

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ELIZABETH SANCHEZ,

Grievant,

v.

Docket No. 2018-0595-MonED

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Elizabeth Sanchez, is employed by Respondent, Monongalia County Board of Education. On October 16, 2017, Grievant filed this grievance against Respondent stating, "Grievant received a written reprimand dated October 6, 2017. Grievant contends that this reprimand is factually incorrect, arbitrary, and capricious. Grievant asserts a violation of W. Va. Code 18A-2-12a." For relief, Grievant seeks, "the removal of this reprimand from any and all records maintained by the Respondent."

A level one conference was held on November 1, 2017, and a decision was issued on November 6, 2017, denying the grievance. Grievant appealed to level two on November 16, 2017, and a mediation session was held on February 22, 2018. Grievant appealed to level three of the grievance process on February 26, 2018. A level three hearing was held before the undersigned administrative law judge at the Grievance Board's Westover, West Virginia office on September 17, 2018. Grievant appeared in person and was represented by John Roush, Esquire. Respondent was represented by Jennifer Caradine, Esquire. Each party submitted Proposed Findings of Fact and Conclusions of Law. This matter became mature for decision on October 22, 2018.

Synopsis

Grievant is employed by Respondent as a Teacher at Westwood Middle School and grieves a letter of reprimand. The letter of reprimand concludes that Grievant engaged in intimidating behavior by standing close to a student and waving her finger in the student's face, while the student stood with his back against the wall. It also concludes that Grievant violated confidentiality by questioning the student as to "why" his guardian did not attend a parent-teacher conference. Respondent did not prove by a preponderance of the evidence that Grievant asked the student "why" his guardian did not attend a parent-teacher conference. Respondent proved by a preponderance of the evidence that Grievant stood close to a student and waved her finger in the student's face, while the student had his back against the wall. Respondent's interpretation of this conduct as a violation of the West Virginia State Board of Education's Employee Code of Conduct was reasonable. The letter of reprimand was not applied in an arbitrary and capricious manner and did not violate Grievant's due process rights. Accordingly, this grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed by Respondent as a classroom teacher at Westwood Middle School.

2. Grievant's student, J.C.J.¹, was having behavioral problems in Grievant's class. J.C.J.'s behavior improved immensely after Grievant met with J.C.J. and his grandmother, J.C.J.'s legal guardian, resulting in Grievant nominating J.C.J. for the "Respect Award".

3. On September 29, 2017, while monitoring students in the hall outside her classroom, Grievant noticed J.C.J. and had the impression that he wanted to speak with her regarding the "Respect Award". Grievant told J.C.J. that she had nominated him for the award. There followed an awkward pause which Grievant filled by asking J.C.J. "if" his grandmother had attended the parent-teacher conference the previous evening and telling J.C.J. how lucky he was to have his grandmother to care for him. J.C.J. began walking away, while telling Grievant he was going to be late for class. Grievant called J.C.J. back, whereupon J.C.J. stopped and backed up against the wall. Grievant moved within a few inches of J.C.J. and, with his back still against the wall, waved her finger a few inches from J.C.J.'s face while reprimanding him for walking away before the conversation was finished. (See, Respondent's Exhibit 2.)

4. While Grievant's conversation with J.C.J. lasted about a minute, the portion of the incident where Grievant called J.C.J. back and reproached him lasted about 14 seconds. (See, Grievant's Exhibit 2.)

5. Neither J.C.J. nor his grandmother complained about the incident.

¹ The student will be identified by his initials in conjunction with past practice of the West Virginia Supreme Court in cases involving underage individuals. See *In the Matter of Jonathan P.*, 182 W.Va. 302, 303 n. 1, 387 S.E. 2d 537, 538 n. 1 (1989).

6. Three teachers² saw and heard brief portions of the incident, made written statements,³ and complained to the Westwood Middle School principal, John Conrad. (See, Principal Conrad's testimony.)

7. Principal Conrad conducted an investigation wherein he viewed a non-audio surveillance video⁴ of the September 29, 2017, incident and talked to Grievant, J.C.J., and the three teachers who witnessed portions of the incident.

8. Principal Conrad issued a letter of reprimand⁵ to Grievant on October 6, 2017, wherein he concluded:

After getting more information from the witnesses and from you, and after reviewing the security camera video, it is clear that you were standing close to the student. The student had his back against the wall, and you were waving your finger in his face. This is intimidating behavior, and this type of behavior from you needs to stop immediately, for the role of a school and its employees is to provide a safe and nurturing environment for students.

Furthermore, discussing with a student in a hallway about why his guardian did not go to a conference is neither the time nor place to discuss a confidential matter. In fact, questioning a student at all about the decision of his guardian to not attend parent teacher conferences is not appropriate; instead, you should have called and should have directly asked the guardian yourself.

² The teachers were Courtney Radcliffe, Lindsay Smalls, and Sarah Cropper.

³ Respondent presented only one of these written statements (that of teacher Radcliffe) at the level three hearing.

⁴ See, Respondent's Exhibit 2.

⁵ Respondent's Exhibit 1.

9. In the letter of reprimand, Principal Conrad brought up their September 12, 2017, conversation, stating that “Mrs. Hagerty and I also reminded you that we had had a similar conversation about your body language and tone with students on 9/12/17 where we expressed to you our concern as to how students were interpreting your body language, and as a result we asked you to work on improving your body language.”

10. During their September 12, 2017, conversation, Principal Conrad and Mrs. Hagerty told Grievant that, due to her body language, she did not have a good rapport with students and that she should not use her finger and hands when communicating with students. (See, Grievant’s testimony.)

11. Respondent did not inform Grievant in the October 6, 2017, letter of reprimand or the verbal directive on September 12, 2017, that she had violated or was in danger of violating any rule or regulation, let alone cite the rule or regulation.

12. Principal Conrad relied on his conversations with teachers and J.C.J., and especially on his conversation with Teacher Radcliffe, in concluding that Grievant asked J.C.J. “why” his grandmother had not attended the parent-teacher conference. (See, Principal Conrad’s testimony at minute 45, second 17, of the level three recording.)

13. Teacher Radcliffe said in a written statement on October 2, 2017, that she did not hear anything that Grievant said to J.C.J. on September 29, 2017. (See, Respondent’s Exhibit 3.)

14. None of the teachers who reported the incident were in a position to see or hear much of the brief exchange between Grievant and J.C.J. (See, testimony of Grievant and Teacher Radcliffe.)

15. Teachers Radcliffe and Smalls are not on speaking terms with Grievant. (See, Grievant's testimony.)

16. All three teachers were friends, especially Teacher Lindsay Smalls and Teacher Courtney Radcliffe, the two teachers who testified at the level three hearing. (See, testimony of Grievant and Teacher Smalls.)

17. Teacher Radcliffe has had clashes with Grievant, one of which resulted in Grievant reporting her to Principal Conrad after Teacher Radcliffe yelled at Grievant in front of her students. After Grievant reported her, Radcliffe screamed at Grievant over the phone multiple times. (See, Grievant's testimony.)

18. Principal Conrad told Grievant on prior occasions that she was exaggerating when she complained to him about Teacher Radcliffe screaming at her in front of her students and about students who were disrespecting her and making fun of her French accent. (See, Grievant's testimony.)

19. J.C.J. was not frightened during the September 29, 2017, incident, but was uncomfortable and worried he would be late to class. (See, Teacher Smalls' testimony.)

20. None of the teachers who witnessed any portion of the incident intervened, but they did approach and talk to J.C.J. afterwards. (See, Teacher Smalls' testimony.)

21. Neither J.C.J. nor his grandmother was called to testify at the level three hearing. No written statements from either J.C.J. or his grandmother were introduced into evidence in this matter.

Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

This grievance asks the undersigned to review three issues in determining whether to remove the October 6, 2017, letter of reprimand from Respondent’s records: the accuracy of the factual conclusions in the letter, whether the letter is arbitrary and capricious, and whether Respondent violated due process in issuing the letter. A grievance concerning a letter of reprimand involves a disciplinary matter in which the employer bears the burden of establishing the charges against an employee by a preponderance of the evidence. *Simms v. Division of Natural Resources*, Docket No. 2015-1156-DOCS (Nov. 12, 2015). As such, Respondent has the burden of proving the accuracy of the charges against Grievant and that Respondent’s issuance of the letter of reprimand was not arbitrary and capricious “[T]he “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency’s actions are valid as long as the decision is supported by substantial evidence or by a rational

basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).” Syl. Pt. 1, *Adkins v. W. Va. Dep’t of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*).

In analyzing the factual accuracy of the October 6, 2017, letter of reprimand, the undersigned will review the following and only conclusions therein: that Grievant engaged in intimidating behavior by standing close to a student and waving her finger in his face, while his back was against the wall, and asking him “why” his grandmother had not attended the parent-teacher conference. The undersigned will disregard any allegations on which the letter of reprimand did not reach a conclusion.

The letter of reprimand never attributes its conclusion that J.C.J. had his back against the wall to Grievant’s conduct. The surveillance video⁶ and the still shots⁷ of the incident show that upon being called back by Grievant, and before Grievant gets near him, J.C.J. backs against the wall on his own. Two conclusions, that Grievant stood close to J.C.J. and waived her finger in J.C.J.’s face, while J.C.J. was against the wall, are consistent with Grievant’s own statements and the surveillance video and the undersigned therefore adopts them.

One of the three factual conclusions made by Respondent against Grievant in its Letter of Reprimand is contested, i.e., Respondent’s conclusion that Grievant asked J.C.J. “why” his grandmother did not attend the parent-teacher conference. There is conflicting evidence regarding this allegation. In situations where “the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required.” *Jones v. W. Va. Dep’t of Health*

⁶ See, Respondent’s Exhibit 2.

⁷ See, Grievant’s Exhibit 2.

& Human Res., Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); See also *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Principal Conrad testified that he relied “especially” on Teacher Radcliffe in reaching his conclusion that Grievant asked J.C.J. “why” his grandmother did not attend the parent-teacher conference. This reliance is tarnished on two counts: first, on account of the discrepancy between what Teacher Radcliffe told Principal Conrad in their conversation (that she heard Grievant ask J.C.J. “why”) and what she told Principal Conrad in her written statement⁸ (that she did not hear what Grievant said to J.C.J.); second, on account of the poor relationship between Teacher Radcliffe and Grievant which arose when Grievant reported Radcliffe for yelling at her in front of her students. The extent of this can be seen in the multiple calls where Teacher Radcliffe screamed at Grievant. They are no longer on speaking terms. Radcliffe’s animus towards Grievant

⁸ Respondent’s Exhibit 3.

has rippling effects on the credibility of other witnesses due to Radcliffe's friendship with Lindsay Smalls and Teacher Cropper. Teacher Smalls and Grievant are also not on speaking terms.

Grievant's version of the September 29, 2017, incident is credible in its plausibility. Grievant contends that she would never have asked "why" J.C.J.'s grandmother did not attend because she did not even know "if" his grandmother had attended the parent-teacher conference. It defies belief that a Teacher would hassle a student about his guardian not appearing at a parent-teacher conference, unless the Teacher told the student to tell his guardian about the conference and the student failed to do so. No evidence was presented about any expectation being placed on J.C.J. to tell his grandmother about the conference. It also defies reason that Grievant would imply that J.C.J.'s grandmother was failing in her duties by asking "why", when Grievant then followed up this question by telling J.C.J. how lucky he was to have his grandmother in his life. Grievant asserts that she only asked, as an icebreaker, "if" his grandmother had attended. Grievant admired J.C.J.'s grandmother for rectifying J.C.J.'s bad behavior. The conversation between J.C.J. and Grievant on September 29, 2017, began very amicably, with Grievant telling J.C.J. about the award for which she had nominated him and how lucky he was to have his grandmother in his life (presumably because J.C.J.'s grandmother had transformed J.C.J.'s behavior sufficiently enough to result in the J.C.J.'s nomination for the "Respect Award"). The conversation only became adversarial after J.C.J. began walking away prematurely, resulting in Grievant admonishing him over a span of fourteen seconds to not walk away when a Teacher is talking to him. The extent of Grievant's credibility can be measured through her testifying against self-interest that

Principal Conrad and Mrs. Hagerty directed her on September 12, 2017, to not point her finger.

Principal Conrad testified that J.C.J. told him that Grievant asked “why”. This statement is recognized as hearsay. “Hearsay includes any statement made outside the present proceeding which is offered as evidence of the truth of the matter asserted.” BLACK’S LAW DICTIONARY 722 (6th ed. 1990). Relevant hearsay is admissible in administrative hearings. *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (Dec. 9, 1997). The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *Id.*; *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-H-115 (June 8, 1990).

The undersigned believes that J.C.J. told Principal Conrad that Grievant asked “why”, and that J.C.J. either misunderstood or told Principal Conrad what J.C.J. thought Principal Conrad wanted to hear. We do not have the benefit of cross-examination to test J.C.J.’s conviction that Grievant asked “why” instead of “if”. The undersigned

understands Respondent's decision to not subject a child to the stress of testifying. However, Respondent never obtained a written statement from J.C.J., nor did it give any explanation for its failure to do so, especially in light of the fact that Respondent knew there were contradictory statements made in this regard after Grievant gave Principal Conrad her version of events. Respondent wants the undersigned to give J.C.J.'s statement as much credence as the statement Grievant made under oath and while subject to cross examination; yet the undersigned has no idea how J.C.J.'s statement would stand up under cross examination. The undersigned does not know if Principal Conrad asked J.C.J. leading questions to elicit his confirmation of events or if J.C.J. told his version without being coached. The undersigned must at least give some extra weight to Grievant's version, especially considering her credibility under cross examination.

This incident on September 29, 2017, and the resulting letter of reprimand, must also be viewed in light of the bad relationship between Principal Conrad and Grievant, and Principal Conrad's dismissiveness towards Grievant in telling her that she was overreacting when she complained to him about Teacher Radcliffe yelling at her in front of her students and about students who were disrespecting her and making fun of her French accent. It must also be viewed in light of the non-intervention by any of the Teachers who witnessed the incident, which hints at either the lack of intimidating severity in Grievant's conduct or the witnesses' inability to clearly see and hear the incident. Neither J.C.J. nor his grandmother complained or raised any concerns about the incident. None of the Teachers who reported the incident were in a position to see or hear much of the brief exchange between Grievant and J.C.J. They did, however, have animus towards Grievant because all three were friends and Grievant had complained to Principal

Conrad about Teacher Radcliffe yelling at her in front of her students. Respondent's witnesses were not more credible than Grievant. The burden of proof is on Respondent. Where Respondent cannot show that its version of events is more likely than not, it has failed to meet its burden. "If" rather than "why" is the more plausible version. Respondent has not proven by a preponderance of the evidence that Grievant asked J.C.J. "why" his grandmother did not attend the parent Teacher conference.

The letter of reprimand contains two surviving conclusions regarding Grievant's conduct: that Grievant engaged in intimidating behavior by getting close to J.C.J. and waiving her finger in J.C.J.'s face, while J.C.J. had his back against the wall. Respondent further contends in Respondent's Proposed Findings of Fact and Conclusions of Law that Grievant violated West Virginia State Board of Education's Employee Code of Conduct.

This code requires all West Virginia school employees to behave as follows:

4.2.1. exhibit professional behavior by showing positive examples of preparedness, communication, fairness, punctuality, attendance, language, and appearance.

4.2.2. contribute, cooperate, and participate in creating an environment in which all employees/students are accepted and are provided the opportunity to achieve at the highest levels in all areas of development.

4.2.3. maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination.

4.2.4. create a culture of caring through understanding and support.

4.2.5. immediately intervene in any code of conduct violation, that has a negative impact on students, in a manner that preserves confidentiality and the dignity of each person.

4.2.6. demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior.

4.2.7. comply with all Federal and West Virginia laws, policies, regulations and procedures.

W. VA. CODE ST. R. § 126-162-4.

The Code of Conduct lends itself to some leeway for interpretation in its ambiguity. As such, Respondent must be allowed some deference in its interpretation thereof, as long as this interpretation is reasonable and uniformly applied so as not to be arbitrary and capricious. “While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer].” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff’d*, Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff’d*, Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

While the letter of reprimand does not directly say so, it implies that Grievant was standing too close to J.C.J. Respondent, however, could not quantify how close was too close. While Principal Conrad could not define “too close”, he implied that he knows it when he sees it and that Grievant was too close to J.C.J. Also, Respondent could not say that hand gestures were not allowed as a teaching or student disciplinary tool. Principal Conrad could not quantify when hand gestures cross the line, but implied that he knows it when he sees it and that Grievant’s hand gestures crossed the line. Grievant argues that the September 29, 2017, incident was an acceptable teaching moment that

did not warrant a letter of reprimand. Grievant contends that she called J.C.J. back when he walked away before their conversation concluded, and only then did she put her finger in his face after J.C.J. had backed up against the wall, but that J.C.J. was not frightened.

Teachers exert some manner of what might appear to be intimidation towards students on a routine basis, whether it be raised voices, threats to send them to the principal, threats of detention, proximity to students, etc. Principal Conrad and Teacher Radcliffe indicated as much in their testimony. Teacher Radcliffe testified that she raises her voice and gets near students while disciplining them. She also testified that there comes a point when one can be too loud with or too close in proximity to a student, and that, while she could not define that line, she was certain that Grievant had crossed it.

The common definition of intimidation entails placing someone in fear.⁹ Perhaps a starting point in determining whether Grievant's conduct towards J.C.J. was intimidation is whether the typical reasonable middle school student would be intimidated by Grievant's conduct. Most middle school students would of course be embarrassed by a public reprimand. But intimidation is different than embarrassment. Every situation where a student is frightened is not necessarily a violation of the Code of Conduct, but it could be a starting point in assessing whether there is a violation. Conversely, every situation where a student is not frightened does not necessitate a finding that there was no intimidation. A student may have nerves of steel or be too cocky to admit that they were intimidated. The situation must be assessed under a "reasonable student" standard.

⁹ Black's Law Dictionary defines "intimidation" as "unlawful coercion; extortion; duress; putting in fear. 821 (6th ed. 1990). The New Oxford American Dictionary defines "intimidate" as to "frighten or overawe (someone), esp. in order to make them do what one wants". 889 (2001). Merriam-Webster's Dictionary and Thesaurus defines "intimidate" as "to make timid or fearful". 436 (2007).

Teacher Smalls testified that J.C.J. was not frightened, i.e., intimidated, by J.C.J.'s conduct. The surveillance video of the incident shows Grievant approach J.C.J. and stand close to him, while his back was against the wall, and wave her finger inches from his face. Standing close to a student is not in and of itself intimidating behavior. Waving a finger at a student is not in and of itself intimidating behavior, i.e., physical proximity may play a role. Therefore, both Grievant's standing close to J.C.J. and waving her finger in J.C.J.'s face cannot be viewed in isolation from each other. Respondent's assessment that these behaviors in combination are intimidating (to the typical/ reasonable student) is reasonable.

Grievant contends that the letter of reprimand is arbitrary and capricious because her actions did not warrant the letter as her behavior was not intimidating and as she had observed her colleagues use similar hand gestures. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd*, Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998). Grievant contends that her body language in use of

hands and fingers is simply a manifestation of her culture and that Respondent should view it as such rather than intimidation. Respondent must use a reasonable person standard and should not make exceptions for cultural backgrounds. It should, however, be sensitive to cultural context and not make negative assumptions as to the intent behind an employee's conduct where there are cultural explanations that shed a more innocent light on the motive behind an employee's conduct. The arbitrariness of the letter of reprimand must be viewed in the context of Respondent's verbal directive and the factual conclusions in the subsequent letter of reprimand.

Respondent asserts that the letter of reprimand issued against Grievant for the September 29, 2017, incident was not arbitrary and capricious because Grievant had been verbally reprimanded on September 12, 2017, to improve her body language with students. There is no evidence that Grievant was aware that the verbal directive she was given on September 12, 2017, was a verbal reprimand rather than verbal guidance. Respondent never documented its verbal reprimand. Grievant did acknowledge that on September 12, 2017, Principal Conrad and Mrs. Hagerty advised her that she needed to change the way she used her finger and hands when interacting with students. Even though the October 6, 2017, letter of reprimand reminded Grievant that she had been given a verbal directive on September 12, 2017, it did not call it a verbal reprimand. There was no evidence that Grievant was informed that she had a right to grieve the verbal directive. Ultimately, the question of whether Respondent's verbal directive to Grievant was a verbal reprimand is a red herring, because no evidence was presented regarding Respondent's progressive discipline and whether a verbal reprimand is necessarily the

first level of discipline. Grievant presented no evidence as to why Respondent could not start its progressive discipline with a letter of reprimand.

Respondent has proven that the action taken was justified. Respondent's interpretation of the Code of Conduct as applicable to Grievant's behavior was reasonable. It was reasonable for Respondent to consider Grievant standing close to J.C.J. and waving her finger in his face as intimidating. To the extent that Grievant presented limited evidence regarding alleged similar gestures used by other teachers, Grievant did not argue that she had been discriminated against or that her punishment should be mitigated. Further, regardless of what other behavior Grievant may have witnessed in her colleagues, Grievant had been specifically warned that she needed to change the way she used her finger and hands when interacting with students.

Grievant contends that Respondent violated West Virginia Code § 18A-2-12a(b)(6). Her argument is based on two areas of this code section that she underlined for emphasis in her proposed findings of fact and conclusion of law, which provides that "[a]ll school personnel are entitled to know how well they are fulfilling their responsibilities and should be offered the opportunity of **open and honest evaluations of their performance on a regular basis** and in accordance with the provisions of section twelve [§ 18A-2-12] of this article. All school personnel are entitled to opportunities to improve their job performance prior to the termination or transfer of their services. Decisions concerning the promotion, demotion, transfer or termination of employment of school personnel, other than those for lack of need or governed by specific statutory provisions unrelated to performance, should be based upon the evaluations, and not upon factors extraneous thereto. **All school personnel are entitled to due process in matters**

affecting their employment, transfer, demotion or promotion”. (emphasis added by Grievant.)

Through the first highlight, Grievant asserts that Respondent violated § 18A-2-12a(b)(6) because Respondent did not let her know how well she was performing through “open and honest evaluations” of her performance on “a regular basis”. Respondent provided Grievant an open and honest evaluation when it informed Grievant two weeks prior to the September 29, 2017, incident that she needed to improve her body language with students and, specifically, to not point her finger at them, and again through the October 6, 2017, letter of reprimand that she not get close to a student and wave her finger in the student’s face. The nature of progressive discipline is that it incrementally provides employees opportunities to improve their job performance. Regardless, this highlight applies to the provision of opportunities for employees to improve their job performance “prior to the termination or transfer of their services.” *Id.* Grievant’s services were not transferred or terminated.

Through the second highlight, Grievant argues that Respondent did not provide her with due process. As Grievant never developed this argument, the undersigned can only guess at any possible due process violation arguments. The West Virginia Supreme Court of Appeals has recognized that “due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case.” *Buskirk v. Civil Serv. Comm’n*, 175 W.Va. 279, 332 S.E.2d 579 (1985) (citing *Clark v. W. Va. Bd. of Regents*, 166 W.Va. 702, 279 S.E.2d 169, 175 (1981)). Due process is generally seen as at least providing notice of the alleged violation and an opportunity to

be heard.¹⁰ Respondent gave Grievant the opportunity to present her version of events before issuing the letter of reprimand. Respondent had informed Grievant two weeks prior to the incident that pointing her finger was inappropriate. Respondent also informed Grievant in the letter of reprimand that her behavior on September 29, 2017, was intimidating.

However, Respondent never put Grievant on notice, either verbally or in writing, that she was in violation of, or in danger of violating, any rule, regulation, or the Employee Code of Conduct. Respondent mentioned in Respondent's Proposed Findings of Fact and Conclusions of Law, filed on October 19, 2017, after the level three hearing, that Grievant was expected to abide by and had violated the Employee Code of Conduct (W. VA. CODE ST. R. § 126-162-4). This Board has previously held that a "[g]rievant was entitled to notice of her misconduct and an opportunity to respond to the charge before Respondent placed the memorandum documenting a reprimand in her personnel file. See *Nadler v. West Virginia University*, Docket No. 05-HE-455 (June 22, 2006)." *Byrd v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital*, Docket No. 2017-0769-DHHR (Aug. 8, 2017), *rev'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 17-AA-74 (March 2, 2018). However, in reversing the decision, the Circuit Court held that "[i]n dealing with routine personnel matters, the WVDHHR should not be required to afford extensive procedural protections for the imposition of verbal reprimands – a very minor form of discipline." *West Virginia Department of Health and Human Resources/William R. Sharpe, Jr. Hospital v. Byrd*, Kanawha Cnty. Cir. Ct. Civil Action No. 17-AA-74 (March 2, 2018), *overruling Byrd v. Department of Health and Human Resources/William R. Sharpe*,

¹⁰ See, BLACK'S LAW DICTIONARY 500 (6th ed. 1990)

Jr. Hospital, Docket No. 2017-0769-DHHR (Aug. 8, 2017). As in the present case, a documentation of that reprimand was placed in Byrd's personnel file. Unlike Byrd, Grievant in the present case was at least given an opportunity to respond to the factual allegations, even though she was not told what rule she was violating.

"The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest." Syllabus Point 1, *Waite v. Civil Service Commission*, 161 W.Va. 154, 241 S.E.2d 164 (1977), *overruled in part on other grounds by W. Va. Dep't of Educ. v. McGraw*, 239 W. Va. 192, 201, 800 S.E.2d 230, 239 (2017). "The scope of due process protection affordable in the instant case is governed by Syllabus Point 5 in *Waite, supra*, which states, '[t]he extent of due process protection affordable for a property interest requires consideration of three distinct factors: first, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of a property interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.'" *West Virginia Department of Health and Human Resources/William R. Sharpe, Jr. Hospital v. Byrd*, Kanawha Cnty. Cir. Ct. Civil Action No. 17-AA-74 (March 2, 2018), *overruling Byrd v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital*, Docket No. 2017-0769-DHHR (Aug. 8, 2017). In *Byrd*, the Circuit Court found that the memorialization of the verbal reprimand in employee's file did "not reach the level of stigmatization which would foreclose future employment opportunities or severely damage Grievant's standing and associations in the community" and that the reprimand

did not involve any falsity.¹¹ Even though Byrd received only a verbal reprimand which was then memorialized in Byrd's file, Grievant's written reprimand is still a relatively minor form of discipline very similar to Byrd's. In *Waite*, the West Virginia Supreme Court found that the employee's suspension was not a protectible due process interest because it did not involve the necessary level of stigmatization. Grievant's liberty interest is not at stake here, because there is not the necessary level of stigmatization due to the discipline only being a letter of reprimand and due to Grievant admitting to at least standing close to J.C.J. and pointing her finger in his face. Similarly, it appears likely that because the discipline is only a letter of reprimand, Grievant's property interests in her continued employment are not sufficiently at stake to entitle her to a heightened due process. Certainly, the cumulative effect of a letter of reprimand could severely impact Grievant's career. However, neither party presented any evidence as to how long Respondent would keep the letter in its files and whether its accessibility would be limited. The undersigned can therefore only guess that both would be limited. The probative value of informing Grievant in the letter of reprimand that she had violated the Employee Code of Conduct is low, as her version of events would probably have been the same. While the administrative burden would be minimal in requiring Respondent to identify the regulation it accuses Grievant of violating, it likely would not have changed the level three outcome. Ultimately, it is unnecessary for the undersigned to go as far as finding that Grievant did

¹¹ See Syl Pt. 2, *West Virginia Department of Education v. McGraw*, 239 W. Va. 192 (2017), "a stigmatizing statement made against a government employee must be false in order to implicate a protected liberty interest, *overruling Waite v. Civil Service Commission*, 161 W. Va. 154, 241 S.E.2d 164 (1977).

not have a protectible due process interest, since Grievant was provided with at least the minimum due process requirements commensurate to the discipline received.

Accordingly, the grievance is DENIED.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. A grievance concerning a letter of reprimand involves a disciplinary matter in which the employer bears the burden of establishing the charges against an employee by a preponderance of the evidence. *Simms v. Division of Natural Resources*, Docket No. 2015-1156-DOCS (Nov. 12, 2015).

3. In situations where “the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required.” *Jones v. W. Va. Dep’t of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3)

reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

4. “Hearsay includes any statement made outside the present proceeding which is offered as evidence of the truth of the matter asserted.” BLACK’S LAW DICTIONARY 722 (6th ed. 1990). Relevant hearsay is admissible in administrative hearings. *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (Dec. 9, 1997). The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants’ out of court statements were in writing, signed, or in affidavit form; 3) the agency’s explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants’ accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *Id.*; *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep’t of Health/Kanawha-Charleston Health Dep’t*, Docket No. 90-H-115 (June 8, 1990).

5. West Virginia State Board of Education's Employee Code of Conduct requires all West Virginia school employees to behave as follows:

4.2.1. exhibit professional behavior by showing positive examples of preparedness, communication, fairness, punctuality, attendance, language, and appearance.

4.2.2. contribute, cooperate, and participate in creating an environment in which all employees/students are accepted and are provided the opportunity to achieve at the highest levels in all areas of development.

4.2.3. maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination.

4.2.4. create a culture of caring through understanding and support.

4.2.5. immediately intervene in any code of conduct violation, that has a negative impact on students, in a manner that preserves confidentiality and the dignity of each person.

4.2.6. demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior.

4.2.7. comply with all Federal and West Virginia laws, policies, regulations and procedures.

W. VA. CODE ST. R. § 126-162-4.

6. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of

opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff’d*, Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

7. “[T]he “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).” Syl. Pt. 1, *Adkins v. W. Va. Dep’t of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). “While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer].” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff’d*, Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff’d*, Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), appeal refused, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

8. “All school personnel are entitled to know how well they are fulfilling their responsibilities and should be offered the opportunity of open and honest evaluations of their performance on a regular basis and in accordance with the provisions of section twelve [§ 18A-2-12] of this article. All school personnel are entitled to opportunities to improve their job performance prior to the termination or transfer of their services. Decisions concerning the promotion, demotion, transfer or termination of employment of school personnel, other than those for lack of need or governed by specific statutory

provisions unrelated to performance, should be based upon the evaluations, and not upon factors extraneous thereto. All school personnel are entitled to due process in matters affecting their employment, transfer, demotion or promotion". W. VA. CODE § 18A-2-12a(b)(6).

9. "The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest." Syllabus Point 1, *Waite v. Civil Service Commission*, 161 W.Va. 154, 241 S.E.2d 164 (1977), *overruled in part on other grounds by W. Va. Dep't of Educ. v. McGraw*, 239 W. Va. 192, 201, 800 S.E.2d 230, 239 (2017). "The scope of due process protection affordable in the instant case is governed by Syllabus Point 5 in *Waite*, supra, which states, '[t]he extent of due process protection affordable for a property interest requires consideration of three distinct factors: first, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of a property interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.'" *West Virginia Department of Health and Human Resources/William R. Sharpe, Jr. Hospital v. Byrd*, Kanawha Cnty. Cir. Ct. Civil Action No. 17-AA-74 (March 2, 2018), *overruling Byrd v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital*, Docket No. 2017-0769-DHHR (Aug. 8, 2017).

10. Respondent did not prove by a preponderance of the evidence that Grievant asked J.C.J. "why" his grandmother did not attend the parent Teacher conference.

11. Respondent proved by a preponderance of the evidence that Grievant stood close to J.C.J. and waved her finger in his face, while J.C.J. stood with his back against the wall.

12. Respondent proved by a preponderance of the evidence that Grievant violated the Code of Conduct when she stood close to a student and waved her finger in the student's face, while the student stood with his back against the wall.

13. Respondent's October 6, 2017, letter of reprimand was not arbitrary and capricious.

14. Respondent did not violate Grievant's due process rights or West Virginia Code § 18A-2-12a.

Accordingly, the grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The civil action number should be included so that the certified record can be properly filed with the circuit court. See *also* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: December 7, 2018

Joshua S. Fraenkel
Administrative Law Judge