THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

THOMAS A. TUCKER

Grievant,

v. **Docket No. 2020-0338-KanED**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Thomas A. Tucker, filed this expedited level three grievance against his employer, Kanawha County Board of Education, dated September 11, 2019, stating as follows: "[t]he Respondent has suspended and dismissed Grievant from his employment. Grievant contends that the allegations are not true. Grievant also contends that Respondent has violated W. Va. Code 18A-2-8 and that mitigation of the penalty is appropriate in this instance." As relief sought, "Grievant seeks reinstatement to employment; retroactive and prospective wages, benefits, & seniority; and removal of all references to this suspension & dismissal from Grievant's personnel & any other records maintained by the Respondent, its agents, & WVEIS. Grievant also seeks an award of interest on all monetary sums."

A level three hearing was conducted on January 24, 2020, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person and by counsel, John E. Roush, Esquire, American Federation of Teachers-WV, AFL-CIO. Respondent, Kanawha County Board of Education, appeared by counsel, Lindsey D.C. McIntosh, Esquire, General Counsel. This

matter became mature for consideration on March 19, 2020, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a teacher. Respondent suspended Grievant, then terminated his contract of employment for failure to report an allegation of sexual abuse in violation of policy and law as he was a mandatory reporter. Grievant denies all of Respondent's allegations asserting that nothing was reported to him; therefore, he had no duty to report anything. Grievant seeks reinstatement to his position. Respondent met its burden of proving that Grievant violated his duty to report and that such justifies its decision to suspend, then terminate Grievant's employment. Accordingly, the grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance, including the record of the lower school disciplinary hearing:

Findings of Fact

1. At the times relevant herein, Grievant was employed by Respondent as a teacher at Carver Career and Technical Center. Carver offers classes for high school and adult students. However, Grievant's class discussed in this decision was for high school students and included students who were under the age of eighteen. Grievant had been employed for about ten years at Carver. Grievant taught the subject of Firefighting. It is noted that Grievant allows his students to call him "T.A." and the lower hearing record reflects the same.

2. Lisa Dorsey is the Principal at Carver. The 2018-2019 school year was her first year serving as principal there. Before becoming Principal, Ms. Dorsey served as the Counselor at Carver. Assistant Superintendent Mark Milam is Principal Dorsey's immediate supervisor.

3. At the times relevant herein, Dr. Ronald Duerring was the Superintendent of Kanawha County Schools.

4. Jeane Ann Herscher is employed by Kanawha County Schools as its Title IX Coordinator/Investigator. She has been so employed since 2002.

5. Sam Farrell-Hill is currently employed by Respondent as an investigator. She began in this position on January 2, 2020. However, before taking this position, Ms. Farrell-Hill was a deputy with the Kanawha County Sheriff's Department. In that position, she participated in the criminal investigation into the allegations made by the two students that are discussed in this grievance.

6. In addition to being a teacher at Carver, Grievant has been a firefighter for approximately twenty-six years. He is a member of the East Bank Volunteer Fire Department and has served as its Chief since 2001. Grievant has also served as an Emergency Medical Technician (EMT) for ten years.

7. Over the years, Grievant has allowed people from the firefighting community, including former students, to visit his classes. These visitors have also served to judge skills competitions for Grievant's classes. Some of Grievant's former students have become members of area volunteer fire departments and he has had the opportunity to work with them. Grievant has maintained friendships with many of his former firefighting students.

8. Visitors to Carver are supposed to sign-in on a log when entering the building. However, that practice was not being strictly enforced at the times at issue. There are several known instances of adult, former students visiting Grievant's classroom without signing-in upon entry.

9. Grievant routinely leaves his classroom while students are present to take his class's attendance record to the office, to get food from a nearby refrigerator for his lunch, and to use the restroom.[1]

10. On the morning of February 13, 2019, student M.S., a minor, along with her mother and stepfather met with Principal Dorsey and reported that on February 11, 2019, an adult visitor in M.S.'s firefighting class, known to her only by his nickname, had pulled his pants down and exposed himself to M.S. and S.M., another minor student, while their teacher, Grievant, was out of the room.[2] M.S. also reported that the visitor had tried to get them to touch his penis. M.S. reported that she did not touch him, but that the other student had.[3]

11. Right after her meeting with M.S. and her parents, Principal Dorsey went to speak to Grievant to find out who had visited his class on February 11, 2019, because no one had signed-in on the school's visitor log for the time period in question. Grievant informed Principal Dorsey that a former student, J.S., had visited his class on the morning

[1] *See*, Grievant's testimony, disciplinary hearing transcript; Grievant's testimony at level three.

[2] The undersigned will follow the past practice of the West Virginia Supreme Court in cases involving underage individuals and will refer to the initials only of the involved students. *See In the Matter of Jonathan P.,* 182 W.Va. 302, 303 n. 1, 387 S.E. 2d 537, 538 n. 1 (1989).

[3] *See*, Respondent's Exhibit 2, email from Principal Dorsey dated February 13, 2019; testimony of Principal Lisa Dorsey.

of February 11, 2019.[4] Principal Dorsey then went on to tell Grievant about the report that had been made. It is unknown whether Principal Dorsey told Grievant that M.S. was the student who made the report.

12. Upon hearing the allegations made about J.S.'s conduct, Grievant told Principal Dorsey that he had known J.S. for a long time and that J.S. would not have done such a thing. Grievant then said something to the effect of "if it is M.S. [making the allegation], I know it's not true because she made an allegation earlier in the year" about another of the class visitors. Grievant stated that he believed this was a "pattern" for M.S. Grievant also told Principal Dorsey that he had called the visitor named in M.S.'s earlier allegation and told him not to return to Carver again.[5] That person was R.S., another of Grievant's former students who now works in firefighting. However, Grievant did not disclose R.S.'s name to Principal Dorsey at that time. Further, it is somewhat disputed as to when Grievant made that call to R.S.[6]

13. Grievant provided Principal Dorsey with J.S.'s name and contact information so that she could contact him.

14. Principal Dorsey's February 13, 2019, conversation with Grievant was the first time she heard about M.S.'s earlier allegation. M.S. and her parents did not mention

[4] The people alleged to have made sexual advances to the students will be identified herein by their initials as there is a possibility of ongoing criminal matters regarding the allegations referenced herein.
[5] *See*, testimony of Lisa Dorsey.
[6] R.S. testified at the lower hearing that Grievant called him in February 2019. Grievant testified that he called R.S. after he was made aware of M.S.'s allegations about J.S. on February 13, 2019. However, when he first spoke to Principal Dorsey on February 13, 2019, he indicated that he had already called the volunteer named in M.S.'s November 2018 allegation [R.S.] and told him not to come back to the school.

it during their meeting, and it had not been previously reported to Principal Dorsey or any other member of administration.[7]

15. During the February 13, 2019, conversation, Principal Dorsey asked Grievant why he had not reported the earlier allegation, and he told Principal Dorsey that he had told M.S. to tell her. Principal Dorsey then informed Grievant of his duty to report such an allegation as he was a mandatory reporter. Grievant told Principal Dorsey that he did not think it was right for him to report it. He stated it was the student's duty to report it to Principal Dorsey.[8]

16. Mandatory reporters are persons identified by state law who are required to report any suspected abuse and neglect of a child to the Department of Health and Human Resources and/or law enforcement.[9]

17. After Principal Dorsey had talked with Grievant, M.S. returned with S.M. to talk to her about the February 11, 2019, incident. At that time, S.M. confirmed M.S.'s account of the same. However, S.M. stated that neither of them touched J.S. It is unknown if S.M. and Principal Dorsey spoke in private at that time.[10]

18. On February 13, 2019, Principal Dorsey reported the students' February 11, 2019, allegation pertaining to J.S. to Child Protective Services (CPS) and the police. Principal Dorsey also reported the matter to Superintendent Ronald Duerring, Jeane Ann Herscher, Assistant Superintendent Mark Milam, and General Counsel Lindsey McIntosh

[7] *See*, testimony of Lisa Dorsey.
[8] *See*, Respondent's Exhibit 2, email from Principal Dorsey dated February 13, 2019; testimony of Principal Lisa Dorsey.
[9] *See*, W. Va. Code § 49-2-803.
[10] *See,* Respondent's Exhibit 2, email from Principal Dorsey dated February 13, 2019; testimony of Principal Lisa Dorsey.

by email. She included in this email what she had learned about M.S.'s earlier allegation and a summary of her discussion with Grievant.[11]

19. On February 13, 2019, Principal Dorsey also contacted student S.M.'s mother and asked her to come in to meet with her that afternoon. They met that afternoon at which time Principal Dorsey informed her of the students' allegations.

20. On February 13, 2019, Principal Dorsey telephoned J.S. and informed him that there were allegations made about his conduct while he was at Carver on February 11, 2019, and that he was no longer allowed to be on Carver's grounds.[12]

21. On February 13, 2019, following her report to the police, Principal Dorsey met with Deputy Brill (first name unknown) to give her statement regarding the February 11, 2019, allegation about J.S.

22. Principal Dorsey informed Grievant on February 13, 2019, that she wanted to meet with him on the morning of February 14, 2019, to discuss how things were to proceed in his class given the allegations that had been made.

23. At 4:48 p.m. on February 13, 2019, Principal Dorsey again emailed Superintendent Duerring, Assistant Superintendent Milam, Jeane Ann Herscher, and Lindsey McIntosh stating as follows:

> I left a message for S.M.'s mother and she came in and met with me this afternoon. Deputy Brill met with me today at 12[:]30 to take a statement. He said that someone would be getting in touch with the students to interview them. I will be meeting with Thomas Tucker tomorrow to remind him of his duty as a mandated reporte[r] regarding the previous incident he mentioned today. *It has just dawned on me that the other*

[11] *See*, Respondent's Exhibit 2, email from Principal Dorsey dated February 13, 2019; testimony of Principal Lisa Dorsey.
[12] *See*, Respondent's Exhibit 2, email from Principal Dorsey dated February 13, 2019; testimony of Principal Lisa Dorsey.

> *incident that I was not informed of and that happened earlier this year should be reported as well.* The instructor is gone for the day[.] I will email him and ask him to write a statement about the incident so that we can determine how to proceed with that information, unless you have a different suggestion.[13]

(Emphasis added).

24. At 5:05 p.m. on February 13, 2019, Principal Dorsey emailed Grievant and informed him that she would need to reschedule their February 14, 2019, meeting. The following exchange occurred thereafter:

> Grievant 8:50 p.m.: That's fine. I will be taking written statements tomorrow 02/14/2019 from the students that were in the vicinity where the alleged incident was to occur. I would also like to know if you have viewed the video footage of that day? I assure you the information will be confidential and that I will ask questions in a general form as to if anyone heard anyone say anything inappropriate to anybody. I will not question either party involved just the witnesses that were in the same location. I will keep a copy of their statements in my file and provide you with a copy if needed.
>
> 02/14/2019
>
> Dorsey 8:05 a.m.: The investigation should be done by the police or by the county. Do not conduct one yourself.
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> Grievant 8:12 a.m.: I am not conducting an investigation. I am just taking statements from the students that were in the same location.
>
> Grievant 9:32 a.m.: I will not conduct any type of questioning or take written statements because I have been instructed by my Principal,

[13] *See*, Respondent's Exhibit 2, email from Principal Dorsey dated February 13, 2019; testimony of Principal Lisa Dorsey.

> Lisa Dorsey and Kanawha County Board of Education Lawyer to not do this. The policy J12A in reference to Title IX Educational Amendments of 1972, Issued 02/21/1980 revised last date of 06/18/2015 revision 4 page 9 states, The initial investigation shall include individual interviews with the complainant, the accused, and others with knowledge relative to the incident (Kanawha County Schools Administrative Regulation Title IX Grievance Procedure) series J12. page 9. I did voice that we were not following the policy because no statements have been taken from witnesses in a timely manner.[14]

25. Principal Dorsey spoke to Grievant in person between his 8:12 a.m. email and his 9:32 a.m. email, again telling him that he was not to take statements as he had indicated. This conversation was somewhat heated. During this exchange, Grievant mentioned having a lawyer and that his lawyer told him to take the statements.[15] After this meeting, Grievant sent the 9:32 a.m. email in which is stated that he would not personally take any statements as he was directed.

26. During the previous school year, there had been a fight in Grievant's classroom that resulted in a student being injured. Following that incident, the former principal at Carver had Grievant take statements from witnesses, including students. The principal handled any and all student "write-ups" resulting from the fight. The fight is not known to have involved any allegations of sexual misconduct of classroom visitors.

[14] *See*, Respondent's Exhibit 3, February 13-14, 2019, email thread.
[15] *See*, testimony of Principal Lisa Dorsey.

27. Later that morning, Principal Dorsey asked Grievant to meet with her in her office. Principal Dorsey provided Grievant with Respondent's General Counsel's number and told him that he could have his lawyer contact her. He informed Principal Dorsey that he would not be doing that. This meeting, too, became heated at times. Grievant was upset over not being allowed to personally take statements from witnesses, or interview the students regarding the allegations against J.S., among other things. He informed Principal Dorsey that he did not believe M.S. and S.M., referred to them as "harlots," and accused them of regular inappropriate conduct during his class.[16] However, Grievant had never reported any such "inappropriate behavior" before this conversation.

28. During this meeting, Grievant was also critical of Principal Dorsey and her leadership, and accused her of making the report about J.S. based upon "secondhand" information.

29. Following the meeting with Principal Dorsey on February 14, 2019, Grievant conducted his class, as usual, and M.S. and S.M. were in attendance. Principal Dorsey later received reports from M.S. and S.M.'s peers that other students in the firefighting class were "being mean" to M.S. and S.M., and that Grievant had been mean to them as well.[17]

[16] *See*, testimony of Principal Lisa Dorsey; Respondent's Exhibit 4, email dated February 14, 2019, 10:53:19 p.m. (a summary of Principal Dorsey's meetings with Grievant and emailed to Superintendent Duerring, Assistant Superintendent Milam, Jeane Herscher, and Lindsey McIntosh).

[17] *See*, Respondent's Exhibit 5, email from Principal Dorsey to Jeane Ann Herscher dated February 15, 2019. The identities of M.S. and S.M.'s "peers" are unknown.

30. In the afternoon of February 14, 2019, Principal Dorsey reported M.S.'s November 2018 allegation to CPS and to the police, just as she had for the February 11, 2019, allegation.

31. Superintendent Duerring made the decision to suspend Grievant, with pay, pending investigation, on the afternoon of February 14, 2019, for his failure to report the allegation made by M.S. in November 2018, and directed Principal Dorsey to inform Grievant of the same. Principal Dorsey, with the assistance of Keith Vititoe, Director of Security, informed Grievant of his suspension.

32. On February 14, 2019, Grievant was suspended from employment, with pay, pending further investigation and review of his failure to report the allegations made by M.S. in November 2018.[18] Grievant remained suspended for the remainder of the 2018-2019 school year.

33. During Grievant's suspension, Ron Godby, a substitute teacher, taught Grievant's firefighting class at Carver.

34. On the evening of February 14, 2019, Principal Dorsey drafted an email to Assistant Superintendent Milam, Jeane Ann Herscher, General Counsel McIntosh, Superintendent Duerring, and Thomas Williams chronicling her interactions and communications with Grievant in an effort to "keep them in the loop." Principal Dorsey included a listing of a number of statements she recalled Grievant making during their meeting that morning, comments she had made to him, and notations about other interactions they had on February 13 and February 14, 2019. This very lengthy email

[18] *See*, Respondent's Exhibit 1, February 14, 2019, suspension letter.

and was sent at 10:53 p.m. that evening.[19] The following are some excerpts from Principal Dorsey's email:

> I wanted to keep everyone updated on my interactions with Thomas (TA) Tucker today as well as any other information regarding the allegations made by [S.M.] and [M.S.]. I apologize for the length of this but [I] got a feeling I needed to keep everyone in the loop. . .
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> The rest of the conversation was fairly heated (and sometimes loud) and I cannot remember the exact order of the comments but felt like some of them may be important later. So, In (sic) no particular order:
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> - He said that he knew the event [with J.S. on February 11, 2019] did not happen because he could see the students the whole time. I looked at the video and he was not with the students the whole time.
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> - He said that he knew that it (the allegation) was not right because I had to ask him the name of the adult who was visiting the class. I told him that I checked the sign in log and that there was only one adult on the visitor log and he signed in for the afternoon but the incident took place in the morning. He said that the girls knew [J.S.'s] name (they did not-they referred to him as [nickname redacted]—I told him that I did have to ask because the visitor on the log was there in the afternoon and that [J.S.] did not sign in. He said that he probably did not sign in and that it was not right that visitors had to sign in for some classes and not for the beauty salon and the pet grooming class. Both of those classes have individual entrances—not really sure where he was going with this but I have a feeling he will bring this up later as some sort of flaw in our system.
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> - He said that the girls were taking a test and that they were trying to get [J.S.] to give them the answers and that [J.S.] told him later that he gave them the wrong answers and that could be verified in WVEIS. Again, not sure of the relevance but it may come up later.

[19] *See*, Respondent's Exhibit 4, February 14, 2019, email from Principal Dorsey.

- He said that he would under no circumstances have the two girls in his class next year.

- He said that the girls were “harlots” and that they were inappropriate in class all the time. I said this was the first I had heard of any inappropriate behaviors by the girls and he said he handled things in his class, but that from now on he would send me every issue that came up in his class. He said that he knew I did not have a VP but that he would not be put in this position again and the (sic) he would send students down all the time. I do feel like he intends on sending me any little thing so that I am inconvenienced and overwhelmed.

- He said that my telling him that he could not interview the students was in violation of the Title IX Grievance Procedure and that I should have stood up to the “people” at the board office and told them that it was not right and that he should be allowed to collect interviews. He also told me that I was in violation of the policy because I did not interview all parties prior to proceeding to the notification step. . .

- He said that this year the school has gone downhill. It used to be like a family but now the staff are divided. He also said that students used to love to be there but they don’t anymore. All of these bad feelings started this year-(basically it is my fault)[.]

- He did then say that he likes me and does not have any problems with me and he knows I don’t always feel supported by him be (sic) he is ok with me. He said he loves this school. He stated that he does a lot for the school but that he will no longer do extra things for the school[.]

- When Mr. Vititoe came to be my witness for the suspension I called Mr. Tucker and asked him to come to the office. He asked if it was just me. I stated that Mr. Vititoe was with me and he said he would not come to the office without his lawyer. When we went to his class to inform him that he was suspended there were three students in his class and he was locked on (sic) his office.

- When he was collecting his belongings from his office he did grab a manila folder from his desk-I will not be surprised if he has already collected statements even though he was told not to and not to communicate with students during his suspension.

- When I told him that the suspension was for failure to report an incident he was surprised and said, you mean it's not about yesterday? . . .

- Today after school, one of our academic instructors informed me that two of the boys in her class told her that [S.M.] would twerk on them when they went into the firefighting class. I have asked Lori McNabb, out (sic) Title IX rep[,] interview both students tomorrow morning. Mr. Tucker had mentioned today that she has inappropriate behavior, not just at school but in the community, that she is desperate for attention. This bothers me for a couple of reasons. First, those boys should have never been in her firefighting class, one is a second-year student and the other is not even in firefighting. Secondly, if this was going on, and students were so uncomfortable with her behavior, why was I not informed about this from the instructor previously.

35. Jeane Ann Herscher was assigned on or about February 13, 2019, to conduct an investigation into M.S. and S.M.'s allegations about J.S. and R.S. Ms. Herscher was provided emails regarding the matter sent by Principal Dorsey and unspecified documents "regarding the complaint." Also, videos from February 7, 11, and 14, 2019, were provided to Ms. Herscher to review.[20] Ms. Herscher interviewed M.S., S.M., and Grievant. She attempted to contact Deputy Brill, but he did not return her call.[21] It is noted that in her investigative report, Ms. Herscher stated that M.S. prepared a written

[20] No videos were presented as evidence at the level three hearing and none were included in the record of the lower hearing. It is unknown what relevant information, if any, was included in the videos.

[21] *See*, Respondent's Exhibit 9, March 15, 2019, Herscher memorandum of investigation.

statement regarding her allegations. However, no such written statement was presented as evidence in this matter and it does not appear in the lower hearing record.

36. On February 15, 2019, M.S.'s boyfriend asked to speak with Principal Dorsey and provided her with screen shots, or images, of text messages M.S. sent to him in which M.S. told him about what had happened with R.S. in Grievant's classroom in November 2018.[22] Principal Dorsey emailed these screen shots to Ms. Herscher for her investigation on that same day. The following exchange is contained in those text messages:

> M.S.: But anyways I stayed at carver all day I can't go with everyone else so it was me, T.A., and [R.S.]. T.A. went to get lunch. He left me and [R.] alone in there T.A. told me to be careful because he knows that [R.] was going to do something. The next day I told [S.M.] about it and then me and [S.] told T.A. and he said I already knew it was going to happen. He didn't do anything about it. So, I texted [R's] girlfriend and told her. She didn't believe me
> He just told him not to come back in there when I'm there.
>
> Boyfriend: wow wtf
> What did he do to you
>
> M.S.: Was grabbing up on me, trying to kiss me, tried making me suck his dick, and said that he wanted to fuck . . . .

Later in the exchange, the texts state that M.S. asked her boyfriend to promise not to tell anyone and that her parents did not know about it.[23]

[22] *See*, testimony of Lisa Dorsey at level three and at the lower disciplinary hearing.
[23] *See*, Respondent's Exhibit 5, February 15, 2019, email and images.

37. Ms. Herscher interviewed M.S. and S.M. separately on different dates. M.S. and S.M. were both accompanied by their attorney, Kameron Miller, and their mothers during their separate interviews. M.S. was interviewed on February 28, 2019. S.M. was interviewed on March 5, 2019. It is unknown if M.S.'s boyfriend was interviewed. He is not mentioned in Ms. Herscher's investigative report. He was not called to testify at either hearing.

38. Ms. Herscher interviewed Grievant on March 5, 2019. Attending with Grievant were his attorney, Joe Spano, Esq., and Rosemary Jenkins, WV-AFT.

39. Ms. Herscher drafted a memorandum dated March 15, 2019, as her investigation report, and submitted the same to Dr. Duerring.[24] This report contains only summaries of her interviews with M.S., S.M., and Grievant. It is unknown if there were any recordings made of these interviews. None were made part of the record of this grievance.

40. An employee disciplinary hearing was conducted on July 25, 2019, before Anne B. Charnock, hearing examiner for the Respondent, at the Board of Education office in Charleston, West Virginia. Grievant appeared in person and with counsel, Mr. Spano. Respondent appeared by General Counsel, Ms. McIntosh. It is noted that students M.S. and S.M., accompanied by their counsel, testified under oath at this proceeding.

41. During her testimony at the lower hearing, M.S. testified that "he [R.S.] was trying to make me do intercourse with him." M.S. was not asked by either counsel to elaborate on any of the specific details regarding the alleged sexual advances made

[24] *See*, Respondent's Exhibit 9, March 15, 2019, Herscher memorandum of investigation.

toward her.[25] She also testified that she and S.M., together, reported the allegations to Grievant the next day.

42. S.M. testified at the lower hearing that, together, she and M.S. had reported to Grievant that R.S. "was trying to get M.S. to suck his penis." She further testified that in response to their report, "He [Grievant]—before we could get it all out, he said that he already knew it was going to happen."[26]

43. On August 21, 2019, the hearing examiner issued her Decision ruling that Grievant's "failure to report an alleged sexual incident involving a student in his classroom in November, 2018[,] and reported to him by that student fits the definition of willful neglect of duty. Employer may undertake any personnel action up to and including termination."

44. Following the issuance of the hearing examiner's decision on August 21, 2019, on an unknown date, by an unknown method, Grievant was informed that he was dismissed from his employment with Respondent for willful neglect of duty due to his failure to report a student's allegation of sexual abuse, that being M.S.'s allegation about R.S.'s conduct in November 2018.[27]

45. Grievant grieved his dismissal, and his earlier suspension, by filing his statement of grievance on September 11, 2019.

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[25] *See*, testimony of M.S., lower school disciplinary hearing.
[26] *See*, testimony of S.M., lower school disciplinary hearing.
[27] No dismissal letter was introduced as evidence in this matter. Therefore, this ALJ does not know how Grievant was informed of his dismissal or what, if any, explanation was given to him for the same. It is noted that Respondent has asserted at level three that Grievant was dismissed from his employment for willful neglect of duty as he failed to report a student's allegation of sexual abuse.

46. Grievant attended trainings on when and how to report sexual misconduct and his duties as a mandatory reporter pursuant to Kanawha County Schools policy and West Virginia law before November 2018.[28]

47. Grievant knew about M.S.'s November 2018 allegation that R.S. made sexual advances toward her while R.S. was visiting the firefighting class before Principal Dorsey informed Grievant of the allegations made about J.S. on February 13, 2019, and he did not report it to school administration or law enforcement.

48. Students S.M. and M.S. were not called to testify at the level three hearing. Their testimony during the lower school disciplinary hearing is included in the transcript of the proceeding which is part of the record of this matter.

49. R.S. was not called to testify at the level three hearing. He, however, testified at the lower disciplinary hearing. J.S. was not called to testify at the level three hearing and did not testify at the lower disciplinary hearing.

50. This ALJ does not know the results of any criminal investigation conducted regarding the allegations of M.S. and S.M.

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

[28] *See*, Respondent's Exhibits 6, and 7, training records; Respondent's Exhibit 8, Kanawha County Schools Administrative Regulation, "Reporting Suspected Child Abuse and Neglect," Series J28A.

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*.

Respondent asserts that it properly terminated Grievant's employment because he failed to report a student's allegation of sexual abuse, and that the same constitutes willful neglect of duty. Grievant argues that Respondent improperly terminated his employment because there was never an allegation of sexual abuse, or sexual misconduct, reported to him; therefore, there was nothing to report. Consequently, Grievant asserts that he did not, and could not have violated the mandatory reporting requirements and policy.

WEST VIRGINIA CODE §18A-2-8 states, in part, that,

> (a) Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge. . . .

W. VA. CODE § 18A-2-8(a). "The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. VA. CODE § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ.,* Docket No. 91-20-005 (Apr. 16, 1991). *See Beverlin v. Bd. of Educ.,* 158 W. Ca. 1067, 216 S.E.2d 554 (1975)." *Graham v. Putnam County Bd. of Educ.,* Docket No. 99-40-206 (Sep. 30, 1999). However, "[i]t is not the label a county board of education attaches to the conduct of the employee . . . that is determinative. The critical inquiry is whether the board's evidence is sufficient to substantiate that the employee actually engaged in the conduct." *Allen v. Monroe County Bd. of Educ.*, Docket No. 90-31-021 (July 11, 1990); *Duruttya v. Mingo County Bd. of Educ.*, Docket No. 29-88-104 (Feb. 28, 1990).

Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *See State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Id.* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on 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).

Further, the "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *See Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ*., Docket No. 01-20-470 (Oct. 29, 2001).

"Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. *Adkins v. Cabell County Bd.*

of Educ., Docket No. 89-06-656 (May 23, 1990). This is a fairly heavy burden, given that Respondent must not only provide that the acts it alleges did occur, but also that the reason for Grievant's neglect of duty was more than simple negligence." *Tolliver v. Monroe County Bd. of Educ.*, Docket No. 01-31-493 (Dec. 26, 2001). Willful neglect of duty "is conduct constituting a knowing and intentional act, rather than a negligent act. *Williams v. Cabell County Bd. of Educ.*, Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ.*, Docket No. 95-29-151 (Aug. 24, 1995); *Hoover v. Lewis County Bd. of Educ.*, Docket No. 93-21-427 (Feb. 24, 1994). Willful neglect of duty encompasses something more serious than incompetence. *Bd. of Educ. v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120, 122 (1990); *Sinsel v. Harrison County Bd. of Educ*., Docket No. 96-17-219 (Dec. 31, 1996)." *Geho v. Marshall County Bd. of Educ.*, Docket No. 2008-1395-MarED (Oct. 30, 2008).

Kanawha County Schools Administrative Regulation J28A, "Reporting Suspected Child Abuse and Neglect,"[29] states, in part, as follows:

> **28.01 Definitions.**
>
> **28.01.0 "Child Abuse and Neglect"** means physical injury, substantial mental or emotional injury, sexual abuse, sexual exploitation, or negligent treatment or maltreatment of a child by a parent, guardian or custodian who is responsible for the child's welfare, under circumstances which harm or threaten the health and welfare of the child. . .
>
> **28.01.3 "Sexual abuse" means:**
>
> (A) Sexual intercourse, sexual intrusion, sexual contact, or conduct proscribed by section three, article eight-c, chapter sixty-one, which a parent, guardian or custodian engages in,

[29] *See*, Respondent's Exhibit 8, Kanawha County Schools Administrative Regulation J28A, "Reporting Suspected Child Abuse and Neglect." This policy is based on and references W. Va. Code §§ 49-2-803 and 49-1-101 *et seq.*

attempts to engage in, or knowingly procures another person to engage in with a child notwithstanding the fact that for a child who is less than sixteen years of age the child may have willingly participated in that conduct or the child may have suffered no apparent physical injury or mental or emotional injury as a result of that conduct or, for a child sixteen years of age or older the child may have consented to that conduct or the child may have suffered no apparent physical injury or mental or emotional injury as a result of that conduct.

(B) Any conduct where a parent, guardian or custodian displays his or her sex organs to a child, or procures another person to display his or her sex organs to a child, for the purpose of gratifying the sexual desire of the parent, guardian or custodian, of the person making that display, or of the child, or for the purpose of affronting or alarming the child; or

(C) Sexual abuse in the first degree, sexual abuse in the second degree or sexual abuse in the third degree.

28.01.4 "Sexual assault" means sexual assault in the first degree, sexual assault in the second degree or sexual assault in the third degree.

28.01.5 "Sexual contact" means any intentional touching, either directly or through clothing, of the breasts, buttocks, anus or any part of the sex organs of another person, or intentional touching of any part of another person's body by the actor's sex organs, where the victim is not married to the actor and the touching is done for the purpose of gratifying the sexual desire of either party.

28.01.6 "Sexual intercourse" means any act between persons involving penetration, however slight, of the female sex organ by the male sex organ or involving contact between the sex organs of one person and the mouth or anus of another person. . .

28.02 Personnel Under Duty to Report. Any school personnel or child care worker who has *reasonable cause to suspect* that a child is neglected or abused or observes the child being subjected to conditions that are likely to result in abuse or neglect shall immediately, and not more than 24 hours after suspecting this abuse or neglect, report the circumstances or cause a report to be made to the Department of Health and Human Resources. *In any case*

where the reporter believes that the child suffered serious physical abuse or sexual abuse or sexual assault, the reporter shall also immediately report, or cause a report to be made, to the State Police and any law-enforcement agency having jurisdiction to investigate the complaint. Any person required to report under this article who is a member of the staff or volunteer of a school shall also immediately notify the principal or the assistant principal or other person in charge, who may supplement the report or cause an additional report to be made. . .

28.03 Report of Illegal Sexual Activity. Any school teacher or other school personnel who receives a disclosure from a witness, *which a reasonable prudent person would deem credible,* or personally observes any sexual contact, sexual intercourse, or sexual intrusion of a child on school premises or on school buses or on transportation used in the furtherance of a school purpose shall immediately, but not more than 24 hours, report the circumstances or cause a report to be made to the State Police or other law-enforcement agency having jurisdiction to investigate the report: Provided, That this subsection will not impose any reporting duty upon school teachers or other school personnel who observe, or receive a disclosure of any consensual sexual contact, intercourse, or intrusion occurring between students. *Provided, however,* That any teacher or other school personnel may make a report immediately, but not more than 24 hours to the principal, assistant principal, or similar person in charge, of a disclosure from a witness, *which a reasonable prudent person would deem credible*, or of a personal observation of conduct described in this section: *Provided further*, That a principal, assistant principal or similar person in charge made aware of such disclosure or observation from a teacher or other school personnel shall be responsible for immediately, but not more than 24 hours, reporting such conduct to law enforcement. In addition to the foregoing, a principal, assistant principal, or similar person in charge who has knowledge of any sexual contact, sexual intercourse or sexual intrusion of a child on school premises or on school buses or on transportation used in furtherance of a school purpose shall immediately report the same to the Superintendent of Schools.

28.04 Notification of Immediate Supervisor. Any employee who reports suspected child abuse or neglect to the West Virginia Department of Health and Human Resources shall

> promptly notify his or her immediate supervisor of the circumstances which caused such report to be made. . . . (Emphasis added.)

West Virginia Code § 49-2-803 states, in part, as follows:

> (a) Any medical, dental, or mental health professional, Christian Science Practitioner, religious healer, school teacher or other school personnel, social service worker, child care or foster care worker, emergency medical services provided, peace officer or law-enforcement official, humane officer, member of the clergy, circuit court judge, family court judge, employee of the Division of Juvenile Services, magistrate, youth camp administrator or counselor, employee, coach or volunteer of an entity that provides organized activities for children, or commercial film or photographic print processor *who has reasonable cause to suspect that a child is neglected or abused, including sexual abuse or sexual assault*, or observes the child being subjected to conditions that are likely to result in abuse or neglect shall immediately, and not more than 24 hours after suspecting this abuse or neglect, report the circumstances to the Department of Health and Human Resources. In any case where the *reporter believes that the child suffered serious physical abuse or sexual abuse or sexual assault*, the reporter shall also immediately report to the State Police and any law-enforcement agency having jurisdiction to investigate the complaint. Any person required to report under this article who is a member of the staff or volunteer of a public or private institution, school, entity that provides organized activities for children, facility, or agency, shall also immediately notify the person in charge of the institution, school, entity that provides organized activities for children, facility, or agency, or a designated agent thereof, who may supplement the report or cause an additional report to be made: Provided, That notifying a person in charge, supervisor, or superior does not exempt a person from his or her mandate to report suspected abuse or neglect. . . .

W. Va. Code § 49-2-803 (2015) (Emphasis added).

The sole issue to be decided in this grievance is whether Respondent has proved by a preponderance of the evidence that Grievant, who is undisputedly a mandatory

reporter, violated this policy, as well as the law, by failing to report a student's allegation of sexual abuse made in or about November 2018, and, if so, whether his suspension and dismissal were justified. While no dismissal letter was introduced as evidence in this matter, the parties do not appear to dispute the stated reason for Grievant's dismissal. It must be noted that whether the two separate allegations of sexual misconduct mentioned in this grievance occurred as alleged *is not* the issue to be decided, nor is whether J.S. and R.S. engaged in any such activity. The crucial facts necessary to decide this grievance are largely disputed.

While many people testified at the level three hearing and at the school-level disciplinary hearing about the allegations and the investigation, the testimonies of Principal Dorsey and Grievant are the most relevant, and dispositive. Principal Dorsey testified that it was Grievant, himself, who told her about M.S.'s allegation from earlier in the school year about another class visitor, now known as R.S., when Principal Dorsey was first speaking to him on February 13, 2019, about the students' February 11, 2019, allegations. Principal Dorsey asserts that she had no knowledge of the earlier allegation until that time because M.S. had not mentioned it during their meeting that morning. Therefore, Respondent is arguing that Grievant, himself, admitted his failure to report an allegation of sexual abuse. Grievant denies telling Principal Dorsey about M.S.'s earlier allegation and denies that M.S. and S.M. reported any allegation of sexual abuse or misconduct to him. It is undisputed that M.S. and S.M. did not report the alleged February 11, 2019, incident to him. They reported it only to Principal Dorsey. Grievant now asserts that he knew nothing about the earlier allegation until he was suspended.

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).

The 2018-2019 school year was Principal Dorsey's first year serving as a principal. Principal Dorsey testified at the school-level disciplinary hearing and at level three. During the level three hearing, she appeared calm, quiet, and professional. She answered the questions asked of her and she was not evasive. She appeared to have a good recollection of her actions and events occurring from February 13, 2019, when she first received the report from M.S. and her mother, forward. She did not hesitate when answering the questions asked of her and seemed confident in her answers. From February 13, 2019, forward, Principal Dorsey documented her actions and her interactions with others regarding this matter by frequent, detailed emails to school

administration. These emails were introduced as evidence at level three. Principal Dorsey maintained good eye contact with Respondent's counsel during her questioning, as well as, with counsel for Grievant. Principal Dorsey's testimony at level three was consistent with her testimony at the school-level disciplinary hearing and with the statements made in her emails. Principal Dorsey is the person who reported Grievant's alleged failure to report the earlier allegation of sexual misconduct to school administration, and she was the one to inform Grievant of his suspension. Given such involvement, Principal Dorsey could be viewed as having an interest in this matter, or a bias against Grievant, which could be a motive to be untruthful. Further, the evidence presented suggests that Principal Dorsey viewed Grievant as often challenging her authority and decision-making before February 2019.[30] This could also be viewed as a motive to be untruthful. However, Principal Dorsey did not appear untruthful. In fact, the evidence presented establishes that Principal Dorsey and Grievant agree on most of the details of their meetings, conversations, and email exchanges. Principal Dorsey was a credible witness.

Principal Dorsey's emails to school administration regarding the students' allegations and the details of her interactions with Grievant were drafted soon after the same. Further, Principal Dorsey continued to update school administration by email about her communications with Grievant and her actions in reporting the students' allegations to the proper authorities. As she testified, the purpose of her emailing the members of administration was to "keep them in the loop," which is reasonable given the seriousness of the students' allegations and the many things she had to do in reporting

[30] *See*, Respondent's Exhibit 4, February 14, 2019, email from Principal Dorsey.

them. Further, policy requires her to report any such matters to the superintendent. The emails being drafted so close in time to the events and communications detailed therein lends support to their accuracy. Had those emails been drafted weeks or months after the events they describe, the likelihood of their accuracy would decrease because the passage of time tends to diminish memory.

These emails, however, constitute hearsay and contain 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). "Hearsay evidence is generally admissible in grievance proceedings. The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings." *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).

Principal Dorsey composed the emails and testified extensively about them and their contents at the level three hearing, as well as at the lower hearing. It is undisputed that the emails presented were drafted by Principal Dorsey and sent as indicated thereon. Her testimony at both hearings was consistent and was consistent with her emails. These emails mostly concern her first-hand account of her communications and interactions with the students and with Grievant on February 13, 2019, and February 14, 2019. However, some of the emails contain statements reportedly made by people other than Principal Dorsey and Grievant. These emails are routine written records that corroborate Principal Dorsey's testimony, as well as much of Grievant's testimony. As such, these emails are entitled to significant weight.

Grievant testified at the school-level disciplinary hearing and at level three. As Grievant is seeking reinstatement to his former position, he has an interest in this matter which could serve as a motive to be untruthful. At the level three hearing, Grievant's demeanor varied. Mostly, Grievant was quiet and calm. When being questioned by his attorney, he answered the questions asked of him and was not evasive. He maintained good eye contact with his counsel. However, when being questioned by opposing counsel, Grievant was evasive at times. Also, he seemed overly defensive and somewhat annoyed by her questions. At one point, he tried to ask questions of opposing counsel. He behaved similarly toward Respondent's counsel at the school-level disciplinary hearing.[31] It is reasonable for Grievant to be upset given that he has lost his job.

[31] *See*, Disciplinary Hearing Transcript, July 25, 2019, pp.140-153.

However, his defensiveness, evasiveness, and appearance of hostility hurt his credibility. Also, while it did not seem to occur as much in the level three hearing, during the lower hearing, Grievant seemed to go out of his way to make disparaging remarks about S.M. and M.S.'s classroom behavior, their capacity for truthfulness, and school performance. Such things are largely irrelevant to this grievance and are more telling about Grievant. His apparent desire to paint M.S. and S.M. in a bad light diminishes his credibility. Grievant's testimony also suggests that he had some animosity toward Principal Dorsey because she had done "an observation" on his teaching earlier in the school year and found some issues with his teaching and controlling his classroom. Such could also be seen as a motive to be untruthful.

There are inconsistencies in Grievant's testimony, in some of the representations he has made, and in some representations made on his behalf. At the lower hearing and at level three, Grievant consistently testified that M.S. and S.M. did not report the November 2018 allegations to him. He also consistently denied telling Principal Dorsey about the November 2018 allegation during their conversation on February 13, 2019. At the lower level, Grievant testified that he did not know that R.S. was implicated in the November 2018 allegation until February 14, 2019, after his conversation with Ms. Dorsey, but before he was suspended, and that unspecified men he worked with at the fire department had told him.[32] However, during the level three hearing, Grievant testified that he did not know R.S. was implicated in the November 2018 allegation until later on, but before the school-level disciplinary hearing in July 2019. This statement is also inconsistent with a letter dated February 18, 2019, that Grievant's former counsel, Joseph

[32] *See*, Disciplinary Hearing Transcript, July 25, 2019, pp.118-119.

H. Spano, Jr., Esq., sent to Dr. Duerring and General Counsel McIntosh four days after Grievant's suspension, which states in part, as follows:

> The (sic) letter is drafted in response to the suspension with pay of my client, Thomas Tucker, by Kanawha County Schools on February 14, 2019. In your first paragraph you claim that Mr. Tucker did not report a previous incident regarding alleged sexual misconduct by a visitor to Carver Career & Technical Center ("Carver"). There is a misunderstanding of what was actually reported to Mr. Tucker at Carver about the first incident with the visitor, [R.S.] [full name redacted] (Mr. Tucker only learned of who the alleged perpetrator was at a later time). No student, or any person, reported to Mr. Tucker that any sexual misconduct took place on the first incident. As a matter of fact, Mr. Tucker over heard (sic) two students talking with each other about overhearing the alleged victim telling another student about the first incident. Mr. Tucker was not sure of what he actually overheard as it was double hearsay and he was not privy to the conversation between these two students. Upon hearing what one may have perceived as possible Title IX violations, he approached the alleged victim and told her to report to him or the principal if anything had happened at Carver. Mr. Tucker was not even sure information he overheard regarded an incident that took place at Carver. The alleged victim declined to report anything at that time. Mr. Tucker was unsure of any of the facts of what had allegedly happened as he overheard a brief conversation of two other student (sic) discussing what they had overheard.[33]

[33] *See*, Respondent's Exhibit 10, February 18, 2019, letter from Mr. Spano to Dr. Duerring and Ms. McIntosh. It is noted that counsel for Grievant, Mr. Roush, objected to the admission of this exhibit based upon relevance and hearsay. Attorney-client privilege was also raised. The document was admitted to the record over the objection, as it is entirely relevant to the grievance. It is a letter sent to Respondent's General Counsel and Superintendent by his counsel in direct response to Grievant's suspension and it raises his defenses. This is not a privileged communication as it was made public. While it is hearsay, such is admissible in grievance hearings. It is a matter of the weight assigned to the evidence, rather than its admissibility. As this document was Grievant's direct response to his suspension and the allegations made against him, it is entitled to significant weight.

The letter clearly identifies R.S. on February 18, 2019, contrary to Grievant's level three testimony. More importantly, the scenario described in this letter about Grievant overhearing two students in the school hallway in November 2018 discussing M.S. and "possible Title IX violations" is largely inconsistent with Grievant's testimony at the lower hearing and at the level three hearing.

At the two hearings, Grievant maintained that he overheard two unidentified students in the school hallway simply state that M.S. was upset and had been crying, not that he heard those students discuss possible Title IX violations. Grievant testified that as M.S. had already gone for the day, he asked her if she was okay on the next school day when she arrived in his classroom. Grievant testified at the lower hearing in response to questions from his former counsel, Mr. Spano, that,

> . . . When she came into the classroom that morning, myself and—Alex Hanna was there, I think. And I'm not for sure, I think Alex was there. I don't know. Well, anyway, she walked into the room and she come down the corridor. And I looked at it (sic) her and I said "Hey, are you okay?" And she said, "Yes." I said, "Is anything wrong?" She said, "No." I said, "Do you need to talk about something?" I said, "You know, I heard two students say you were upset on Friday." "No, I'm fine."[34]
>
> Q: Okay. At that point, did you have any idea it was regarding anything to do with sexual misconduct, and Title IX issues at the school?
>
> A: No, I do not.
>
> Q: Why did you ask her if she was all right? How did you remember it from Friday?
>
> A: Because, I mean, I've got a very—very good memory. . . .

[34] *See*, Disciplinary Hearing Transcript, July 25, 2019, pp.112-113.

> Q: Okay. What did MS say to you when you asked her if she was all right? What—
>
> A: She said she was fine. She said she didn't want to talk about anything. . . .[35]

This ALJ could find no point in the lower hearing transcript where the February 18, 2019, letter account was corrected on the record, or its discrepancies explained. When asked by Respondent's counsel about the inconsistencies between Grievant's testimony and the February 18, 2019, letter during the level three hearing, Grievant became defensive, appeared angry, and stated that his former counsel's letter was incorrect. When asked if his former counsel was with him at the lower hearing, Grievant became evasive and did not want to answer that simple question. Eventually, Grievant answered, admitting that his former counsel attended the lower hearing with him, just as the transcript already in the record reflects.

Despite Grievant's claim that Mr. Spano's letter was incorrect, on page 109 of the lower hearing transcript, Grievant acknowledges Mr. Spano's letter and its contents, implying he had read it. The exchange between Grievant's then-counsel, Mr. Spano, and Grievant, about the alleged February 11, 2019, incident, beginning on page 108, states, in part, as follows:

> Q: Okay. So they're continuing to take their test on Monday?
>
> A: That—that's when Ms. Dorsey said that the allegations were supposed to have happened.
>
> And—and I expressed that I didn't think those allegations had happened because I was in the room all day that day, because they were taking a test.

[35] *See*, Disciplinary Hearing Transcript, July 25, 2019, p.113.

Q: But did you ever bring up a previous incident to Ms. Dorsey?

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A: No.

Q: Now, you heard—

A: No.

Q: --her testimony today that you –that she said you brought up that, oh, there was [an] incident before where they reported to me and that I didn't report it because I didn't believe it. Is that true?

A: No.

Q: That's not true?

A: No. I—I told Ms. Dorsey that I had overheard two students—*the same thing that's in your letter*—that I had overheard two students back in November saying that M.S. was upset.

Q: Okay.

A: Okay. This was on a Friday.

Q: And we're going to clarify exactly what you heard. Which two students did you hear?

A: I have no idea who the two students were. This was at lunchtime. I was coming through the double doors from the foyer.

As I rounded the corner to the right, there were two students walking in the hallway in front of me, and they were talking about M.S. being upset and crying.

And they went down the hall, I went in my classroom. That was on a Friday. She had left for the day.

Q: Okay. I'm going to clarify on this. What else did you hear? Is that all you heard?

A: That's it, that's all I heard.

Q: Did you hear anything about sexual misconduct?

A: No.

Q: Why did you hear that they were—that M.S. was upset?

A: They never said. They were walking away from me as I walked in the classroom. . .

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Q: Do you remember the exact date?

A: It was early November, mid-November, somewhere in there. It was probably the second week in November. I don't remember the exact date, no.

Q: Okay. So all you heard [was] that M.S. was upset and crying?

A: Yes. . . .[36]

Despite acknowledging and referencing the letter in recounting the details of how he found out about M.S. being upset during his lower level testimony, Grievant contradicted the account described in that letter. Such could be explained by the passage of time given that the testimony was given about five months after the date on the letter. However, it would seem that something as serious as alleged sexual misconduct toward one of his students at his school, especially when one of his classroom visitors was implicated, would not likely be so easy to forget. However, it is true that Grievant, himself,

[36] *See*, Disciplinary Hearing Transcript, July 25, 2019, pp.108-111. (Emphasis added.)

did not draft the letter. As such, there is certainly a possibility that the drafter made mistakes.

The February 18, 2019, letter states that Grievant overheard the two students in the hall discussing that they had overheard M.S. describing the November 2018 incident with R.S., and that Grievant spoke to M.S. afterward because of what he heard. Grievant's former counsel described this as "double hearsay," implying that what Grievant overheard was unreliable, and apparently not meeting the threshold for reporting it as a mandatory reporter. However, the letter explains that the reason Grievant followed up with M.S. and why he made no report was because ". . . Mr. Tucker was *unsure* of any of the facts of what had allegedly happened as he overheard a brief conversation of two other student (sic) discussing what they had overheard." (Emphasis added.) [37] Further, the letter states that "[u]pon hearing what one may have perceived as possible Title IX violations, he approached the alleged victim and told her to report to him or to the principal if anything happened at Carver." This line appears to support Principal Dorsey's testimony that on February 13, 2019, when she was investigating the February 11, 2019, allegations, Grievant said that he had told M.S. to report the November 2018 incident to her. Grievant has changed his account of what he knew and when he knew it more than once since February 13, 2019. While it is possible that simple mistakes and failed memory could explain these inconsistencies, it is not plausible. Given all of this, Grievant was not entirely credible.

Alex Hanna testified at the school level disciplinary hearing and at level three. He was also interviewed during the police investigation. No written statement or police report

[37] *See*, Respondent's Exhibit 10, February 18, 2019, letter.

regarding Mr. Hanna's interview was introduced as evidence in this matter. Mr. Hanna appeared a bit nervous at the level three hearing, but was otherwise calm and displayed the appropriate demeanor. He was not evasive and answered the questions asked of him. In November 2018 and in February 2019, Mr. Hanna was a student in Grievant's firefighting class with M.S. and S.M. He graduated from high school in 2019. At the time of the level three hearing, he was over the age of eighteen. Mr. Hanna has no known interest in this matter. However, he was one of Grievant's students and appears to be part of the local firefighting community along with Grievant. It is unknown whether he serves on the fire department of which Grievant is chief. Grievant testified that he was friends with his students and former students. While the extent of Mr. Hanna's friendship with Grievant is unknown, it is safe to say that they are on friendly terms. Given Mr. Hanna's relationship with Grievant and as he is part of the local firefighting community, Mr. Hanna may feel some loyalty to Grievant that would suggest bias, or motive to be untruthful.

Mr. Hanna's testimony at level three and his testimony at the lower hearing was fairly consistent and it was mostly consistent with Grievant's. Mr. Hanna testified at level three that he was in Grievant's classroom one day in mid-November 2018 and heard Grievant ask M.S. if she was okay and she said that she was, but that is all he could remember.[38] He further testified that he had not heard any mention of an allegation of

[38] At the disciplinary hearing, Mr. Hanna said the exchange took place in January 2019. The disciplinary hearing was held in July 2019. He was only two months off, and he was right that it occurred during the winter of the 2018-2019 school. The passage of time could explain this discrepancy. It appears that since the July 2019 disciplinary hearing, there has been discussion of the incident which likely caused Mr. Hanna to now know that the incident occurred in November 2019. Mr. Hanna testified that he had not reviewed the transcript of his testimony from the disciplinary hearing.

sexual touching or sexual assault occurring in the classroom and had no knowledge of such. He denied any knowledge of M.S. and S.M. meeting with Grievant in his office around that same time. It is noted that Mr. Hanna's testimony is somewhat inconsistent with the letter from attorney Spano dated February 18, 2019. Grievant testified at the lower hearing that his exchange with M.S. on the Monday morning after overhearing the unidentified students' conversation was more than one sentence asking if she was okay. Nonetheless, according to his testimony, Mr. Hanna could only recall hearing Grievant ask M.S. if she was okay and M.S.'s response of "yes." This is more consistent with how Grievant testified at level three. In fairness to Mr. Hanna, it had been over a year since that Monday in November 2018 when he testified at the level three hearing.

However, Mr. Hanna's testimony was totally contradicted by that of Ms. Farrell-Hill. She testified in rebuttal that when she interviewed Mr. Hanna by telephone on or about December 3, 2019, as part of the sheriff's department investigation, he told her that in 2018 when he was a student, he had overheard M.S. talking about R.S. having her perform a sexual act. Further, Ms. Farrell-Hill testified that Mr. Hanna told her that when he overheard M.S., he notified R.S. of what M.S. had said. It is noted that Mr. Hanna was not under oath during his interview with Ms. Farrell-Hill. Given Mr. Hanna's very limited memory and his relationship with Grievant, along with Ms. Farrell-Hill's contradicting testimony, Mr. Hanna's credibility is questionable.

Samantha Farrell-Hill was called to testify by Respondent in rebuttal to Grievant's case-in-chief at the level three hearing. While she is now employed by Respondent, she was at least one of the Kanawha County Sheriff's Deputies who investigated M.S. and S.M.'s allegations regarding R.S. and J.S. She appeared calm and professional. She

displayed the appropriate demeanor toward the proceeding. She answered the questions asked of her and she was not evasive. She appeared to have a good recollection of her actions during her 2019 investigation and she maintained good eye contact with those questioning her. Ms. Farrell-Hill could be viewed as having a bias in favor of Respondent because she is now employed as its investigator. Also, as she investigated the allegations in a criminal investigation, she could be viewed as having an interest in this matter. However, no indication of bias or interest could be detected. Ms. Farrell-Hill appeared credible.

William White was called to testify at the level three hearing. He did not testify at the school disciplinary hearing. He appeared calm and friendly. Mr. White is the Fire Chief of the Rand Volunteer Fire Department and has been since 1970. He is one of Grievant's colleagues and has known Grievant and his family for many years. The Rand Fire Department building is only a few blocks from Carver and Mr. White has visited Grievant's class in the past. However, it has not been suggested that he visited Grievant's class during any of the times relevant herein. Nor has it been suggested that he witnessed any of the alleged incidents of sexual misconduct toward M.S. Mr. White testified mostly about Grievant's reputation for honesty and his professionalism and not the merits of the case. Mr. White's friendship and professional relationship with Grievant, suggests that he may be biased in Grievant's favor, which may be a motive for him to be untruthful. Moreover, Mr. White is the grandfather of one of the visitors accused of making sexual advances toward M.S. This relationship can be viewed as giving Mr. White an interest in this matter.

With respect to the alleged November 2018 incident at Carver, Mr. White testified that he knew nothing of it until someone from the Kanawha County Sheriff's Department called him for a brief telephone interview. However, Ms. Farrell-Hill's testimony contradicted Mr. White's. Ms. Farrell-Hill testified that she, indeed, telephoned Mr. White during her investigation and interviewed him during that call. However, she testified that Mr. White stated that his grandson had told him about the allegation made by M.S., and he had also heard about it from "the guys" at the fire department. Mr. White was not under oath during his phone interview with Ms. Ferrell-Hill. Given Mr. White's relationship with Grievant and his being the grandfather of one of the visitors accused of making sexual advances toward M.S., he was not credible. Further, the testimony of the Ms. Farrell-Hill only further diminishes his credibility.

The testimonies of Ms. Herscher, Janie March, Dean Dickens, and Ron Godby are largely irrelevant. There is no dispute that Ms. Herscher conducted the investigation into the allegations. She was not present during the February 13, 2019, conversation between Principal Dorsey and Grievant, nor was she present during their February 14, 2019, meeting. However, she received at least some of Principal Dorey's emails to and from administration and Grievant at the commencement of her investigation. She also received the email from Principal Dorsey containing the screen shots of the purported text exchange about the alleged November 2018 incident between M.S. and her boyfriend. Such is also hearsay as M.S. was not asked about the texts at the lower hearing and she did not testify at the level three hearing. Further, M.S.'s boyfriend was not called to testify at either hearing. Ms. Herscher interviewed Grievant and the two students, M.S. and S.M. in the course of her investigation and drafted her report. This report was admitted into

evidence. The investigative report is hearsay and contains hearsay as it lists only Ms. Herscher's summaries of her witness interviews. No transcripts or recordings of the interviews, or written statements, were admitted into evidence.

Janie March, Dean Dickens, and Ron Godby did not witness any of the alleged incidents involving M.S., S.M., and the classroom visitors, and they were not present for any conversations between Grievant and Principal Dorsey or Grievant and M.S. and S.M. Also, they were not interviewed during Ms. Herscher's investigation. Ms. March's testimony largely concerned her claims to have overheard a teacher reporting to Principal Dorsey that M.S. had threated to make a false sexual harassment claim against another student. Further, the teacher alleged to have made the report was not called as a witness. Such is hearsay and is unrelated to the alleged incidents discussed herein. This hearsay evidence was offered solely to attack M.S.'s credibility. Mr. Dickens, who was then on the Title IX Board, testified about a conversation he had with Grievant in February 2019 before Grievant was suspended. Mr. Dickens testified that Grievant asked him about his duty to report and that Grievant stated that he did not know if anything happened with a student of his, but that the student said she was okay when he had asked her.

S.M. and M.S. testified at the school-level disciplinary hearing, the transcript of which is part of the record of this case. S.M. and M.S. each testified that, together, they told Grievant about R.S. making sexual advances toward M.S. in his classroom soon after it happened, which was before Christmas break in 2018. Their testimonies at the lower hearing were largely consistent. Further, based upon the testimonies of Principal Dorsey and Ms. Herscher at level three, it appears the students' statements to them during their

separate meetings were also largely consistent with their lower level testimonies.[39] It appears that the students' statements to Principal Dorsey and Ms. Herscher were largely consistent with each other as well. However, because the students did not testify at level three, the testimonies of Principal Dorsey and Ms. Herscher as to what each student said to them is hearsay, as is Ms. Herscher's investigation report. There were no written statements from M.S. or S.M., or recordings of their interviews, presented. Therefore, Ms. Herscher's investigation report is entitled to little weight.

The undersigned had no opportunity to assess M.S. and S.M.'s demeanors. However, that does not mean that their lower hearing testimony cannot be considered in this decision. The testimony given at the lower proceeding was sworn and is part of the record to be considered in making the decision in this matter. For instance, it is common for parties to submit their grievances for decision at level three based solely upon the record of a lower hearing without a level three hearing. In such an instance, no one testifies before the level three ALJ. Grievant's position that their testimonies cannot be considered is incorrect. However, the better evidence would have been the students' testifying at level three. While this ALJ cannot assess their demeanors, a comparison can be made between the students' lower testimony and the other evidence contained in the record to determine whether there are any inconsistencies, conflicting evidence, or corroborating evidence.

At the lower disciplinary hearing, counsel limited their questioning of M.S. and S.M. to the issue of whether they reported the alleged November incident involving R.S. to

[39] *See*, testimony of Lisa Dorsey and Jeane Ann Herscher at the level three hearing and at the school disciplinary hearing.

Grievant. Both M.S. and S.M. testified that they reported it to him together and such occurred in his office. Their testimonies were largely consistent. With respect to the alleged incident with R.S., it is noted that M.S. only described R.S. as "trying to make her do intercourse," while S.M. testified that "[R.S.] was trying to get M.S. to suck his penis." M.S. was not asked to elaborate on any other specifics of the alleged incident. Given that M.S. was the alleged victim, her age, and that she was having to speak about such sensitive matters in front of adults, teachers and school administration, it is reasonable that she would be uncomfortable, and would be less graphic in her description of the incident. These are not inconsistent statements. Further, looking at M.S.'s text messages to her boyfriend, who was another student, which were provided to Principal Dorsey, while they are hearsay, her description of the incident included words more like those used by S.M. Also, M.S. and S.M.'s statements to Ms. Herscher during her investigation appear consistent with their statements to Principal Dorsey. A review of the record shows that M.S. and S.M.'s account of the incident to Principal Dorsey on February 13, 2019, regarding J.S. varied only slightly and that variation did not concern the reporting of the incident. That variation had to do with whether the students touched J.S. during the alleged February 11, 2019, incident. Again, given that the one variation in their accounts has nothing to do with the reporting of the allegations, and that such could easily be attributed to embarrassment given that they were speaking to an adult about this sensitive subject and as the students' parents had become involved, the variation is largely of no consequence.

Pursuant to the policy, "sexual intercourse" means any act between persons involving penetration, however slight, of the female sex organ by the male sex organ or

involving contact between the sex organs of one person and the mouth or anus of another person. . . .” **“**Sexual abuse” means: (A) [s]exual intercourse, sexual intrusion, *sexual contact*, or conduct proscribed by section three, article eight-c, chapter sixty-one, which a parent, guardian or custodian engages in, attempts to engage in, or knowingly procures another person to engage in with a child . . . .” (Emphasis added). Therefore, “sexual abuse” includes “sexual contact” which is explicitly defined as “any intentional touching, either directly or through clothing, of the breasts, buttocks, anus or any part of the sex organs of another person, or intentional touching of any part of another person’s body by the actor’s sex organs, which the victim is not married to the actor and the touching is done for the purpose of gratifying the sexual desire of either party.” No definitions of “parent, guardian, or custodian” are included in the policy. As such it is unknown whether R.S., a young, adult man, and former student, who was visiting his friend Grievant’s, classroom and who was left alone with M.S. would be a “custodian” under the policy. However, the definition of “sexual contact” does not include the “parent, guardian, or custodian” clause. Accordingly, M.S. and S.M.’s description of R.S.’s alleged conduct toward M.S. in November 2018, meets the definition of sexual contact as defined by Kanawha County Schools Policy J28A, and is, therefore, also considered an allegation of sexual abuse. Additionally, M.S.’s description of R.S. kissing her, grabbing on her, and trying to make her perform oral sex on him as contained in the text messages sent to her boyfriend, who provided copies of the same to Ms. Dorsey, also meets this definition. Further, at level three, Grievant has “acknowledged that had had a duty to report” the

allegations made about R.S.'s conduct toward M.S. "*if he had received the report.*"[40] Grievant's defense is that the allegations were never reported to him.

Despite the volume of evidence in the record of this grievance, the outcome of this grievance largely hinges on whether Principal Dorsey or Grievant was more credible. Grievant and Principal Dorsey mostly agree on the facts of their conversations and communications on February 13 and February 14, 2019. The main discrepancies involve whether Grievant told Principal Dorsey about M.S.'s earlier allegation during their first conversation on the morning of February 13, 2019, and some of the statements made during their February 14, 2019, meeting. Grievant does not deny that he told Principal Dorsey that he did not believe M.S.'s allegation about J.S. However, Grievant denies that he referred to M.S. and S.M. as "harlots" as Principal Dorsey claimed. Grievant testified that such word was not in his "active vocabulary." When asked by his counsel if he knew what the word meant, Grievant answered, questioningly, "dancer," but stated that he "has not looked it up." Interestingly, both of these disputed statements have to do with Grievant's opinion of M.S. The word "harlot" is obviously a descriptor. Having made a previous allegation of sexual advances does not amount to an opinion of M.S. It would be a statement of fact, but saying so in an effort to suggest that she makes false claims of sexual advances and that such is a "pattern" for her, would suggest an opinion—that she is not to be believed. Such is also consistent with the way Grievant has attacked the two students' credibility and disparaged them during these proceedings. Also, perhaps coincidentally, one of the allegations made about M.S.'s "inappropriate" class behavior

[40] *See,* Grievant's proposed Findings of Fact and Conclusions of Law, pg. 6.

contained within the record is that she "twerked" on boys. "Twerking" is a type of sexually suggestive dance move. Perhaps, one that a harlot "dancer" might employ.

Grievant testified that he runs his class like a real fire station, and such appears consistent with his testimony and the evidence presented. The evidence suggests that there was a fraternal nature to Grievant's class, also like a real fire department or fire station. He allowed his students to call him "T.A." and he testified that he was friends with his students and former students. Also, there appears to have an unwritten rule in Grievant's class: what happens in class, stays in class. Such only adds to the fraternal nature of the class. Many of his former firefighting students are now his colleagues, or peers, in the local firefighting community, and he appears to be held in high regard within that community. Grievant testified that he works with some of his former students in his role as Fire Chief of East Bank Volunteer Fire Department and has responded to calls with them. R.S. and J.S. are both Grievant's former students, as is Mr. Hanna, at this time. Also consistent with the fraternal nature of the class, Grievant testified that he does not write-up students for behavior issues in class or send them to the principal's office. Such is consistent with the evidence presented. This is also in line with the "what happens in class, stays in class" mentality. Such would explain why M.S. and S.M. would have told only Grievant about R.S.'s conduct in November 2018, and not Principal Dorsey. Another consequence of this mentality is that M.S. and S.M. were reluctant to tell Principal Dorsey about their February 2019 allegations for fear of retaliation from their classmates. They testified at the lower hearing that they told Principal Dorsey their February 2019 allegations because when they told Grievant about the prior allegation, nothing happened. Also consistent with the "what happens in class, stays in class" mentality is that Grievant

never reported S.M. or M.S. to Principal Dorsey for any alleged inappropriate conduct, or for leaving his class and running around the school, if such, in fact, happened. It is noted that Grievant never mentioned any such behavior issues until the allegations against J.S. were made known to him. It would seem that the relaxed, fraternal nature of the class is at the root of the problems that surfaced on February 13, 2019.

Grievant appears to routinely ask former students and other current firefighters to help him in his class. Others just appear to visit him without having been asked to help. On its face, there does not appear to be anything wrong with this whatsoever. However, both the alleged incidents underlying this grievance are supposed to have involved adult classroom visitors and took place in the classroom while Grievant was out. Given the fraternal atmosphere and the class being somewhat isolated from administration, Grievant leaving classroom visitors alone with students, or leaving students and visitors together unsupervised, put the students at risk and created the perfect environment for problems to arise. While Grievant has denied leaving visitors alone with students, the evidence demonstrates that, most likely, he does. It is undisputed that he regularly leaves the class to take attendance to the office, to go to the bathroom, and to go get his lunch. He never alleged taking class visitors with him when he left the classroom to do such things, or that the visitors left the room when he did. Taking attendance to the office appears to be a daily activity, and it cannot be believed that he did not eat lunch when he had classroom visitors. If so, Grievant would have said so during any of the many times he has been allowed to speak about this issue. Further, it has been alleged that the November 2018 incident involving R.S. happened when Grievant was out getting his lunch.

Based upon the evidence presented and the record of this grievance, Principal Dorsey's account of her conversation with Grievant on February 13, 2019, is more credible that Grievant's. Her testimony has been consistent throughout and was consistent with her emails while Grievant's has varied. Despite Principal Dorsey's involvement in reporting the matter to school administration and her informing Grievant of his suspension, she has no substantial interest in the outcome of this grievance. Despite Grievant's denials, it is more likely that he knew about M.S.'s prior allegations about R.S. and that during his first conversation with Principal Dorsey on February 13, 2019, Grievant told Principal Dorsey about the same without thinking about the consequences. The evidence suggests that Grievant only told Principal Dorsey in an effort to dissuade her from believing the report made by M.S. and her parents that morning about J.S., and to attempt to undermine M.S.'s credibility. Such would explain his surprise when Principal Dorsey informed him that he was being suspended for failure to report the November 2018 allegations, and not for what happened in his classroom involving J.S. on February 11, 2019.

It really does not matter how Grievant learned of M.S.'s allegations about R.S. The evidence establishes that he knew about the allegations given his comments about M.S. to Principal Dorsey during their February 13, 2019, conversation. As stated in the policy, a teacher "who has reasonable cause to suspect that a child is neglected or abused . . . shall immediately, and not more than 24 hours after suspecting this abuse or neglect, report the circumstances or cause a report to be made to the Department of Health and Human Resources. In any case where the reporter believes that the child suffered . . . *sexual abuse* or sexual assault, the reporter shall also immediately report, or

cause a report to be made to the State Police and any law-enforcement agency having jurisdiction to investigate the complaint. Any person required to report under this article who is a member of the staff . . . of a school shall also immediately notify the principal or the assistant principal . . . who may supplement the report or cause an additional report to be made." (Emphasis added). The policy also states that, "[a]ny school teacher . . . who receives a disclosure from a witness, which a reasonable prudent person would deem credible, or personally observes any sexual contact, sexual intercourse, or sexual intrusion of a child on school premises . . . shall immediately, but not more than 24 hours, report the circumstances or cause a report to be made to the State Police or other law-enforcement agency having jurisdiction to investigate the report . . . ."[41] Even if M.S. and S.M. did not report their November 2018 allegations to him, if Grievant had overheard the students in the hall discussing possible "Title IX violations," as originally claimed in the February 18, 2019, letter, and that caused him to ask M.S. if she had "anything to report" and if she were "okay," Grievant certainly had reason to suspect "abuse" and "sexual contact" as defined in the policy and he had a duty to report it even if M.S. denied it. The policy requires *mandatory* reporting. It was not up to Grievant to investigate or assess M.S.'s credibility. He was required to report what he had heard. Even if he was unsure about what happened and did not think to report to law enforcement, Grievant was required to immediately report it to Principal Dorsey. From there, Principal Dorsey could have assisted him with other required reporting. Instead, Grievant placed the burden on the student to report it, chose not to believe her, or decided to keep it in his class and

[41] *See*, Respondent's Exhibit 8, Kanawha County Schools Administrative Regulation J28A, "Reporting Suspected Child Abuse and Neglect."

handle it on his own by calling R.S. and telling him not to return to Carver. Any way you have it, Grievant willfully violated his duty to report. As such, this ALJ cannot conclude that Respondent's decision to suspend, and subsequently, dismiss Grievant from employment was unreasonable, or arbitrary and capricious.

For the reasons set forth herein, Respondent proved by a preponderance of the evidence that Grievant violated Kanawha County Schools Policy J28A by failing to report a student's allegations of illegal sexual contact, which is a type of sexual abuse, and that such constitutes willful neglect of duty, thereby warranting the termination of his employment. While Grievant asserted in his statement of grievance a claim that Respondent violated W. Va. Code § 18A-2-8 and a claim for mitigation of the penalty, Grievant did not address either of these claims in his proposed Findings of Fact and Conclusions of Law. Therefore, these claims are deemed abandoned and will not be further addressed herein. Accordingly, this 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. WEST VIRGINIA CODE §18A-2-8 sets out the reasons for which a public school employee may be dismissed or suspended and states, in part as follows:

> (a) Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge.
>
> (b) A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article. The charges shall be stated in writing served upon the employee within two days of presentation of the charges to the board.

3. "The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. VA. CODE § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ.,* Docket No. 91-20-005 (Apr. 16, 1991). *See Beverlin v. Bd. of Educ.,* 158 W. Ca. 1067, 216 S.E.2d 554 (1975)." *Graham v. Putnam County Bd. of Educ.,* Docket No. 99-40-206 (Sep. 30, 1999).

4. Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *See State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Id.* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on 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).

5. "Any medical, dental, or mental health professional, Christian Science Practitioner, religious healer, school teacher or other school personnel, social service worker, child care or foster care worker, emergency medical services provided, peace officer or law-enforcement official, humane officer, member of the clergy, circuit court judge, family court judge, employee of the Division of Juvenile Services, magistrate, youth camp administrator or counselor, employee, coach or volunteer of an entity that provides organized activities for children, or commercial film or photographic print processor who has reasonable cause to suspect that a child is neglected or abused, including sexual abuse or sexual assault, or observes the child being subjected to conditions that are likely to result in abuse or neglect shall immediately, and not more than 24 hours after suspecting this abuse or neglect, report the circumstances to the Department of Health and Human Resources. In any case where the reporter believes that the child suffered serious physical abuse or sexual abuse or sexual assault, the reporter shall also immediately report to the State Police and any law-enforcement agency having jurisdiction to investigate the complaint. Any person required to report under this article who is a member of the staff or volunteer of a public or private institution, school, entity that provides organized activities for children, facility, or agency, shall also immediately notify the person in charge of the institution, school, entity that provides organized activities for children, facility, or agency, or a designated agent thereof, who may supplement the report or cause an additional report to be made: Provided, That notifying

a person in charge, supervisor, or superior does not exempt a person from his or her mandate to report suspected abuse or neglect. . . ." W. Va. Code § 49-2-803 (2015).

6. "Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. *Adkins v. Cabell County Bd. of Educ.*, Docket No. 89-06-656 (May 23, 1990). This is a fairly heavy burden, given that Respondent must not only provide that the acts it alleges did occur, but also that the reason for Grievant's neglect of duty was more than simple negligence." *Tolliver v. Monroe County Bd. of Educ.*, Docket No. 01-31-493 (Dec. 26, 2001). Willful neglect of duty "is conduct constituting a knowing and intentional act, rather than a negligent act. *Williams v. Cabell County Bd. of Educ.*, Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ.*, Docket No. 95-29-151 (Aug. 24, 1995); *Hoover v. Lewis County Bd. of Educ.*, Docket No. 93-21-427 (Feb. 24, 1994). Willful neglect of duty encompasses something more serious than incompetence. *Bd. of Educ. v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120, 122 (1990); *Sinsel v. Harrison County Bd. of Educ*., Docket No. 96-17-219 (Dec. 31, 1996)." *Geho v. Marshall County Bd. of Educ.*, Docket No. 2008-1395-MarED (Oct. 30, 2008).

7. 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).

8. "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). "Hearsay evidence is generally admissible in grievance proceedings. The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings." *Gunnells v. Logan County Bd. of Educ.,* Docket No. 97-23-055 (Dec. 9, 1997).

9. 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).

10. Respondent has proved by a preponderance of the evidence that Grievant violated Kanawha County Schools Policy J28A by failing to report an allegation of sexual contact/sexual abuse, and that its actions in suspending and subsequently terminating Grievant's employment were justified.

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* 156 C.S.R. 1 § 6.20 (eff. July 7, 2018).

DATE: July 17, 2020.

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Carrie H. LeFevre
Administrative Law Judge