhibit professional behavior by showing positive examples of preparedness, communication, fairness, punctuality, attendance, language, and appearance.
>
> 4.2.2. contribute, cooperate, and participate in creating an environment in which all employees/students are accepted and are provided the opportunity to achieve at the highest levels in all areas of development.
>
> 4.2.3. maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination.
>
> 4.2.4. create a culture of caring through understanding and support.
>
> 4.2.5. immediately intervene in any code of conduct violation, that has a negative impact on students, in a manner that preserves confidentiality and the dignity of each person.
>
> 4.2.6. demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior.

Grievant is aware of the behavior that is expected of her in regard to her interactions with the students in her charge. Grievant's deeds were sufficiently knowing and intentional to effect student's attitude and perception of school. Principal Lee testified it is her opinion that Grievant can be pleasant and appropriate at times but also has a side of her that can be vicious and vindictive. Ms. Gibbs, formerly Grievant's aide, specified that Grievant is vengeful and retaliatory. Grievant had recently been on an Improvement Plan to address identified performance issues. The Plan ran from August 21, 2009, to January 15, 2010.

This was a constructive way to make Grievant aware of deficiencies and assist her in strengthening identified areas of weaknesses.

The undersigned, in review of the record in total, is persuaded that while it is acknowledged Grievant is proficient in presenting the material to students, there are ongoing behavior issues with regard to Grievant's treatment of some of the children in her care. Grievant does not acknowledge that her interaction with students is at times inappropriate. Nevertheless, Grievant is aware that there were concerns with her conduct at school.[20] Classroom climate was identified as a deficiency. Grievant's 2009-2010 classroom conduct was observed and testified to by credible adult witnesses. Prior administrative actions did not motivate Grievant to exhibit acceptable behavior. Instead, her devotion to her own principles overrode established codes of conduct.

"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*

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[20] Grievant had been suspended several months before the current grievance due to identified behavior concerns. The previously identified behavior concerns were not in regard to her treatment of students. Nevertheless, as a result of that suspension, Grievant and her then representative had agreed to meet with Principal Lee and Ms. Roberts regularly. At those meetings, the four discussed Grievant's overall performance and attitude. Clearly Grievant knew what Principal Lee and Ms. Roberts considered to be problems with her behavior, including Grievant's methods of disciplining kindergarten students in her care. Grievant was afforded an opportunity to discuss the issues with administrative personnel of Respondent.

and Human Res., Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions are closely related to actions that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

Actions taken by Respondent were not arbitrary and capricious. The nature of the misconduct in this case was willful, knowing and intentional to the degree that the actions constitute a reasonable and sufficiently substantial basis for disciplinary actions. Respondent's reaction to the information presented was appropriate. Grievant's actions were deliberate and intentional to the degree that the conduct constituted insubordination and willful neglect of duty.

It is recognized that when grounds for a school employee's dismissal include charges relating to conduct which is deemed correctable, the county board must establish that it complied with provisions of West Virginia Department of Education Policy 5310 requiring it to inform the employee of his deficiencies and afford him a reasonable period to improve. *Mason County Bd. of Educ. v. State Supt. of Schools*, 165 W. Va. 732, 739, 274 S.E.2d 435, 439 (1980); *See also Maxey v. McDowell County Board of Education*, 575 S.E.2d 278, 2002 W.Va. LEXIS 226 (2002); *McMann v. Jefferson County Bd. of Educ.* Docket No. 2009-1340-JefED (Oct. 21, 2009). In the instant case, Respondent contends that under the facts and circumstances presented, an additional improvement plan is not required nor likely to orchestrate lasting change. The potential for harm is readily apparent.

While Grievant is a teacher with thirty years of experience and ability, she also has had the benefit of a prior improvement plan, which did not motivate her to significantly adjust her attitude or behavior in the manner prudent thought would dictate. In the circumstances of this case, the undersigned is persuaded that Grievant's attitude and

misconduct in this case constitute a reasonable and sufficiently substantial basis for termination of employment without further opportunity to improve.

III. Reprisal

Grievant asserted she is the victim of bias and reprisal. WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a *prima facie* case of reprisal, the Grievant must establish, by a preponderance of the evidence, the following elements:

> (1) that he engaged in protected activity;
>
> (2) that he was subsequently treated in an adverse manner by the employer or an agent;
>
> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
>
> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). "[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel

action." *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994). Grievant has concluded and rationalized that officials employed by Respondent have a negative perception of her and her interaction with others. Grievant contends Principal Lee and Associate Superintendent Roberts were individually and/or collectively predisposed against her.

Grievant may truly believe that others are out to get her, but this belief is not enough to sustain the accusation of reprisal and conspiracy levied against Respondent, the Kanawha County Board of Education. Grievant did not demonstrate through any measurable means that the actions of Respondent were tainted by nefarious motive. The information of record does not include evidence which establishes or significantly tends to indicate tainted action on the part of agents of Respondent. The evidence of record indicates that administrative personnel attempted to assist Grievant. An unflattering observation can be a valid reflection. The improvement plan was designed to aid Grievant with what had been identified as deficiencies, not punishment. There is no evidence that a dispute between Grievant and any administrators of Kanawha County Board of Education facilitated or significantly contributed to the instant disciplinary measure.

As to the severity of the penalty imposed, this is an affirmative defense. 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). 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). 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).

Under the circumstances presented, it has not been demonstrated that the disciplinary measure levied was so clearly disproportionate to the employee's offense that it constitutes an abuse of discretion. Investigation of Grievant's conduct with regard to then current students was revealing of both past and present conduct. Grievant is and was unwilling to acknowledge shortcomings in her conduct. Respondent presented persuasive testimony and evidence to demonstrate that Grievant has teaching skills and cares about the students; however, the record also reflected conduct of Grievant that is disturbing and unlawful. Grievant's actions were deliberate and were intended to inflict emotional or physical pain upon a child and constituted cruelty as contemplated by W. VA. CODE § 18A-2-8. This behavior constituted insubordination and a willful neglect of duty.

The events of this matter are extremely unfortunate and regrettable, but the undersigned cannot find that termination was too severe a penalty. Respondent had discretionary options in the circumstances of this case. Nevertheless, Respondent elected to terminate Grievant. Given the considerable deference afforded to employers in disciplinary situations, the undersigned is without sufficient justification to rule that the discipline imposed was excessive. Respondent has substantial discretion to determine a

penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute his judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997).

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *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).

2. A board of education may suspend or dismiss any person in its employment for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a *nolo contendre* to a felony charge. W. VA. CODE § 18A-2-8. Suspension or dismissal of a teacher or school employee pursuant to W. VA. CODE § 18A-2-8 must be exercised reasonably, not arbitrarily and 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); *De Vito v. Board of Education of Marion County,* 285 S.E.2d 411 (W.Va. 1981); *Harry v. Marion County Board of Education,* 203 S.E.2d 319, Syl. Pt. 1 (1998); *Maxey v. McDowell Co. Board of Ed.*, 575 S.E.2d 278 (2002).

3. Dismissal of an employee under W. VA. CODE § 18A-2-8 “must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously.” Syl. Pt. 3, in part, *Beverlin v. Board of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975); Syl. Pt. 4, in part, *Maxey v. McDowell County Board of Education*, 212 W. Va. 668, 575 S.E.2d 278 (2002); Syl. Pt. 7, in part, *Alderman v. Pocahontas County Bd. of Educ.*, 223 W.Va. 431, 675 S.E.2d 907(2009).

4. Insubordination involves 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). Insubordination " encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988) *citing Weber v. Buncombe County Bd. of Educ.*, 266 S.E.2d 42 (N.C. 1980).

5. 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 County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996).

6. To prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. *Williams v. Cabell County Bd. of Educ.*, Docket No. 95-06-325 (Oct. 31, 1996); *Jones v.*

Mingo County Bd. of Educ., Docket No. 95-29-151 (Aug. 24, 1995); *Hoover v. Lewis County Bd. of Educ.*, Docket No.93-21-427 (Feb. 24, 1994).

7. Respondent demonstrated its disciplinary actions, in the facts of this case, were not arbitrary, capricious or clearly excessive. Respondent met its burden of proof by a preponderance of the evidence, and established just case for disciplinary actions against Grievant.

8. Respondent established by a preponderance of the evidence that Grievant's actions were deliberate and intentional to the degree that the conduct constituted insubordination and willful neglect of duty.

9. Grievant's actions were deliberate, intentional and inflicted emotional or physical pain upon a child which constitutes cruelty as contemplated by W. VA. CODE § 18A-2-8.

10. Respondent established by a preponderance of the evidence that, in the circumstances of this case, Grievant's pattern of conduct constituted a terminable offense.

11. The 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).

12. Grievant failed to meet her burden of demonstrating the penalty was clearly excessive or reflects an inherent disproportion between the offense and the personnel action.

13. Respondent had discretionary options in the circumstances of this case. Considerable deference is afforded to employers in disciplinary situations. An Administrative Law Judge will not substitute his judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997).

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: August 2, 2011

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Landon R. Brown
Administrative Law Judge