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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

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JOHN H. MILLER

v.

Docket No. 89-20-108

KANAWHA COUNTY BOARD OF EDUCATION

DECISION

John H. Miller (Grievant or Miller) is employed by Respondent Kanawha County Board of Education as a science teacher at St. Albans High School (SAHS). Based on a February 9, 1989, altercation with a student, and after an evidentiary hearing thereon,¹ Miller was suspended without

¹ The testimony and exhibits from that hearing, including the transcription of a February 9, 1989, interview with SAHS students J.M. and S.B., are part of the record at Level IV and will be considered as if originally presented here.

Any reference in this Decision to transcript and page, e.g., T. 10, relates to the suspension hearing.

The undersigned perceives no reason to mention SAHS students by name in this Decision and therefore, they will be identified by initials.

pay for three days, March 14, 15 and 16. On March 21, 1989, he initiated the following grievance at Level IV:²

Decision wrong based on whole record; decision wrong as a matter of law. Grievant disputes suspension of three days without pay and findings and conclusions on which decision was made.

Hearing was conducted at SAHS³ on May 17, 1989.⁴ The parties were allowed until May 31, 1989, to submit proposed findings of fact and conclusions of law; that date having passed, the matter is mature for resolution.⁵

On February 9, at approximately 2:50 p.m., six male SAHS students were talking loudly in the hallway of SAHS' "science wing."⁶ The SAHS schoolday, which consisted of

² Education employees who are suspended from work and who wish to grieve this punishment may bypass the lower administrative planes of the grievance procedure. W.Va. Code §18A-2-8.

Grievant does not allege any procedural deficiency on Respondent's part in his suspension, and none is apparent to the undersigned. See W.Va. Code §§18A-2-7, 18A-2-8.

³ This meeting was held at the school for various reasons, including a view of the altercation site.

⁴ A previously-scheduled hearing was continued for good cause and upon joint motion of the parties. The Level IV hearing was, in essence, supplementary to the March 6, 1989, suspension hearing.

⁵ Grievant submitted his proposals on May 31; Respondent did not present any materials post-hearing, and it is presumed that it relies upon its' suspension decision's findings and conclusions.

⁶ Apparently, these students had just returned from classes at a county vocational-technical center and were waiting for friends who finished the schoolday at 3:00 p.m.

An attempt has been made to abridge the description of this incident so that only pertinent facts are presented.

seven periods, ended at 3:00 p.m. Grievant, whose room was in this wing, was assigned seventh period as his preparation and planning time. He was disturbed by the students' conversation and, entering the hallway, he instructed them to move to the cafeteria. Four students promptly complied; the other two, J.M. and S.B., did not. Grievant repeated that they should vacate the hall and additionally instructed J.M. to remove his cap.⁷ J.M. refused, advising he was leaving the premises. Grievant suggested that if that was his intention, he do that quickly. J.M. and S.B. moved toward a double-door school exit and Grievant followed to ensure the openings were fully closed after the boys left.

Once at the doors, Miller pushed one open by use of the safety bar. S.B. went through, but J.M. stopped in the doorway. At some point shortly thereafter, J.M. said to the teacher, "Don't hit me with the door," or words to that effect.⁸ Miller's response is the subject of dispute; the pupils claim that Grievant stated he would hit J.M. if the path was not cleared, and Miller avers that he simply requested that J.M. move so that he might shut the door.

⁷ The record indicates that it is at least the policy of SAHS' Principal Alvin Anderson that hats not be worn in the building.

⁸ At the suspension hearing, Grievant testified that he did not recall J.M. saying anything regarding not being hit with the door. T. 94-95. At Level IV, Grievant remembered that J.M. had indeed done so.

At any rate, despite the opportunity to do so, J.M. chose not to move⁹ and Grievant made contact with J. M.'s face, precisely, the side of the chin, with his hand. He alleges that J. M.'s hands were open and forward and that he believed the boy was about to strike him, so he brought his own hands up in self-defense.¹⁰ The boys declare that J.M. was carrying books, that he made no threatening movement, and that Grievant's fist was clenched at the time. J.M. was not bodily injured in any significant way; presumably, Grievant could have easily hurt him had that been his intent, since the teacher is physically larger than J.M. and is, according to Level IV testimony, a former boxer.

Immediately, Grievant, J.M. and S.B., all rather upset, went to the school's administrative offices and met with Principal Alvin A. Anderson and Vice-Principal Larry Rawlings. The boys, without conferring, offered both written and oral statements, see n. 1, and Grievant was invited to prepare his version of the incident in writing for submission the next morning, which he did. Statements were also taken on February 10 from SAHS student J.P., who

⁹ Written statements from both J.M. and S.B. reveal that the former youth purposely blocked the doorway squarely after Grievant had requested he vacate the area.

¹⁰ At Level IV, Grievant denied using his fists; however, on some occasions on or since February 9 but prior to May 17, 1989, he indicated to the contrary. E.g., KCS Ex. #1-p. 3.

saw "some things," T. 10, including, according to J.P.,¹¹ Miller "jump out at. . .[J.M.] with his fist," KCS Ex. #1-p. 6, and "throw a punch." T. 60.

Testimony offered from teachers Weldon Burroughs, Sue Chandler, David Webster and John Duerenberger tended to establish that students often loitered in SAHS' science wing during the last few minutes of the schoolday and sometimes caused commotion, but was otherwise irrelevant. Principal Anderson testified about his meeting with Grievant, J.M., S.B. and Rawlings on February 9 and related matters, and advised that he had orally reprimanded Grievant in September 1988 for inappropriate behavior toward J.M.. T. 106, et seq.; KCS Ex. #1-p. 1.

After a careful review of all the evidence in this case, including the February 9 and 10, 1989, statements of Grievant, J.M., S.B., J.P., Anderson and Rawlings,¹² which are incorporated by reference herein and made a part hereof, the undersigned finds Respondent has met its burden of proof. Further, Grievant's version of this incident is simply not as credible as that of the students. It is clear that there is animosity between Grievant and J.M., perhaps based on the September situation and it is surmised that

¹¹ J.P. was one of the four students who, with J.M. and S.B., made up the group of six originally accosted by Grievant.

¹² These statements all may be found in KCS Ex. #1.

neither was overly polite to the other at any time on February 9, before or after the physical contact. However, there is no evidence that J.M. or S.B. had opportunity to fabricate stories, and their statements are similar and believable. Both admit, in effect, that J.M. may have provoked Grievant by purposely blocking the doorway, realizing this would be an irritant. J.M., S.B. and J.P. all stated that Grievant's fist was clenched, and J.M. and S.B. said that Grievant actually hit the former young man in this manner. At one point immediately after the incident, even Grievant admitted "he hit. . .[J.M.] with his fist." KCS Ex. #1, p. 3. Even though J.M. was guilty of provocation, albeit mild, Grievant's reaction was inappropriate and sanctions against him related thereto were warranted.¹³

The remainder of this Decision will be presented as formal findings of fact and conclusions of law.

¹³ This scenario is dissimilar to that recounted in McBride v. Wayne Co. Bd. of Educ., Docket No. 50-86-184-01 (Aug. 28, 1986). In that case, a teacher's resort to physical handling of a student was, for a number of reasons, found not to justify disciplinary action against the teacher.

FINDINGS OF FACT

1. Grievant, a teacher at St. Albans High School, struck a student's face with his fist on February 9, 1989. The blow was relatively light and the student was not injured.

2. The student inappropriately provoked Grievant by engaging in behavior designed to be irritating, but he did not threaten Grievant or act in any way so as to reasonably place Grievant in fear of being attacked.

3. As a result of this incident, Grievant was suspended from his employment for three days without pay.

CONCLUSIONS OF LAW

1. In disciplinary cases such as this, the respondent county board of education has the burden of proof. Bonnett v. Kanawha Co. Bd. of Educ., Docket No. 20-89-007 (May 19, 1989); Webb v. Mason Co. Bd. of Educ., Docket No. 26-89-004 (May 1, 1989).

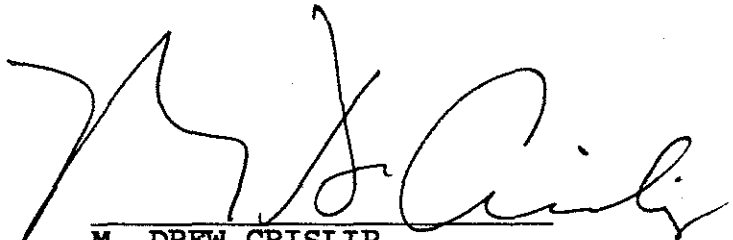
2. An education employee in West Virginia may be suspended for behavior constituting "immorality." W.Va. Code §18A-2-8. "That term, as it appears in the statute, may be defined as 'conduct "not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community. . ."' Golden v. Bd. of Educ.

of the Co. of Harrison, 285 S.E.2d 665, 668 (W.Va. 1981), quoting from Webster's New 20th Century Dictionary, Unabridged (2d Ed. 1979), at 910." Bonnett.

3. Grievant's use of physical force in this situation may properly be considered immoral within the meaning of Code §18A-2-8.

Accordingly, this grievance is **DENIED**, and Grievant's three-day suspension without pay upheld.

Either party may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of this decision W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.


M. DREW CRISLIP
HEARING EXAMINER

Dated: July 31, 1989