



REPLY TO:
407 Neville Street, Suite 120
Beckley, WV 25801
Telephone: 256-6855
ON NET: 557-6855

Members
James Paul Geary
Orton A. Jones
David L. White

**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**
GASTON CAPERTON
Governor

Offices
240 Capitol Street
Suite 515
Charleston, WV 25301
Telephone 348-3361

HARRY DURUTTYA

v. Docket No. 29-88-104

MINGO COUNTY BOARD OF EDUCATION

DECISION

Grievant, Harry Duruttya, a mathematics teacher at Gilbert Junior High School (GJHS), was dismissed from his employment with the Mingo County Board of Education (Board) by letter dated March 29, 1988. He lodged an appeal of that action in the Board's central office April 5, 1988 with Mr. W.L. Bostic, Assistant Superintendent of Schools. Approximately fifty days later, grievant's counsel filed a petition for a writ of mandamus in Mingo County Circuit Court asking that the Board be ordered to process his request for a hearing. By order dated June 6, 1988, this request was denied. No appeal of this order was made but grievant's counsel filed a request with the West Virginia Education and State Employees Grievance Board for a Level IV hearing on the same date. The matter was set for hearing July 1, 1988, at which time evidence concerning the original filing with the Board's office was presented and legal argument made concerning compliance with pertinent statutory provisions for such filings.

By order dated July 14, 1988, the undersigned denied a motion by the Board to dismiss the grievance for failure to timely file and held grievant had substantially complied with W.Va. Code §18A-2-8. By order dated September 8, 1988, the Mingo County Circuit Court reversed this holding and concluded grievant's filing with the Board office was improper and could not be cured by advancing an appeal to the Grievance Board fifty-one days later. The West Virginia Supreme Court of Appeals reversed this decision on June 8, 1989, reinstating the adjudication that grievant was entitled to a Level IV hearing. Duruttya v. Mingo County Board of Education, 382 S.E.2d 40 (W.Va. 1989). Several continuances for cause prevented a hearing until August 31, 1989, at which time both parties presented extensive testimony and documentary evidence in support of their positions. Proposed findings of fact and conclusions of law were received by October 24, 1989.

Grievant's termination letter advised him that he was being dismissed on the grounds of incompetency, cruelty, insubordination and willful neglect of duty. The letter cited fourteen specific incidents or conduct on the part of the grievant which was deemed sufficient for his dismissal. The evidence presented by the Board in support of its decision is best reviewed when set forth under the particular charge to which it relates.

CRUELTY

C.M.,¹ one of grievant's students during the 1987-88 school term, testified that on or about February 25, 1988, he was attempting to leave a classroom at the conclusion of a class period when grievant grabbed him by the collar of his jacket and "pulled him sideways." He stated grievant was attempting to force him to clean up paper which had been thrown by other students during the period. He further testified that grievant made no other physical contact with him but that he had witnessed him grab another student, S.J., by the neck. On cross-examination, C.M. conceded that he had been given a direct order to pick up the paper prior to his attempt to leave the classroom.

C.M.'s father testified that he complained to the principal at GJHS, Ms. Burma Hatfield, when his son reported that he had been grabbed by the collar. He stated that he met with grievant, Ms. Hatfield and several other parents shortly thereafter but did not feel satisfied with grievant's explanation. He subsequently made a written request that C.M. be placed in another mathematics class which was granted by Ms. Hatfield.

Student J.M. testified that he observed grievant make physical contact with C.M. and had also seen him grab S.J. in the area of his shoulder blade. He did not elaborate on the circumstances surrounding these incidents.

¹There being no need to reveal the names of the students testifying, they are referred to herein only by initials.

Student M.R. stated she observed grievant grab S.J. by the shoulder and shove him down in a seat. She also could not recall what, if anything, had precipitated the incident.

A.H. testified that in October 1987, he was sharpening a pencil when grievant picked him up by his neck, carried him to his seat and dropped him in it. He stated that the injury to his throat caused him to vomit blood that evening when he returned home. A.H. also related an incident in which he was engaged in a fight with another student in grievant's classroom. He stated that grievant separated them and, when they were about to start fighting again, he, grievant, hit him on the chin with his fist. According to A.H. this blow caused a bruise. He stated he reported both of these incidents to his mother.

A.H.'s mother testified that her son had come home complaining of a neck injury and reported that grievant had caused it. She also stated he informed her that a bruise on his chin had been inflicted by grievant. She further testified that grievant admitted picking A.H. up by the neck during a conference concerning the incident.

Ms. Linda Montgomery, a special education instructor at GJHS during the 1987-88 school term, testified that A.H. had reported the incidents to her indicating that grievant had choked him and punched him on the chin. She also stated that her students, on several occasions, had informed her that grievant referred to them as "typical special education students who could not learn, and would not learn, listen or behave."

Student M.W. testified that she observed grievant kick another student, P.M., in the leg because he caught him "mocking" him. She also stated that she had seen grievant push other students down in their seats.

S.C. also testified that he saw grievant kick P.M. He stated that he thought the kick was not intended to hurt him and was probably the result of grievant's losing his temper.

An improvement plan developed by Ms. Hatfield in November 1987 cautioned grievant to "immediately cease the use of physical contact" with students. She testified that she had received several complaints at the time about grievant's use of physical force in the classroom.

INCOMPETENCE

Most of the evidence pertaining to this particular charge concerns grievant's alleged inability to maintain control over his classes and failure to develop and/or implement an adequate course of math instruction for his students.

Student C.M. testified that grievant "had no control at all" over his classes. He also stated that, although students were assigned textbooks, grievant often deviated from it and "made his own directions." J.M. also testified that grievant had little control over his classes. He stated that out of a fifty-five minute class, grievant would spend only fifteen to twenty minutes on actual math instruction with the remainder spent either discussing his personal life or trying to discipline students. J.M. further testified that he was an honor student prior to

entering grievant's class but received an F in the class. As a result of complaints made to Ms. Hatfield and then-Superintendent Harry Cline by his parents, J.M. was placed in another math teacher's class. He stated he then received A's.

Ms. Micah Justice, a member of the Parent Advisory Council at GJHS, testified that, after receiving complaints from her son concerning his inability to comprehend the subject matter as presented by grievant, she received permission to observe his class during the second nine-week term of the 1987-88 school year. She stated that, during the hour in which she observed, grievant had control of the class for only two to three minutes and for the rest of the period students either talked or threw spitballs. She opined that he may have had the attention of three of the twenty-five students present. Ms. Justice also testified that grievant directed all students to open their textbooks but made no further reference to it. She stated she could not follow when he placed problems on the chalkboard and discussed his own "rules." Finally, she stated that, although she observed discipline problems in one other class, they were not as severe as those in grievant's room. Ms. Mary Robinette, another member of the Parent Advisory Council who had observed one of grievant's classes, generally confirmed Ms. Justice's statements about his lack of control.

Student M.R. testified that she had always received A's in mathematics but had great difficulty learning in grievant's class. She stated that, although she did not understand a lot of his "rules" and failed a number of his tests, she continued to

receive final grades of A or B. She further stated that the deficiencies in her performance were offset by extra points grievant granted her for being on time for class or bringing her textbook. M.R. also confirmed C.M.'s testimony that only fifteen to twenty minutes of grievant's class were spent on instruction and little discipline was exercised over students. According to M.R., the discipline problems in the class and the problems she and other students were having comprehending the subject matter caused them to request a meeting in February 1988 with grievant and Ms. Hatfield. She did not elaborate on what, if any, changes took place after this conference.

Ms. Brenda Jones testified that, in response to complaints from her daughter that grievant had stated she was too dumb to learn, she obtained permission to sit in on one of his classes. She stated that he attempted to teach mathematics but the students were not comprehending. On cross-examination, Ms. Jones testified that during her observations, grievant told some students they were too dumb to learn. She also stated that because of grievant's practice of ejecting her daughter from the class each day, she began taking her home as the class was the last in her daily schedule. Ms. Jones' daughter testified that grievant sent her to the office nearly every day shortly after class commenced. She stated that she had never been sent to the office by any other teacher and her math grades markedly improved after she was allowed to go to another teacher approximately four weeks before the end of the school year. On cross-examination, she conceded that she would not open her textbook as directed and

would talk to other students but asserted she did not cause any trouble in class.

Student D.M. testified that he too was ejected from grievant's class nearly every day of the school year. He stated he would report to class and after five minutes be directed to stand outside in the hall. D.M. further testified that he would sometimes do as directed but would usually go to the room of another teacher who assisted him with math assignments. He also stated that other students were routinely made to stand in the hall. The testimony of Ms. LaDonna Anvil, a reading teacher at GJHS, corroborated that of D.M. She stated that he came to her room on an almost daily basis and she would help him with assignments occasionally. Ms. Anvil also stated that she experienced her own discipline problems but, unless they were of a severe nature such as fights, she never sent students to the office and never resorted to having students stand in the hallways.

Student R.B. testified that she had great difficulty learning mathematics in grievant's class and received F's, although she had previously attained grades of A, B or C in the subject. She stated he had little control over the class and she was routinely sent to the office or directed to stand in the hall for asking questions. On cross-examination, R.B. stated she had never encountered problems with other teachers at GJHS.

Student V.H. testified that she had, prior to grievant's class, received A's in mathematics but she could not grasp his method of teaching. Although she had never been made to do so,

she stated that students were directed by grievant to stand in the hallway nearly every day. V.H. was one of the students that attended the February 25, 1988, meeting with grievant and Ms. Hatfield to discuss the problems they were having. She also did not testify regarding the results of this meeting.

Student S.C.² testified that he also had received A's and B's in previous mathematics classes but was unable to understand grievant and received F's in his class during most of the 1987-88 term. He stated that he failed other classes causing his retention in the eighth grade, but that he subsequently passed mathematics in another teacher's class. S.C. received a math award in the ninth grade for achieving the highest grade in his class. He also confirmed that students, including himself, were placed in the hallway by grievant on a daily basis. He further testified that grievant regularly told students in the class that they were either dumb, stupid or did not know how to learn. Student A.B. testified she also had difficulty comprehending math in grievant's class and that he would refer to students as either dumb or fools. She stated that on one occasion such remarks caused the class to get mad and "throw a fit on him." Out of the fifty-five minutes allotted to the class, A.B. said grievant devoted only twenty minutes to instruction with the remainder spent talking about his personal life.

²S.C. also testified concerning grievant's physical contact with student P.M. recounted supra.

Ms. Hatfield testified that grievant was assigned to her school at the beginning of the 1987-88 school term when she first became a principal. She stated that she realized after two months of the term that grievant was not performing satisfactorily. The November 10, 1987, improvement plan she prepared for grievant listed the following deficiencies:

1. Lack of control in classroom
2. Failure to communicate subject matter adequately to students
3. Failure to follow through on oral suggestions and recommendations of principal
4. Failure to abide by rules as set forth by principal concerning proper behavior of teacher when encountering discipline problems.

The plan set forth six "Expectations" in which grievant was either directed to cease certain practices or adopt others. In addition to the previously-discussed prohibition concerning physical contact with students, the grievant was directed not to "set students outside classroom." Activities designed to assist him in the achievement of the plan's goals were provided, as were projected time frames for its implementation. Mr. Gary Archer, grievant's West Virginia Education Association representative, was present during the meeting in which grievant was presented this plan. He provided grievant a set of cassette tapes which dealt with student disciplinary methods. Ms. Hatfield loaned him a book dealing with the same subject matter.

Ms. Hatfield further testified that she subsequently made numerous observations of grievant's classroom and did not feel his performance improved. Her notes made after observations on November 19, 1987, December 3, 1987 and December 14, 1987, generally reflect that grievant had little, if any, control of

his classroom. The exit of students from the room constantly, despite her directions to grievant not to allow them to do so, was cited as a major problem. The notes also reflect a dissatisfaction on Ms. Hatfield's part with grievant's refusal to rely more on textbooks as directed. The December 3 notes reveal that she had assigned three of grievant's students to another teacher because of complaints from parents.

Ms. Hatfield also testified that grievant, despite her instructions against doing so and prohibitions in Board policy, used low grades as a disciplinary measure. At least six students were given zeroes for their day's performance for this purpose. Ms. Hatfield further testified that grievant constantly sent students to her office with notes requesting help in getting control over his class and used an intercom system between his room and her office for the same purpose.

Grievant was given another evaluation and improvement plan on February 15, 1988. The evaluation listed twenty-five areas in which he needed improvement and five in which he met expectations. Grievant signed the form noting that he disagreed with the assessment except for five of the designated "needs improvement" areas. The five included "Maintains discipline satisfactory for learning," "Exhibits mature judgment in dealing with students," "Ability to generate interest in class" and "Accepts constructive suggestions."³ The improvement plan contained many

³Ms. Hatfield had made no comment in "Uses community
(Footnote Continued)

of the same directions contained in the November 10 plan. Additional deficiencies included grievant's reference to students in a derogatory manner and using grades as a disciplinary measure. Under the heading "Time allowed," Ms. Hatfield noted that "As this is the second improvement plan presented, I expect to see immediate improvement. Three months have already been allowed and no visible improvement in discipline or teaching technique can be observed."

Subsequent to the issuance of the second plan, Mr. Archer approached Ms. Hatfield and proposed that she and grievant enter into a written agreement. Among other things, the agreement provided that grievant would relinquish his mathematics classes, cover for absent teachers on mornings and teach three computer classes in the afternoon for the remainder of the 1987-88 term. He would also accept placement on an administrative transfer list as unassigned for the next school year and seek other positions in Mingo County for which he was qualified. In return Ms. Hatfield would not recommend that grievant's employment be terminated. Ms. Hatfield stated she assented to sign the agreement only if Superintendent Cline gave his approval, which he did not.

(Footnote Continued)

resources when appropriate," one of the areas to which grievant took exception. She testified that she had no knowledge of grievant's activities in this area and therefore made no rating in the category. Apparently grievant felt he had performed adequately in this particular area of the evaluation.

Finally, Ms. Hatfield testified that she concluded in March 1988 that grievant should no longer be employed. She stated that she had exhausted all ideas and resources. By letter dated March 9, 1988, Ms. Hatfield expressed regret for having to do so but recommended to Mr. Cline that grievant's employment be terminated at the end of the school year.

INSUBORDINATION

The evidence presented on this particular charge was centered primarily on grievant's alleged refusal to carry out Ms. Hatfield's orders not to place students in the hallway and adhere to a teaching program centered on the textbook. In addition to the foregoing testimony of students and parents, Ms. Hatfield testified that she specifically ordered grievant on numerous occasions not to place students in the hallway. She stated that grievant was also instructed numerous times to follow the textbook. A statement of "Teacher Responsibilities" (Board's Exhibit No.8), given to all teachers at GJHS, explicitly instructed them not "[to] allow students out of class unless emergency and then only with a hall pass." As previously mentioned, the November 1987 improvement plan also directed grievant to cease this practice. Ms. Hatfield stated she had made it clear to all her teachers, including grievant, that grades were not to be used for discipline purposes, but grievant submitted to her handwritten notes indicating he had done so.

WILLFUL NEGLECT OF DUTY

The Board takes the position that evidence presented in support of the charge of incompetence also demonstrates that grievant willfully neglected his explicit and implicit duties as a teacher. For reasons hereinafter discussed, it is not necessary to address this contention. It is sufficient to simply note that certain alleged actions of the grievant could be characterized in a number of ways.

Mr. Rush Curry, a retired mathematics teacher, testified on behalf of the grievant. He stated that he had taught mathematics for approximately forty-four years and had generally utilized instruction methods whereby students were encouraged to learn basic math rules for solving problems. Mr. Curry further testified that grievant had asked him to review materials relating to his own methods and that review revealed nothing unusual or significantly different from the procedures he had used prior to retirement.

Ms. Terry Rickey testified that her son was in grievant's class for only three months during the 1987-88 school year because of back surgery. She stated he had difficulty in the class but grievant was helpful and provided ways, including numerical games, by which he could overcome his problems.

Student B.H. also testified on grievant's behalf. He stated that he had difficulties with certain aspects of mathematics but in grievant's class he was able to learn. He stated that grievant had little control over the classroom because the majority of students just did not want to learn. Student C.C.

related that she was able to comprehend some of the subject matter in grievant's class, although she failed one semester. Student J.W. failed both semesters but stated it was due to other students who continuously caused discipline problems in the class.

Ms. Trudy Hatfield, an English teacher at GJHS during grievant's tenure, testified generally about the extent of discipline problems there. She stated Ms. Burma Hatfield, the principal, did not support teachers when problems arose and students were usually sent back to apologize when directed to go to the office. She related two incidents in which she felt Principal's Hatfield's disciplinary measures were inadequate. Ms. Trudy Hatfield also testified that grievant had implemented several suggested techniques to gain control of his classroom. These measures included placing unruly students in her room, changing his seating arrangement, observation of other teacher's classes and tape-recording his classes. She stated that Principal Hatfield had directed him to discontinue the tape recording and prohibited him from placing students in her classroom. According to Ms. Trudy Hatfield, she and other teachers also placed students out in the hallway as a disciplinary measure. On cross-examination she conceded she had never got along with Principal Hatfield and, that, when she placed students in the hallway, it was in such a manner that she could observe them at all times.

Ms. Gloria Vannatter⁴ testified that in an attempt to prepare herself for a GED examination, she audited grievant's class for approximately ten days. She characterized his teaching methods as "ABC mathematics" and stated she was able to learn in the class although her son, who did not like the grievant, barely passed the class if at all. On cross-examination Ms. Vannatter stated grievant tried to maintain control over his class but he was not successful to any degree.

Mr. Antione Andren,⁵ a music teacher assigned to Gilbert Elementary School but who taught at least one class at GJHS during grievant's assignment there, testified that he had resigned his position because of his displeasure with the way student discipline was handled and "[his] general treatment as a teacher." He stated the principal at GJHS would not support the teachers when disciplinary problems arose and teachers were generally directed to handle the situations themselves. Mr. Andren further testified that his frustration with one particular student led him to grab him and place him in his seat. This confrontation resulted in Mr. Andren's suspension for three days and arrest, presumably for battery. He stated the arrest warrant contained a statement to the effect that the principal had encouraged parents to file the charges. According to Mr. Andren,

⁴Ms. Vannatter's testimony was taken in deposition August 29, 1989, in a telephone conference held in the offices of the Board's counsel.

⁵Mr. Andren's testimony was taken in deposition July 29, 1988, also at the offices of the Board's counsel.

he and grievant experienced similar discipline problems and lack of support.

Grievant testified extensively. He stated that he first began teaching in Mingo County during the 1984-85 school term at Burch High School in Delbarton. According to grievant he "had problems" with the principal there and, after proceedings before the Board, he was advised that his employment would continue under the provision that he "get out of Delbarton and substitute teach the rest of the year."⁶ He made several applications for positions but was rejected until a vacancy occurred at GJHS. Grievant stated that Ms. Hatfield was aware of his problems at Burch and prior to the beginning of the school term they had a conference. During this conference grievant informed Ms. Hatfield that he expected to have problems with discipline and requested her help in this area. He characterized her responses as sympathetic and said he felt they were embarking on a good principal-teacher relationship.

Grievant further testified that he first encountered discipline problems on or about September 9, 1987, when he attempted to adhere to a policy which prohibited students from leaving class to go to the restroom. He explained that several students

⁶It is assumed that the Board was acting on a recommendation to dismiss by the Superintendent. The action was apparently taken sometime during the 1986-87 school year since grievant testified he worked at Burch for three years. The record does not reveal whether grievant's substitute service was confined to Burch or Mingo County Schools in general.

refused to abide by the rule and after they were directed to go to the office, they merely returned and apologized. Grievant recounted another incident when he allowed a female student, who was coughing, to go to a drinking fountain, only to discover her later exiting a restroom with a male student. He did not elaborate on what, if any, punishment the students received but presumably it was less than he expected. Grievant represented that he had made suggestions to Ms. Hatfield concerning certain discipline measures which should be implemented for the entire school, including paddling, but none were given consideration.

Regarding the allegation by A.H. that he lifted him by the neck and carried him to his seat, grievant testified that the student deliberately broke his pencil and disregarded orders not to go to the pencil sharpener. He said he then wrapped his arms around the student's chest, lifted him up, turned him around and ordered him to return to his seat. Grievant refuted A.H.'s mother's testimony that he admitted choking him and stated "I believe I always have denied it." In response to C.M.'s assertion that grievant had grabbed him by the collar of his jacket, grievant explained that he was filling in for a reading teacher and had instructed students to read magazines but many refused to do so. He stated he was trying to grade papers in the meanwhile but was being "bombarded with spit wads to the point that [he] finally just quit and...tried to observe who was doing what." According to grievant, C.M. refused orders to pick up the paper and attempted to leave the room at the end of the class. Grievant stated he attempted to retain him physically but he just

ducked and exited the room. Concerning A.H.'s testimony that grievant had struck him on the chin after he had ceased fighting with another student, grievant stated that he did not believe he had done so. In regard to assertions that he had kicked student P.M., grievant testified that he had merely turned around and unavoidably ran into him.

Responding to contentions made regarding his failure to follow directions in the first improvement plan, grievant testified that he implemented suggestions contained in the book Ms. Hatfield provided him and the tapes given him by Mr. Archer. He represented that he had used a recorder to tape several classes⁷ and noted substantial improvement in the students' behavior but discontinued the practice per Ms. Hatfield's orders. He also explained that he had changed the seating patterns in his classes with only limited success. Grievant conceded he had observed only two classes of other teachers, both of whom he felt were strong disciplinarians. According to grievant, placing unruly students in other teachers' classrooms was usually successful but Ms. Hatfield ordered him to cease this practice also.

Addressing contentions that his methods of teaching were inadequate, grievant explained that tests administered to his

⁷The referenced book (Grievant's Exhibit No.5) instructs teachers to videotape classes on the theory that the students' behavior will improve if they are aware their actions are being recorded. The tapes are also to be used for self-evaluation by the teacher. Grievant stated that video equipment was not available so he used his own audio cassette recorder.

students revealed many were woefully lacking in basic mathematics skills needed on the eighth-grade level. This prompted him to deviate from the textbook and develop a basic set of "rules" which he felt would provide the most expeditious method for improving those skills. A sample of the type of sheets contained a list of rules to be applied on various mathematics problems (Grievant's Exhibit No.9) reveals rather clear-cut steps to be followed when a problem entailed subtraction, addition or division of fractions. Grievant stated his students were directed to utilize these sheets in an effort to simplify or provide short-cuts in what he considered problems which they had not been previously prepared to solve. It was his opinion that all mathematics should be taught in this manner and his methods varied little from those contained in the textbook.

In regard to the assertions of students and others that he had referred to students as dumb or stupid, grievant stated comments he had made to the effect that students might be ignorant of certain mathematics principles may have been misinterpreted. He explained that nothing derogatory was intended by such statements and the word "ignorant" simply meant someone had never had the opportunity to learn of something. He conceded that the same accusation had been made at Burch and he was "careful never to try to get [himself] into the same situation."

On cross-examination grievant conceded that he had only provided students two written lists of rules, including the aforementioned list concerning fractions. The rest were either communicated verbally or written on the chalkboard. He also

stated that he had not taken control of his classroom after either of the improvement plans, although he understood that the direction that he do so contained in the first was mandatory. In response to questions concerning Ms. Hatfield's direction not to use rules and adhere to the textbook, grievant stated he did not comply because he knew no other way to teach. When asked about his practice of using low grades as a disciplinary measure, grievant maintained the book given him by Ms. Hatfield approved of the measure. Upon further questioning, grievant was unable to reference any such use of grades in the book except in incidents where students were found to be cheating.

Grievant also admitted that he frequently placed students outside the classroom despite Ms. Hatfield's explicit directions not to do so. Grievant stated he did so out of desperation and because "nothing seemed to be working to gain control of the classroom." He placed at least part of the blame for this lack of control on Ms. Hatfield, who he felt was not providing him enough support but conceded he was to blame also.

In response to further questions concerning the students' allegations that he had called them dumb or stupid, grievant stated they were lying but could offer no explanation as to why they would make false statements except intimidation by a source unknown to him.

When called as a rebuttal witness, Principal Hatfield testified that grievant had never approached her with suggestions concerning disciplinary measures for the school but that he had requested, on several occasions, to paddle students. She stated

that his facial expressions on these occasions suggested to her that he "couldn't wait to get hold of one with a paddle." These requests were denied because of school policy forbidding paddling. Ms. Hatfield also refuted the assertion of grievant and others that discipline at GJHS was a severe problem. She stated grievant was the only teacher experiencing severe problems and, while she had placed others on improvement plans, he was the only one who had not succeeded in the goals which were outlined.

Grievant advances two main arguments for reversal of the Board's decision to dismiss.⁸ First, he maintains the Board simply did not present sufficient evidence that he failed to carry out the directions contained in either improvement plan. Second, he asserts the Board failed to adequately assist him in his efforts to improve in violation of West Virginia Board of Education Policy 5300.⁹ Except for the charge of cruelty, these contentions are without merit.

⁸Inexplicably, grievant, in his post-hearing submissions, asserts that the Board failed to identify any specific ground for dismissal and proceeds to address all grounds contained in W.Va. Code §18A-2-8, including immorality and intemperance. As previously discussed, the dismissal letter not only contained the specific grounds but also cited a number of areas and/or incidents wherein grievant's performance or behavior was deemed inadequate. It is therefore assumed that counsel misread the letter and reference to charges not contained therein was in error. It should be noted that, while citing the Board's failure to identify the charges, grievant makes no assertion that the Board denied him any procedural due process rights.

⁹The pertinent part of Policy 5300 provides:

(a) Every employee is entitled to know
(Footnote Continued)

Grievant's testimony concerning the incidents in which he allegedly made physical contact with two students was not persuasive. He was evasive in his explanation of the incident involving A.H. The account he gave of the contact was in direct contradiction of A.H.'s testimony, which was the more credible. There was no showing made that A.H. had any motive for making false reports of the incident. Further, Ms. Harvey (A.H.'s mother) and Ms. Montgomery, although not witnesses, corroborated the students' accounts. Similarly, testimony that grievant kicked P.M. was much more credible than grievant's explanation that he had just run into him. There was also no evidence presented that would even tend to show some ulterior motive for students to misrepresent the incident. As previously noted, S.C. even tried to mitigate the severity of grievant's action by expressing an opinion that the kick was not a hard one and

(Footnote Continued)

how well he is performing his job, and should be offered the opportunity of open and honest evaluation of his performance on a regular basis. Any decision concerning promotion, demotion, transfer or termination of employment should be based on such evaluation and not upon factors extraneous thereto. Every employee is entitled to the opportunity of improving his job performance prior to the termination or transfer of his services and can only do so with the assistance of regular evaluation.

(b) Every employee is entitled to "due process" in matters affecting employment, transfer, demotion or promotion.

grievant may have been angry. A.H.'s statement that grievant had hit him on the chin after he had ceased fighting with another student was also credible. Significantly grievant, when specifically questioned concerning this incident, did not deny it but instead stated that he did not believe he had hit the student. The testimony of C.M. that grievant had grabbed his jacket was inconsistent and it cannot be concluded that his account was more plausible than grievant's.

All of these occurrences, with the exception of the incident involving C.M., however, took place prior to the first improvement plan when grievant's behavior was deemed remediable by Ms. Hatfield. The Board presented no evidence except the testimony of C.M., which was inconclusive, that grievant had any physical contact with students after being advised in the plan that he was to cease any such contact. It is therefore concluded that he complied with the directive and the Board's evidence in regard to the charge of cruelty cannot be the basis for dismissal. See Slavin v. Cabell County Board of Education, Docket No. 06-88-121 (February 17, 1989). Nor can it constitute any part of the Board's overall burden of proof, See Kirk v. Mingo County Board of Education, Docket No. 89-29-99 (September 12, 1989), in establishing just cause for grievant's termination. The foregoing conclusions regarding grievant's responses to questions and explanations were, however, considered relevant in the assessment of his credibility as a witness on other matters.

Grievant's assertions that the Board failed to demonstrate he had not complied with the improvement plan is simply without

basis. It is abundantly clear from the testimony of Ms. Hatfield and grievant's own testimony that he refused to comply with the order not to place students in the hallway. It is also apparent from the record that, while grievant did attempt to gain some control over his students as directed by the November 1987 improvement plan, he had made little, if any, progress by the time he was evaluated in February 1988. Furthermore, the steps he did take appear superficial in nature. There was no evidence that grievant attempted to maintain, for any period of time, any particular practice designed to give him some control. The one disciplinary measure with which he was understandably most pleased was placing unruly students in other teachers' classrooms. Significantly, grievant agreed with Ms. Hatfield's February 1988 conclusions that he had failed to improve in the most important areas contained in his improvement plan.

It cannot be said that grievant's use of the basic rules of mathematics, in itself, constituted incompetence. What is clear, however, is that he could not adequately convey to students how and when to apply them. While grievant's attempts to bring students, deficient in these basics, up to an acceptable level was well-intentioned, it is apparent he was not successful. Except for two occasions when grievant reduced the rules to written hand-out form, students were forced to rely on his verbal or chalkboard explanations. Considering grievant's almost total abandonment of the textbook, it is understandable that students reported a lack of reference points and confusion over the focus of his classes. Furthermore, even students with previously high

grades in mathematics were unable to comprehend grievant's methods, indicating that some changes were badly needed. Grievant's failure to recognize this need can obviously be considered incompetence. His steadfast refusal to implement the changes as directed by Ms. Hatfield can be viewed as insubordinate action on his part. It is also clear that grievant's severe discipline problems were, to some extent, the result of the students' confusion over his methods. Without their attention, which grievant apparently lost early in the year, little control over their behavior could be expected. His resort to placing particular students in the hallways nearly every day, the almost desperate pleas to Principal Hatfield for help, and use of grades as a disciplinary measure, indicate the extent to which grievant had lost control over his classes.

Grievant's assertions concerning the Board's compliance with Policy 5300 are similarly not supported by the evidence. He correctly argues that, implicit in the policy is some provision that an employee experiencing difficulties which require an improvement plan should receive some assistance from his supervisor, but there was no evidence that he did not receive such. Ms. Hatfield made numerous suggestions in the first improvement plan as to how grievant could achieve the goals therein. While it is obvious from grievant's testimony that he wanted most discipline problems handled outside his classroom, it was very basic control over his students within the classroom which Ms. Hatfield directed him to try to achieve. Assistance from her on this problem would necessarily involve only suggestions and

reference to written materials on her part. Even though, the record reflects that she was constantly coming to grievant's aid when his entire class would be out of control and, by her own presence, impose some measure of discipline. Her conclusion that placing disruptive students in other teachers' classrooms was not an acceptable practice was quite reasonable considering grievant's past practice of disassociating himself with particularly troubling students. While her direction to cease tape recording students, a practice which achieved some success, was unexplained, this alone cannot support grievant's assertion that he was not receiving adequate assistance on his improvement plan.

The basic purpose of Policy 5300 is the prevention of disciplinary actions against school employees for deficiencies which are correctable but which the employee has never been apprised of or given the opportunity to rectify. Mason County Board of Education v. State Superintendent of Schools, 274 S.E.2d 423 (W.Va. 1981); Trimboli v. Board of Education of the County of Wayne, 254 S.E.2d 561 (W.Va. 1979). In the present case, it is extremely clear that grievant was fully advised of what Ms. Hatfield deemed inadequate performance and that he fully recognized his deficiencies. He was afforded four months to achieve some improvement but made only minor attempts to correct his deficiencies during that period. Not only did grievant not demonstrate noticeable improvements, he willfully refused to follow the directions of Ms. Hatfield to cease certain disciplinary methods and was therefore insubordinate. See Martin v. W.Va. State Fire Commission, Docket No. 89-SFC-145 (August 8,

1989); Webb v. Mason County Board of Education, Docket No. 26-89-004 (May 1, 1989).

In summary, it should be noted that although the presentation of evidence and discussion herein have been focused on the particular charges leveled against grievant, his conduct and not the labels used by the Board have been considered determinative. Mason County Board of Education v. State Superintendent of Schools, supra; Holland v. Raleigh County Board of Education, 327 S.E.2d 155 (W.Va. 1985). The undersigned concludes that the Board has proven the charges against the grievant by a preponderance of the evidence.

In addition to the foregoing, the following findings of fact and conclusions of law are made.

FINDINGS OF FACT

1. Grievant, a mathematics teacher, was first assigned to GJHS at the beginning of the 1987-88 school term. Prior to the commencement of the term, he and his principal, Ms. Burma Hatfield, had a conference during which both expressed concerns over his ability to maintain student discipline in his classroom.

2. After observing grievant's performance and receiving complaints from parents and students concerning his use of physical force to discipline students, Ms. Hatfield placed grievant on an improvement plan November 10, 1987. The plan directed grievant to, among other things, cease physical contact

with students, make changes in his teaching style and gain control of his classroom.

3. In February 1988, after numerous observations of grievant's classroom, many of which were the direct result of his pleas for help in gaining control of students, Ms. Hatfield completed an evaluation of his performance concluding that little, if any, progress had been made on the November 1987 improvement plan. Grievant was subsequently placed on another plan and directed to make immediate improvement in areas outlined therein. Grievant, who was also advised to work on areas identified as deficiencies in the first plan, noted his agreement with Ms. Hatfield's assessment of his progress in several areas, including control of his classroom.

4. In March 1988, Ms. Hatfield concluded that grievant had failed to follow her directions and recommended to Mr. Harry Cline, then Superintendent of Schools, that his employment be terminated. The Board subsequently voted to terminate his employment.

CONCLUSIONS OF LAW

1. Upon a school employee's appeal of a board of education's decision to dismiss pursuant to W.Va. Code §18A-2-8, the board must substantiate the charges against said employee by a preponderance of the evidence. Landy v. Raleigh County Board of Education, Docket No. 89-41-232 (December 14, 1989); Kirk v.

Mingo County Board of Education, Docket No. 89-29-99 (September 12, 1989); Garcia v. Marshall County Board of Education, Docket No. 25-87-274-3 (December 29, 1987).

2. When grounds for a school employee's dismissal include charges relating to incompetency or conduct which is deemed correctable, the Board must also establish that it complied with the provisions of West Virginia Board of Education Policy 5300 requiring it to inform said employee of his deficiencies and afford him a reasonable period of time to improve. Policy 5300 implicitly contains provisions that the employee must be assisted in this goal and not thwarted from achieving objectives set forth in an improvement plan. Mason County Board of Education v. State Superintendent of Schools, 274 S.E.2d 435 (W.Va. 1987).

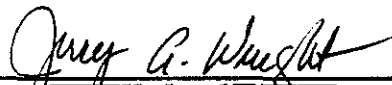
3. The Board has established by a preponderance of the evidence that grievant was fully apprised of his deficiencies and was given a reasonable period of time to improve yet failed to achieve the goals outlined in an improvement plan given him November 10, 1987.

4. The Board has also established that grievant was provided ample assistance on the plan by his principal and that he was incompetent in the performance of his duties by failing to exercise even minimal control of his classroom and to implement a method of mathematics instruction which his students could comprehend.

5. The Board has also established that grievant received orders to cease his disciplinary practice of placing students in the hallway from his principal, a person with the authority to give such orders, yet continued the practice and was therefore insubordinate. See, Martin v. W.Va. State Fire Commission, Docket No. 89-SFC-145 (August 8, 1989); Webb v. Mason County Board of Education, Docket No. 26-89-004 (May 1, 1989).

Accordingly, the grievance is DENIED.

Either party may appeal this decision to the Circuit Court of Mingo County or 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.


JERRY A. WRIGHT
Chief Hearing Examiner

Dated: February 28, 1990