NORVEL WILLIS,

Grievant,

v. DOCKET NO. 96-19-230

JEFFERSON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Norvel Willis, filed this grievance on June 12, 1996, pursuant to W. Va. Code §18-29-1, et seq., protesting his dismissal from employment with the Jefferson County Board of Education ("Board") by letter dated May 30, 1996. This matter was held in abeyance for an extensive period of time pursuant to agreement of the parties, and several continuances were granted for good cause shown. Additionally, scheduling of a level four hearing in this grievance was further delayed while counsel for certain witnesses appealed an order ruling on motions dated June 24, 1997. Eventually, on March 10, 1998, the Circuit Court of Jefferson County, West Virginia, issued an order requiring that the witnesses' counsel, attorney Laura Rose, be allowed to participate in the level four hearing to protect the interests of her clients. For administrative reasons, this matter was reassigned to the undersigned administrative law judge on April 1, 1998. A level four hearing was conducted in the offices of the Jefferson County Board of Education in Charles Town, West Virginia, on July 20 and 21, 1998. Grievant represented himself, the Board was represented by attorney Claudia Bentley, and, as stated above, severalwitnesses (See footnote 1) were represented by Ms. Rose. This matter became mature for consideration on September 28, 1998, the deadline for submission of the parties' post-hearing briefs. (See footnote 2) The following narrative will be supplemented by formal findings of fact and conclusions of law.

Grievant was employed as a substitute classroom teacher and, pursuant to extra-curricular contracts, as an assistant track coach and basketball coach at Charles Town Junior High School during the 1995-1996 school year. He had been employed by the Board for

several years prior to that time, with no record of disciplinary actions or unsatisfactory performance evaluations. However, Grievant did receive a written “official warning” from Principal Richard Keeler on December 6, 1994, regarding his behavior around female students. This matter will be discussed in further detail below.

By letter dated May 1, 1996, Grievant was notified by Judson Romine, Jefferson County Superintendent, that he was going to recommend to the Board that Grievant's employment be terminated. The basis for the recommendation was allegations that Grievant had kissed a female student, M.R., at a track meet, along with allegations by other female students of “prior inappropriate touching, kissing and inappropriate verbalcomments with clear sexual overtones.” May 1, 1996, letter, Attachment 2 to Joint Exhibit 1. (See footnote 3) The Board conducted a hearing regarding the superintendent's charges, which was held on May 13, 15, 19, and 23, 1996, at which time Grievant was represented by counsel and allowed to present evidence and cross-examine the Board's witnesses. Thereafter, the Board voted to terminate Grievant's employment, and he was notified by certified letter dated May 30, 1996.

The impetus for the charges against Grievant were the events that transpired between him and M.R. on April 25, 1996. M.R. was competing in a track meet, and Grievant was functioning as the announcer and scorekeeper. M.R. had just won a race, and ran up to the press box, where Grievant and several other people were seated, to ask about the scores. As M.R. testified at both the Board hearing and at level four, after congratulating her for winning a race, Grievant placed his hand on the back of her neck, pulled M.R. toward him, and kissed her on the cheek. Specifically, Grievant was responding to M.R.'s question about a time, and he was pointing to it on a sheet of paper. The kiss allegedly happened as M.R. was bending toward Grievant to read the time. According to M.R., she believed he would have kissed her on the lips, if she had not turned her head. Grievant made no other comments after he kissed M.R., and she immediately left the press box area. M.R. was very upset about the incident, and was in tears immediately after it happened. She told some friends and her mother about the incident later the same day.

Prior to the “track meet incident” and during the same school year, M.R. testified thatGrievant had touched her at other times. On various occasions Grievant rubbed her back, starting at her shoulders, ending with his hand just brushing against her buttocks. He also

had walked past her while she was seated on bleachers in the gymnasium, squeezing her thigh as he passed. M.R. testified that, when this happened, the area where he touched her was more than halfway up her thigh. Grievant had also substituted for the teacher of M.R.'s keyboarding class that year, and, on a few occasions, had walked up behind her while she was typing, rubbing the backs of her arms between the shoulders and elbows. M.R. stated that she tried to pull away when he did this, but he did not stop. She also testified that she felt uncomfortable on all the occasions when Grievant touched her, and that she felt "dirty" when he kissed her at the track meet. She did not believe Grievant kissed her in order to congratulate her. M.R. did not report these other incidents, because she knew another student had complained about Grievant the year before, and "nothing had been done."

H.L., who was also seated in the press box at the time, saw Grievant lean toward M.R. and kiss her cheek. H.L. testified that she was sitting at the same table as Grievant, with two people between them. She happened to glance in their direction, when she saw the kiss, but she did not notice where Grievant's hands were. H.L. had also been touched by Grievant in a way that made her feel uncomfortable. At a track meet, Grievant came up behind H.L. and massaged her back and shoulders without having been asked. While he was massaging her, H.L. stated that Grievant was standing so close to her that his stomach was touching her back. H.L. was one of several other girls who came forward with M.R. to report Grievant's touching them in ways that made them uncomfortable during the 1995-1996 school year. D.J. also witnessed Grievant kissing M.R. on the cheek, but saw nothing more. Just as H.L., she confirmed that M.R. was extremely upset right after the kiss. D.J. also described instances when Grievant had rubbed her shoulders and back, finishing by just grazing her buttocks, almost exactly as described by M.R. On one occasion, D.J. was bending down to get a drink from a vending machine, and Grievant, who was standing beside her, placed his hand on her back, bending toward her, and "got very close" to her. D.J. testified that she thought he may have meant to kiss her, but she moved away. Grievant had also addressed D.J. as "Hey, Beautiful" on one occasion.

Like the other girls, M.B. was on the track team and had Grievant as a substitute teacher. (See footnote 4) She described an incident when Grievant was encouraging her to run in a particular race. While doing so, he had his hand around her arm, pushing her arm and,

consequently, his own hand against her breast. He said "You can do it," as he pushed on her arm. He repeated the motion several times, his hand touching her breast each time.

K.W., another member of the track team, testified that, one day at track practice, Grievant put his arm around her shoulders and said "You've been looking mighty fine." Also, during a gym class, other students were complaining about K.W. and M.R.'s shorts being too short. They went to Grievant to ask his opinion about their shorts, and he said something to the effect of "If you were a little older, I would marry you." It is unclear from the record whether this comment was directed toward K.W., M.R., or both.

J.U. was on the girls' basketball team and in the seventh grade during the 1995- 1996 school year. She interacted with Grievant, because he worked with the boys' andgirls' basketball teams, and also as a substitute teacher. One day during basketball practice, J.U. and Grievant were sitting beside each other on the bleachers, and Grievant suddenly leaned over and kissed her cheek. He didn't say anything, and she was not sure why he did it. When asked if some event precipitated the kiss, J.U. testified that she really could not recall. She also testified that Grievant had touched her leg above the knee one time, and that he had told her she looked good in her track shorts. She was uncomfortable, but did not realize Grievant's conduct was wrong until the other girls came forward with M.R.

C.W. helped keep the stats during track meets. She, Grievant and some other people were in the press box during a meet, and she felt someone "smack her on the butt." When she turned around, Grievant was laughing, and the other people present told her he was the one who did it. Later the same day, C.W. took off the coat she had been wearing, under which she was wearing a sleeveless shirt. When she did so, Grievant said "mm, mm, mm," and C.W. told him he was not supposed to say things like that. In response, Grievant said "I can look as long as I don't touch."

M.C. also played basketball and ran track; she was around Grievant during 1995- 1996 as a result of sports and had him as a substitute teacher. One time in gym class Grievant told M.C. she looked good in her gym shorts. On other occasions, he told her she was "looking good." One night when a basketball game was canceled, M.C. used the phone in the coaches' office, which was not unusual for members of sports teams. Grievant was in the office at the time, and, as she was leaving, Grievant kissed M.C. on the cheek. No other people were in the room

at the time.

Other girls who testified to encounters with Grievant during the same school yearwere J.R., J.B., and T.C. J.R. was also a member of the basketball team, and testified that, on the way home from a game, Grievant rubbed her thigh as he told her she had played a good game. J.B. asked to be removed from Grievant's class after he made comments about how “fine” she looked, and she perceived that he was flirting with her. T.C., who was on the track team, testified that, for no apparent reason, Grievant bent over and rubbed her calf and thigh while she was doing stretching exercises.

As mentioned earlier, Grievant had been warned about flirtatious conduct toward students because of an incident that occurred during the 1994-1995 school year. C.S. was a junior high student at that time and saw Grievant around school frequently. Grievant made comments to her such as “Hey, Sexy” and made a remark about her “luscious lips” one time when she was applying lipstick. Because his comments made her uncomfortable, C.S. reported it to the principal. This incident resulted in a conference between Grievant and Principal Richard Keeler, followed by a memorandum from Principal Keeler to Grievant dated December 6, 1994:

> As a follow-up to our conference on Tuesday, December 6, 1994, I am writing to remind you that you need to be more careful with your behavior around female students. Behavior that may be according to you (sic) as “friendly”, could be perceived as “flirting” by a female student.
>
> During our conference you assured me that you would be more careful with your behavior around female students. This memorandum is to be noted as an official warning.

Level IV Joint Ex. 1 (Exhibit 2 at Board hearing). Grievant initialed the memorandum upon receipt that same day.

Grievant offered the testimony of Charles Black, football and track coach at Charles Town Junior High, and Meredith Polen, Athletic Director. Mr. Black testified that, along withcoaching together at the junior high school, he had coached little league with Grievant for 15 years. In all that time, he had never seen Grievant touch a female student and had received no complaints about such conduct. Mr. Polen gave similar testimony, stating he had known Grievant over 30 years and had not received any reports of improper conduct. However, Mr.

Polen's own daughter had complained to him that Grievant had made some sort of inappropriate statement to her. Mr. Polen could not remember the exact nature of the comment, except it was something like "you look nice today," and he "didn't think anything of it." He stated that Grievant "had a way of . . . saying that to kids." Level IV Tr. at 391. Mr. Polen also testified he believed it was possible that the girls got together and decided to "get" Grievant.

On October 24, 1994, the Board adopted a "Sexual Harassment Policy" which provided, in pertinent part:

> **It shall be a violation of this policy for any student or employee of the Jefferson County school district to harass a student or an employee through conduct or communication of a sexual nature as defined by this policy at a school sponsored event.**
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> *** * * * ***
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> **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 that conduct or communication is made a term or condition, either explicitly or implicitly, 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 or communication has the purpose or effect of substantially or unreasonably interfering with an individual'semployment or education, or creating an intimidating, hostile, or offensive employment or education environment.**

Specific examples of sexual harassment may include but are not limited to:

. . . sexual teasing, jokes, remarks, or gestures;

. . . sexually suggestive looks or gestures;

. . . inappropriate patting, pinching, or cornering;

. . . intentional brushing against another's body;

. . . inappropriate sexual flirtations, advances, or propositions from a member of the same or opposite sex;

. . . verbal or written comments about an individual's body;

. . . sexually degrading word(s) or actions used to imitate, describe an individual or to refer to some aspect of the individual's behavior, appearance, attitude or conduct. . . .

Level IV, Joint Ex. 2. The policy authorizes discipline for any violations, including dismissal.

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 dismissal of a teacher must be based upon one or more of the causes listed in Code § 18A-2-8, which 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.**

Although Grievant's suspension and termination letters did not state which of thespecific causes listed in the statute his dismissal was based upon, Respondent argued at level four that it has proven Grievant engaged in conduct constituting immorality and insubordination. In such cases, the proper focus is whether the charge of misconduct has been proven, not the label attached to such conduct. Russell v. Kanawha County Bd. of Educ., Docket No. 90-20-415 (Jan. 24, 1991).

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 (1981). Immorality has also been explained as follows:

> **[I]mmoral conduct which (sic) goes beyond a matter of judgment such that the teacher may properly be assumed to have prior notice of its wrongful character and thus may be properly held responsible for his conscious disregard of established moral standards. 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.**

Hayes v. Kanawha County Bd. of Educ., Docket No. 94-20-1143 (June 28, 1995) (citing Youngman v. Doerhoff, 890 S.W.2d 330 (Mo. 1994)).

Insubordination is the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Directors, Docket No. 93-BOD-309 (May 31, 1994);

Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). To prove insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour CountyBd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

The May 1, 1996, letter to Grievant from Superintendent Romine stated, in pertinent part, as follows:

> **The basis for my recommendation [of dismissal] is (sic) the allegations of kissing a female student at a track meet in which Charles Town Junior High School participated at Jefferson High School on April 25, 1996, allegations which were supported by our investigation. Additionally, and as you know after the initial allegation was made, additional students came forward as witnesses to the kissing referenced above and with allegations of prior inappropriate touching, kissing and inappropriate verbal comments with clear sexual overtones. All of these allegations were discussed with you, in detail, during our conference yesterday.**
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> *** * * * ***
>
> **You have been warned, in writing, and counseled, previously based on similar conduct. That this is not the first complaint(s) raised and given the statements of several witnesses, deemed truthful and reliable by me in my investigation, I must recommend termination.**

Level IV Joint Ex. 1, Attachment 2.

The testimony of the students involved in this case is uncontroverted. (See footnote 5) With the exceptions of M.R. being extremely emotional during the level four hearing and D.J. and J.U. seeming unable to recall some things, all of the girls were credible and seemed very sure of the facts to which they testified. Even in spite of being very tearful and upset, M.R. appeared very honest and forthright in her testimony about how and when Grievant touched or kissed her. (See footnote 6) Accordingly, the undersigned finds that Grievant did, in fact, touchand/or kiss each of the witnesses in the manner described in their testimony.

Having established that Grievant committed the acts alleged, it must now be determined whether dismissal was appropriate. It has been previously held by this Grievance Board that

innocent pats on the back or legs may show poor judgment on the part of a teacher, but do not necessarily constitute immorality or justify dismissal. See Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997); Hayes, supra. However, the undersigned cannot, in good conscience, find that Grievant's constant touching, massaging, kissing and comments to students were "innocent." Moreover, and perhaps most importantly, Grievant had previously been warned about his "friendly" gestures toward students which could be misconstrued, yet he continued this conduct.

There is no question that Grievant's actions were insubordinate within the meaning of Code § 18A-2-8. He was instructed to be careful in his conduct around female students, specifically with regard to actions which could be construed as "flirting." After having been so warned, Grievant proceeded to spend the entire next school year telling female students they "looked good," "looked fine," that he would like to marry them, and touching them in more than "inadvertent" or "innocent" ways. See Petry, supra. An experienced educator should realize that--especially when dealing with adolescent and young teenage girls_kisses, rubs, squeezes, and pats, especially above the knee, are simply not appropriate. It is just not believable that Grievant meant all of this touching to be innocent. Most amazingly, Grievant kissed not one, but three, of his students, at least one of which was behind closed doors with no one else around. After having been specifically warnedabout "flirtatious" conduct, Grievant continued to engage in such activities with numerous students, directly disobeying the Superintendent's instruction. Therefore, Respondent has proven insubordination.

Not only were Grievant's actions "flirtatious," but they also fell within the prohibited activities addressed by the Board's sexual harassment policy. Many of Grievant's statements, touching, and, certainly, his kissing of female students can easily be characterized as sexual in nature. Additionally, several of the girls demonstrated through both their demeanor and testimony that Grievant's actions had the "purpose or effect of . . . creating an intimidating, hostile or offensive . . . education environment." Level IV, Joint Ex. 2. M.R. especially has been extremely traumatized by Grievant's kissing her, and J.B. asked to be removed from his class. Knowing that the sexual harassment policy was in place and applicable to all employees, Grievant still persisted in touching female students and making statements with sexual connotations. His conduct clearly violates the policy.

The West Virginia Supreme Court of Appeals has recently held that a board of education's adoption of a sexual harassment policy, "proscribing comments of a sexual nature and sexually-harassing conduct," is simply a "reiterat[ion] that immorality, as contemplated by W. Va. Code § 18A-2-8, is inappropriate, and by authorizing termination for such conduct, the policy has tracked what is authorized [by the statute]." Harry v. Marion County Bd. of Educ., No. 24792 (W. Va. July 6, 1998). Accordingly, the Court determined that it is appropriate for a school board to terminate an employee, who has violated a sexual harassment policy, for immorality under Code § 18A-2-8. Having reached the conclusion, the Court then found that it was not arbitrary and capricious for the board to terminate Mr. Harry, who made comments to students such as "I bet you look good ina swimsuit" and "I can't wait to see you in your speedo." Like Grievant in the instant case, Mr. Harry had also been warned about making inappropriate remarks to students, but continued to do so.

Therefore, the undersigned finds that, in addition to charges of insubordination, Respondent has proven that Grievant engaged in immorality as contemplated by Code §18A-2-8 and Harry, supra. Dismissal is an authorized disciplinary measure for these violations, and the Board did not act arbitrarily and capriciously in dismissing Grievant, especially in view of his prior warning and continuous, repeated incidents of inappropriate behavior.

It appears that Grievant's defense to the charges at issue here is that he did not commit the acts alleged. This is gleaned from the superintendent's May 1, 1996, letter which includes a statement that Grievant denied the charges, and also from Grievant's post-hearing submission at level four, which includes several statements to that effect. Unfortunately, the "testimony" Grievant offered in his post-hearing submission is not admissible for consideration here, because it has not been subject to cross examination, as required by W. Va. Code § 18-29-6. (See footnote 7)

Also addressed in Grievant's "argument" are allegations about the conduct of the investigation in the spring of 1996, and Principal Keeler in particular. Grievant did raise the issue of how the investigation was conducted when he cross examined Principal Keeler,so these allegations are admissible and must be addressed. (See footnote 8) **Grievant argues that Principal Keeler should not have conducted the investigation himself, because the policy requires that all sexual harassment complaints be referred to the Human Rights Officer, who**

then authorizes an investigation, which may be conducted by "an official or officials of the school district." Level IV, Joint Ex. 2. Principal Keeler testified that, on the day the girls came to see him, the Human Rights Officer, Pat Hubbard, could not be reached. Therefore, he requested and received permission from Beverly Hughes, Director of Personnel, to begin the investigation. There does not appear to be anything in the policy which prohibits the building principal from investigating sexual harassment complaints, so long as the complaints are not against him. Principal Keeler attempted to get authorization from the Human Rights Officer, but, because of her unavailability, received it from the personnel director.

Grievant has also intimated that Principal Keeler somehow assisted the girls in formulating their complaints. This is simply unsupported by any evidence. All of the girls were questioned about how and when they gave their statements. Each testified that she independently wrote down her version of the events, without assistance from any party. These statements given in 1996 are consistent with each girl's testimony at the pre- termination hearing and at level four, and there is no evidence of any kind of falsification. Because of the extremely long lapse of time between when the statements were given in April of 1996 and the level four hearing in July of 1998, along with the young ages of thewitnesses, it would seem that, if the statements were false, some inconsistent testimony would have been inevitable. On the contrary, each and every girl gave very credible testimony regarding specific facts and incidents, entirely consistent with the statements and testimony from over two years ago. Grievant has not proven any improprieties with regard to the witnesses' statements.

Grievant has not refuted the evidence which establishes that he was insubordinate and immoral, as set forth in Code § 18A-2-8.

Findings of Fact

1. Grievant was employed as a substitute teacher, track coach and basketball coach at Charles Town Junior High School during the 1995-1996 school year, and had been so employed for several years before that time.

2. In December of 1994, Grievant was warned about making "friendly" comments to female students, which could be misconstrued by the students as "flirtatious."

3. During the 1995-1996 school year, Grievant touched M.R. on numerous occasions,

consisting of rubbing her shoulders and back with his hand just grazing her buttocks, rubbing the backs of her arms during keyboarding class, and squeezing and rubbing her thigh.

4. On April 25, 1996, Grievant pulled M.R. toward him and kissed her on the cheek at a track meet.

5. H.L. and D.J. witnessed Grievant kissing M.R. at the track meet.

6. M.R. was uncomfortable because of Grievant's conduct and was upset by the kiss.

7. Grievant massaged H.L.'s back and shoulders at a track meet, while standingclose enough to her that his stomach was touching her back.

8. Grievant rubbed D.J.'s back and shoulders, finishing with his hand just brushing against her buttocks, and called her "Hey, Beautiful."

9. While encouraging M.B. to compete in a track meet, Grievant pushed his hand against her breast.

10. Grievant told K.W. she "had been looking mighty fine" and "if you were old enough, I'd marry you."

11. Grievant kissed J.U. on the cheek for no reason, told her she looked good in her shorts, and touched her leg above the knee.

12. Grievant said "mm, mm, mm" about C.W.'s appearance, and also said "I can look as long as I don't touch."

13. Grievant kissed M.C. on the cheek in the coaches' office for no reason, with no one else present. He also told her she was "looking good" on several occasions and looked good in her gym shorts.

14. Grievant rubbed J.R.'s thigh as he told her she had played a good game.

15. J.B. asked to be removed from Grievant's class after he made comments about how "fine" she looked, and she perceived that he was flirting with her.

16. Grievant massaged T.C.'s leg while she was stretching, for no apparent reason.

17. Charles Black, football and track coach at Charles Town Junior High, never received any reports of Grievant behaving inappropriately around female students.

18. Meredith Polen, Athletic Director, received a complaint from his daughter about an inappropriate remark Grievant made to her.

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 dismissal of a teacher must be based upon one or more of the causes listed in Code § 18A-2-8.

3. The term "immorality," as used 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 (1981).

4. Insubordination is the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Directors, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). To prove insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

5. Respondent proved by a preponderance of the evidence that Grievant's conduct constituted immorality, as contemplated by Code § 18A-2-8.

6. Respondent established by a preponderance of the evidence that Grievant'sconduct was insubordinate, as contemplated by Code § 18A-2-8.

7. Respondent established by the preponderance of the evidence that Grievant violated the Board's sexual harassment policy.

8. It is permissible for a school board to dismiss an employee who violates a county board of education's sexual harassment policy for immorality. Harry v. Marion County Bd. of Educ., No. 24792 (W. Va. July 6, 1998).

9. Grievant's dismissal for immorality, insubordination, and violation of the sexual

harassment policy was not arbitrary and capricious.

Accordingly, this grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Jefferson 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.

Date: October 28, 1998 _____

DENISE MANNING SPATAFORE

Administrative Law Judge

Footnote: 1

The student witnesses represented by counsel were M.R., K.W., M.C., D.J., M.B., J. B., and C.W. Consistent with Grievance Board policy and practice, only the initials of minors will be used, due to the sensitive nature of the allegations in this case.

Footnote: 2

Grievant sent his post-hearing submission to the undersigned on August 28, 1998, due to his lack of understanding that an extension for filing briefs had been granted to both parties, because the level four transcript had been delayed. Because Respondent had the benefit of reviewing Grievant's submission prior to submitting its arguments, Grievant was informed by the undersigned, by correspondence dated August 31, 1998, that he could respond to Respondent's brief, if he indicated a desire to do so. Grievant did not respond, so this matter became mature upon receipt of Respondent's brief.

Footnote: 3

The entire transcript, attachments and exhibits, from the Board's hearing on the charges against Grievant were admitted into the record at level four as Joint Exhibit 1.

Footnote: 4

Although Grievant was an assistant coach for the boys' track team, he also worked with the girls' team, because the girls and boys trained together.

Footnote: 5

Grievant did not testify at either the pre-termination Board hearing or at level four, even after being admonished by the undersigned for "testifying" during his cross examination of witnesses and being instructed that he could testify later during the hearing. Level IV Tr. at 50.

Footnote: 6

Respondent also offered testimony from M.R.'s mother regarding how upsetting the kissing incident was to her, and discussing how M.R. is still being treated by a therapistbecause of it.

Footnote: 7

This is true of the majority of the information contained in Grievant's submission, which includes numerous statements about events which were not addressed during the hearing, and allegations about particular testimony and witnesses which were not brought up during the hearing, and are therefore inadmissible.

Footnote: 8

Grievant also attacked Principal Keeler professionally and personally in his arguments, but these allegations are not supported by any evidence offered at hearing, so they are inadmissible for consideration.