LISA AUSTIN,

Grievant,

v. DOCKET NO. 97-20-089

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Lisa Austin, grieves her termination by the Kanawha County Board of Education (KCBOE or Board), arguing that she did not commit any acts warranting immediate discharge, and that she was not afforded a written improvement plan. Disciplinary hearings were held on October 28, 1996 and January 13, 1997, apparently to investigate numerous allegations of misconduct. The hearing examiner's findings of fact and conclusions of law were made and adopted by the Board on February 10, 1997, and resulted in Ms. Austin's immediate termination. (See footnote 1) She timely filed this grievance at Level IV, and hearing was held on March 27, 1997. The case became mature for decision on April 29, 1997, when, by agreement of the parties, proposed findings of fact and conclusions of law were due.

At the Level IV hearing, Grievant moved that Respondent be restricted to proof involving the six specific charges sustained in the findings and conclusions adopted by the KCBOE in terminatingher employment, thus excluding evidence on several unproven charges. Respondent did not object, but stated that it had also adopted a finding that Grievant's problems communicating with parents had resulted in lack of trust and confidence in Grievant's teaching ability. The motion was granted, as modified to include the allegations about poor communication between Grievant and parents. Thus, only the seven charges which served as the basis for Grievant's dismissal are addressed herein.

The following findings of fact are made:

FINDINGS OF FACT

1 1 . KCBOE charged that in School Year (SY) 1995-96, Grievant engaged in specific acts warranting her dismissal under W. Va. Code §18A-2-8, as follows: a) Grievant sought cayenne pepper from school cooks to use on a student's tongue; b) Grievant expelled gas at a parent, BF (See footnote 2) ; c) Grievant referred to student SM as a "bitch"; d) Grievant displayed student ST's artificial eye to students and staff; e) Grievant employed the phrase "in the hole" after being told not to do so by Principal Dillon; f) Grievant restrained student CM in a Rifton chair (See footnote 3) ; and g) Grievant did not communicate well with parents and staff, resulting in a lack of trust and confidence which precludes her ability to function effectively as a teacher.

2 2 . Grievant has a Master's Degree in Special Education and professional teaching certificates in the areas of mental impairments, behavior disorders and learning disabilities. Prior to SY 1995-96, Grievant had three weeks' experience teaching students with severe and profound impairments.

3 3 . Grievant has been employed by KCBOE since 1989. She began working as a full-time substitute and has held a full-time regular teaching position since SY 1993-94. Grievant worked at Pratt Elementary School (Pratt) in SY 1994-95 as instructor of the special education resource room.

4 4 . During SY 1995-96, Grievant was assigned to a self- contained classroom at Pratt, consisting of four students with physical and mental disabilities. Three of these students are non- ambulatory and non-verbal. A fifth child, CM, was in Grievant's classroom all day for the first semester, and half-days for the second semester.

5 5 . Adults other than Grievant were regularly in Grievant's classroom. Lois Macleery, Grievant's full-time, in-class aide for SY 1995-96, was usually present. LC, student CM's personal aide, was in Grievant's classroom with CM full time for the first semester, and half days for the second semester. In addition, Grievant's classroom was regularly visited by a physical therapist, a speech therapist, a vision therapist, a hearing therapist, an occupational therapist and a therapist for the orthopedically-impaired. At least one parent was also frequently present in Grievant's classroom. BF, the mother of student JF, was generally in Grievant's classroom four days a week.

6 6 . Grievant and BF did not get along well. By the end of SY 1995-96, Principal Dillon had instructed Grievant to have Ms. Macleery work with BF's child, in order to minimize potential for conflict. Principal Dillon had previously instructed BF not to disrupt Grievant's classroom by socializing with other adults in the classroom, but to socialize elsewhere.

7 7 . Grievant jokingly asked for cayenne pepper to use on a student's mouth. She took no action to

procure it, never possessed cayenne pepper in her classroom, and did not use any with any student at any time. Grievant had no intent to put pepper on any child.

8 8 . Grievant did not expel gas on BF and, if gas was expelled at all, it was done unintentionally.

9 9 . Grievant did not call any student "bitch."

10 10 . Student ST has an artificial eye that occasionally becomes dislodged. Grievant is to clean it and either replace it, or send it home with the student.

11 11 . Julia Edwards is a substitute teacher at Pratt, who sometimes substituted for Grievant. On a single occasion, when ST's eye became dislodged and Ms. Edwards was scheduled to substitute for Grievant the following day, Grievant took the eye to Ms. Edwards to show her how to replace it. At the time, Ms. Edwards was substituting in another classroom, students were present, and the eye was held in such a way that students could see it. Ms. Edwards asked Grievant to put the eye away, as she had already been shown how to replace it. Grievant did so and left the classroom.

12 12 . On that same day, Grievant attempted to show the eye to Kathy Selbe, the school secretary. Grievant stated, "This eye is looking at you" or something similar. Ms. Selbe did not look to see if Grievant actually had the eye, no students were present, and the entire incident took approximately ten seconds. Ms. Selbe did not report the incident to Principal Vicki Dillon at the time.

13 13 . Time out was referred to as "the hole" by Grievant, because student SM used that term to refer to it, and had used that term prior to Grievant's assignment to the classroom.

14 14 . Principal Dillon instructed Grievant not to use the phrase "in the hole" to refer to time out, in response to an incident on or about May 3, 1996, when Grievant had used the phrase in the presence of her students and many other adults. Grievant did not use the term again after picture day.

15 15 . There were three Rifton chairs in Grievant's classroom, one of which was usually in the time out area in a corner of Grievant's classroom and could be set off by a screen. The screen allowed a child's legs, up to about eight inches from the floor, to be observed from any location in the classroom. A child behind the screen was always fully visible to at least one adult in the classroom, as well.

16 16 . Grievant placed student CM in time out on several occasions, and did restrain CM, using a Velcro strap on the Rifton chair, on at least one occasion. CM could be fully seen at all times by an adult in the classroom while so restrained, and suffered no ill effects.

17 17 . Student CM is assigned an aide, LC. LC accompanies CM throughout the school day. CM's mother complained about the use of time out, alleging that time out was not allowed by the IEP. CM's mother never expressed concern about use of restraints to Grievant or Principal Dillon. Any problem with placing CM in the Rifton chair was quickly rectified early in the year.

18 18 . Principal Dillon went on medical leave on or about May 11, 1996. For at least some part of the time Principal Dillon was on medical leave, Mary Wuletich, a teacher, served as the substitute principal. Sometime after May 11, 1996, parent BF came into Ms. Wuletich's office obviously irate and overwrought, while Ms. Wuletich was having a telephone conference with Principal Dillon. BF asked Ms. Wuletich to call a meeting with Grievant immediately. Ms. Wuletich told BF to wait. BF left Ms. Wuletich's office, found Karen Hamilton, another teacher who occasionally substituted for Principal Dillon, and had Ms. Hamilton accompany her to Grievant's classroom. Patricia Parsons, a substitute custodian, was present and apparently unobserved for at least the first part of the confrontation that ensued. In the classroom, BF "unloaded on" Grievant, yelling, cursing, and pointing fingers. Witnesses feared BF might become violent. Grievant remained calm and controlled throughout the confrontation. Grievant asked BF what BF wanted Grievant to do, and BF replied that Grievant losing her job was the only thing that would satisfy her. The catalyst for BF's behavior was that one of BF's children had overheard Grievant saying that she did not want BF to disrupt her classroom.

19 19 . Grievant has been diagnosed with and treated for Attention Deficit Hyperactivity Disorder (ADHD). She made KCBOE aware of this, and requested certain accommodation therefore.

20 20 . A degree of impulsiveness and socially inappropriate behavior is typical of a person with ADHD. Grievant had requested that Principal Dillon bring to her attention any inappropriate behavior, as Grievant needed social prompts to appreciate social norms. Principal Dillon agreed to do this.

21 21 . Grievant's evaluations prior to the second semester of SY 1995-96 were consistently satisfactory in all areas. Gr. Exhs. 5,6, 7 and 8.

22 22 . Principal Dillon rated Grievant as satisfactory in all evaluation areas for the first semester of SY 1995-96, and made written comments complimentary of Grievant's classroom and student relations skills. The evaluation comments also implied improvement in Grievant's communications with fellow teachers. Gr. Exh. 8.

23 23 . On May 3, 1996, prior to going on medical leave, Principal Dillon evaluated Grievant's

performance again, rating Grievant as satisfactory in four of six areas. Grievant was rated as unsatisfactory in the areas of "Communication" and "Professional work habits." Principal Dillon's written comments were complimentary of Grievant's interaction with students, but noted that Grievant's communication "with all parents is not reaching the level it should..." and that Grievant's "deficiency is in interaction with other adults. She is improving... but it remains an area for improvement." Principal Dillon wrote that Grievant "needs to continue to work on reactions to confrontational situations with adults and to remain calm and professional" and that the "[d]eficiencies identified are effectively communicating with parents and interacting appropriately with other educational personnel." Gr. Exh. 9 (emphasis in original).

24 24 . Principal Dillon thought Grievant was "one of the best teachers I have." She continues to believe today that Grievant is a good teacher, as do several parents of disabled children who were taught by Grievant. Principal Dillon did not request, and was surprised by, Grievant's termination.

25 25 . Principal Dillon intended for Grievant to be placed on an improvement plan when she returned for SY 1996-97. She did not anticipate that Grievant's employment would be terminated.

26 26 . No improvement plan was ever drafted or implemented for Grievant.

DISCUSSION

KCBOE determined that the incidents specified in Finding of Fact number 1 warranted immediate termination of Grievant's employment. (KCS Exhibit 1.) KCBOE's authority to discipline an employee must be based on 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.

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). In order to decide whether KCBOE has met its burden of proof, the issue of witness credibility must be resolved, as many accounts of events differ to a greater or lesser degree from witness to witness. First, however, each specific incident will be briefly discussed.

I. SPECIFIC INCIDENTS:

A. Cayenne Pepper incident:

Grievant admitted making a comment about getting cayenne pepper to discourage a student's inappropriate behavior. However, she specifically denied intending to put pepper or any similar substance on a child's tongue. The eyewitness accounts agree that her demeanor was joking, not serious. Accordingly, I find that Grievant was joking in making the comment, and that she did not, in fact, actually seek cayenne pepper for use on a student or otherwise. While her comment shows incredibly poor judgment, she clearly did not intend to act.

B. Expelling gas:

Parent BF and Ms. Macleery testified that Grievant intentionally expelled gas on BF. However, the details of their accounts differed, and, as noted below, their testimony is less credible than that of Grievant. Grievant admitted to expelling gas as a joke around Ms. Macleery, in the fall of SY 1995. Principal Dillon explained to Grievant the inappropriateness of this behavior, and Grievant testified that she did not do it again thereafter. Grievant denies expelling gas on BF, intentionally or unintentionally, at any time. As Grievant's testimony is more credible, I find that this incident did not occur.

C. "Bitch" incident:

Ms. Macleery was the only person to testify that Grievant had ever called a student, "bitch." Ms. Macleery's testimony was not substantiated by any other witness, nor did Ms. Macleery report this alleged conduct. Given the relative credibility of Grievant, as opposed to that of Ms. Macleery, Respondent has failed to prove by a preponderance of evidence that Grievant called her student a "bitch," jokingly or otherwise.

D. The eye incidents:

Grievant admitted to taking a student's artificial eye to the school secretary, and to Ms. Edwards in another classroom. Her accounts essentially matched with those of Ms. Selbe, the secretary, and Ms. Edwards. Ms. Selbe minimized the seriousness of the incident, and Ms. Edwards stated that

Grievant did not make fun of the eye, or the child to whom it belonged. Grievant acted with good intentions in attempting to ensure her substitute, Ms. Edwards, knew how to properly replace the eye. She apologized for her error in judgment in attempting to show the eye to Ms. Selbe. While Grievant's visit to Ms. Edwards may be excused, her words to Ms. Selbe, "This eye is looking at you," cannot. The incident merits some disciplinary action.

E. "The Hole" incident:

Grievant admits referring to time out as "the hole," and doing so on picture day in the library. Principal Dillon was uncertain about when she told Grievant to stop using the term, but she did state unequivocally that she was unaware of Grievant's use of this term prior to Grievant's May 3, 1996 evaluation. Other witnesses indicated that picture day was within the first few days of May, 1996. Grievant testified that the discussion was held on or immediately after picture day, as she remembered wondering why BF had been present during pictures. Principal Dillon recalled BF registering the complaint, which tends to support Grievant's recollection of events. Because of the inference that the term was discussed on or immediately after picture day, KCBOE failed to prove that Grievant's use of the term on picture day was in contravention of an instruction not to use the term. Thus, Grievant was not insubordinate in using the term.

While Grievant clearly used the term "the hole," it was used in response to a student's use and understanding of the term as meaning time out, which predated Grievant's presence in the classroom. The term was not used in anything other than the same context in which Grievant could have used the term "time out," so Grievant was not cruel in using the term. However, some disciplinary action is appropriate, due to the obvious inappropriateness of the term and the error of judgment shown in employing it.

F. Restraining CM in the Rifton chair:

Grievant admits to putting CM in the time out chair, which is a Rifton chair. However, she denies restraining CM by use of the Velcro straps. On the point of using restraints, I find Grievant's testimony less reliable than that of LC, CM's aide. LC was generally a credible witness, and his truthfulness was unquestioned. While LC minimized the events at the Level IV hearing, he essentially testified that a strap was used on at least one occasion when CM was put in time out. He clearly testified at the disciplinary hearing that Grievant had used the Velcro strap to restrain CM. However, he was quick to add that the child was neither injured nor in danger of any injury. Rather, the child learned to pull off

the strap and dismantle the chair, and time out became a game. LC specifically stated that the child was fully visible to an adult at all times while in time out. LC's testimony thus refuted concerns raised by others that, as CM suffered seizures, CM's life could be endangered if CM was restrained behind a screen in time out, where a seizure might not be observed.

CM's mother was the only person who stated that this disciplinary technique was not allowed by the student's IEP, and the IEP itself was not introduced as evidence. As noted below, CM's mother's testimony is unreliable. Principal Dillon implied that there had been some problem with using time out with CM, when she stated that the problem had been rectified quickly, early in the year. However, she did not specify what the problem was. Thus, the problem could have been with either CM's mother's understanding of the IEP, or Grievant's adherence thereto. Her testimony also impeached the credibility of CM's mother, by confirming that the problem was immediately addressed, rather than continuing after being brought to Grievant's attention, as alleged by CM's mother.

Relying on LC's testimony, I find that Grievant used time out with student CM, and that she employed restraints on one occasion. However, KCBOE failed to prove that this was not permitted by CM's IEP.

G. Communications with parents:

Grievant admitted to being "socially tone deaf" due to her Attention Deficit/Hyperactivity Disorder (ADHD), and admitted that she therefore had problems communicating with adults. Thus, Grievant essentially admitted to Respondent's last charge. However, it seems likely that communication problems were also due to other people and to misunderstandings about CM's IEP. Nearly unanimously, eyewitnesses to the May 1996 confrontation between BF and Grievant stated that Grievant maintained a calm and non-hostile demeanor in the face of BF's extremely hateful words and manner, that Grievant did not raise her voice or respond in anything less than a professional manner. This hardly seems in keeping with charges that communication problems were entirely of Grievant's making. While KCBOE proved that communication problems existed, KCBOE failed to prove by a preponderance of the evidence that such problems were the fault of Grievant, or that they were not correctable due to some failure on Grievant's part.

II. CREDIBILITY DETERMINATIONS:

An Administrative Law Judge is charged with assessing the credibility of the witnesses who appear before her. Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995).

Factors to consider in assessing a witness's testimony are the witness's demeanor; opportunity or capacity to perceive and communicate; reputation for honesty; attitude toward the action; and admission of untruthfulness. In addition, one should consider the presence or absence of bias, interest, or motive; the consistency of prior statements; the existence or nonexistence of any fact testified to by the witness; and the plausibility of the witness's information. Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996) and authorities cited therein.

A. Grievant's credibility:

Grievant's testimony is generally credible. Her demeanor was composed and straightforward. Grievant appeared forthright in admitting to several actions and to errors of judgment, and generally she appeared truthful and sincere. Her testimony was, in the main, confirmed by testimony of other credible witnesses. Grievant was not hostile even on cross-examination, and her answers were not evasive. While there were minor discrepancies with the testimony of other witnesses regarding details, these are not sufficient to find her testimony less than candid and generally reliable. However, LC's testimony is accepted as true on the issue of whether Grievant used restraints on CM, as noted above. LC simply is a more disinterested witness than Grievant, and was consistent in his testimony, as well as having a forthright, sincere demeanor. While Grievant's testimony that she did not use restraints calls into question her other testimony, it is assumed that Grievant simply does not recall using the Velcro strap, rather than that Grievant intentionally lied about this lone issue.

B. BF's credibility:

Several complaints leading to Grievant's discharge were lodged by BF, a parent, including several charges which were held unproven at the disciplinary hearing. BF's testimony is generally not credible, for several reasons. First, and most importantly, BF lied. She explicitly denied, under oath, that she had said she wanted to get Grievant fired, while several other witnesses testified that BF had said exactly that on several different occasions. Ms. Parsons, the substitute custodian and a neighbor of BF, stated that BF had told her she was going to have Grievant fired. Ms. Edwards, a substitute teacher and neighbor of BF, only reluctantly admitted BF had said she would get Grievant fired. Ms. Hamilton (a teacher and substitute principal at Pratt) heard BF state she wanted Grievant fired during a May 1996 confrontation between BF and Grievant. None of these three had any apparent motive to falsify a statement on this point. Thus, BF's account is controverted by several other witnesses with first-hand information and no apparent bias against her.

Further, BF's testimony was evasive on several points (such as whether she was a disruptive influence in Grievant's classroom, and her statements to Grievant during a confrontation) and she selectively recalled events (such as remembering what Grievant had said, but not what she had said herself). Her prior allegation that Grievant had revealed confidential information when BF herself had in fact revealed it, merely confirms her selective memory, if not her penchant for prevarication. Possible motive for BF's personal vendetta against Grievant was suggested in testimony that BF was asked to leave Grievant's classroom when socializing with a male therapist, and that Grievant had criticized her parenting skills. BF also testified below that she did not believe Grievant was qualified to teach her child. (Tr., Vol I, p.114-115.) Ultimately, regardless of motive, BF's testimony is simply not believable.

C. Ms. Macleery's credibility:

Ms. Macleery, an aide assigned to Grievant's classroom, gave testimony difficult to assess, but ultimately deemed unreliable. While her testimony sometimes comports with the testimony of other witnesses, including Grievant, it differs significantly in some aspects and Ms. Macleery may have been influenced by her affiliation with BF. Ms. Macleery said that when Grievant allegedly expelled gas on BF, it was done jokingly, and the classroom had a lighthearted atmosphere. BF characterized the atmosphere as hostile. Grievant denied the crude behavior, but essentially agreed with BF's description of the atmosphere at the time. At the hearing below, BF stated that two therapists were in the classroom and could hear the exchange between she and Grievant, but did not indicate that Ms. Macleery could have witnessed it. While this does not necessarily mean that Ms. Macleery could not have heard, it does suggest that she was not in a very good position to observe events. The two therapists mentioned did not appear as witnesses.

Ms. Macleery was the only person to testify that Grievant had ever called a student "bitch." Ms. Macleery stated that Grievant did not use any other inappropriate language, and that she did not know whether or not she had reported this to Principal Dillon. Ms. Macleery's testimony on this point was not substantiated by any other witness, while there were generally other adults in Grievant's classroom at most times and it seems likely that some other person would have overheard Grievant curse at a student, if such was indeed her practice. Ms. Macleery did not voice complaints about any of Grievant's alleged behavior at the time it occurred. Apparently, when Principal Dillon began investigating BF's complaints, Ms. Macleery made her allegations for the first time. Indeed, the "bitch"

incident was not reported until June of 1996.

Ms. Macleery was, by the end of SY 1995-96, assigned to BF's child as an aide. Thus, Ms. Macleery works closely with BF, and her actions are closely monitored by BF. Ms. Macleery was a visitor to BF's home, and admitted accompanying BF in visiting another parent. This other parent was told, falsely, that Grievant was mistreating his child. While it is not clear that Ms. Macleery's actions on these occasions represented collusion with BF to provoke ill feelings towards Grievant, nor that Ms. Macleery was the person who spread false information, the actions were not satisfactorily explained by either Ms. Macleery or BF. It is probable that Ms. Macleery has been influenced by her necessary affiliation with BF, and perhaps by fear of BF (See footnote 4) as well. I find that Ms. Macleery's testimony is not reliable.

D. Ms. Edwards' credibility:

The testimony of Ms. Edwards, a substitute teacher for Grievant and others at Pratt, and a parent of a disabled student, was substantiated by others regarding the "eye" incident. Ms. Edwards testified that Grievant used the term "the hole" hatefully when pictures of Grievant's class were being taken. Other parents, the librarian, aides, photographers, and other adults were also present. Yet Ms. Edwards' characterization of Grievant's tone was not substantiated by any other witness, including BF, who complained to Principal Dillon about the incident and the terminology used. Moreover, Ms. Edwards did not report the incident to anyone, nor did she discuss it with Grievant. Ms. Edwards also did not mention it in the hearing below.

Her testimony regarding Grievant's use of the Rifton chair for CM's time out is similarly suspect. Ms. Edwards was not clear regarding which facts she assumed and which she observed. She seemed to say she saw CM strapped into the chair, but later clarified that she only saw the chair and saw the straps in the classroom, and assumed their use. After stating that she was concerned for the child's life, Ms. Edwards admitted that she took absolutely no action to determine whether the child was in fact restrained, or to bring her concerns to anyone's attention. Had Ms. Edwards truly been concerned about CM's safety, Ms. Edwards would have taken some action to address it. Finally, her testimony was evasive on some points. Her testimony is deemed unreliable except on the issue of the artificial eye, to which Grievant admitted.

D. Ms. Hamilton's credibility:

Ms. Hamilton, a teacher and substitute principal, testified about a confrontation between BF and

Grievant which occurred after May 11, 1996. Ms. Hamilton was present at the confrontation between BF and Grievant; her demeanor indicated truthfulness; and her account agreed with several other eyewitnesses. Ms. Hamilton testified that apparently one of BF's children had reported to BF that Grievant had said she did not want BF to disrupt her classroom, and that this had made BF irate. BF had demanded that Ms. Hamilton accompany her to confront Grievant about this. Ms. Hamilton did so. BF screamed, yelled, and pointed fingers at Grievant, and was "out of control." Grievant remained calm and controlled, Ms. Hamilton explained. When Grievant asked BF what she could do to satisfy BF, BF responded that the only way she would be satisfied is if Grievant lost her job. Ms. Hamilton's statements were consistent, and her reputation for honesty was not questioned. Ms. Hamilton's testimony was credible.

E. Ms. Parsons' credibility:

The testimony of Ms. Parsons, a substitute custodian and neighbor of BF, is generally credible, despite one implausible statement about having heard BF mention Grievant by name three years earlier. This statement is discounted as the product of faulty memory and the passage of time. Her account of the confrontation between BF and Grievant accorded with the accounts of other witnesses, and she was not alleged to have any bias or motive to testify either in Grievant's favor or against BF.

F. Ms. Wuletich's credibility:

Ms. Wuletich, teacher and substitute principal, was credible. She testified to BF's uncontrolled anger just prior to BF's confrontation with Grievant in May 1996. She stated that, from her office just down the hall, she could hear BF yelling during the confrontation, although she could not hear specifically what was said. Her testimony was clear and agreed with others' accounts, and she did not testify to more than she witnessed first hand.

G. Principal Dillon's credibility:

Principal Dillon's testimony was clear, was limited to what she herself knew, and agreed with others' accounts. She testified that Grievant was one of her best teachers, except for problems communicating with parents and staff. She also testified to numerous facts, as recounted elsewhere. Her demeanor was straightforward, and she appeared objective and evenhanded in addressing the issues involved in this grievance. No one questioned her veracity.

G. CM's mother's credibility:

CM's mother, CM, testified in a self-contradictory fashion about whether CM had been strapped into the Rifton chair. Her testimony is not credible due to its internal inconsistency and lack of clarity. Moreover, had she in fact been concerned that her child might have a seizure while restrained in the chair and allegedly not visible to adults in the classroom, she would have taken some definite action to intervene in the matter. Instead, she did nothing on at least one occasion, she complained about use of time out (but not the use of restraints) on another occasion; and she never voiced any complaint with Principal Dillon. CM's Individual Education Plan (IEP), she asserted, had no provision for behavior modification, and therefore no behavior modification techniques could be employed. This contradicted other testimony that the IEP indicated behavior management, but not how to implement behavior management. She also stated that she thought Grievant a "monster" for using time out with CM. CM's testimony, particularly as to the contents of the IEP and whether problems recurred, was not supported by other witnesses nor by her own admitted conduct at the time these incidents occurred. CM's testimony is not reliable.

SUMMARY

KCBOE proved that Grievant made remarks about getting cayenne pepper, used the term "the hole" in referring to time out; inappropriately displayed a student's artificial eye in the presence of other students and staff; and restrained student CM in a Rifton chair. However, KCBOE failed to prove that Grievant sought out pepper to use on a student; that Grievant failed to follow CM's IEP; that Grievant intentionally expelled gas on BF; or that Grievant referred to a student as a "bitch." While there were obvious communication problems, KCBOE failed to prove that these were exclusively, or even primarily, the fault of Grievant. KCBOE failed to show that Grievant had evil intent in taking any of the actions she was shown to have taken. KCBOE failed to show that any of Grievant's unsatisfactory behaviors were not correctable.

Now, it must be determined whether the proven incidents provide grounds justifying disciplinary action under W. Va. Code §18A-2-8. As KCBOE did not specify which of the listed causes was relied upon, each will be considered.

III. CAUSES FOR DISMISSAL:

A. Immorality:

Immorality is defined as "conduct... contrary to the moral code of the community; wicked;

especially, not in conformity with the acceptable standards of proper sexual behavior." Golden v. Bd. of Educ. of County of Harrison, 285 S.E.2d 665 (W.Va. 1981). In prior grievances, charges of immorality have generally involved sexual misconduct. See, e.g., Camiolo v. McDowell County Bd. of Educ., Docket No. 92-33-245 (Jan. 26, 1993). No immoral conduct is involved here.

B. Incompetency/Unsatisfactory Performance:

These two items are frequently discussed together as their definitions are overlapping. Sinsel at 23. 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, at least as it applies to performance issues, requiring that professional personnel be given notice of unsatisfactory conduct and an opportunity to improve. If the employee is still not performing satisfactorily by the next performance evaluation, the supervisor may place her on another improvement plan (IP) or recommend dismissal. Williams, supra. It is not always necessary for a professional to be on an IP before she can be dismissed. However, an IP and past performance evaluations, with subsequent reoccurrence or continuation of identified problems, can establish a continuing pattern of behavior which has proven not correctable. Williams at Conclusion of Law #11.

Here, Grievant was informed for the first time that she was not performing satisfactorily on her May 3, 1996 evaluation. All of the proven incidents appear to be serious, but correctable, errors of judgment. Indeed, Principal Dillon testified that she intended to place Grievant on an IP when Grievant returned to Pratt for SY 1996-97. Grievant was not allowed to return, and was thus not put on an IP.

Without more egregious conduct than was proven here, Grievant must be given clear notice of performance problems and an opportunity to improve, as required under W. Va. Code §18A-4-12. Such notice and opportunity to improve were not provided. Grievant's prior work history was unblemished, as shown by her evaluations. Grievant has not been proven to be incompetent, and unsatisfactory performance does not support immediate dismissal on these facts. **(See footnote 5)**

C. Cruelty:

On the infrequent occasions when the issue of cruelty has been addressed, this Grievance Board has applied the Webster's New World Dictionary's definition of "deliberately seeking to inflict pain and suffering; enjoying other's suffering; without mercy or pity." Second College Ed. (1984), as cited in Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990). Physical and emotional abuse through name calling, placing 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). However, where actions were not directed towards a student, teachers who essentially threw tantrums were found not guilty of cruelty. Nida v. Boone County Bd. of Educ., Docket No. 91-03-268 (July 13, 1991); Slack v. Morgan County Bd. of Educ., Docket No. 92-32-420 (June 23, 1993). Overall, then, it appears that, to be cruel, one must have an intent to act or a disposition to inflict pain or suffering. Sinsel, at 23. Such intent or disposition to cause suffering was not proven in this case. Grievant's actions were not cruel, and she cannot be dismissed on this ground.

D. Insubordination:

Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Sinsel, supra; Riddle v. Bd. of Directors, Docket No. 93-BOD-309 (May 31, 1994). 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. Sinsel; Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). "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). In this instance, KCBOE failed to show that Grievant disobeyed any prior instructions, or defied authority. Under these facts, KCBOE has failed to prove that Grievant's actions were insubordinate. (See footnote 6)

E. Willful Neglect of Duty:

Although there is no precise definition of "willful neglect of duty," it must encompass something more serious than incompetence, and it 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); Hoover, v. Lewis

County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). Had KCBOE proven that Grievant knowingly failed to comply with a student's IEP, this cause may have sustained its action. However, credible testimony regarding the contents of CM's IEP was not elicited, and KCBOE failed to otherwise prove that Grievant's conduct was in contravention of the IEP's terms. Although Grievant has shown serious errors in judgment and failure to maintain a professional decorum, KCBOE has pointed to no set of facts which proves willful neglect of duty under the above standard. This ground cannot support Grievant's dismissal.

F. Remaining Causes:

Clearly, no cause of action is supported on this record for intemperance, which generally involves alcohol or substance abuse. Neither is there any evidence regarding conviction of a felony, or plea thereto. Thus, the remaining causes are not applicable to these facts.

CONCLUSIONS OF LAW

1 1. A preponderance of the evidence is evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. Black's Law Dictionary, 5th Ed., p. 1064.

2 2. A county board of education must exercise its statutory authority to dismiss tenured employees reasonably and in a manner which is not arbitrary or capricious. See, e.g., Rovello v. Lewis County Bd. of Educ., 381 S.E.2d 237 (W.Va. 1989).

3 3. When assessing and weighing the various facets of the disciplinary action including the seriousness of the employee's conduct, the actual or potential harm to the school system, and the employee's work history, the nature of the employee's conduct rather than the label attached to it must be evaluated. When warranted, the punishment imposed can be modified. See, Bd. of Educ. of the County of Gilmer v. Chaddock, 398 S.E.2d 120 (W.Va. 1990); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar.18, 1997); Surber v. Mingo County Bd. of Educ., Docket No. 96-29-015 (Dec. 30, 1996).

4 4. KCBOE showed by a preponderance of the evidence that Grievant's performance was unsatisfactory in that:

4.a a. she made an inappropriate comment regarding cayenne pepper;

4.b b. she inappropriately displayed a student's artificial eye to students and staff; and

4.c c. she used an inappropriate term to refer to time out.

5 5. KCBOE showed by a preponderance of the evidence that Grievant restrained CM in a Rifton chair for time out on one occasion. However, this was not shown to be in contravention of CM's IEP.

6 6. KCBOE failed to prove that Grievant was immoral, incompetent, cruel, insubordinate, intemperate, willfully neglectful of her duty.

7 7. A teacher whose performance is unsatisfactory is to be given notice of the deficiencies, a formal remediation plan to correct deficiencies, and a reasonable period of time in which to correct deficiencies. W. Va. Code §18A-2-12.

8 8. A charge of incompetency or unsatisfactory performance may include any aspect of the job which may be reasonably expected to be performed, such as appropriate interaction with students, classroom discipline, and other assigned duties. Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996).

9 9. Grievant is entitled to a reasonable period of time, and a plan, for improvement of her unsatisfactory performance. KCBOE failed to afford a remediation plan or reasonable period of time for remediation of the deficiencies prior to terminating her employment, in violation of W. Va. Code §18A-2-12.

10 10. While some disciplinary action is appropriate under these circumstances, KCBOE's dismissal of Grievant is not permissible.

Accordingly, this Grievance is **GRANTED IN PART**. The Respondent is hereby **ORDERED** to reinstate Grievant, with the exception of a thirty-day suspension, and to award her back pay with interest, seniority and other benefits, after deductions for the five day suspension. Respondent is further **ORDERED** to develop and implement an improvement plan to correct Grievant's unsatisfactory performance.

Any party may appeal this decision to the Circuit Court of Kanawha County, and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its 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 appropri ate court.

Dated: May 20, 1997 _____

JENNIFER J. MEEKS,

Administrative Law Judge

Footnote: 1

Although the record is not clear, it appears that Grievant did not work for KCBOE after the end of the 1995-1996 school year.

Footnote: 2 As has been the Grievance Board's practice in cases of this nature, students and parents are referred to by initials only in this Decision.

Footnote: 3 A Rifton chair is a wooden chair with arm rests and a back, which has removable Velcro straps. The chair is used to position students who have poor body control, and who generally cannot sit up unassisted, so that they can eat or be fed, or engage in other activity.

Footnote: 4 This grievance and the evidence herein strongly implies, if it does not prove, that BF is willing to bring false charges in bringing formal charges against persons whom she dislikes.

Footnote: 5 Incompetency and inability to correct her conduct may be proven, should Grievant exercise such poor judgment in her speech or actions in the future. She need not be counselled about each word she chooses or each exchange with other adults, and is expected to act professionally and to serve as a good role model for students.

Footnote: 6 Grievant is now clearly on notice that terms which may be interpreted as disparaging are not to be employed, regardless of Grievant's own subjective intent in doing so, and future use of similar disparaging terminology may be used to prove insubordination. As noted in footnote 5, she need not be warned about each individual word.