WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

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JEFFREY S. WYNNE

v. Docket No. 89-20-682

KANAWHA COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant Jeffrey S. Wynne was employed by Respondent Kanawha County Board of Education as a special education teacher at Dupont Junior High School (DJHS). As a result of a November 2, 1989, altercation with a student on school property, Grievant was suspended with pay pending a disciplinary hearing to be held on November 15, 1989.[1] At the conclusion of that hearing, the evaluator recommended that Grievant be dismissed from his employment.[2] Respondent's

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[1] The testimony and exhibits from that hearing are part of the record herein 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 November 15 hearing.

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

[2] The evaluator's decision was rendered on November 16, 1989, and contained detailed findings of fact and conclusions of law.

Superintendent presented this recommendation to Respondent, which voted on November 16, 1989, to dismiss Grievant effective immediately. Grievant was notified of this action by letter dated November 17, 1989.

On November 27, 1989, Grievant initiated the following grievance directly at level four:[3]

> I was improperly dismissed under the provisions of [W.Va. Code §] 18A-2-8. I seek reinstatement to my teaching position at Dupont Junior High School.

A level four hearing was conducted on December 21, 1989,[4] and the parties were given until January 5, 1990, to submit proposed findings of fact and conclusions of law; that date having passed, the matter is mature for resolution.

While the evidence varies considerably with regard to events immediately prior to and following this incident, the following general account is undisputed. On November 2, 1989, Grievant was performing his usual lunch-period duty of

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[3] Education employees who are dismissed and who wish to grieve this punishment may file directly at level four, bypassing the lower administrative planes of this procedure. W.Va. Code §18A-2-8.

[4] The level four hearing was originally scheduled for December 15, 1989, but was continued for good cause upon joint motion of the parties. The parties requested the continuance in anticipation of a ruling by Kanawha County Circuit Judge Herman G. Canady, Jr., on a writ of mandamus to force Respondent to reinstate Grievant and a writ of prohibition to bar this Grievance Board from going forward with the level four hearing and issuing a decision. The basis for Grievant's request for these writs was the same as those asserted at level four in support of Grievant's motion to dismiss. Judge Canady's ruling was issued by letter dated February 27, 1990, and denied the relief sought.

patrolling the DJHS grounds. B.C. and numerous other students had finished eating their lunch and had congregated in an area of the school yard frequented by the football players and cheerleaders. Several of the students, including B.C., were putting glow-in-the-dark Halloween make-up on each other. During this time, Grievant was walking around the school building on patrol. As he rounded the west end of the building, he observed a student pick up a section of link chain.[5] After taking the chain from the student, Grievant wadded it up in his hand and continued on around the building. Shortly thereafter, B.C. approached Grievant with some of the Halloween paint on his fingers. B.C. rubbed the paint on Grievant's neck, then turned and ran. After travelling a short distance, B.C. was struck in the back of the head by the chain which had been in Grievant's possession. As a result of being hit by the chain, B.C. suffered three large swollen areas on his head, each of which was lacerated. Grievant then accompanied B.C. into the school building, where he cleaned the student's wounds, obtained a clean shirt for him and allowed him to return to class. Grievant then reported the incident to Mr. Forest Mann, DJHS principal. Mr. Mann summoned the school nurse to his office to examine B.C. B.C.'s father was called and,

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[5] This piece of chain was subsequently found to be forty-four inches in length and to weigh approximately one and one-half pounds.

after conferring with the nurse, Mr. Mann and Grievant, he took his son home.

Mr. Mann then asked Grievant to prepare a written account of the events which had transpired.[6] On the following day, November 3, Mr. Mann sent a letter to Respondent's Superintendent, Dr. Richard Trumble, summarizing the results of his investigation, which included a conversation with Grievant. By letter dated that same day, Dr. Trumble notified Grievant in some detail of the allegations against him and suspended him with pay pending further investigation by Respondent. On November 6, 1989, Dr. Trumble informed Grievant that a disciplinary hearing would be held on November 15, 1989.

At the outset of the level four hearing, Grievant's counsel moved for dismissal of the charges against his client and for his immediate reinstatement on the grounds that, since W.Va. Code §18A-2-8 provides that a board of education may dismiss or suspend an employee for "[i]mmorality, incompetency, cruelty, insubordination, intemperance or willful neglect of duty," the charges must state such grounds and without that statement Grievant cannot know how to defend. The notice was contained in a November 3, 1989, letter to Grievant from Respondent's Superintendent advising him of his immediate suspension with

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[6] This handwritten document was admitted into evidence at the November 15 hearing as Wynne Exhibit 1.

pay pending further investigation and a disciplinary hearing. Grievant was advised that "it is alleged that you threw a length of chain at student [B.C.] shortly after lunch on November 2, 1989. As a result, student [B.C.] received a head injury which involved lacerations of the scalp, bleeding and swelling." Respondent's Collective Exhibit 1.

Grievant cited, inter alia, Meckley v. Kanawha Co. Bd. of Educ., 383 S.E.2d 839 (W.Va. 1989), wherein the West Virginia Supreme Court of Appeals ruled in its syllabus,

> "'The authority of a county board of education to dismiss a teacher under W.Va. Code 1931, 18A-2-8, as amended, must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously.' Syllabus point 3 in Beverlin v. Board of Education of Lewis County, [158] W.Va. [1067], 216 S.E. 2d 554 (1975)." Fox v. Board of Education, 160 W.Va. 668, 236 S.E.2d 243 (1977).

The motion was denied without prejudice for further consideration herein. While Meckley and the cases it cites clearly require that the action of the employee for which he is disciplined must comprise one of the stated types of misconduct, the statute does not require that the notices so label the action. As the Supreme Court has also stated, in a similar circumstance:

> It is not the label given to conduct which determines whether [W.Va. Bd. of Educ. Policy] §5300(6)(a) procedures must be followed but whether the conduct forming the basis of dismissal involves professional incompetency and whether it directly and substantially affects the system in a permanent, noncorrectable manner.

Mason Cty. Bd. of Ed. v. State Supt. of Sch., 274 S.E.2d 435, 439 (W.Va. 1980). Moreover, this Grievance Board has recently ruled that Code §18A-2-8 does not require that a notice of suspension or dismissal specify which type of misconduct is alleged in the language contained in that provision. Rather, due process is not denied if the notice apprises the grievant of the nature of the charges and the alleged conduct comprises one of the types of misconduct listed in §18A-2-8. Walker v. Kanawha County Board of Education, Docket No. 89-20-384 (October 26, 1989). That case also makes reference to the West Virginia Supreme Court of Appeals decision in Snyder v. Civil Service Commission, 238 S.E.2d 842 (1977) wherein it was stated:

> Where an act of misconduct is asserted [in a notice of dismissal] it should be identified by date, specific or approximate, unless its characteristics are so singular that there is no reasonable doubt when it occurred. If the act of misconduct involves persons or property, these must be identified to the extent that the accused employee will have no reasonable doubt as to the identity of the persons or property involved.

At 844. Clearly, the notice in this case fulfilled even this stringent standard. Furthermore, these is no indication, nor has there been any allegation, on this record that Grievant was surprised by any evidence presented and could not defend himself against the charges. Moreover, Grievant himself had furnished his principal with a detailed one-page handwritten account of the incident dated November 2, 1989. The allegations contained in the notice of discipline would

undoubtedly fall within the grounds of "immorality"[7] and would possibly constitute "willful neglect of duty" or "cruelty." Accordingly, it is concluded that the notice to Grievant of his actions giving rise to his dismissal was legally sufficient.

While Grievant does not deny throwing the chain which struck B.C. in the head, he does deny that he intended to injure the student, characterizing his actions instead as inadvertent. Grievant argues that Respondent's decision to dismiss him was thus unduly harsh, especially in light of his past professional performance.

In reviewing matters of this sort, "the sole significant issue is whether [the school board] acted arbitrarily and capriciously in suspending and dismissing [the teacher], considering the evidence placed in the record." Beverlin v. Board of Education of Lewis County, 158 W.Va. 1067, 1972, 216 S.E.2d 554, 557 (1975).

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[7] "Immorality" is defined as "conduct 'not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially not in conformity with the acceptable standards of proper sexual behavior.'" 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.

Initially, it should be noted that, while B.C. did testify at the November 15 hearing, he did not testify at level four. Instead, Respondent's counsel submitted a certified transcript of the disciplinary hearing together with all exhibits as Respondent's entire level four presentation. Grievant's counsel was in agreement with this course of action.[8] As a result, the undersigned did not have the opportunity to make a determination as to B.C.'s credibility. Ordinarily, Respondent's failure to call B.C. as a witness at level four would mean that it failed to meet its burden of proof because it would be impossible to observe the demeanor of an essential witness and to draw conclusions regarding his credibility. See Landy v. Raleigh County Board of Education, Docket No. 89-41-232 (December 14, 1989).

Given the circumstances of this case, however, a determination concerning the credibility of Respondent's witnesses is not essential to the resolution of this matter. As mentioned earlier, Grievant does not deny that the incident occurred but contends that his actions were inadvertent and without intent to injure B.C. Furthermore, Grievant subpoenaed student R.H. to the level four hearing.

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[8] Grievant was unrepresented by counsel at the disciplinary hearing, being assisted instead by a WVEA representative. However, his counsel at level four advised the undersigned that he had had ample opportunity to review the transcript and discuss the same with his client.

R.H. was apparently the only independent witness to the events. Indeed, the witnesses whose credibility is most essential to a proper resolution of this grievance are those presented by Grievant himself. There was testimony from B.C. in November as to certain statements made and actions taken by Grievant which would indicate that he attempted to cover up the incident and Grievant's level four testimony did not directly contradict that of B.C. Finally, and perhaps most importantly, Grievant testified at his disciplinary hearing and again at level four that he essentially agreed with B.C.'s version of the events as presented on November 15. Therefore, Respondent's failure to present the live testimony of B.C. at the level four hearing is not fatal to its case.

B.C. testified at the disciplinary hearing that, after eating his lunch in the school cafeteria, he went into the school yard where a number of students were putting glow-in-the-dark Halloween makeup on their faces. B.C. placed some of the makeup on his fingers and walked up to Grievant, reaching out for him with the makeup. He then rubbed makeup on Grievant's neck, turned and ran. When he was approximately ten to fifteen yards from Grievant, he was struck in the back of the head with a piece of chain. B.C. stated that he initially stumbled forward, but then turned around and walked toward the school. At that point, Grievant approached him saying "if I had a gun, I would have shot you." (T. 14). B.C. testified that Grievant also told him

to "keep it between us." (T.14). Grievant then took him to the men's faculty lounge to calm him down and clean his wounds. While on the way to the lounge, they passed Mr. Mann in the hallway. According to B.C., Grievant told him that if they hurried, Mr. Mann would not see them.

In the faculty lounge, Grievant cleaned the blood from B.C.'s head with a wet paper towel. He then covered B.C.'s bloody shirt with his jacket and took him upstairs in search of another shirt. Grievant and B.C. then encountered DJHS student M.C., who had two shirts on. Grievant told M.C. to give one of the shirts to B.C. After taking B.C. into the boys' restroom to change shirts, Grievant took the bloody shirt, rolled it up and placed it in B.C.'s locker. B.C. then returned to his fifth period English class. Shortly thereafter, Mr. Lipscomb, the football coach, came to the classroom to get B.C. out of class. Once in the hallway, B.C. began to cry and told Coach Lipscomb what had occurred. Coach Lipscomb then sent him to the football field house where Mr. Reeser and Coach Wallace were waiting. Mr. Mann then arrived to check on B.C. and, shortly thereafter, Mr. Reeser accompanied him to Mr. Mann's office where he was examined by the school health nurse. B.C. then related to Mr. Mann what had occurred. His father was then notified and, after meeting with Mr. Mann and Grievant, he took B.C. home.

The following day, B.C. was taken to an emergency care facility with complaints of bad headaches and dizziness. A

skull x-ray apparently revealed that B.C. had a buildup of blood in the back of his head.[9]

Ms. Sharon Richardson, R.N., testified at the disciplinary hearing that she was employed at the time as a school nurse and, on the day in question, was at DJHS seeing children in the school clinic and performing various tests. Significantly, Ms. Richardson stated that this was her regularly-scheduled day to staff the DJHS clinic. Upon being summoned to Mr. Mann's office to examine B.C., she observed

> three lacerations of the scalp. These were in a vertical line starting just to the left of the crown of the head and proceeding down the back of the head to about an inch above the neckline. The top and bottom lacerations had minimal bleeding and swelling. The middle laceration had swelling equal to the size of a half dollar. The blood had been cleaned away and no fresh bleeding was evident.

Respondent's Exhibit 1. She checked for neurological problems and found none but she did observe that B.C. had watery eyes and was sniffling and crying. Ms. Richardson then applied ice to the back of his head and advised him to see a doctor. Ms. Richardson was also present when B.C. informed Mr. Mann what had occurred. She then prepared a written report which was admitted into evidence at the disciplinary hearing as part of Respondent's Exhibit 1. In

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[9] With the exception of the school nurse's report of her examination and observations, dated November 2, 1989, no medical evidence was submitted.

addition to the information discussed above, Ms. Richardson documented B.C.'s account of the incident as he related it to Mr. Mann. His version of events at that time was consistent with his testimony at the disciplinary hearing.

Grievant has had four separate opportunities to give his version of the events leading up to and immediately following B.C.'s injury--when he reported the incident to Mr. Mann, in his November 2 handwritten account of the events, at the November 15 disciplinary hearing and at the level four hearing. The following is a brief discussion of these four accounts.

Mr. Mann testified at the disciplinary hearing that shortly after lunch on November 2, 1989, Grievant, visibly upset, entered his office and closed the door. His first statement was "I busted [B.C.]." (T.30). When asked for an explanation, Grievant replied "I hit [B.C.] in the head with a chain." (T.30). Grievant also informed Mr. Mann that B.C. was in the football field house behind the school building. There was no further discussion at that time as Mr. Mann left to check on B.C.'s condition. However, he did ask Grievant to prepare a written account of the incident.

This written account, dated November 2, was admitted into evidence at the disciplinary hearing as Wynne Exhibit 1. In that document, Grievant states that

> [B.C.] rushed at me from a group of students. His hand was out-stretched toward me and he struck me in the neck with his fingers. (He appeared to have something white on his fingers.) As he struck me, he took off in a sprint beside me, at

> which time I reacted and threw the piece of chain at him.

This document contains very little discussion concerning what happened after the chain struck B.C.

Grievant also presented testimony at the November 15 disciplinary hearing conducted by Respondent.[10] After outlining his professional qualifications, Grievant testified that during the lunch period, he was on duty patrolling the school grounds. Upon observing a student pick up a section of link chain, Grievant confiscated it and continued around the west end of the building. The remainder of this testimony for the most part paralleled his written account discussed previously. With regard to the actual throwing of the chain, Grievant stated

> Of course, I just reacted. I kind of flinched to the right, at which time [B.C.] was sprinting across the yard, and I just simply reacted and threw what I had in my hand.

(T.48). He then stated that, after realizing B.C. was injured, he escorted him to the men's faculty lounge instead of the closer boys' restroom because there was less student traffic there and he wanted to minimize B.C.'s embarrassment as much as possible. This was also the reason given for passing Mr. Mann in the hallway on the way to the lounge

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[10] Throughout this Decision, the undersigned has attempted to capture the essence of testimony and not necessarily quote it verbatim.

without calling these events to his attention at that time (T.49).

On cross-examination, Grievant stated that, while he disputed B.C.'s testimony that the distance between them was approximately 20 feet, he had never before attempted to approximate the distance and did not really know. However, he did say that the distance was possibly five or six strides of approximately one yard each[11] (T.52). While Grievant did not recall stating "If I had a gun, I would have shot you," (T.53), he admitted that he may have made such a statement but only in a joking manner and to loosen the tension. Grievant initially denied making the statement to B.C. that "If we hurry we can keep this between the two of us" (T.53), while on the way to the faculty lounge. He later conceded that it was possible, stating, "I may have made some comment, but I don't recall verbatim making the comment of that nature" (T.54). He did admit to covering B.C.'s bloody shirt with his jacket, requesting another student to take off a shirt and give it to B.C., rolling up B.C.'s bloody shirt and stuffing it in his locker, and sending B.C. to his next class. However, he maintained that all of these statements and actions were designed to prevent embarrassment to B.C. and relieve his anxiety as opposed to covering up the incident.

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[11] This would, of course, be fifteen to eighteen feet.

Finally, Grievant testified at level four that, as he rounded the building with the chain in his hand, he saw B.C. out of the corner of his eye sneaking between students. He then stated, "I turned and looked at him and he rushed at me." He maintained that B.C. was coming from his (Grievant's) right side and he flinched to avoid being hit in the face. As B.C.'s fingers struck him in the neck, he was further knocked off balance and spun to his right in an effort to regain his balance. As this occurred, Grievant stated that he flung the chain in B.C.'s general direction simply as a reflex reaction. Grievant's remaining level four testimony regarding the events immediately following this incident was consistent with that elicited at the disciplinary hearing.

Grievant also presented at level four the testimony of DJHS student R.H. R.H., apparently the only independent eyewitness to these events, testified that B.C. "walked up behind" Grievant and "wiped white stuff on his neck." Grievant then turned quickly and hit B.C. in the head. R.H. reiterated that B.C. approached Grievant from the back and "touched him on the neck." When asked specifically what Grievant did immediately before throwing the chain, R.H. replied "he just stood there and then he just turned around." R.H. estimated that B.C. was five to ten feet from Grievant at the time.

DJHS student C.H. also testified on Grievant's behalf at level four. While he did not witness the throwing of the

chain, he was standing at the school door when Grievant and B.C. went inside. According to C.H., Grievant was walking beside B.C. and telling him "how things like this could happen when you horseplay." C.H. stated that Grievant was getting his point across to B.C. in "a forceful way" though "not really in a mean way."

Grievant presented numerous students, teachers and parents at level four as character witnesses on his behalf. According to these witnesses, it appears that Grievant was well-liked, at least by his fellow coaches, the athletes and their parents.[12] Each of the character witnesses testified that Grievant was a peace-loving person and that the incident with B.C. was not typical of his behavior. However, none of these witnesses testified as to his reputation for truthfulness.

The controlling issue in this matter is whether Grievant's actions were sufficient to support Respondent's decision to terminate him pursuant to W.Va. Code §18A-2-8. It is the determination of the undersigned, based upon all available evidence and information, that Grievant's dismissal must be upheld.

As discussed earlier, Grievant gave his version of this incident on four separate occasions. However, not until the

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[12] In addition to his teaching duties, Grievant served as the school trainer and was employed by the Athletic Boosters as the wrestling coach.

level four hearing did he testify that B.C. knocked him off balance and the chain left his hand during his attempt to regain it. It is significant that this description of the events was not at all similar to the description given by student R.H., a disinterested bystander. As discussed earlier, R.H.'s testimony directly contradicts Grievant's that B.C. rushed at him, knocking him off balance. According to R.H., after having the Halloween paint rubbed on his neck, Grievant turned and hit B.C. in the head with the chain. Further, while Grievant contends that the throwing of the chain was a reflex action, occurring instantaneously, the fact remains that, even by his own testimony, B.C. had time to run approximately eighteen feet before being struck by the chain.

At the disciplinary hearing held by Respondent, Grievant testified that he flinched to the right to avoid being hit by B.C.'s outstretched hand. However, at the level four hearing, he testified that B.C. approached him from the right side of his body. It is not plausible that, had Grievant indeed flinched, he would have done so in the direction of an oncoming object. Finally, neither of these accounts are consistent with the testimony of R.H., who testified at level four that B.C. walked up to Grievant from behind. R.H.'s testimony is also inconsistent with Grievant's level four testimony that, as he saw B.C. out of the corner of his eye, he turned and faced him as he was rushed.

Based upon the demeanor of the witnesses, the inconsistency of Grievant's testimony in material matters involving this grievance, and the fact that R.H. was a disinterested third-party witness, the conflict of evidence is resolved against Grievant. It is especially important to point out that Grievant's version of events given to his principal and in his handwritten account most closely resemble the testimony of R.H. Of course, both of these statements were given on the day of the incident, when Grievant would have had little or no opportunity to reflect upon the possible adverse consequences of his statements. Accordingly, it is the opinion of the undersigned that Grievant's action in throwing the chain is sufficient to sustain Respondent's action in terminating him.

Furthermore, Grievant's denial of any attempt to cover up his actions was likewise unpersuasive. It is significant to the undersigned that Grievant and B.C. passed Mr. Mann in the hallway on the way to the faculty lounge without informing him of what had transpired. While Grievant's explanation for this failure was an attempt to minimize embarrassment to B.C., it is difficult to imagine how informing the school principal of what had occurred at the time it occurred could be more embarrassing to B.C. than sending him to an English class with the wounds described by Ms. Richardson. It is also puzzling that Grievant, although a certified athletic trainer, would take B.C. to the men's faculty lounge, which had no first aid supplies, when the

school clinic, which did have first aid supplies, was open and staffed by a registered nurse. Likewise, the fact that Grievant obtained a clean shirt from another student's back, rolled up the bloody shirt and placed it in B.C.'s locker, and sent him to an English class instead of Mr. Mann's office makes Grievant's denial of an attempted cover-up improbable at best. Moreover, it was clear from the testimony of Mr. Mann and Ms. Richardson that B.C. was not emotionally capable after this incident of sitting in an English class without drawing attention to his situation. Finally, while Mr. Mann testified that Grievant told him that B.C. was in the field house with the coaches, Grievant was never able to adequately explain how he came to have that knowledge.

In conclusion, it is the opinion of the undersigned that Grievant did, in fact, attempt to cover up to the extent possible his actions with regard to the injury of B.C. While Grievant offered a response to each and every one of the points discussed above, those responses were simply not persuasive.

Finally, Grievant presented at level four the testimony of Mr. Jack Perry. Mr. Perry, who teaches physical education and coaches football and wrestling at Stonewall Jackson Junior High School, has been employed as a professional educator in Respondent's system for the past twenty-one years. The announced purpose of Mr. Perry's testimony was to establish that, for the past twenty-one years,

Respondent's usual method of discipline of teachers accused of assaulting students was a suspension without pay and not outright dismissal.[13] Mr. Perry stated that he was aware of two teachers who had had criminal warrants issued against them charging battery. One of the teachers was charged after separating two fighting students and holding one on the floor. This particular incident occurred fifteen years ago. No details were presented concerning the circumstances of the other teacher. When pressed as to the source of this knowledge, the witness stated he was "aware only by what you hear in school." Most importantly, however, Mr. Perry did not know what action, if any, Respondent took against these two teachers. As a result, Grievant has failed to prove by a preponderance of the evidence that Respondent's choice of

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[13] The level IV hearing was originally scheduled for the morning of December 15, 1989. At approximately twelve noon on December 14, Grievant's counsel hand-delivered to the undersigned's office a request for a subpoena duces tecum directed to Mr. William Courtney, Respondent's director of Employer/Employee Relations, and requiring him to produce a list of teachers suspended or dismissed by Respondent for striking students during the last three years. Due to the late hour of this request, the undersigned informed Grievant's counsel that the subpoena would not be issued. It was suggested that Grievant's counsel telephone Mr. Courtney and attempt to reach an agreement regarding the compilation and production of this information. If such agreement could not be reached, the parties would be permitted to argue this issue at the hearing. When the level four hearing was rescheduled, no further requests for the subpoena duces tecum were made and nothing more was heard concerning this information until Mr. Perry testified.

punishment violated its usual pattern of discipline in similar circumstances.

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

Findings of Fact

1. Grievant was employed by Respondent as a special education teacher at DuPont Junior High School from 1987 until his suspension and subsequent dismissal in November, 1989.

2. On November 2, 1989, Grievant was patrolling the school grounds during the lunch period when he confiscated a section of link chain from another student. The chain was forty-four inches in length and weighed approximately one and one-half pounds.

3. As Grievant continued patrolling the school grounds, he was approached from behind by DJHS student B.C. B.C. walked up behind Grievant and rubbed a small amount of white glow-in-the-dark Halloween paint on his neck. B.C. then turned and ran away from Grievant.

4. Grievant then turned and threw the chain at student B.C. B.C. was approximately twenty feet from Grievant when the chain was thrown and it struck him in the back of the head.

5. Grievant then approached B.C. and commented "If I had a gun, I would have shot you." Grievant then placed his

jacket around B.C.'s bloody shirt and escorted him to the men's faculty lounge. On the way to the lounge, Grievant made a comment to B.C. that "If we hurry, we can keep this between us." Grievant also told B.C. "Things like this could happen when you horseplay."

6. After cleaning B.C.'s wounds, Grievant told student M.C. to remove one of his two shirts and give it to B.C. Grievant then took B.C. to the boys' restroom, where he changed shirts. Grievant then rolled up B.C.'s bloody shirt and placed it in his locker. B.C. was then sent on to his fifth period English class.

7. B.C. was removed from his English class by Mr. Lipscomb who then escorted him to the football field house. Mr. Lipscomb then left to inform DJHS principal, Mr. Forest Mann, of what had occurred.

8. Prior to Mr. Lipscomb's arrival, Grievant entered Mr. Mann's office and closed the door. His first statement was "I busted [B.C.]" When asked by Mr. Mann for an explanation, Grievant replied "I hit [B.C.] in the head with a chain." Mr. Mann then instructed Grievant to prepare a written account of the incident while he went to the football field house to check on B.C.'s condition. Grievant had informed Mr. Mann that B.C. was at the football field house.

9. When Mr. Mann observed B.C. in the football field house, he concluded that the student was emotionally unable to talk or answer questions. Mr. Mann determined that B.C. was alert, examined his wounds and then returned to his

office after instructing Mr. Lipscomb to bring B.C. there when he regained his composure.

10. Upon B.C.'s arrival at Mr. Mann's office, he was examined by Ms. Sharon Richardson, a registered nurse in Respondent's employ. Ms. Richardson was at the school staffing the student clinic on her regular day to do so. Ms. Richardson's examination revealed three scalp lacerations in a vertical line. The top and bottom lacerations had minimal bleeding and swelling. The middle laceration had swelling equal to the size of a half dollar. Ms. Richardson applied ice to the wounds and advised B.C. to be examined by a physician.

11. B.C.'s father was called to the school, where he briefly met with Mr. Mann, Grievant and his son. He and B.C. then left the school. Disciplinary proceedings against Grievant were started the following day.

12. B.C. testified at the Respondent's disciplinary hearing on November 15, 1989. A certified transcript of that testimony was introduced as part of Respondent's presentation at level four. Student R.H. testified at level four that B.C. walked up behind Grievant and rubbed paint on his neck. He further testified that, as B.C. ran from Grievant, Grievant stood in place, then turned and threw the chain at B.C. Student C.H. testified at level four that he overheard Grievant to B.C. immediately after the incident that "things like this can happen when you horseplay." C.H.

testified that Grievant made this comment in a forceful manner.

13. Grievant presented his version of this incident on four separate occacions. The first two versions given by Grievant were made at a point in time shortly after these events when he would have had little or no opportunity to reflect upon the possible adverse consequences of his statements. These first two statements by Grievant most closely resemble the testimony of independent witnesses R.H. and C.H. Grievant's testimony at level four differed significantly from his first two accounts of the incident and from the accounts given by the independent witnesses.

14. Grievant presented numerous witnesses at level four who testified that the incident with B.C. was out of character for Grievant and that he had a reputation as a peace loving person. However, none of these witnesses testified as to Grievant's reputation for truthfulness.

15. In addition to the earlier findings with regard to Grievant's actions in throwing the chain at B.C., it is specifically found that, following this incident, Grievant did attempt to cover up to the extent possible his actions. While Grievant offered a response to each and every one of the allegations regarding a cover-up, these responses were simply not persuasive.

16. Based upon the demeanor of the witnesses, the inconsistency of Grievant's testimony in material matters involving this grievance, and the fact that R.H. and C.H.

were disinterested third-party witnesses, the conflict of evidence in this matter is resolved against grievant.

17. Grievant attempted to show through the testimony of Mr. Jack Perry that the decision of Respondent to dismiss him for his actions was a departure from Respondent's usual pattern of discipline in similar circumstances.

18. The type of conduct as described herein is, at best, indicative of an unprofessional relationship between Grievant and his student and a total disregard for his responsibility as an educator. At worst, it is conduct constituting a criminal offense and there is no basis upon which the conduct can be either justified or excused. More specifically, it is specifically found that Grievant's actions in throwing this chain were not accidental but were an intentional act of aggression against B.C. brought on by minimal provocation at best. This type of conduct is inherently harmful to the student/teacher relationship and to the school district and renders Grievant unfit to teach.

Conclusions of Law

1. W.Va. Code §18A-2-8 authorizes a county board of education to dismiss or suspend a teacher for any of the causes listed therein, e.g., "immorality."

2. It is not required by W.Va. Code §18A-2-8 that the notice of discipline specify which type of misconduct is alleged, for example, "cruelty." The notice in this case advised Grievant of the nature of the charges against him

and therefore did not violate due process notice requirements. See Higginbotham v. Kanawha County Board of Education, Docket No. 20-87-087-1 (Aug. 12, 1987).

3. The preponderance of the evidence is the standard of proof to apply in dismissal proceedings. Copenhaver v. Raleigh County Board of Education, Docket No. 42-86-175-1 (Aug. 15, 1986); Allison v. Kanawha County Board of Education, Docket No. 20-86-273-1 (Dec. 30, 1986).

4. A teacher may be dismissed without direct proof of an adverse effect of the alleged misconduct where the conduct directly involves minor students and is patently inappropriate. Such conduct is presumed to have an adverse effect on the students, teachers and staff of the school. Allison; McCroskey v. Webster County Board of Education, Docket No. 51-88-116 (Oct. 31, 1988).

5. Throwing a chain at a student's head during lunch hour and subsequently attempting to conceal said action constitutes "immorality" as a matter of law and directly affects a teacher's fitness to teach. Proof of either charge by a preponderance of the evidence will justify dismissal of the teacher.

6. Respondent has satisfied its burden of proof set out in Miller v. Kanawha County Board of Education, Docket No. 89-20-108 (July 31, 1989), and acted in good faith in attempting to preserve the integrity of the school system in Kanawha County.

7. There has been no evidence that Respondent acted arbitrarily or capriciously or deviated from its usual pattern of discipline in cases involving similar circumstances.

For the foregoing reasons, it is **ORDERED** that the grievance is **DENIED.**

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.

Robert M. Nunley

ROBERT M. NUNLEY
HEARING EXAMINER

Date: April 24, 1990