SANDRA SINSEL,

Grievant,

v. **Docket No. 96-17-219**

HARRISON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Sandra Sinsel, grieves her termination by the Harrison County Board of Education ("HCBOE or "Board"). (See footnote 1) She is charged with insubordination, willful neglect of duty, cruelty, and incompetency for an incident on February 14, 1996, involving inappropriate touching, verbal threatening, and profanity. (See footnote 2)

Grievant was suspended from that date, pending resolution of Superintendent Robert Kittle's recommendation that Grievant's employment be terminated. A hearing before the HCBOE was scheduled for July 2, 1996, on this recommendation, but rescheduled to allow HCBOE to amend the notice, and to inform Grievant that prior acts would be used to support the recommendation. A board hearing was held on July 15, 1996, evidence was taken, and the Board approvedSuperintendent Kittle's recommendation and terminated Grievant's employment on the grounds previously specified. Grievant then refiled her grievance to Level IV on July 24, 1996, stating HCBOE engaged in:

Arbitrary and capricious disciplinary actions including: harassment, discrimination, retaliation, lack of due process, deformation [sic] of character and use of multiple punishments for same accusations:

She requested as relief:

Reinstatement of employment contract with all sick leave, personal days and benefits restored including seniority, reinstatement to the same retirement program with defined benefits, demotion of Mr. Fain so that he can't destroy other teachers, a public apology from the school board for deformation [sic] of character based on hearsay, and reimbursement of all salary and legal fees.

A Level IV hearing was held on September 16, 1996, in Elkins, West Virginia. This case became mature for decision on November 7, 1996, the deadline for the parties' proposed findings of fact and

conclusions of law.

Background

Grievant has been employed as a teacher with HCBOE for sixteen years, eleven as a regular teacher and five as a substitute. She has a Masters degree plus 48 hours and has taught seventh grade science for the past several years at South Harrison High School ("SHHS").

On April 29, 1994, Mr. Gary Fain, Grievant's principal, issued Grievant a written reprimand for a "hit, slap or tap on the back of the head." He stated the severity of this act could be debated, and that the touching "was not done with malice and little or no harm was done." (See footnote 3) PT Hg. Bd. Ex. 2. However, Principal Fain noted the Harrison County Policy JDA ("JDA") on corporal punishmentdoes not condone "[s]triking a child about the head . . . under any circumstances short of self- defense" and directed Grievant to not "place [her] hands upon a child[,] especially during a disciplinary action." Id. During the Level IV hearing in the instant grievance, Grievant testified she had done nothing inappropriate and did not slap this child. Grievant did not grieve this written reprimand, and stated at the Level IV hearing that she did not know she could, even though she was a member of an employee association.

On November 14, 1994, the following academic year, Principal Fain found Grievant had struck another student, E.G. (See footnote 4) , and referred the matter to Superintendent Kittle. On November 28, 1994, Superintendent Kittle wrote Grievant stating she would receive a ten-day suspension for striking and cursing E.G. This decision was reached after a conference with Grievant, her representative, Principal Fain, Superintendent Kittle, and Mr. Robert Skidmore, Administrative Liaison Officer. Superintendent Kittle noted he would present this charge of cruelty to HCBOE on December 13, 1994. He also noted Grievant had agreed to seek professional counseling through the Employee Assistance Program and outlined her rights in the grievance process.

Grievant's signed statement about the E.G. incident given to Principal Fain on November 14, 1994, stated that while working on an archeological dig E.G. was disruptive. She then asked the students to wash their hands and:

E.G. and boys came up to the sink, other boys washed their hands and started running the shop-vac to clean up. E.G. did not do this, instead he turned on the spigot and water splashed everywhere.

I lost it, and slapped E.G., only my finger tips touched his face close to his eye. He than began to help clean up. When the bell rang _ I took E.G. to the office to Mrs. Leggett.

I have to say something to E.G. everyday about his behavior, I even moved a student to another class because E.G. would talk no matter what I said or did.

Grievant also added the following:

The principal came to me after I had made this written statement and asked if it were true that I made some statement about “Knocking him (E.G.) on his ass.” I indicated that I said something to that effect.

During the July 15, 1996 Level IV hearing, Grievant testified she had turned the water on to the proper temperature, and she saw E.G. turn off the cold water and she “knew other kids would get burnt”. She then “dramatically” or “frantically” reached for the spigot to protect the other children, and E.G. leaned forward at the same time running his face into her hand. Grievant stated two of her fingers touched E.G.'s cheek, and this touching was an accident. She took E.G. to Assistant Principal Pamela Carson-Leggett's office because even accidental touching must be reported.

On November 28, 1994, while Grievant was suspended, but prior to HCBOE's action, Principal Fain received three Citizen's Complaints from other parents stating Grievant had struck their children. These parents also complained about Grievant cursing and intentionally embarrassing their children in front of others. On December 9, 1994, Grievant wrote Principal Fain denying the charges in each of the Citizens' Complaints.

Principal Fain indicated Grievant's written reprimand on April 29, 1994 was justified. He received complaints from E.G.'s parents, and later, Citizens' Complaints from the M's , J's, and D's. He indicated he discussed the E.G. situation with Grievant, but did not discuss the three other complaints because Grievant was on suspension and not at school. In response to cross-examination, he testified he did not request Citizen Complaints from anyone. Id. at 168. Grievant presented the testimony of Lana M., the aunt of the child identified in one of the Citizens' Complaints. She knew Grievant as a friend and as a teacher. Ms. M. indicated she was present when the M. incident took place, but that she did not see the student; in fact, she did not see anything.

Before the December 13, 1994 HCBOE meeting, Grievant's attorney wrote HCBOE's attorney memorializing their negotiations and offering “terms of resolution.” PT Hg. Bd. Ex 4. Through this

letter, Grievant agreed to accept a ten-day suspension, to seek counseling, to take a leave of absence for the remainder of the school year, to not return to work until the counseling agency certified she was able to return, and to be placed on an Improvement Plan ("IP"). Grievant also sought assurance that no other complaints had been received, and that the ten-day suspension would "incorporate all disciplinary action to be taken against her . . .". Id.

On December 20, 1994, Respondent's attorney wrote Grievant's counsel to confirm HCBOE's actions on December 13, 1994, and to finalize the agreement. He noted HCBOE had "approved [Grievant's] ten (10) day suspension as a result of the unauthorized striking of students for disciplinary purposes." PT Hg. Bd. Ex. 5.

At the Level IV hearing, Grievant stated she did not strike any student, but took the ten-day suspension because she had touched E.G., and that was against policy. She also indicated HCBOE's attorney had forced her attorney, through intimidation, to accept the leave of absence. She also stated she authorized her attorney's letter and was afraid she would "get fired" if she did not agreeto the leave of absence. Upon her return to SHHS, Grievant was placed on an IP and successfully competed its requirements on November 21, 1995. (See footnote 5)

February 14, 1996 Incident

The testimony regarding the February 14, 1996 incident is conflicting, thus it will be necessary to explore these statements and make determinations about the credibility and reliability of the testimony.

A.D. was a seventh grade student in Grievant's seventh period science class. The record contains his sworn testimony at the Pretermination Hearing and a signed statement he gave to Principal Fain, when he interviewed A.D. on February 15, 1996, at his home. A.D. testified his sixth period teacher, Ms. Dean, kept him after class for disciplinary reasons until the seventh period tardy bell rang. Then Ms. Dean refused to give A.D. a tardy slip which he needed to get into Grievant's class. A.D. tried to go to Grievant's class, but she refused to admit him without a tardy slip. She sent him to Ms. Dean to get this slip, and then Ms. Dean and Grievant discussed the slip while A.D. stood in the hall. Ms. Dean still refused to give him a slip, and Grievant and Ms. Dean sent A.D. to the office to get one. A.D. went to the office and neither the Assistant Principal nor the Principal were there. Ms. Smith, the office secretary, told A.D. Ms. Dean was to give him the slip. A.D. returned to Grievant and Ms. Dean,

and Ms. Dean would still not give him a tardy slip, Grievant would still not let him in her class, and A.D. was still in the hall. While in the hall, Grievant yelled at A.D. for placing his books on the floor and for putting his foot on the wall. A.D. was again sentto the office for a tardy slip. He returned with Assistant Principal Carson-Leggett, who told Ms. Dean to write the tardy slip.

A.D. then went into Grievant's class, talked to M.D., and started doing his work. Grievant yelled at him to be quiet and to get to work. He eventually told M.D. that M.D. was being a nuisance and to quit it. Grievant yelled at A.D. again to be quiet. Then A.D. thought Grievant told him to leave class, and he gathered up his books to go. Grievant asked A.D. where he was going, and he said, “You told me to leave.” Grievant then told A.D. to sit down and be quiet. A.D.'s response was, “Okay. Well, I'm sorry.”

A.D. stated Grievant got really mad then, walked to his desk, and she may have slammed her open palm on his desk. Grievant then reached across the desk and grabbed A.D. with both hands by the shirt collar, while he was sitting. Grievant twisted the shirt collar up, and her knuckles were pressed lightly into A.D.'s throat. A.D. stated he could still breathe, but it hurt “a little bit,” and he was frightened. Grievant then stated, “It would be worth a whole another year [sic] suspension to knock your teeth down your throat” or something very similar to that. A.D. said he was sorry and Grievant grabbed him by the arm and said, “Get your ass out of my classroom.” Then Grievant and A.D. went to Assistant Principal Carson-Leggett's office.

In Ms. Carson-Leggett's office, Grievant told her she had grabbed A.D.'s collar lightly. He talked to both women about his behavior and after a while, Grievant left.

A.D. stated he was “nervous” and “all shook up” and wondered why Grievant had done what she did. Shortly thereafter, school let out and A.D. went home. When he got there he told his step- dad and later called his father. A.D.'s mother returned from work at eleven o'clock, and he told her what happened. When relating Grievant's statement about knocking his teeth down his throat, A.D. stated, “or something like that. I don't remember.” PT Hg. Trans at 41. These phrases were clarified on cross-examination. A.D. stated, “All I remember about [the statement is] 'It would be worth another year's worth of supervision to knock your teeth down your throat.'” Id. at 53. A.D. was again asked whether he remembered what Grievant said or was relying on what other students told him. A.D. responded, “I remember. I knew _ I remember what she said . . . . I don't remember all of it, but I just remember the part where she said 'It'd be' _ It would a whole another year's worth of suspension just

to knock your teeth down your throat." Id. at 57.

Mr. D., A.D.'s father, testified his son called him around six or seven on that evening. A.D. told his dad that "a teacher had choked him and that he was scared to go to school the next day, he didn't know what was going to happen again." Id. at 6. Mr. D. called Grievant on the phone and asked her if she had choked his son. Grievant responded that she had "just gotten carried away." Id. Mr. D. reported these were her exact words. Grievant verified she had put her hands on his son. Id. at 63. Grievant also apologized several times. Mr. D.'s impression of the conversation was that Grievant had "more or less" confirmed A.D.'s report of the incident.

Ms. A., A.D.'s mother, also testified. She stated she found her son upset and in bed crying when she returned home from work at eleven o'clock. A.D. was worried he was going to get in trouble. He then recounted the incident in the same way as he did at hearing. A.D. demonstrated how Grievant had grabbed him by the collar and yelled at him. Id. at 66, 68.

Ms. A. kept A.D. home from school and called Assistant Principal Carson-Leggett the next morning. Ms. Carson-Leggett stated the incident "did not happen", and that she was not aware of any choking or cussing. Ms. A. then called the Board office to "find out what was going on." LaterGrievant called Ms. A. to discuss what happened, and indicated A.D. should not have been in that class because there were "too many troublemakers." Id. at 73. The day following this incident, numerous parents called Ms. A. to tell her of other negative incidents with Grievant.

Mr. Fain testified about his investigation of the incident, and past problems with Grievant. He stated he received a call from his Supervisor, Mr. Donald Kniceley, the morning of February 15, 1996, while he was attending a meeting at another school. Mr. Kniceley told him to go to SHHS and investigate an incident in Grievant's seventh period class on February 14, 1996. Principal Fain returned to SHHS and directed students from Grievant's seventh period class to empty classrooms. He asked Mr. Tom Moots, Assistant Principal, to tell the students to put their name at the top of a piece of paper and ask them to write "if anything unusual happened in their science class on the 14^{th} . . .". Id. at 156. He then verified the statements and signatures. Each of the twelve remaining students wrote a statement, and all of these were submitted. Principal Fain also talked to Grievant and typed a statement for her signature. Additionally, he requested and received a statement from the parent volunteer, Dana Reed, who was in the room at the time of the incident. All of these statements were submitted at the Pretermination Hearing.

Ms. Dana Reed volunteered in Grievant's classroom and was present the day of the incident. In her written statement and sworn testimony, she indicated A.D. was late to class and required to stand in the hall until he got a tardy slip. She was not sure whether Ms. Dean and Grievant had any conversation or communication between them, as she was busy working on papers. A.D. was upset when he came into the classroom, and the students were noisy and would not be quiet. Grievant told A.D. to "butt out" and he misunderstood her and started to leave the class. Grievant then told A.D. to take his seat. Ms. Reed did not see or hear Grievant slam her hand down on the desk. She did seeGrievant walk to the front of A.D.'s desk, and they exchanged a few words. She did not hear what was said, and she could not see Grievant's hands as Grievant's back was to her. Grievant then told A.D. to go to the office and he did not want to go. Ms. Reed reported Grievant again told A.D. to get his "behind" to the office, but then stated she could have possibly said "ass". Id. at 108-109.

Although all students submitted a statement about the events on February 14, 1996, HCBOE called only three to testify at the Pretermination Hearing. Grievant did not call any students when she presented her case at Level IV. J.M., a then-seventh grader, testified that Grievant would not let A.D. into class without a tardy slip and sent him to get one from Ms. Dean. Grievant then motioned to Ms. Dean to not give him one. After A.D. got into the room and class had started, J.M. heard a loud conversation between the two of them and saw Grievant touch A.D. "like around the neck, a little snug or a choke." Id. at 89. At hearing J.M. stated Grievant told him "to get to the office." In his written statement, he said Grievant told him "to get his ass to the office."

J.R.G. was also a student in A.D.'s class. He recalled A.D. was not allowed into the class because he did not have a tardy slip. Grievant directed him to get one and closed the classroom door on him, leaving him in the hallway. Later A.D. returned to the room, gave Grievant his tardy slip, and went to his desk. Grievant asked A.D. for his homework, and A.D. and Grievant had a conversation about his not doing it, in which A.D. "mouthed off." Id. at 93. Grievant then grabbed A.D.'s shirt with both hands and turned A.D. toward her. She did not have her hands on his throat. After being shown his written statement, J.R.G. remembered Grievant had said, "If I didn't want to get suspended it would be worth knocking your teeth down your throat." Then Grievant told A.D., "Take your ass to the office." K.S. testified, he remembered A.D. was tardy, but did not notice anything else until Grievant "hit her hand on the table." Grievant and A.D. were in a conversation about calling his parents. Grievant had her hands on A.D.'s shirt collar and pulled him toward her. Then she told him

"to get his ass to the office." She stated A.D. had been talking and not working on his assignment, but that he was not being "flip" in his responses to Grievant.

All the statements from the ten students who did not testify reflected Grievant was angry and grabbed A.D. Some said Grievant grabbed him by the shirt collar, others by the neck, and one was not sure where she grabbed him. Most said Grievant told A.D. "to get his ass to the office." Two reported Grievant signaled to Ms. Dean to not give A.D. a tardy slip. Only one of the ten reported Grievant saying it was worth getting suspended to knock his teeth down his throat.

Ms. Carson-Leggett indicated she was now principal at SHHS and was assistant principal at the time of the incident. She stated she had known Grievant for four years and dealt with her on a daily basis. She noted she and Grievant were friends and that they had gone to dinner "a few times" and talked on the phone "a few times." She has this type of friendly relationship with several faculty members. She also reported her relationship with Principal Fain was "strained." The parties stipulated Ms. Carson-Leggett had been involved in multiple and lengthy litigation with HCBOE, and that Principal Fain had appeared in these proceedings. She stated Grievant had asked her to come to the Pretermination Hearing, but Ms. Carson-Leggett informed Grievant she would not willfully attend because of her own personal situation, but would come if subpoenaed. The fact that Ms. Carson-Leggett had recently received a thirty-day suspension was "brought out" to show possible bias in the grievance proceedings. In terms of the A.D. incident, Ms. Carson-Leggett stated Grievant brought A.D. to her office saying A.D. was not doing well in class. Grievant told her she grabbed A.D.'s collar and said "One of these days, A." While Ms. Carson-Leggett and A.D. discussed some problems at home, A.D. cried, and Grievant left Ms. Carson-Leggett's office. A.D. did not tell her about anything that happened in the classroom, and she did not ask. Ms. Carson-Leggett noted that because it was almost time for A.D.'s bus, she took A.D. to the counselor to arrange a future meeting, and called A.D.'s step-father to report problems with A.D.'s school work. The next morning, A.D.'s mother called to speak to Ms. Dean. Ms. Carson-Leggett also offered to connect her with Grievant, Ms. A. talked to Ms. Dean, but indicated she did not care to talk to Grievant, as she had already spoken to Mr. Fain.

Ms. Carson-Leggett also reported Grievant had improved her interactions with the students over the first semester of the 1995-96 school year. She clarified this statement saying Grievant frequently used a "sharp" tone with students that would cause them to think they were in trouble, or that

Grievant was mad at them instead of knowing that she “cared” about them.

Mr. James Moore, SHHS's counselor, recalled Ms. Carson-Leggett bringing A.D. to his office shortly after school was out. A.D. was shaken and in distress. When Mr. Moore asked A.D. questions and Ms. Carson-Leggett answered for him, thus A.D. did not speak to him.

Grievant testified in her own behalf at Level IV. Her account of the February 14, 1996 event differs from the other witnesses in some important respects. A.D. was late to her class because he had a problem in Ms. Dean's class. She would not let him into the class without a slip because it was against the rules. A.D. should have gotten a tardy slip from Ms. Dean, but she would not give him one. Thus, A.D. had to go to the principal's office for one, but he returned without it becausethe principal was not in. The secretary had told A.D. the teacher should give him one. A.D. remained in the hall, but he was Ms. Dean's responsibility because he had not been admitted to her class. Grievant stated she did not know until later that A.D. had been retained in class for disciplinary reasons. Later, A.D. returned to the principal's office, received a tardy slip, and was admitted to her class. Grievant stated she had no discretion to admit late students when they did not have a slip. She stated she had never let a student in without a late slip, and that she and Ms. Dean did not talk about A.D.

When A.D. entered the room he disrupted class, and she told him several times to quiet down. She walked over to the lab table where he was sitting, thinking that “maybe if he knew I was serious” he would quiet down. He kept talking. She placed one hand on the table, and one hand on A.D.'s outside shirt collar and said “one of these days, A., one of these days.” She stated this meant A.D. should bring his behavior and talking under control. A.D. stood up, and when questioned where he was going, he responded he thought she had told him to go to the office. She told him she had not, but they needed to go. Grievant decided going to the office was a good idea, and considering what had “happened last year and all the intimidations and agreements,” Grievant thought it would be in her best interest to take A.D. to the office and she did. She stayed until A.D. “teared up” and left.

Grievant confirmed that she had talked to A.D.'s father. She said she had grabbed his collar and told him she was frustrated and tired and if you wanted to call that “losing it,” you could. Grievant was not aware of the charges until she was hand-delivered a letter. She talked to Mr. Fain and made an oral statement to him. Grievant presented the testimony of three HCBOE employees to demonstrate the disciplinary action taken against her was discriminatory as compared with their

treatment. Mr. Sam Bellotti, a nine-year teacher's aide, testified he hit a special education student three years ago and received a five-day suspension. He had never been accused of such behavior either before or after this event. Ms. Karen Davis, a twenty-three year teacher, reported she had been accused of choking a student, she did not do it, HCBOE knew she did not do it, and she received a written reprimand. Mr. Robert Steele, a nineteen year teacher, stated he had never been disciplined by the Board and had never inappropriately touched a student.

Grievant also called Mr. Donald Newsom, an eighteen-year old special education student, and his mother, Shirley, to discuss inappropriate behavior of Mr. Fain. He claimed that when he was in the seventh grade, he and another boy were “just wrestling” in the hall, and Mr. Fain separated them, took him into the cafeteria, told him to settle down, and then choked him. Another time, Mr. Fain told Mr. Newsom to return to lunch detention, and Mr. Newsom refused because he thought he had served his time. Mr. Fain tried to move him physically by choking him, and then Mr. Newsom threw hot soup in Mr. Fain's face to protect himself. Mr. Newsom was expelled from school for this incident. His mother stated Mr. Newsome had long claw marks on his neck from the event. Mr. Newsom was eventually allowed to return to another school. He stated he has been expelled two more times. His mother stated Mr. Newsom has been expelled once and suspended three times. Mr. Fain did not receive any discipline for either of these events.

Issues

Grievant's arguments appear to be four-fold. First, her actions with A.D. were appropriate. She lightly touched A.D.'s collar with one hand to get his attention; she indicated verbally he neededto calm down, she did not ever threaten, or use force, and she took his arm to go to the office to restrain him. She states all touching was appropriate, within her discretion, and necessitated by A.D.'s misbehavior. She did not violate Board Policy JDA. Second, if she did curse, by using the word “ass”, this word alone does not merit discharge. Third, the testimony of HCBOE's witnesses is flawed and comes only from students. Fourth, that none of Grievant's behavior was insubordinate, she engaged in no willful neglect of duty or cruelty, and her evaluations demonstrate she is a good teacher. Hence, she cannot be found incompetent. Grievant also argues her prior reprimand and suspension were inappropriate because she never admitted or acknowledged any misconduct. The various agreements reached in these prior proceedings were to prevent further disruptions and costs.

Grievant also argues the reprimand or the suspension agreement did not state she acted inappropriately. (See footnote 6)

Respondent asserts the charges against Grievant are proven, and Grievant was guilty of cruelty, willful neglect of duty, insubordination, and incompetency when she inappropriately grabbed, cursed, and threatened a seventh grade student. HCBOE maintains Grievant has a pattern of inappropriately touching students, and thus, has a serious, persistent problem in conforming her behavior to the policies and standards expected from a teacher in the public school system.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ.,Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41- 232 (Dec. 14, 1989). In order to decide whether HCBOE has met this burden of proof, it is first necessary to resolve the issue of witness credibility, as Grievant's testimony contradicts the testimony of Respondent's witnesses.

An Administrative Law Judge is charged with assessing the credibility of the witnesses that appear before her. Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dept. of Health and Human Res./Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). “The fact that [some of] this testimony is offered in written form does not alter this responsibility.” Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996). The United States Merit System Protection Board Handbook (“MSPB Handbook”) is helpful in setting out factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984). Some factors to consider in assessing a witness's testimony 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. Id. 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' information. Id.

Respondent submitted ten written statements from students in Grievant's seventh period class. These statements are obviously hearsay, but relevant hearsay is admissible in administrative

hearings. See W. Va. Code §18-29-6. The key questions are whether these statements are credible, and what weight, if any, to give this testimony. In Borninkhof v. Department of Justice, 5 MSBP 150 (1981), the Merit Systems Protection Board identified several factors that affect the weight hearsay evidence should be accorded. These factors are: 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.; Perdue, supra; Seddon v. W. Va. Dept. of Health/Kanawha-Charleston Health Dept., Docket No. 90-8-115 (June 8, 1990).

The testimony of the one other adult in the room, Ms. Reed, the parent volunteer, is basically nonhelpful. Although she was close to where the action occurred, she saw and heard nothing, stating that Grievant's body blocked her view, and she was busy working on papers. She could not see Grievant's hands, and she heard no conversation, other than reluctantly agreeing that Grievant did tell A.D. “to get his ass to the office.” She does indicate a communication took place between these individuals, but remembers nothing that would support either Grievant's statements or A.D.'s. Ms. Reed did indicate this seventh period class was generally “rowdy, rude, and loud” and sometimes the students “mouthed off”, but that Grievant had no difficulty maintaining order.

Although A.D. did not appear before the ALJ at Level IV his testimony at the Pretermination Hearing is clear. He testified he did not remember everything that happened, but he was certain Grievant grabbed his shirt collar with both hands and twisted the collar under, told him it would beworth a suspension “to knock [his] teeth down [his] throat,” and said, “get your ass to the office.” He was not one hundred percent sure if she grabbed his arm to take him to the office, but thought she had. He does not remember Grievant slamming her hand on the desk. His written statement, given a day after the event, and his sworn testimony are consistent, no witness indicated A.D. to be untruthful, A.D. was capable of perceiving and communicating, and his account was plausible. The undersigned had no opportunity to observe A.D.'s demeanor or identify his attitude toward the action.

The three students who testified at the Pretermination Hearing were able to communicate clearly,

did not demonstrate bias, and their testimony was consistent with their prior statements. Their accounts of the incident vary on specific points, as is typical of eyewitness testimony, but all agree Grievant was angry and grabbed A.D. in the neck area. This testimony was consistent with their written statements, and no evidence was presented to show they were untruthful or dishonest. J.R.G. and K.S. both stated Grievant pulled A.D. toward her and told A.D. to get his “ass” to the office.

Next, the written statements of the ten remaining students who did not testify must be examined to decide if they are credible, and what weight their statements should be given. Students were to write about anything unusual that happened; the specific incident or a portion of the incident was not identified. Each statement was approximately a paragraph long, and each student recalled Grievant grabbed A.D. and most remember the “ass to the office” statement.

In reviewing the Borninkhof factors to assess what weight to give hearsay, the following information was examined. Respondent indicated it did not have the right to subpoena the students at the Pretermination Hearing. Additionally, the statements were written with the name and date oneach, and are basically consistent and corroborate each other. The credibility of these individual declarants was not attacked, other than to note they were all seventh grade students.

Although not present when the incident occurred, A.D.'s parents indicated A.D.'s testimony at hearing was consistent with his prior account, and that he was upset and worried. Further, A.D.'s father stated that when he confronted Grievant during the phone call, she did not say A.D. was lying, but said she was sorry and admitted “losing it.”

In assessing Grievant's credibility, her testimony will be reviewed as a whole. Grievant chose not to present her case at the Pretermination Hearing. At Level IV she testified about all three of the incidents for which she was disciplined, and denied committing any of the acts. This Grievance Board does not allow collateral attacks on prior disciplinary actions that were not grieved. If these prior actions were not grieved, a respondent is not required to prove the truth of the allegations at a subsequent hearing. See, Perdue, supra, at 4. Thus, Respondent does not have the burden of proving Grievant's prior acts and disciplines, and the rationale for them can be presented into evidence at this hearing. Perdue, supra.

During her testimony, Grievant denied slapping L.N. in the April 29, 1994 incident. She stated the outcome of the situation would not have been any different if she had said, “Good job, L.” Grievant did not clarify this statement, and the undersigned is unclear as to the meaning. Grievant stated she did

not slap, or inappropriately touch L.N.

Grievant's Level IV testimony about the E.G. incident directly contradicts many aspects of her signed and dated statement given to Mr. Fain shortly after the incident. In her statement to Mr. Fain she states, “I lost it, and slapped E.G.” No mention is made of the dash to fix the water spigot to prevent student injury. At the Level IV hearing, Grievant stated she hurried to turn the spigot toprevent students from being “burnt”, and as she reached toward the spigot, E.G. ran his face into her hand. The inconsistency between these two accounts calls into question Grievant's credibility. The first statement, given closer in time to the events and prior to this action, clearly indicates Grievant lost her temper and “slapped at” E.G. This version of the incident appears the more plausible of the two, and supports her motivation to accept a ten-day suspension, take a seven-month leave of absence, seek counseling, and complete an IP. It is difficult to believe an individual would accept these terms if she believed her actions were reasonable and required to maintain the safety of other students.

As for this current incident, the weight of the evidence is against Grievant. All the students agree Grievant was angry and grabbed A.D., and most agree she cursed and told A.D. to get his “ass” to the office. Some recall the statement about “knocking your teeth down your throat.” None recall Grievant merely touching A.D.'s collar with one hand and saying, “one of these days, A, one of these days.” While it does appear A.D. was less than cooperative, was talking in class, and “spoke back” to Grievant, there is no evidence, even from Grievant, that she was threatened by A.D., or needed either to restrain him physically or grab his arm to take him to the office. (See footnote 7) The fact Grievant apologized to A.D.'s mom and dad and told Mr. D., “I lost it” while not accusing A.D. of fabricating his story, also confirms the students' version of the events.

Thus, the undersigned finds Grievant became angry with A.D., grabbed his shirt collar with both hands in the neck area, threatened him, grabbed his arm, and told him to get his “ass” to theoffice. Grievant was standing during this event and A.D. was sitting. Grievant did not act in self- defense and was not afraid for her or any students' safety at the time of this event.

The next issue to decide is whether Grievant's behavior substantiates the charges against her, and whether Grievant's dismissal for these actions was an abuse of HCBOE's discretion.

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. Va. 1067, 216 S.E.2d 554 (1975). W. Va. Code §18A-2-8 provides, in pertinent part:

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. 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.

One of the charges against Grievant is insubordination. Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Directors/So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ, Docket No. 94-01-394 (Jan 31, 1995). (Cf. Rogliano v. Fayette County Bd. of Educ., Docket No. 94-10-164 (Oct. 25, 1994), where it wasdetermined that "Grievant was given ample opportunity and notice that disciplinary action would be taken against him . . . ."). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990).

Grievant's failure to follow HCBOE's JDA policy regarding corporal punishment, a policy which she knew was in existence at the time, constitutes insubordination. Grievant was on notice that violations of this policy would result in disciplinary action, because Grievant had been disciplined for violations of this policy twice previously. Thus, HCBOE has established Grievant knowingly violated this policy.

Respondent must also prove a charge of willful neglect of duty by a preponderance of the evidence. Arbaugh v. Putnam County Bd. of Educ., Docket No. 90-40-437 (May 22, 1991). Although the West Virginia Supreme Court of Appeals has not formulated a precise definition of "willful neglect of duty", it does encompass something more serious than incompetence and imports "a knowing and intentional act, as distinguished from a negligent act." Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398

S.E.2d 120 (1990). Hence, to prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Chaddock, supra.

The same reasoning stated in the insubordination discussion applies to this charge. Grievant clearly knew what conduct was expected of her, and her actions constituted a knowing and intentional act. Grievant's knowledge that her act was inappropriate is demonstrated by her threat to A.D., “it would be worth a year's suspension to knock your teeth down your throat.” The charge of cruelty has not been addressed frequently by the Grievance Board. Previously this Board has applied the Webster's New World Dictionary's definition of the word: “deliberately seeking to inflict pain and suffering; enjoying other's suffering; without mercy or pity.” Second College Ed., (1984) (cited in Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990)). A fourth grade teacher's “continued practice of physical and emotional abuse” by name- calling, placing his hands on students, angry outbursts, and threatening behavior has been found to constitute cruelty. Pinson v. Cabell County Bd. of Educ., Docket No. 06-87-100-1 (July 21, 1987).

In Nida v. Boone County Bd. of Educ., Docket No. 91-03-268 (July 13, 1991), and Slack v. Morgan County Bd. of Educ., Docket No. 92-32-420 (June 23, 1993), this Grievance Board did not find teachers guilty of cruelty who threw “plastic” chairs, kicked furniture, raised their voices, and knocked things over, as these actions were not directed toward a student, and the teacher had not “harassed, chastised or belittled the students in front of their peers.” Slack at 7. Overall, it appears cruelty must contain an intent to act or “disposition to inflict pain or suffering.” The American Heritage Dictionary, 2d College Ed. (1991).

In the instant case, Grievant's behavior falls within this definition of cruelty. Her behavior was intentional, and she grabbed, threatened, and cursed A.D. in front of his peers. Thus, HCBOE has proven this charge.

The last charge against Grievant is one of incompetence. Grievant argues she cannot be guilty of incompetence because she is a good teacher. She also states her prior disciplinary problems cannot be used in these proceedings. Unsatisfactory performance and incompetency are frequently discussed together as their definitions are overlapping. These terms apply to the individual's ability to perform all the expectations of a position, not just one. “In terms of unsatisfactory performance,a county board of education is prohibited from 'discharging, demoting or transferring an employee for

reasons having to do with prior misconduct or incompetency that has not been called to the attention of the employee through evaluation, and which is correctable.' Syl. Pt. 3, Trimboli v. Bd. of Educ., 163 W. Va. 1, 254 S.E.2d 561 (1979); See also Holland v. Bd. of Educ. of Raleigh County, 327 S.E.2d 155 (W. Va. 1985).” Williams v. Cabell County Bd. of Educ, Docket No. 95-06-325 (Oct. 31, 1996). W. Va. Code §18A-2-12 clarifies and codifies this statement and requires that professional personnel must be given notice of unsatisfactory conduct and an opportunity to improve. If the employee is still not performing satisfactorily by the next performance evaluation, their supervisor may place them on another IP or recommend them for dismissal. Id. It is not always necessary for a professional to be on an IP before such employee can be dismissed.

Grievant's inappropriate behavior, and her areas of incompetency were brought to her attention by a written reprimand, a ten-day suspension, a requirement to seek counseling, and an IP. “It is appropriate to review an employee's past performance evaluations and IP's, and the subsequent reoccurrence or continuation of identified problems when deciding whether to remove that professional from her current position. This practice can establish a continuing pattern of behavior which has proven not correctable.” Williams at Conclusion of Law 11. Grievant has demonstrated a continuing pattern of losing her temper, inappropriately touching students, and cursing them. This problem has not proven to be correctable, and therefore, HCBOE has established the charge of incompetency.

The above discussion will be supplemented by the following findings of fact and conclusions of law.

Findings of Fact

1. Grievant has been employed by HCBOE as a regular teacher for eleven years.

2. On April 29, 1994, Grievant received a written reprimand for slapping a student.

3. On December 20, 1994, Grievant received a ten-day suspension for inappropriately touching several students. She was required to seek counseling and was placed on a seven-month leave of absence. Upon her return to the classroom, she was required to complete an IP to assist in correcting her student interactional problems.

4. On February 14, 1996, Grievant became angry and grabbed A.D.'s shirt collar with both hands and twisted it under. She then threatened A.D., told him “to get his ass to the office”, and

grabbed his arm to escort him there.

5. During this interaction, Grievant was not threatened, A.D. did not need to be restrained, and Grievant did not act in self-defense.

6. A.D. was frightened and shaken by this incident.

Conclusions of Law

1. An employer must establish the charges in a disciplinary matter by a preponderance of the evidence. W. Va. Code §18-29-6; Nicholson v. Logan County Bd. of Educ., Docket No. 95- 23-129 (Oct. 18, 1995); Froats v. Hancock County Bd. of Educ., Docket No. 91-15-159 (Aug. 15, 1991).

2. A county board of education possesses the authority to terminate an employee, but this authority cannot be exercised in an arbitrary and capricious manner. W. Va. Code §18A-2-8; See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995).

3. Insubordination, willful neglect of duty, cruelty, and incompetency are among the causes listed in W. Va. Code §18A-2-8 for which an education employee may be disciplined. See, Jones v. Mingo County Bd. of Educ., Docket No. 95-29-151 (Aug. 24, 1995); Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

4. Insubordination includes “willful failure or refusal to obey reasonable orders of a superior entitled to give such order.” Riddle v. Bd. of Directors/So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89- 004 (May 1, 1989).

5. “Insubordination encompasses more than an explicit order and refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer.” Nicholson, supra; Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 20, 1988), aff'd 387 S.E.2d 529 (W. Va. 1989).

6. In order to establish insubordination, the employer must demonstrate that the employee's failure to comply with a directive was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

7. To prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. Hoover v. Lewis County Bd. of

Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990). 8. Although the West Virginia Supreme Court has not formulated a precise definition of "willful neglect of duty", it does encompass something more serious than incompetence and imports "a knowing and intentional act, as distinguished from a negligent act." Chaddock, supra.

9. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990), citing Meads v. Veterans Admin., 36 M.S.P.R. 574 (1988); Daniel v. U.S. Postal Serv., 16 M.S.P.R. 486 (1983); Davis v. Smithsonian Inst., 13 M.S.P.R. 77 (1983).

10. Cruelty is a deliberate act to inflict pain and/or suffering. Behavior which is directed toward a student, and which may include harassment, belittling, threatening, and/or grabbing, slapping, and restraining, without the need for self-defense, meets this definition. See Slack v. Morgan County Bd. of Educ., Docket No. 91-03-268 (July 13, 1991); Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990); Pinson v. Cabell County Bd. of Educ., Docket No. 06-87-100-1 (July 21, 1987).

11. Dismissal of a professional employee for unsatisfactory performance or incompetency requires notice of the deficiency and an opportunity to improve. If, at the next performance evaluation, this professional is still not performing satisfactorily, another improvement plan may be issued, or the supervisor may recommend dismissal. W. Va. Code §18A-2-12; Syl. Pt. 3, Trimboli v. Bd. of Educ., 254 S.E.2d 561 (W. Va. 1979). See Williams v. Cabell County Bd. of Educ., Docket No. 95-06-325 (Oct. 31, 1996).

12. It is appropriate to review an employee's past performance evaluations and IP's, and the subsequent reoccurrence or continuation of identified problems when deciding whether toremove that professional from her current position. This practice can establish a continuing pattern of behavior which has proven not correctable. Williams, supra.

13. A charge of incompetency or unsatisfactory performance does not have to be based solely on a teacher's ability and capabilities in imparting information to her students. It may also include any aspect of her position that a county board may reasonably expect her to perform, such a appropriate interaction with students, classroom discipline, and other duties as assigned.

14. An employee does not have to be currently on an IP to be terminated. Grievant demonstrated by her ongoing performance problems that her behavior was not correctable. See

W. Va. Code §18A-2-12. Williams, supra.

15. HCBOE has met its burden of proof and established its charges of insubordination, willful neglect of duty, cruelty, and incompetency. Its decision to terminate Grievant's employment, given the circumstances and history, was not such an excessive penalty as to be arbitrary and capricious. See Lanehart, supra; Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994); Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Harrison County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

_____

JANIS I. REYNOLDS

Administrative Law Judge

Dated: December 31, 1996

Footnote: 1

This grievance was first received on June 6, 1996, prior to HCBOE's final action on Grievant's termination.

Footnote: 2

The original notice to Grievant stated she was being dismissed for insubordination, unprofessional conduct, and using profanity. This notice was then amended by agreement of the parties.

Footnote: 3

The exhibits submitted by HCBOE at the Pretermination Hearing will be referred to as PT Hg. Bd or G Ex __. The transcript will be referred to as PT Trans at __.

Footnote: 4

All students and their parents will be referred to by initials only.

Footnote: 5

One of the requirements of the IP was a daily diary of incidents in which students were disciplined. Grievant continued this record after completing the IP. Grievant indicated she did write up the February 14, 1996 incident, but this contemporaneous writing was not submitted as evidence.

Footnote: 6

At the Level IV hearing, Grievant also argued she was discharged because of her friendship with Ms. Carson-Leggett. The evidence indicated Ms. Carson-Leggett saw Grievant daily at school, thought of Grievant as a friend, and had gone to dinner with her a few times and talked on the phone with her a few times. Without further evidence this "friendship" does not provide motivation for Grievant's dismissal.

Footnote: 7

Grievant is 5'1" tall and weighs approximately 180 lbs. A.D. was approximately 5'5" tall and weighed 90-100 lbs.