WILLIAM WAHL,

Grievant,

v. DOCKET NO. 98-28-175

MINERAL COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, William Wahl, requests the removal of a letter of reprimand, dated March 17, 1998, from his personnel file. This grievance was initiated at level one on March 19, 1998, where Grievant's immediate supervisor denied the grievance on April 24, 1998. Grievant appealed to level two, where a hearing was conducted on April 28, 1998, followed by a written decision from Charles B. Kalbaugh, Superintendent, denying the grievance. Level three proceedings were waived, and Grievant appealed to level four on May 22, 1998. A level four hearing was held in this Grievance Board's office in Morgantown, West Virginia, on August 4, 1998. Grievant was represented by Owens Brown, representative for the West Virginia Education Association, and Respondent was represented by attorney Kimberly Croyle. This matter became mature for decision on September 1, 1998, upon receipt of the parties' proposed findings of fact and conclusions of law.

Grievant is employed by the Mineral County Board of Education ("Board") as a special education teacher at Elk Garden Primary-Middle School. The incident which led to the letter of reprimand occurred on March 3, 1998, at which time Grievant was on "recess duty," monitoring elementary-age students in the gymnasium, along with another teacher. As was his practice during recess duty, Grievant also monitored the hallways adjacent tothe gym, to make sure no students had wandered into unsupervised areas. On the day in question, Grievant walked into the hallway just outside the gym, at which time he heard children's voices coming from the girls' restroom. The restroom door was open, as it always was. As Grievant approached the open doorway, he saw a small girl (approximately kindergarten age) standing just behind the door. Grievant testified that he could see her through the crack between the door and the wall, where the hinges are located. Upon seeing the

little girl behind the door, Grievant said “this isn't a playground,” and asked her to come out. She came from behind the door and exited with Grievant, who took her back to the gymnasium. The entire sequence of events lasted only a few seconds.

When Grievant retrieved the little girl from the restroom, three other female students were present inside the restroom, Julie B., Jessica S., and Crystal R, (See footnote 1) who were all fifth grade students. When Grievant appeared, Jessica and Julie were at the sink, and Crystal was coming out of one of the stalls. The students' versions of what happened that day agree with Grievant's, except for the following points:

--

All three girls testified that Grievant actually entered the restroom, stepping just inside the doorway, to retrieve the little girl. Grievant testified he stood just outside the restroom, but in the open doorway.

–

The girls testified that the little girl appeared to be going into the stall closest to the door, instead of merely hiding behind the door.

The girls testified that they believed Grievant's only purpose in entering the restroom was to retrieve the little girl. However, they were upset by the incident, and immediately reported it to a teacher, who directed them to Principal Paula Athey. Ms. Athey took each student into the bathroom individually, asking her to explain what happened. She then asked them to give written statements. Ms. Athey discussed the incident with Grievant the following day, March 4, 1998, and he stated that he did not believe it had been important enough to report, and that he had not actually entered the restroom.

Principal Athey issued the following letter of reprimand to Grievant on March 17, 1998:

> I'm writing in regards to the incident which occurred on March 3, 1998, at which time you entered the girls' bathroom unannounced. After investigating this incident, talking with the girls who were in the bathroom at this time of your entrance, and speaking with you.(sic) I've come to the conclusion that you used poor judgment when you entered the girl's bathroom on the date in question.
>
> Consider this a letter of reprimand. Your entering a girl's bathroom unannounced was unacceptable. Male teachers should never enter a girl's bathroom unless they believe a child is in danger or in an attempt to break up a fight. Even when these circumstances exist, any teacher entering an opposite gender bathroom should always

> announce themselves prior to entering.
>
> In future similar circumstances you will be expected to use only the above criteria for determining when to enter the girls bathroom and any other action to the contrary may be considered as direct insubordination or immoral.
>
> This letter will become part of your file. Should you have any questions or concerns please don't hesitate to see me in order to arrange a conference.

The parties agree that neither the Board nor Elk Garden School has any writtenpolicies regarding teachers of opposite genders entering restrooms. In addition, teachers at Elk Garden were not given any oral instructions regarding this issue.

Discussion

Pursuant to W. Va. Code §18-29-6, the burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in Code §18A- 2-8, and must be exercised reasonably, not arbitrarily or capriciously. Parham v. Raleigh County Bd. of Educ., 192 W. Va. 540, 453 S.E.2d 374 (1994); 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). Code §18A-2-8 provides, in pertinent part:

> [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.

This Grievance Board has recognized that lesser penalties, such as reprimands, can be imposed for the offenses listed in this statute. See Blankenship v. Mingo County Bd. of Educ., Docket No. 97-29-486 (Apr. 17, 1998).

Principal Athey did not specify in the letter of reprimand upon which of the Code §18A-2-8 charges it was based. However, she testified at level four that she believed Grievant's conduct was

immoral, and the level two decision includes a legal conclusion that Grievant engaged in immorality within the meaning of the statute. Respondent has argued in its level four brief that it is not required to state a specific charge when disciplining anemployee, but it only need prove that the employee engaged in the conduct alleged. In support of its position, the Board has cited the Grievance Board's recent decision in Brown v. Mercer County Bd. of Educ., Docket No. 98-27-113 (July 30, 1998). However, Respondent has incorrectly interpreted that decision.

Although noting that the proper focus in these cases is “whether the charge of misconduct is proven, not the label attached to such conduct,” the administrative law judge in Brown, supra, did not find that a board of education is thereby excused from having to prove that the employee's conduct did, in fact, constitute a violation of one of the charges set forth in Code §18A-2-8. In that case, the employee's conduct was found to constitute insubordination and willful neglect of duty, as those terms are defined by the statute, the West Virginia Supreme Court of Appeals and this Grievance Board. Accordingly, Respondent must not only prove that Grievant engaged in the conduct alleged, but that it also constituted a violation for which he could be disciplined.

Clearly, immorality is the only cause listed in Code §18A-2-8 with which this grievant could be charged for entering a girls' restroom unannounced, and, in fact, Respondent has based much of its argument at level four upon that charge. The term immorality, as used in the statute, connotes conduct “not in conformity with accepted principles of right and wrong behavior; 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, 668 (W. Va. 1981). “Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires at least an inference of conscious intent.” See Hayes v. Kanawha County Bd. of Educ., Docket No. 94-20-1143 (June 28, 1995), citing Youngmanv. Doerhoff, 890 S.W.2d 330 (Mo. 1994). The undersigned finds that Grievant's conduct was not immoral.

Grievant admitted that he retrieved the little girl from the restroom after seeing her behind the door. However, he contends that he did not actually step into the restroom. Whether he did or did not actually enter the room, as the other students alleged, is of no moment. All agreed the Grievant's only motive in entering the restroom was to retrieve the little girl, and the entire event lasted only a few seconds, perhaps ten. Moreover, the layout of the restroom completely prevented Grievant from

seeing into the stalls, because the doorway faces a partition wall, and the stalls are on the other side, facing a different direction. Therefore, even if Grievant did take a few steps into the room, there was no danger of him unwittingly, or even intentionally, glimpsing a student in one of the stalls.

There was nothing “immoral”, “wicked” or sexually motivated about Grievant's actions. While he may have exercised poor judgment, and should have realized the implications of a male teacher being seen in such close proximity to a girls' restroom, this is not conduct which would be considered “always wrong” or demonstrative of any conscious intent to be lascivious. Obviously, Grievant's only thoughts were with retrieving a very young child, who should not have been unsupervised, and he reacted quickly, without thinking of the possible implications. Yes, he could have returned to the gymnasium to ask the female teacher there to come get the little girl, but the child could have traveled on to another location by that time. Therefore, Grievant did the best he could under the circumstances.

Although the Board has proven that Grievant stepped into the doorway of a girls' restroom unannounced, it has not established that this conduct constituted immorality, asdefined by Code §18A-2-8, or any other charge for which school employees may be disciplined.

Findings of Fact

1. Grievant has been employed as learning disabilities teacher by the Board for eight years, and is assigned to Elk Garden Primary-Middle School.

2. On March 3, 1998, while on recess duty, Grievant heard children's voices coming from the girls' restroom just outside the gymnasium.

3. Upon approaching the restroom, where the door was standing open, Grievant saw a kindergarten-age girl standing just behind the door.

4. Stepping into the doorway, Grievant said to the little girl “this isn't a playground,” and escorted her out of the restroom.

5. Julie B., Jessica S., and Crystal R. were in the restroom when Grievant retrieved the little girl, and were upset that he appeared to enter the restroom.

6. Grievant received a written reprimand from Principal Paula Athey for entering the girls' restroom unannounced.

7. Grievant's sole purpose for stepping into the doorway of the girls' restroom was to retrieve

the small child.

Conclusions of Law

1. Pursuant to W. Va. Code §18-29-6, the burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). 2. The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in Code §18A-2-8, and must be exercised reasonably, not arbitrarily or capriciously. Parham v. Raleigh County Bd. of Educ., 192 W. Va. 540, 453 S.E.2d 374 (1994); 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). 3. "Immorality", as set forth in Code §18A-2-8, connotes conduct "not in conformity with accepted principles of right and wrong behavior; 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, 668 (W. Va. 1981).

4. Grievant's conduct was not "immoral," as contemplated by Code §18A-2-8.

5. Grievant's conduct did not fall within any of the causes listed in Code §18A-2- 8, for which school employees can be disciplined.

Accordingly, this grievance is **GRANTED**, and Respondent is **ORDERED** to remove the March 17, 1998, reprimand from Grievant's file, along with any and all references thereto.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Mineral 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 ofthe intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

Date: September 14, 1998 _____

V. DENISE MANNING

Administrative Law Judge

Footnote: 1

As has been Grievance Board practice, the full names of children will not be used in cases where sensitive facts are involved.