

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**DANIEL MILES,
Grievant,**

v.

Docket No. 2023-0116-CabEd

**CABELL COUNTY BOARD OF EDUCATION,
Respondent.**

DECISION

Grievant, Daniel Miles, filed this grievance against Cabell County Board of Education ("CCBE"), Respondent, protesting his suspension without pay. The original grievance was filed on August 15, 2022, and the grievance statement provides:

Grievant was suspended without pay for allegations of "sexual conduct". These charges can easily be proven false with surveillance footage of the hallways and public spaces where the false allegations claimed to occur. Negligence on part of school in failing to have adequate working surveillance cameras.

Grievant's requested relief;

Reinstatement, Back Pay.

As authorized by W. VA. CODE § 6C-2-4(a)(4), this grievance was filed directly to level three of the grievance process.¹ A level three hearing was held before the undersigned Administrative Law Judge on January 18 and 19, 2023, in the Grievance Board's Charleston office. Grievant appeared in person and by legal counsel Abraham Saad. Respondent appeared by Dr. Ryan S. Saxe, Superintendent, and by General Counsel Sherrone D. Hornbuckle-Myers. At the Level Three hearing, testimony was taken from eleven or more witnesses: Chuck Kingery, Independent investigator

¹ W. VA. CODE § 6C-2-4(a)(4), provides that an employee may proceed directly to level three of the grievance process upon agreement of the parties, or when the grievant has been discharged, suspended without pay, demoted or reclassified resulting in a loss of compensation or benefits.

contracted through Mountain State; minor children;² Sarah Fox, Counselor at Barboursville Middle School; Kerri Smith, Principal at Barboursville Middle School; Justin Boggs, Executive Director of Middle Schools; Tim Hardesty, Deputy Superintendent; Dr. Ryan Saxe, Superintendent; Brent Shirkey, parent; Tracy Brumfield, Physical Education teacher at Barboursville Middle School; Matthew Croft, CPS:IIU Investigator; and Grievant. Exhibits from both parties were admitted into evidence and numbers were kept according to their presented proposed exhibit list. At the conclusion of the level three hearing, the parties were invited to submit written proposed findings of fact and conclusions of law proposals. Both parties submitted Proposed Findings of Fact and Conclusions of Law, and this matter became mature for decision on or about June 16, 2023, on receipt of the last of these proposals.³

Synopsis

Grievant alleges that his suspension without pay was unjust, unsupported by facts, and the result of Respondent's failure to follow Federal Title IX Statute and Cabell County Board of Education (CCBE) Policy. Respondent, CCBE, argued that its actions were proper and in accordance precedent which recognizes and provides for suspension without pay predicated on pending criminal charges. Grievant maintains Respondent violated Grievant's liberty and property interest by failing to follow identifiable policy and failing to follow procedure, which allegedly would have prevented the course of events

² It is prudent and in accordance with Grievance Board practice not to identify minors by their full name. Students referenced in this decision will be identified by their initials.

³ The parties were each granted one or more extensions to file post hearing argument and/or fact-law proposals. Ultimately the PFOFs and subsequent support documents were due, by post mark date of June 16, 2023.

that led to criminal charges and Grievant's suspension. Grievant proposes that the student(s) accusations – if taken as true – do not meet the definition of sexual in nature.

Respondent did not treat Grievant differently than similarly situated employees. If there are allegations of any inappropriate sexual touching, police are notified as required by the West Virginia State Code. e.g., see W. Va. Code §49-2-803; also see W. Va. Code §18A-2-8 Respondent is authorized to suspend, place the affected employee on administrative leave, or reassign the employee to duties that do not require direct interaction with students. W. Va. Code §18A-2-8(c). It is the sole and exclusive discretion of the school district coupled with reasonableness whether such employee is suspended, placed on leave (paid or unpaid), or reassigned. Respondent is not required to reassign Grievant during the pendency of the criminal charges.

Respondent established by a preponderance of the evidence proper grounds for its agents' actions, which include suspension with and without pay. Similarly, Respondent established that the decision to move Grievant from paid administrative leave to unpaid suspension was within its discretion. It is proper to suspend Grievant without pay pending the resolution of the criminal charges with which Grievant has been charged. In addition to Respondent's actions, Grievant's license was suspended by the West Virginia Department of Education; thus, Grievant is currently ineligible to teach. W. Va. Code §18A-3-6(b) Grievant has not established by a preponderance of the evidence that Respondent's actions were unlawful. Accordingly, 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 worked as a physical education teacher in Cabell County Schools for over 20 years; he received his undergraduate degree in sociology from Marshall University in 1998. He went on to receive a master's degree in physical education from Marshall (pre-K to adult) in 2000.

2. Grievant began working for Cabell County Schools in 2000 as a special education teacher in 2000. In the fall of 2002, he became a contract employee with the CCBE and in 2005 he received his first full-time teaching position with Cabell County Schools. Grievant worked the last three school years at Barboursville Middle School.

3. Over a span of 20 years, Grievant served many years as a girls' track coach and girls' volleyball coach at Barboursville Middle School and Cabell Midland High School both located in Cabell County, West Virginia. He primarily taught middle school and high school aged girls ranging from 6th grade to 12th grade. Grievant served as the technology integrated specialist for Cabell County Schools for a few years where he was in charge of helping teachers learn how to use the technology and to integrate that technology into their classrooms for all 27 county schools.

4. Over the course of his employment, Grievant received high remarks and positive performance evaluations over the tenure of his career. G Ex 21 – Personnel File and R Ex 2-6 – Grievant's evaluations.

5. It is noted that historically, separately, and distinct from the instant matter, in March 2021, Grievant was placed on paid leave pending an investigation; by Child Protective Services ("CPS"). Respondent acknowledges and agrees that no student

complained against Grievant in 2021.⁴ With regard to the 2021 investigation “CPS” made “no findings” against Grievant. G Ex 3 – CPS Report “No Findings of Abuse.”

6. The instant Investigation of 2022, began with a complaint from minor, female students C.B., M.M., and L.B.⁵

7. Minor-female-student, C.B. testified at the level three hearing, now a ninth grader, but was in eighth grade as a student at Barboursville Middle School when the incidents in question occurred in the winter of 2022. C.B. provided information regarding how and why she alleged the complaint against Grievant.

8. C.B. and two other female students went to school counselor, Sarah Fox, because she felt she should inform an adult about the events that happened. C.B. Testimony, also see R Ex 27:

a. C.B. indicated that Grievant stared at her and touched in places she didn't like. There were things Grievant said that made her feel uncomfortable.

b. Student C.B. provided that Grievant would tickle her a lot.

c. It is alleged that Grievant would hold CB's hand and hold it for longer than she felt was necessary. Student C.B. didn't like it.

d. Started out with things he would say and talking to her a lot, went from there to more physical touching. It started with her hands and shoulders and then started to more private areas, like her thighs.

9. When questioned how the interactions began, C.B. indicated it started out with little things Grievant would say and talking to her a lot more than other students.

⁴ Grievant was investigated in 2021. This investigation began when another employee at Barboursville Middle School was being investigated by Chuck Kingery, Independent Investigator for Cabell County Schools. During or as a result of the investigation, Grievant's actions drew interest and concern.

⁵ Students referenced in this decision will be identified by their initials.

Things progressed from there to more physical touching. It started with her hands and shoulders and then started to more private areas, like her thighs (L3 testimony).

10. C.B. documented her presentation of information in a written statement for school administration. R Ex 27.

11. Sarah Fox, Counselor at Barboursville Middle School, was the initial person C.B. and her friends went to see.

12. Counselor Fox testified at the instant level three hearing. Ms. Fox has been a counselor for going on 24 years. She primarily deals with individual counseling, crisis intervention, mediation, some classroom parenting meetings, and a variety of factors. Some of the other issues she deals with on a day-to-day basis included: conflict with other students, depression, and anxiety.

13. C.B., M.M., and L.B., went to counselor Fox on or about December 21, 2021, providing that they wanted to talk about a situation regarding Grievant that made them uncomfortable. The students were initially very nervous.

14. Counselor Fox met with the students and provided each student with the opportunity to submit information in a written format. Each provided a statement. R Exs 27, 28, and 29. Ms. Smith allowed the students to write out the statements with their parents and bring them back. The statements were handed over to school administration.

15. Counselor Fox was directed to contact Child Protective Services (CPS). Her report to CPS was memorialized.⁶ G Ex 6.

⁶ At the L3 Hearing, Counsel Fox provided that when she makes a CPS report, she is very cautious because she wants to be there for her students but does not want to initiate ongoing

16. Counselor Fox interpreted the students' disclosures as eighth grade girls, who were aware of their bodies and being touched period, and it made them uncomfortable, and they were not sure how to interpret that behavior out of a teacher.

17. Counselor Fox reported the disclosure(s) from the students to Principal, Kerri Smith.

18. At the relevant time of this grievance matter Kerri Smith served as principal of Barboursville Middle School. Principal Smith testified at the instant level three hearing. She had been in education for 30 years; an Elementary teacher in Mason County, West Virginia and then as an administrator. She has been in Cabell County, West Virginia, for (7) seven years. She started as Assistant Principal at Huntington East Middle School and then Assistant Principal at Barboursville Middle School, which she now serves as Principal.

19. Principal Smith indicated she knew Grievant as a colleague and as his supervisor.⁷

20. Principal Smith acknowledged she did not have students that regularly came to her concerning allegations of sexual misconduct between a teacher and a student. She contacted Justin Boggs, Executive Director of Middle Schools, who is her direct supervisor.

questioning to create further tainting of issues with whatever else may be going on. L3 Testimony
⁷ Ms. Smith was not the Principal at Barboursville Middle School in 2021, she was not aware of the investigation of Grievant in 2021. She testified that she only became aware of the incident when Grievant was being placed on paid administrative leave under her supervision as principal and it was brought to her attention by Deputy Superintendent Hardesty.

21. Arrangements were made so that the identified students (C.B., M.M., and L.B) could enter school at a separate entrance from where Grievant was stationed on morning duty at the school.

22. Justin Boggs, Executive Director of Middle Schools, acknowledges that he took over from this point on. Director Boggs testified at the level three hearing. Director Boggs had worked for Cabell County Schools in his position for approximately four and a half years. Mr. Boggs provided his career timeline as teaching his first four years at Beverly Hills Middle School in Cabell County and then went on as Assistant Principal at Milton Middle School for two years. This was followed by two years at Cabell Midland High School as Curriculum Principal, where he then went to the West Virginia Department of Education for five years and then returned to Cabell County to his current Director position.

23. Director Boggs had occasionally dealt with issues involving allegations of sexual misconduct between a teacher and a student. It is Bogg's practice to immediately report any such allegations as he is a mandatory reporter. Further, Director Boggs provided he had been given guidance that there was only a certain number of times students could be interviewed regarding allegations involving sexual misconduct. L3 testimony.

24. Director Boggs looked at the student's written statements and initiated contact with Deputy Superintendent Hardesty. Director Boggs was of the opinion that the student statements were alarming and instructed counselor Fox to contact CPS and the police.

25. As mandated reporters under W. Va. Code §49-2-803, school personnel are required to report suspected abuse or neglect within 24 hours to the West Virginia State Police, any law enforcement agency having jurisdiction, and the Department of Health and Human Resources.

26. Director Boggs did have knowledge of the 2021 incident. He became aware of this incident because of another allegation against another employee at the school. That investigation among other things, yielded a comment that Grievant should be investigated because he put hands on students. L3 testimony.

27. Director Boggs felt the need to call the police because of the nature of the allegations being sexual in nature, and he did not want to impede any type of investigation that would possibly happen. Director Boggs confirmed this with Tim Hardesty.

28. Tim Hardesty is Deputy Superintendent of Operations and Support for Respondent. He has held this position for a little over a year and a half. He was Assistant Superintendent over personnel and policy for three years prior to becoming Deputy Superintendent. Tim Hardesty was the Elementary Administrative Assistant prior to being Assistant Superintendent for several years. He was principal of Ona Elementary in Cabell County, West Virginia for eight years preceding and three years as Assistant Principal at the same school. Mr. Hardesty had taught for five years prior to becoming Assistant Principal.

29. Deputy Superintendent Hardesty had previously worked with Grievant for a number of years. He had gotten to know Grievant when they were enrolled in a class together and really got to work with Grievant when he became the Elementary

Administrative Assistant over all of the elementary schools. Deputy Superintendent Hardesty testified as to Grievant's employment with Respondent which began in 2005.

30. During the time in question 2021-2022, Deputy Superintendent Hardesty served as a Title IX coordinator for CCBOE.⁸

31. Deputy Superintendent Hardesty explained the Cabell County Schools policy once a felony (criminal) allegation is received. As a protective measure, an employee is placed on paid administrative leave. Child Protective Service is called, but Respondent also calls the Internal Investigation Unit (IIU). Then IIU decides if they are going to refer the complaint for an investigation. If there are any allegations of any inappropriate sexual touching, police are notified as required by the West Virginia State Code. Superintendent Hardesty reiterated that he was taught that once you turn something over to CPS and IIU, you give them the opportunity to decide if they are going to investigate it before Respondent begins an investigation.

32. Matthew Croft works for the West Virginia Department of Health and Human Resources (DHHR) as the supervisor of the Investigator of the Institutional Investigative Unit. Matthew Croft testified at the L3 hearing of the instant matter.

33. Mr. Croft has worked in the IIU since 2005; he has served as supervisor since March 1, 2017. Mr. Croft supervises 12 investigators (two of which are senior investigators). One of the many aspects of his job duties, Mr. Croft screens intakes or complaints that come through the DHHR/CPS hotline; he determines if the department

⁸ A Title IX investigation conducted by a school district is a process that is separate and distinct from any criminal investigation. Title IX investigations can be conducted before, during or after a criminal investigation. Title IX investigations do not have the same standard of evidence as criminal investigations.

will investigate those as abuse and neglect in an out-of-home setting. Supervisor Croft, on a regular basis and in the natural course of his job, reviews reports from investigators; and has the power to approve the report or send it back for further investigation or action.

34. Deputy Superintendent Hardesty was aware of the 2021 allegations against Grievant. He was aware Grievant had been placed on paid administrative leave and that CPS had been called concerning the allegations. Video surveillance supplied to CPS in 2021 case was actually pulled due to a separate investigation and Grievant appeared in the video in the background. L3 testimony.

35. Deputy Superintendent Hardesty was of the opinion that items of interest during the 2021 investigation were that Grievant had been interacting with some students, placing hands on their shoulders or flipping their hair, those types of things.⁹ CPS did not substantiate any allegations of abuse or neglect in the 2021 incident. Mr. Hardesty spoke with Grievant and his WVEA Representative following the 2021 investigation.

36. Deputy Superintendent Hardesty issued Grievant a non-disciplinary memo of conference which included, in pertinent part:

The summary of the IIU investigation states that you told the investigator you pat students on their head, poke at their sides and back of the neck. You described doing this in a jovial manner without sexual intent or motive. Mr. Miles, such interactions should not take place with students at school. You have a very jovial and outgoing personality that is beneficial to students in a school setting, but such touching and actions are not to take place. As an adult our actions must be such that all students feel welcome and appreciated while ensuring that none feel uncomfortable.

R Ex 7.

⁹ There was video footage in association with the 2021 investigation, Grievant appeared in some of the footage. Respondent did not have access to identified surveillance footage concerning the instant matter.

37. Deputy Superintendent Hardesty is of the opinion that Grievant was on notice that he should not be touching students. Further, Grievant made assurances to Deputy Superintendent Hardesty that his name would never come across his desk again.

38. Nonetheless, Grievant's name did come across Deputy Superintendent Hardesty's desk again in January of 2022, specifically when he delivered a letter placing Grievant on paid administrative leave for similar allegations. R Ex 10.

39. At the beginning of the instant matter after the report(s) was first made and the investigations were initiated, Respondent elected to place Grievant on paid administrative leave. Grievant remained on paid leave for over seven months. Grievant was placed on paid Administrative Leave for allegations of misconduct with regard to the instant matter on January 13, 2022.

40. When an investigation is conducted by the police or DHHR into a school employee, a school district is required under W.Va. §18A-2-8 to either suspend, place the affected employee on administrative leave, or reassign the employee to duties that do not require direct interaction with students.

41. It is the sole and exclusive discretion of the school district whether such employee is suspended, placed on leave (paid or unpaid), or reassigned.¹⁰

42. Grievant was charged with a misdemeanor of Sexual Abuse in the Third Degree on July 8, 2022, per W. Va. Code § 61-B-9 (a). (R Ex 18).

¹⁰ See, *Clark v. Kanawha County Bd. of Educ.*, Docket No. 2011-0987-KanED (Aug. 17, 2011); *Adkins v. Cabell County Board of Education*, Docket No. 2012-0085-CabED. (Apr 26, 2012); upheld by the Supreme Court of Appeals of West Virginia- *Cabell County Board of Education v. Adkins* - Memorandum Decision dated June 15, 2016.

43. Grievant was further charged with a felony of Sexual Abuse by parent, guardian, custodian, or Person in Position of Trust to child per W. Va. Code §61-8D-5 on July 8, 2022. (R Ex 19).

44. The status of Grievant's paid administrative leave changed after Grievant was charged criminally. Respondent sent Grievant notice of a conference at the Cabell County Board of Education Central Office. (R Ex 11).

45. Grievant, with legal counsel, was provided the opportunity to explain the charges and allegations of misconduct on July 20, 2022. Present at that meeting was Grievant (via phone), Grievant's attorney, Abraham Saad; Keri Smith, Principal of Barboursville Middle School; Justin Boggs, Executive Director of Middle Schools; Tim Hardesty, Deputy Superintendent of Operations and Support; Sherrone Hornbuckle, Respondent's General Counsel; and Superintendent Saxe.

46. Superintendent Saxe recommended to Respondent that Grievant be suspended without pay beginning July 20, 2022. (R Ex 12).¹¹ Dr. Saxe testified at the level three hearing as to his role in moving Grievant from paid administrative leave to unpaid suspension.

47. On August 2, 2022, Respondent Cabell County Board of Education, held a Board meeting.

48. On August 2, 2022, Respondent suspended Grievant without pay for a period to end when the criminal matter against Grievant is resolved. (R Ex 13).

¹¹ The letter further stated that pursuant to Senate Bill 535 that amended West Virginia Code Section 18A-3-6(b), Grievant would automatically receive a letter (R Ex 23) from the West Virginia Department of Education providing that Grievant's license be automatically suspended as of July 7, 2022.

49. Grievant was charged with felony charge of sexual abuse by a parent, guardian, custodian or person in a position of trust to a child and a misdemeanor charge of third-degree sexual abuse. As permitted by W. Va. Code §18A-2-8, Grievant was placed on administrative leave *without pay*.

50. Respondent CCBOE “has a duty and authority to provide a safe and secure environment in which students may learn and prosper; therefore, it may take necessary steps to suspend or dismiss any person in its employment at any time should the health, safety, or welfare of students be jeopardized, or the learning environment of other students has been impacted.” W. Va. Code §18A-2-8 (d).

51. Additionally, on August 11, 2022, a preliminary hearing was held before the Cabell County Magistrate Court. Magistrate Miller found probable cause and bound the criminal case over to the Cabell County Grand Jury.

52. Grievant filed a Level Three grievance on August 15, 2022

53. At the Level Three hearing, testimony was taken from eleven witnesses: C.B., minor child who disclosed allegations against Grievant; Chuck Kingery, Independent investigator contracted through Mountain State E.S.C.; Sarah Fox, Counselor at Barboursville Middle School; Kerri Smith, Principal at Barboursville Middle School; Justin Boggs, Executive Director of Middle Schools; Tim Hardesty, Deputy Superintendent; Dr. Ryan Saxe, Superintendent; Brent Shirkey, parent; Tracy Brumfield, Physical Education teacher at Barboursville Middle School; Matthew Croft, CPS:IIU Investigator; and Grievant, Daniel Miles. Exhibits from both parties were admitted into evidence and numbers were kept according to their proposed exhibit list.

Discussion

Respondent, CCBOE suspended Grievant. Grievant is and has been suspended with pay on February 21, 2022, and without pay since July 20, 2023. The question presented by this grievance is whether Respondent violated law, rule, or policy or otherwise acted arbitrarily and capriciously in suspending Grievant (with and/without pay). The suspension of an employee pending investigation of an allegation of misconduct is not disciplinary in nature and a grievant bears the burden of proving that such suspension was improper. *Miller v. Kanawha County Board of Education*, Docket No. 2015-0214-KanED (May 29, 2015); *Ferrell and Marcum v. Reg'l Jail and Corr. Facility Auth./W. Reg'l Jail*, Docket No. 2013-1005-CONS (June 4, 2013). This grievance does not involve discipline against Grievant. At the time of the level three hearing, Grievant had only been suspended pending investigation and a decision by Respondent on what, if any, discipline was appropriate. Respondent need not prove that actual disciplinary action would be justified but Respondent need only establish that suspension pending an investigation was proper. See *Lemery v. Monongalia County Bd. of Educ.*, Docket No. 91-30-477/494 (Apr. 30, 1992); *Kitzmiller v. Harrison County Bd. of Educ.*, Docket No. 13-88-189 (Mar. 31, 1989) (citing *Brown v. Dept. of Justice*, 715 F.2d 662 (D.C. Cir. 1983)). See also *Miller*, *supra*.

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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 party bearing the burden has not met its burden. *Id.*

Grievant alleged Respondent should have initiated a Title IX investigation instead of turning the complaint over to Child Protective Services (CPS) and law enforcement. Grievant, via Legal Counsel, argues that Respondent failed to properly complete an investigation. Grievant maintains Respondent had a responsibility to both complainants and to Grievant to carry out and follow Title IX policies and procedures.¹² Grievant contends that as a direct result of circumventing its federal obligation to investigate the matter, Respondent is responsible for Grievant's predicament.

The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in West Virginia Code §18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. See *Maxey v. McDowell County Bd. of Educ.*, 212 W. Va. 668, 575 S.E.2d 278 (2002); *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991); *Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975) *Hays v. Hampshire County Bd. of Educ.*, Docket No. 03-14-327 (Jan. 30, 2004). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. See *State v. ex re. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and

¹² Grievant argues that Mr. Hardesty's obligation as Title IX Coordinator is not limited to passing the information to CPS and/or law enforcement. Grievant suggests that pursuant to the standards of Cabell County Board of Education policy Standard 3362 and 2266, anti-harassment, any reports made to children services, which is CPS, or to local law enforcement shall *not terminate the compliance officer's responsibility to continue to investigate a complaint of any type of harassment.*

capricious when “it is unreasonable and without consideration, and in disregard of facts and circumstances of the case.” *Id.* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). Generally, an action is considered arbitrary and capricious if the agency did not rely on the 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. W.Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (October 16, 1996).” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997).

When an investigation is conducted by the police or DHHR into a school employee and a rational nexus exists between the alleged conduct and performance of the employee employment, a school district is required to either suspend, place the affected employee on administrative leave, or reassign the employee to duties that do not require direct interaction with students.¹³ West Virginia Code §18A-2-8(c) provides, in pertinent part, that “[a]n employee charged with the commission of a felony, a misdemeanor with a rational nexus between the conduct and performance of the employee’s job or child abuse may be reassigned to duties which do not involve direct interaction with pupils pending final disposition of the charges.” *Id.* This statute allows a board to reassign an employee who has been charged with a felony but does not require a board to do so. Any such reassignment is discretionary, not mandatory. See, *Clark v. Kanawha County Bd. of Educ.*, Docket No. 2011-0987-KanED (Aug. 17, 2011).

¹³ Also see Policy 4373; Chapter 5, Procedures for Addressing Allegations of Inappropriate Behavior, R Ex 9; Amended W. Va. Code §18A-3-6, R Ex 22.

Certainly, Grievant is presumed innocent of the pending criminal charges until proven otherwise. Nonetheless, this Grievance Board has previously upheld the right of a board of education to indefinitely suspend an employee without pay while criminal proceedings are conducted so long as some particular event will eventually bring a conclusion to the suspension (such as completion of a criminal trial). See, *Blaney v. Wood County Board of Educ.*, Docket No. 03-54-169 (Jan. 16, 2004); *Hicks v. Monongalia County Bd. Of Educ.*, Docket No. 04-30-183 (Aug. 13, 2004); *Dobbins v. Nicholas County Bd. of Educ.*, Docket No. 04-34-396 (Mar. 9, 2005). The fact that Grievant has not been indicted is of no consequence. See *Adkins v. Cabell County Board of Education*, Docket No. 2012-0085-CabED (Apr. 26, 2012); upheld by the Supreme Court of Appeals of West Virginia- *Cabell County Board of Education v. Adkins* - Memorandum Decision dated June 15, 2016. (R Ex 25). The undersigned cannot find that Respondent exceeded its statutory authority by suspending Grievant pending the resolution of the criminal actions. Further, the instant Grievant cannot compel Respondent to reassign him during the pendency of the criminal charges. It is the exclusive discretion of the school district whether such employee is suspended, placed on leave (paid or unpaid), or reassigned. *Id.*

In January of 2022, when the report was first made and the investigations were initiated, Respondent elected to place Grievant on paid administrative leave. Grievant remained on paid leave for over seven months (it is not totally clear what parties were during this period of time.). On July 8, 2022, Grievant was charged with a misdemeanor of Sexual Abuse in the Third Degree per W. Va. Code §61-B-9 (a). (R Ex 18). Grievant was further charged with a felony of Sexual Abuse by parent, guardian, custodian or Person in Position of Trust to child per W. Va. Code §61-8D-5 on July 8, 2022. (R Ex 19).

After the charges were formally levied, Respondent granted Grievant an informal conference on July 20, 2022. Grievant, with legal counsel, was provided the opportunity to explain the charges and allegations of misconduct. Present at that meeting was Grievant (via phone), Grievant's attorney, Abraham Saad; Keri Smith, Principal of Barboursville Middle School; Justin Boggs, Executive Director of Middle Schools; Tim Hardesty, Deputy Superintendent of Operations and Support; Sherrone Hornbuckle, Respondent's General Counsel; and Superintendent Saxe. Superintendent Saxe recommended that Grievant be suspended without pay. (R Ex 12). On August 2, 2022, Respondent Cabell County Board of Education held a Board meeting. Respondent suspended Grievant without pay for a period to end when the criminal matter against Grievant is resolved.¹⁴ (R Ex 13). These actions by Respondent are lawful.¹⁵

¹⁴ A board of education may indefinitely suspend an employee without pay while criminal proceedings are conducted, so long as some particular event will eventually bring a conclusion to the suspension (such as completion of a criminal trial). Further, the employee need not have been indicted on the criminal charges. *Meadows v Nicholas County Bd. of Educ.*, (Dec 19, 2012); *Adkins v. Cabell County Bd. of Educ.*, Docket No. 2012-0085-CabED (Apr. 26, 2012) Also see *Dobbins v. Nicholas County Bd. of Educ.*, Docket No. 04-34-396 (Mar. 9, 2005); *Hicks v. Monongalia County Bd. of Educ.*, Docket No. 04-30-183 (Aug. 13, 2004); *Blaney v. Wood County Bd. of Educ.*, Docket No. 03-54-169 (Jan. 16, 2004).

¹⁵ This Grievance Board has found a rational nexus between pending criminal charges and a school employee's job duties in such situations as felony sexual misconduct with children (*Balis v. Braxton County Bd. of Educ.*, Docket No. 98-04-094 (Jan. 22, 1999)), possession of child pornography (*Adkins, supra*), using a minor to film sexually explicit conduct (*Hurley v. Logan County Bd. of Educ.*, Docket No. 97-23-024 (Apr. 14, 1997)), improper touching of a child on a school bus (*Hicks v. Monongalia County Bd. of Educ.*, Docket No. 04-30-183 (Aug. 13, 2004)), manufacture of methamphetamine (*Clark v. Kanawha County Bd. of Educ.*, Docket No. 2011-0987-KanED (Aug. 27, 2011)), felony sexual abuse of a minor female (*Dobbins, supra*), and sexual misconduct with two students (*Blaney v. Wood County Bd. of Educ.*, Docket No. 03-54-169 (Jan. 16, 2004)). Obviously, where the victim is a student or a minor child, it is not difficult to find a rational nexus for separating the employee from additional potential victims. Not coincidentally, the Legislature included a proviso in W. Va. Code §18A-2-8(c) which states: "An employee charged with the commission of a felony may be reassigned to duties which do not involve direct interaction with pupils pending final disposition of the charges."

Grievant appears to be under the impression that somehow a school's Title IX investigation could or would have somehow assisted in the defense of the criminal charges made against Grievant by the West Virginia State Police. The undersigned is not so convinced.¹⁶ During the time in question 2021-2022, Tim Hardesty served as a Title IX coordinator for Respondent. Grievant argues that Deputy Superintendent Hardesty's obligation as Title IX Coordinator is not limited to passing the information to CPS and/or law enforcement but that he had an obligation to investigate the matter under Title IX rules and regulations.

Multiple witnesses testified that Respondent does not interfere during an investigation if it is being handled by CPS or law enforcement. The undersigned does not make a determination as to whether this is a good, bad, or less than productive use of time. Deputy Superintendent Hardesty testified Respondent usually reaches out to the Internal Investigation Unit (IIU). If IIU does decide to investigate Respondent waits to begin its own investigation because Respondent does not want to impede the process. Further, Deputy Superintendent Hardesty is of the opinion that sexual harassment was not covered under Cabell County Schools Policy 3362 R Ex 3. In particular, Policy 3362 states:

Sexual harassment covered by Policy 2266, nondiscrimination on the basis of sex education programs or activities is not isolated in this policy...Except for sexual harassment that is covered by Policy 2266, nondiscrimination on the basis of sex education programs or activities, any individual who believe they have been subjected to harassment and/or violence hereinafter referred to as complainant.

¹⁶ A Title IX investigation conducted by a school district is a process that is separate and distinct from any criminal investigation. The undersigned is not persuaded a Title IX investigation by Respondent's agents would significantly change the status of this matter.

Mr. Hardesty testified that he had no further involvement, because he turned the investigation over to law enforcement and the CPS IIU unit under the direction of Matthew Croft.¹⁷ Grievant expended a great deal of emphasis and effort on the lack of Respondent's IX investigation. The undersigned is not convinced that a Title IX investigation by Respondent's agents would significantly change the facts of this matter.

The failure to conduct a Title IX investigation is noted. However, **Grievant was not placed on unpaid leave because of a Title IX Decision-Maker determination. Grievant was placed on unpaid leave because he was charged by police with a felony per W. Va. Code §61-8D-5.** The undersigned does not agree with the premise that failing to conduct a Title IX investigation is to blame for Grievant's predicament. Title IX investigation or no Title IX investigation, Respondent is not obligated to continue to compensate an employee who is charged with a felony charge of sexual abuse by a parent, guardian, custodian or person in a position of trust to a child and a misdemeanor charge of third-degree sexual abuse, especially when the charges stem from incidents that occurred during his employment with the Cabell County Board of Education. Teachers hold positions of trust and are expected to protect, and to be role models for, their students. The activities with which Grievant is charged, if proven, are inherently inconsistent with the duties and responsibilities of a teacher. See, *Hurley v. Logan County Bd. of Educ.*, Docket No. 97-23-024 (Apr.14, 1967).

¹⁷ Matthew Croft testified at the L3 hearing of the instant matter. He works for the West Virginia Department of Health and Human Resources as the supervisor of the Investigator of the Institutional Investigative Unit. Mr. Croft on a regular basis and in the natural course of his job reviews complaints and reports from investigators. It is not perceived that Respondent failed to initiate information seeking procedure(s) to seek out truth regarding the allegations against Grievant.

The last issue that was addressed in the Level Three grievance hearing was the fact that Grievant cannot perform his duties as a teacher as his teaching license was simultaneously suspended by the West Virginia State Department of Education at the commencement of the felony and misdemeanor charges. The order provides that Grievant's teaching Certificate is suspended under W. Va. Code §18A-3-6(b) effective upon entry of the Order (corrected order July 25, 2023). See R Ex 23.

"Incompetency" is defined to include 'lack of ability, legal qualification, or fitness to discharge the required duty.' Black's Law Dictionary 526 (Abridged Sixth Ed. 1991). See *Durst v. Mason County Bd. of Educ.*, Docket No. 06-26-028R (May 30, 2008); *Posey v. Lewis County Bd. of Educ.*, Docket No. 2008-0328-LewED (July 25, 2008). A Grievant's lack of certification for his or her position constitutes "incompetency." See *Jones v. Fayette County Bd. of Educ.*, Docket No. 2009-1075-FayED (Aug. 5, 2009); *Mellow v. Jefferson County Bd. of Educ.*, Docket No. 2010-1397-JefED (Oct. 8, 2010).

Grievant cannot teach currently due to suspension placed on his license by the West Virginia Department of Education, a state regulating agency, this is a totally different agency, separate and distinct from Respondent, a county school board. Senate Bill 535 that amended West Virginia Code §18A-3-6 provides that Grievant's license would be automatically suspended by the West Virginia Department of Education. R Ex 22. This is not an action within Respondent's purview. Dr. Saxe issued the Grievant a charge letter which recommended moving Grievant from paid administrative leave to unpaid suspension. R Ex 12. The letter further stated that pursuant to amended West Virginia Code §18A-3-6(b), Grievant would receive a letter from the West Virginia Department of Education that his license would be automatically

suspended. R Ex 23. Thus, Respondent informed Grievant of the triggering, but Respondent is not the authoritarian entity invalidating Grievant's license. Grievant is currently ineligible to teach in that Grievant's license was suspended by the West Virginia Department of Education. If Grievant is acquitted of the charges or if said charges are dismissed Grievant's certification shall be reinstated unless otherwise prohibited by law. Id. also see West Virginia Code §18A-3-6(b)

Grievant was placed on unpaid administrative leave by Respondent, as recognized by West Virginia Code §18A-2-8(c), this unpaid leave is warranted considering that Grievant has been charged with felony charge of sexual abuse by a parent, guardian, custodian or person in a position of trust to a child and a misdemeanor charge of third-degree sexual abuse stemming from incidents that allegedly occurred while employed by Cabell County Board of Education. The criminal charge is still ongoing, and until the matter is resolved, in an effort to protect the health, safety, and welfare of its students, Respondent's decision to place Grievant on unpaid leave is prudent, appropriate, and in the best interests of the students.¹⁸ Respondent does not have a mandatory duty to reassign Grievant to an alternative position while his criminal charges are pending. There is no merit to Grievant's argument that proper protocol was not followed in moving Grievant from paid administrative leave to unpaid suspension. Respondent's failure to carry out and/or follow Title IX policies and procedures is NOT responsible for Grievant's

¹⁸ Respondent did not have to prove that actual disciplinary action would be justified but that suspension pending a resolution of the pending criminal charges was proper. *Miller v. Kanawha County Board of Education*, Docket No. 2015-0214-KanED (May 29, 2015) also see *Lemery v. Monongalia County Bd. of Educ.*, Docket No. 91-30-477/494 (Apr. 30, 1992); *Kitzmiller v. Harrison County Bd. of Educ.*, Docket No. 13-88-189 (Mar. 31, 1989) (citing *Brown v. Dept. of Justice*, 715 F.2d 662 (D.C. Cir. 1983)).

predicament. Respondent's failure to conduct a full Title IX investigation has not invalidated Respondent's ability to suspend Grievant with or without pay.

On July 8, 2022, Grievant was charged with a felony of Sexual Abuse by parent, guardian, custodian or Person in Position of Trust to child per West Virginia Code §61-8D-5. Suspending Grievant from his employment, is within the authority and discretion of Respondent. Grievant has not established by a preponderance of the evidence sufficient rationale to justify overturning this lawful action. Further Grievant has not persuaded the undersigned that Respondent's actions were so unduly out of bounds that Grievant is entitled to corrective measures. Grievant was suspended pending the outcome of criminal proceedings involving alleged sexual conduct towards student(s). Suspension pending an outcome is considered non-disciplinary. Thus, the burden of proof is on Grievant. Grievant did not establish his non-disciplinary suspension was unlawful.

Conclusions of Law

1. The suspension of an employee pending investigation of an allegation of misconduct is not disciplinary in nature and a grievant bears the burden of proving that such suspension was improper. See *Miller v. Kanawha County Board of Education*, Docket No. 2015-0214-KanED (May 29, 2015); *Ferrell and Marcum v. Reg'l Jail and Corr. Facility Auth./W. Reg'l Jail*, Docket No. 2013-1005-CONS (June 4, 2013).

2. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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 party bearing the burden has not met its burden. *Id*

3. In situations where a school employee has been suspended incident to a criminal investigation, "[t]he question presented by this grievance is whether Respondent violated law, rule, or policy or otherwise acted arbitrarily and capriciously in suspending Grievant without pay, . . . while the matter was investigated and a decision made regarding discipline." *Miller v. Kanawha County Board of Education*, Docket No. 2015-0214-KanED (May 29, 2015).

4. Respondent did not have to prove that actual disciplinary action would be justified but that suspension pending an investigation was proper. See *Lemery v. Monongalia County Bd. of Educ.*, Docket No. 91-30-477/494 (Apr. 30, 1992); *Kitzmiller v. Harrison County Bd. of Educ.*, Docket No. 13-88-189 (Mar. 31, 1989) (citing *Brown v. Dept. of Justice*, 715 F.2d 662 (D.C. Cir. 1983)). See also *Miller*, *supra*.

5. West Virginia Code §18A-2-8(c) provides, in pertinent part, that " . . . [a]n employee charged with the commission of a felony may be reassigned to duties which do not involve direct interaction with pupils pending final disposition of the charges." *Id*. This statute allows a board to reassign an employee who has been charged with a felony, but does not require a board to do so. Any such reassignment is discretionary, not mandatory. See, *Clark v. Kanawha County Bd. of Educ.*, Docket No. 2011-0987-KanED (Aug. 17, 2011).

6. A board of education may indefinitely suspend an employee without pay while criminal proceedings are conducted, so long as some particular event will eventually

bring a conclusion to the suspension (such as completion of a criminal trial). Further, the employee need not have been indicted on the criminal charges. *Adkins v. Cabell County Bd. of Educ.*, Docket No. 2012-0085-CabED (Apr. 26, 2012) See *Dobbins v. Nicholas County Bd. of Educ.*, Docket No. 04-34-396 (Mar. 9, 2005); *Hicks v. Monongalia County Bd. of Educ.*, Docket No. 04-30-183 (Aug. 13, 2004); *Blaney v. Wood County Bd. of Educ.*, Docket No. 03-54-169 (Jan. 16, 2004).

7. Respondent established by a preponderance of the evidence proper rationale and facts to justify suspending Grievant with and without pay.

8. 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 is 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). 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). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001)(citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). While a searching

inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute his judgment for that of the authoritarian agency. *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001). See generally *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

9. “An allegation that an employer failed to follow procedural requirement in accomplishing a disciplinary action is an affirmative defense, and Grievant has the burden of establishing the facts to support such allegation by a preponderance of evidence.” *Bradley v. Cabell County Bd. Of Educ.*, Docket No. 99-06-150 (Sept. 9, 1999).

10. Grievant failed to prove that Respondent's failure to carry out and/or follow Title IX policies and procedures is responsible for Grievant's predicament.

11. Respondent established by a preponderance of the evidence that it is within Respondent's discretion to reassign or suspend Grievant without pay pending the outcome of the felony charge pending against him.

12. Grievant failed to prove that Respondent's failure to conduct a full Title IX investigation invalidated Respondent's ability to suspend Grievant with or without pay.

13. Grievant failed to establish that Respondent's actions were arbitrary and capricious.

14. Grievant failed to prove that Respondent action of suspending Grievant pending the outcome of pending criminal charges was a violation of law.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals.¹⁹ Any such appeal must be filed within thirty (30) days of receipt of this decision. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

Date: July 31, 2023

Landon R. Brown
Administrative Law Judge

¹⁹ On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over “[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to 29A-5-4 or any other provision of this code[.]” W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.