DAVID LANEHART,

Grievant,

v.

DOCKET NO. 97-23-088

LOGAN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, David Lanehart, filed this grievance directly to level four on February 13, 1997, pursuant to W. Va. Code § 18A-2-8, challenging his suspension without pay by the Logan County Board of Education ("Board"), effective February 4, 1997 through June 12, 1997. Hearing was held in the Grievance Board's Charleston, West Virginia office on March 20, 1997, and this case became mature for decision on or about March 25, 1997, following receipt of a copy of the March 3, 1997 Board minutes and the parties' proposed findings of fact and conclusions of law.

SUMMARY OF THE EVIDENCE

The transcript of Grievant's March 3, 1997, disciplinary hearing before the Board was incorporated into the record. The summary of evidence reflects the testimony received at the disciplinary hearing, followed by the evidence and testimony received at level four. While certain documents were referred to in the disciplinary hearing, they werenot submitted as evidence in that proceeding. However, that material was entered into evidence at level four.

Disciplinary Hearing Testimony

The Board presented the testimony of J.R., S.G., and Wayne Bennett. Grievant testified in his own behalf, and presented the testimony of Bea Orr, Donna Bryant, Phil Zeto, J.P., Tisha Stapleton, Teresa Brown, and Arnetta Stillwell. (See footnote 1)

Level Four Exhibits

Jt. Ex. 1 -

March 4, 1997 letter from Superintendent John D. Myers to Grievant

Jt. Ex. 2 -

Report of Psychological Evaluation, dated February 17, 1997

Jt. Ex. 3 -

Logan County Schools Sexual Harassment Policy

Jt. Ex. 4 -

Aerial Photograph of Logan Central Junior High School

Jt. Ex. 5 -

Diagram of Logan Central Junior High School

Jt. Ex. 6 -

Spring 1997 Victoria's Secret catalog

Jt. Ex. 6A -

Page 109 of Spring 1997 Victoria's Secret catalog

Jt. Ex. 7 -

February 11, 1997 letter from Grievant to Mr. and Mrs. R.; 11 letters of support; May 6, 1996 Teacher Evaluation; May 3, 1996 Coach Evaluation Conference Report

Jt. Ex. 8 -

March 3, 1997 Board Minutes

Jt. Ex. 9 - Transcript, March 3, 1997, disciplinary hearing. (See footnote 2)

Level Four Testimony

The Board presented the testimony of Superintendent John Myers. Grievant did not testify.

ISSUE

The issue is whether the Board proved, by a preponderance of the evidence, that Grievant engaged in sexual harassment of a female student in violation of its Sexual Harassment Policy, and whether that conduct constitutes willful neglect of duty under W. Va. Code § 18A-2-8.

AFFIRMATIVE DEFENSE

Grievant asserts the Board did not follow its own sexual harassment policy when investigating the allegations against him. Grievant asserts the Board violated W. Va. Code § 6-9A-4 in its manner of deliberating following the March 3, 1997 disciplinary hearing. Grievant asserts his four-month suspension without pay was too severe and arbitrary and capricious.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts:

1. Grievant is employed by the Board as a physical education teacher at Logan Central Junior High School.

2. J.R., an 8th-grade student at Logan Central Junior High School, was in Grievant's physical education class during the first semester of the 1996-97 school year. Jt. Ex. 9, p. 29.

3. One day before class began, Grievant talked to J.R. about the length of shorts she had worn to school. J.R. was not familiar with the school's dress code. Grievant told her cutoff shorts were not permitted, and touched her with his hand above the knee to indicate the allowable length of shorts. Ex. 9, pp. 29-32.

4. The school has a policy that students are not to wear shorts more than five inches (5") above the knee. If a student wears shorts that are too short, teachers are supposed to refer the student to the school office. According to the school dress code, cutoffs are prohibited. Jt. Ex. 9, p. 37.

5. J.R. told her parents a few days later about the shorts incident. Neither J.R. nor her parents complained to school officials regarding this incident. Jt. Ex. 9, pp. 32, 48. 6. On January 28, 1997, Grievant asked J.R. whether she had modeled for Victoria's Secret catalog. When J.R.

responded “no”, Grievant told her there was a model in that magazine that looked like her. Grievant told J.R. if he thought of it, he would bring the magazine in and show her the picture. Jt. Ex. 9, pp. 6, 131.

7. The following day, on January 29, 1997, Grievant and another teacher, Phil Zeto, were outside the classroom building on lunch duty, monitoring students who were returning to the classroom building from the gymnasium, which is housed in a separate building. Jt. Ex. 5; Jt. Ex. 9, pp. 8, 83.

8. Grievant called J.R. to come over to where he was standing with Mr. Zeto. He told her to wait while he went to his vehicle to retrieve a Victoria's Secret magazine. He returned to where J.R. and Mr. Zeto were standing, and showed her a picture of a model in a yellow, one-piece swimsuit. Jt. Ex. 6, 6A; Jt. Ex. 9, pp. 8, 84, 132.

8. Grievant asked Mr. Zeto if he thought J.R. looked like the model. Jt. Ex. 9, pp. 8, 84.

9. Grievant gave J.R. the magazine and told her not to show it to anyone. Jt. Ex. 9, pp. 9, 132.

10. Grievant did not touch J.R. during the encounter. Jt. Ex. 9, pp. 85, 132.

11. The Board has promulgated a Sexual Harassment Policy, which was in effect at the time of the alleged incidents, and disseminated to its personnel, including Grievant. Jt. Ex. 3.

12. J.R.'s father complained of the Victoria's Secret incident to Logan County School officials. Attorney Brian Abraham and Ray Woolsey, Assistant Superintendent,conducted an investigation. They spoke to the students, the principal, and Grievant. Grievant admitted the incident occurred as described.

13. Mr. Abraham and Mr. Woolsey reported the results of their investigation to Superintendent John Myers on February 3, 1997. LIV, Myers.

14. On February 6, 1997, Superintendent Myers notified Grievant that he was being suspended without pay effective February 4, 1997 through June 12, 1997, based on violations of W. Va. Code § 18A-2-8 and County Policy I.8 Sexual Harassment Policy.

15. On February 11, 1997, Superintendent Myers notified Grievant that a hearing was scheduled before the Board for February 18, 1997, regarding his suspension.

16. On February 11, 1997, Grievant wrote a letter of apology to J.R. and her parents for exercising poor judgment, and putting J.R. in an embarrassing situation. Jt. Ex. 7.

17. On March 3, 1997, the Board held a special meeting for the purpose of conducting a

disciplinary hearing on Grievant's suspension. Jt. Ex. 8.

18. At the beginning of the disciplinary hearing, Board President Donnie Steele moved to go into executive session pursuant to W. Va. Code § 6-9A-4. The motion was seconded by Board member Bob Wolfe. Jt. Ex. 8; Jt. Ex. 9, p. 3.

19. Following the conclusion of the disciplinary hearing, the Board asked all persons present to leave so it could deliberate on the matter. Jt. Ex. 9, p. 155.

20. Following the Board's deliberations, it came out of executive session, and unanimously voted to uphold Grievant's suspension without pay. Jt. Ex. 8; Jt. Ex. 9, p. 156. 21. On March 4, 1997, Superintendent Myers notified Grievant of the Board's decision. Jt. Ex. 1.

DISCUSSION

Because this is a disciplinary action, the Board must prove the allegations against Grievant by a preponderance of the evidence. W. Va. Code § 18-29-6. Although the Board's suspension letter does not specifically assign a basis allowed under W. Va. Code § 18A-2-8, representations made by both parties' counsel indicate the Board is relying on the ground of “willful neglect of duty”, as well as violation of the Logan County Schools Sexual Harassment Policy (Jt. Ex. 3). Specifically, the Board alleges that Grievant's conduct towards J.R. involving the shorts incident and the Victoria's Secret incident constituted sexual harassment. Grievant does not deny the incidents took place as described in the above Findings of Fact. Grievant does not challenge the sufficiency of the notice of suspension.

W. Va. Code § 18A-2-8 states in pertinent part:

> [A] board may suspend or dismiss any person in its employment for 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 contendre to a felony charge. . . .

The authority of a county board to suspend or dismiss a teacher under this section must be based upon the just causes listed and must be exercised reasonably, not arbitrarily or capriciously. Rovello v. Lewis County Bd. of Educ., 381 S.E.2d 237 (W. Va. 1989); Beverlin v. Bd. of Educ., 216 S.E.2d 554 (1975). If the action is challenged, the county board must prove, by a preponderance of the evidence, that the employee engaged in the conduct complained of, and that the punishment

imposed was commensurate withthe offense. Perkins v. Greenbrier County Bd. of Educ., Docket No. 94-13-019 (Aug. 12, 1994). For the following reasons, the undersigned finds Grievant engaged in sexual harassment of J.R, in violation of the Board's Sexual Harassment Policy, and that conduct constitutes willful neglect of duty under W. Va. Code § 18A-2-8.

The Board's Sexual Harassment Policy prohibits “any form of sexual harassment”, which is defined as follows:

A.

Sexual harassment consists of unwelcome sexual advances, requests for sexual favors, sexually motivated physical conduct or other verbal or physical conduct or communication of a sexual nature when:

1. submission to such conduct is made explicitly or implicitly as a term or condition of obtaining or retaining employment or of obtaining an education; or

2. submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's employment or education; or

3. that conduct of communication has the purpose or effect of substantially or unreasonably interfering with an individual's employment or education, or creating an intimidating, hostile, or offensive employment or education environment.

The Policy defines a “hostile environment as “the conduct or(sic) one individual against another that interferes with the individual's work or learning performance or creates a working or learning environment that is offensive or intimidating.” Jt. Ex. 3. The Policy lists examples of subtle/overt forms of sexual harassment, including:

1. verbal harassment or abuse;

2.

unwelcome or inappropriate letters, telephone calls, or materials of a sexual nature;

3. sexual teasing, jokes, remarks, or questions;

4. sexually suggestive looks or gestures;

5. pressure, subtle or overt, for sexual activity;

6. unwelcome or inappropriate patting, pinching, or cornering;

7. intentional brushing against another's body; 8. attempted or actual rape or sexual assault;

9. requesting or demanding sexual favors accompanied by implied or overt threats concerning an individual's employment or educational status;

10. requesting or demanding sexual favors accompanied by implied or overt promises of preferential treatment with regard to an individual's employment or educational status; or

11. any unwelcome sexually motivated touching.

Jt. Ex. 3.

The Policy designates the Title IX Coordinator as the sexual harassment investigator. It also provides that a student should report any sexual harassment to the principal. The Title IX Coordinator, upon receiving a complaint of sexual harassment, will authorize an investigation, which can be conducted by “an official or officials of the school district or by a third part(y) or third parties designated by the Superintendent. The investigating party shall provide a written report of the status of the investigation within 10 working days to the Superintendent.” Jt. Ex. 3.

The Policy provides that a substantiated harassment charge against any employee of the Board shall subject that employee “to an improvement plan and such disciplinary action which may include actions ranging from a verbal reprimand to dismissal. Education or counseling may be recommended.” Jt. Ex. 3.

At the level four hearing, the Board also referred to the State Board of Education's legislative rules prohibiting racial, sexual, religious/ethnic harassment and violence. 126 CSR 18 (1997). The definition of sexual harassment in that policy is virtually identical to that found in the Board's policy. The State Board's policy also list examples of sexual harassment, many of them similar to those found in the Board's policy, as well as the following: f. unwelcome behavior, verbal or written words or symbols directed at an individual because of gender.

g. the use of authority to emphasize the sexuality of a student in a manner that prevents or impairs that student's full enjoyment of educational benefits, climate or opportunities.

§ 126-18-4.1.4

The State Board's policy also sets forth a reporting procedure, but states explicitly that “[n]othing in this policy shall prevent any person from reporting harassment or violence directly to the county superintendent. . . “. § 126-18-6.

Grievant objected to the Board's reliance on the State policy on the ground that it was not included in the charges leveled against him in his suspension letter. There is no dispute that the State's policy was in effect at the time of the magazine incident. Further, other than the two examples of sexual harassment listed above, the State's policy is virtually identical to the Board's Policy. The Board argues that the State's policy was the state of the law at the time of Grievant's conduct. Clearly, the parties may rely on any statement of the law which they feel is applicable and controlling to support their case. In this instance, the State Board's policy is virtually identical to the Board's policy in all pertinent aspects, and thus I cannot find that Grievant has been prejudiced in any way by the Board's reliance on this document to support its charges. The Board did not allege in its suspension letter that Grievant violated the State Board of Education's policy on sexual harassment. It is merely using that Policy to bolster its argument that Grievant did violate its own Sexual Harassment Policy.

The issue is whether the Board has proven by a preponderance of the evidence that Grievant engaged in sexual harassment as defined in its Policy, and whether that conductconstitutes willful neglect of duty. Grievant admits he engaged in the conduct, but denies it constitutes sexual harassment.

With regard to the shorts incident, I agree with Grievant. I cannot conclude from the Board's evidence that Grievant's conduct towards J.R., in that instance, amounts to sexual harassment. Grievant pointed out to J.R. that she was violating the school's dress code by wearing cutoff shorts, which were also too short. J.R. was embarrassed by Grievant's admonition, as might be expected from an 8th grade student. While Grievant touched J.R. with his hand to demonstrate the allowable length of shorts, there was no evidence presented as to the nature of the touching, i.e., exactly where it happened, the duration of the touching, or the amount of pressure applied by Grievant. Other than

the inference raised by the Board, there is no indication that Grievant inappropriately touched J.R. in connection with this incident. According to the school's dress code policy, Grievant should have referred J.R. to the office to have her shorts measured. However, the fact that he did not send her to the office does not support a conclusion that he sexually harassed her.

With respect to the Victoria's Secret incident, I find Grievant's conduct amounted to sexual harassment in violation of the Board's Sexual Harassment Policy. Grievant's conduct towards J.R. was unwelcome, and included directing a symbol, in this case, a picture, at her simply because of her gender. Showing J.R. a picture of a model in a bathing suit also emphasized her sexuality in a manner which she found threatening, intimidating, and embarrassing. Grievant asserts he was merely attempting to boost J.R.'s self-esteem by paying her a compliment, but there is no question that the method he chose to accomplish this goal was entirely inappropriate for a male teacher vis-a-vis a female student. Grievant told J.R. he would bring in the magazine “if he thought of it.” Grievant clearly did think of it as he brought in the magazine the very next day. Furthermore, asking a female whether she has modeled is recognized by most reasonable people as a common “pick-up” line. While J.R. may not have perceived the question as such, her father clearly did when the story was related to him, and reasonably so. Grievant acknowledged that he would be concerned if a male teacher approached his own daughter in the same manner. Grievant's acknowledgment indicates that he understood this type of behavior constituted sexual harassment. It is unfortunate that Grievant could not apply that understanding to his own actions. See Turner v. W. Va. Div. of Highways, Docket No. 94-DOH-594 (Feb. 28, 1995). In addition, the fact that Grievant told J.R. not to show anyone the magazine indicates some awareness on his part that it was inappropriate for him to have given her the magazine in the manner in which he did.

Grievant denies his actions contained any sexual motivation, nor did he intend to intimidate, embarrass, or threaten the student. Grievant alleges that the definitions contained in the Board's policy center primarily around conduct which is sexually motivated, and thus that must be an element of the conduct in order for it to be deemed sexual harassment. Grievant submitted the testimony and report of his counselor to show that he was not a sexual predator. Jt. Ex. 2. He also presented the testimony of various witnesses who defended his character. Nevertheless, Grievant's interpretation is too strict; one does not have to be a predator to engage in sexual harassment. Harassment does not have to be sexual in nature, but merely motivated because of gender. Brougher v. Univ. of

Pittsburgh, 713 F. Supp. 139 (W.D. Pa. 1989). The Equal Employment Opportunity Commission has noted that harassment not involving sexual activity orlanguage may also give rise to Title VII liability if it is “sufficiently patterned or pervasive and directed at an employee because of their sex.” EEOC Policy Guidelines on Sexual Harassment, 8 Fair Empl. Prac. Man. (BNA) 405:6692 (Mar. 19, 1990).

Grievant's conduct toward J.R. could fall under the very first example in the Board's Policy of “verbal harassment or abuse”. It could also fall under the second example of “unwelcome or inappropriate letters, telephone calls, or materials of a sexual nature.” While Grievant does not perceive the picture of the model in a bathing suit to be material of a sexual nature, the student clearly was offended by it, embarrassed, and frightened by Grievant's interest in her. The definition does not apply to what the perpetrator of the conduct believes, but what the victim believes. (See footnote 3) The United States Supreme Court has adopted a reasonable person standard in determining sexual harassment. Under this standard, the trier of fact must “adopt the perspective of a reasonable person's reaction to a similar environment under similar or like circumstances.” Harris v. Forklift Systems, Inc., No. 92-1168, ___ U.S. ___ (1993). While a single or isolated incident of offensive sexual conduct will not always create an abusive or hostile environment, one must look at the totality of the circumstances, including the nature of the advance, the context in which it occurred, and the status of the offender versus the status of the victim. EEOC Policy Guidelines on Sexual Harassment, 8 Fair Empl. Prac. Man. (BNA) 405:6689 (Mar. 19, 1990); Harris, supra. Applying these principles, I find that the Board has proven by a preponderance of the evidence that Grievant engaged in conduct which created a hostile, intimidating, or offensive learning environment for J.R., a violation of the Board's Sexual Harassment Policy. Looking at the totality of the circumstances, and putting myself in the shoes of J.R., it is easy to see how Grievant's conduct would make her feel embarrassed, intimidated, and frightened. J.R., an 8th-grader, was asked by an adult male teacher whether she had ever modeled in Victoria's Secret magazine. When she answered “no”, Grievant did not let it rest. Instead, he told her he would bring in the magazine if he thought of it. The next day, Grievant called her over to where he and another adult male teacher were standing, showed her a picture of a young woman in a bathing suit, and asked the other male teacher whether J.R. looked like the model. Grievant's conduct was directed towards her simply because of her sex, and it necessarily drew attention to J.R.'s sexuality. She was embarrassed, intimidated, and frightened by this display of interest in her by Grievant. It is reasonable to believe that she would not feel

comfortable around Grievant the remainder of the school year in light of this incident.

Even if the allegations against Grievant were not “sexual harassment” under the Sexual Harassment Policy, he still would not prevail in his grievance. The West Virginia Supreme Court of Appeals has generally declined to assign specific definitions to the “causes” for which county board of education employees may be disciplined. In most cases, it has taken the broader approach of 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 to determine if, overall, the county board exercised its discretion to discharge reasonably. The Court hasfocused on the nature of the employee's conduct rather than the label attached to it, and, when warranted, modified the punishment imposed. See, Bd. of Educ. of the County of Gilmer v. Chaddock, 398 S.E.2d 120 (W. Va. 1990); Surber v. Mingo County Bd. of Educ., Docket No. 96-29-015 (Dec. 30, 1996).

> Seriously wrongful conduct by a civil service employee can lead to dismissal even if it is not a technical violation of any statute. The test is not whether the conduct breaks a specific law, but rather whether it is potentially damaging to the rights and interests of the public.

State ex rel. Ashley v. Civ. Svc. Commn, 395 S.E.2d 787 (W. Va. 1990), syl. 3, quoting Mangum v. Lambert, 394 S.E.2d 879 (W. Va. 1990). This Board has applied the Ashley principle to higher education employees in Waiters v. Univ. of W. Va. Bd. of Trustees, Docket No. 90-BOT-356 (Dec. 28, 1990), noting that “when one is charged with inappropriate behavior that behavior's simple mislabelling by the charging entity is not necessarily controlling.” Accord, Davis v. W. Va. Dept. of Motor Vehicles, Docket No. 89- DMV-569 (Jan. 22, 1990). Thus, even if Grievant's conduct did not amount to sexual harassment under the Board's Policy, it clearly was inappropriate given his status as a male teacher and J.R.'s status as an 8th grade girl, and discipline was warranted.

The Board alleges Grievant's violation of its Sexual Harassment Policy constitutes willful neglect of duty under W. Va. Code § 18A-2-8. 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. of the County of Gilmer v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990). Hence, in order to prove willful neglect of duty under W. Va. Code § 18A-2-8, the employer must establish that

theemployee's conduct constituted a knowing and intentional act, rather than a negligent act. Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996); Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994); Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994).

"'Willful neglect of duty' may be defined as an employee's intentional and unexcusable failure to perform a work-related responsibility." Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990). The Board's Sexual Harassment Policy had been communicated to Grievant before January 28, 1997. His conduct on that date was inconsistent with that Policy. Moreover, he acknowledged he would be concerned if a male teacher approached his own daughter in the same manner, thus evidencing an understanding that his conduct was inappropriate. Finally, Grievant's letter of apology to J.R. (Jt. Ex. 7), as well as his counseling report (Jt. Ex. 2), indicate his awareness that his conduct was wrong. See Groom v. Raleigh County Bd. of Educ., Docket No. 90-41-482 (Apr. 30, 1991). Admittedly, this is a close call of willful neglect of duty. Regardless, I am satisfied that Grievant's conduct can reasonably be characterized as such.

AFFIRMATIVE DEFENSES

Grievant complains the Board did not follow the reporting procedures of its Sexual Harassment Policy because the Title IX Coordinator, Brenda Skibo, did not receive the complaint or authorize the investigation. This complaint puts form over substance. To accept such a stringent requirement assumes that virtually every employee, student, and parent has not only read, but memorized, the entire Sexual Harassment Policy. This is too heavy a burden to place on anyone's shoulders, especially when emotions are necessarily running high. In this instance, J.R.'s father reported the sexual harassment to theSuperintendent's office. The Superintendent authorized an investigation by school officials, who reported the status of their investigation to him within 10 days. There is no evidence the Board did not attempt to follow the reporting procedures of its policy to the best of its ability, and Grievant's allegation in this regard fails. Even if it is contrary to policy to allow the complaint to be made to the Superintendent, this is harmless error, as Grievant has not shown any prejudice from the Board's failure to comply with its policy to the exact letter.

Grievant also asserts the Board violated state law by making its decision regarding the suspension in executive session, in violation of W. Va. Code § 6-9A-3. That Code Section requires

all meetings of a governmental agency be open to the public. It allows for executive session in matters relating to discipline, but Code § 6-9A-4 prohibits any decision being made in executive session.

W. Va. Code § 6-9A-3 provides, in pertinent part:

> Except as expressly and specifically otherwise provided by law, whether heretofore or hereinafter enacted, and except as provided in section four [§ 6-9A-4] of this article, all meetings of any governing body shall be open to the public. . . .

W. .Va. Code § 6-9A-4 provides, in pertinent part:

> No provision of this article shall be construed to prevent the governing body of a public body (See footnote 4) from holding an executive session during a regular, special or emergency meeting, after the presiding officer has identified the authorization under this article for the holding of such executive session and has presented it to the governing body and to the general public, but no decision shall be made in such executive session.
>
> An executive session may be held only upon a majority affirmative vote of the members present of the governing body of a public body as defined in this article for the following:
>
> . . .
>
> (2) The appointment, employment, retirement, promotion, demotion, disciplining, resignation, discharge, dismissal or compensation of any public officer of employee, or other personnel matters, or for the purpose of conducting a hearing on a complaint against a public officer or employee, unless such public officer or employee requests an open meeting; or . . . (Emphasis added)

The transcript of the March 3, 1997 special Board meeting reflects the Board President made a motion to go into executive session to conduct the disciplinary hearing of Grievant, which was seconded. No opposition to the motion was noted. Jt. Ex. 9, p. 3. This action is clearly authorized by Code § 6-9A-4(2). The transcript reflects that the Board, at the conclusion of the hearing, asked the parties to leave so it could deliberate. Following its deliberations, the Board resumed proceedings and voted on the Superintendent's recommendation to suspend Grievant without pay. The transcript at this point reads as follows:

> [WHEREUPON AT 10:15 p.m. the following proceedings were had in executive session after the Board members had deliberated:]

MR. STEELE: We have been in executive session for 6-9A-4; is that right?

MR. ABRAHAM: Yes.

MR. STEELE: Upon the recommendation of the Superintendent of the Logan County Board of Education, we uphold the suspension of David Lanehart from March the 3rd until June the 12th of this year. I make that motion as a Board member. I need a second.

MR. WOLFE: I second that motion.

MR. STEELE: All those in favor, raise their right hand. Opposed? None.

Any other questions? If not --

MR. MYERS: -- I think one question we would have and I'm sure -- is whether that's with or without pay.

MR. STEELE: That's without pay. Any other questions? If not, we have some business we would like to discuss.

[Hearing in this matter was concluded].

Jt. Ex. 9, pp. 155-6.

The minutes of the March 3, 1997 special meeting of the Board indicate that

Under WV Code § 6-9A-4(2), Mr. Hardesty made the motion to go into an executive session at 6:35 p.m. for the purpose of a teacher suspension hearing. Mr. Wolfe seconded the motion. Motion carried. Vote: 5-0.

Upon returning from an executive session at 10:18 p.m., the Board took the following action:

Upon the recommendation of the Superintendent, Mr. Steele made the motion to uphold the suspension without pay of David Lanehart, who is a teacher at Logan Central Jr. High School. The suspension will be from February 4, 1997 to June 12, 1997. This suspension is based on substantiated allegations of sexual harassment toward a female student. Mr. Wolfe seconded the motion. Motion carried. Vote: 5-0.

Jt. Ex. 8 (emphasis added).

While the minutes indicate the Board came out of executive session to vote on Grievant's suspension, the transcript is less clear. A review of the minutes and the transcript lead me to conclude that the Board came out of executive session to make its decision regarding Grievant's suspension, in conformance with Code § 6-9A-4. The Board minutes reflect that the Board, “upon returning from an executive session. . . .”, voted on Grievant's suspension. Second, the transcript indicates that Mr. Steele inquired, “we have been in executive session for 6-9A-4. . .?” Mr. Steele did

not say “we are in executive session”, but rather, “we have been in executive session”, indicating that he was referring to the meeting immediately prior to his statement as one that occurred in the past. Therefore, I find the Board did not violate the Open Meetings Law in rendering its decision on Grievant's suspension.

Finally, Grievant asserts that his four-month suspension without pay is too severe and arbitrary and capricious. The Board justified its action by explaining that it wanted to keep J.R.'s learning environment free from any hostility, intimidation, or fear, and the bestway to accomplish that was by suspending Grievant for the remainder of the school year. It is evident the Board was justified in this regard, as the Victoria's Secret incident occurred outside the school building, while Grievant was supposed to be on lunch duty. Grievant demonstrated an ability to communicate with J.R., even though she was not his student at the time.

Grievant also presented evidence of one other teacher who had been charged with sexual harassment who only received a 30-day suspension without pay. The Board argued that that individual was not found by the Board to have engaged in sexual harassment. Rather, the Board found his actions constituted improper classroom management, for which he received a 30-day suspension and was placed on an improvement plan.

The evidence in this grievance does not support a finding that the discipline imposed in this matter was inappropriate, or that the Board abused its discretion or acted in an arbitrary or capricious manner when imposing a four-month suspension without pay for sexual harassment. The Sexual Harassment Policy provides that “[a] substantiated harassment charge against any employee of the Logan County School District shall subject such employee to an improvement plan and such disciplinary action which may include actions ranging from a verbal reprimand to dismissal.” Since Grievant was suspended for the remainder of the 1996-97 school year, he obviously was not placed on an improvement plan for that period. The Policy mandates that the Board shall place Grievant on an improvement plan at the beginning of the 1997-98 school year.

CONCLUSIONS OF LAW

1. A county board of education must prove the charges that are relied upon to support disciplinary action against its employees by a preponderance of the evidence. W. Va. Code § 18-29-6.

2. The authority of a county board of education to suspend or dismiss a teacher under W. Va. Code § 18A-2-8 must be based upon the causes listed therein and must be exercised reasonably, not arbitrarily or capriciously. Parham v. Raleigh County Bd. of Educ., 453 S.E.2d 374 (W. Va. 1994).

3. "Willful neglect of duty" encompasses something more serious than incompetence and imports "a knowing and intentional act, as distinguished from a negligent act." Bd. of Educ. of the County of Gilmer v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990). In order to prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than an negligent act. Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996); Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994); Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994).

4. Logan County Policy 1.8 Sexual Harassment Policy prohibits any sexual harassment, which consists of unwelcome sexual advances, requests for sexual favors, sexually motivated physical conduct or other verbal or physical conduct or communication of a sexual nature. Jt. Ex. 3.

5. The Board has proven by a preponderance of the evidence that Grievant engaged in sexual harassment of J.R. when he asked her if she had modeled for Victoria'sSecret, and then showed her a picture of a model in a yellow, one-piece bathing suit from a Victoria's Secret catalog.

6. Grievant was aware of and familiar with the Board's Sexual Harassment Policy, and that his conduct was inappropriate; therefore, the Board has proven by a preponderance of the evidence that Grievant's conduct was intentional, not merely inadvertent or careless, and constitutes willful neglect of duty. See DeVito v. Bd. of Educ., County of Marion, 285 S.E.2d 411 (W. Va. 1981).

7. The Board substantially complied with the investigating and reporting procedures of the Sexual Harassment Policy.

8. The Board did not violate W. Va. Code § 6-9A-1, et seq. (the Sunshine Law), in conducting the disciplinary hearing on Grievant's suspension without pay.

9. The Board's decision to suspend Grievant for four months without pay was not an abuse of discretion or otherwise inappropriate.

Accordingly, this grievance is **DENIED**. However, the Board is hereby **ORDERED** to place Grievant on a plan of improvement in the beginning of the 1997-98 school year in accordance with its Sexual Harassment Policy.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Logan 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.

MARY JO SWARTZ

Administrative Law Judge

Dated: June 13, 1997

Footnote: 1

It is the Grievance Board's practice to use initials of students, especially in matters involving sensitive facts.

Footnote: 2

References to the disciplinary hearing transcript will be "Jt. Ex. 9, p. ."

Footnote: 3

Grievant asserts that J.R. is not credible in claiming she was intimidated or upset because she did not react in any way to being shown the magazine. However, that fact bears no relevance to whether Grievant's conduct falls within the definition of sexual harassment.

Footnote: 4

A county board of education is included within the definition of "public body" within the meaning of Code §§ 6-9A-1, et seq. (the Sunshine Law).