HILDA BEHELER,

Grievant,

v. **Docket No. 98-23-276**

LOGAN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Hilda Beheler (Grievant) filed this grievance pursuant to W. Va. Code §§ 18-29-1, et seq., alleging wrongful termination by Respondent Logan County Board of Education (LCBE). The grievance was initiated at Level II sometime (See footnote 1) before July 9, 1998, when a Level II hearing was conducted by LCBE. The grievance was denied by LCBE Superintendent Ray Woolsey on July 16, 1998. Grievant waived Level III, as authorized by W. Va. Code § 18-29-4(c), and appealed to Level IV on July 30, 1998. A Level IV evidentiary hearing was conducted in this Grievance Board's office in Charleston, West Virginia, on September 30, 1998. (See footnote 2) Grievant made an oral closing argument, and this matter became mature for decision on October 27, 1998, upon receipt of LCBE's written argument.

BACKGROUND

LCBE employed Grievant as a substitute classroom teacher for the 1997-98 school year. LCBE's Superintendent, Ray Woolsey, did not recommend renewal of Grievant's substitute contract for the 1998-99 school year, and her contract as a substitute expired at the end of the school year. Grievant contests the Superintendent's decision, alleging that he refused to renew her contract in retaliation for her “whistle-blowing” activities during the 1997-98 school year. Superintendent Woolsey stated his decision was based on a number of minor incidents involving Grievant which, when considered cumulatively, caused him to determine it would not be in the best interests of the students of Logan County to employ Grievant as a substitute. LCBE disputes whether Grievant engaged in any proper

whistle-blowing activity, further asserting that the same decision would have been made without regard to any such proper activity by Grievant.

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

Based upon a preponderance of the credible evidence contained in the record established at Levels II and IV, the following Findings of Fact pertinent to resolution of this grievance have been determined.

FINDINGS OF FACT

1. Grievant was employed by LCBE as a substitute classroom teacher for the 1997-98 school year. She had been employed in that capacity under separate annual contracts since 1991.

2. Grievant worked 104 days during the 1997-98 school year, including an assignment to Logan Middle School (LMS) teaching a fifth grade language arts class from approximately October 3, 1997 to January 25, 1998.

3. Ernestine Sutherland is Principal of LMS. On October 3,1997, Grievant went to LMS to pick up her daughter who was staying after school with Ms. Sutherland. Grievant had been drinking wine with dinner that evening. When she went in the school, an LCBE board meeting was concluding, and Grievant walked by a board member who smelled alcohol on her breath. No disciplinary action was taken following this encounter.

4. In December 1997, Grievant entered the classroom of another substitute teacher, Hank Bowen, and called him “a piece of shit” in front of his class. Grievant acknowledges that this was unprofessional. She was not disciplined for the incident.

5. On December 16, 1997, Grievant reported an incident to Ms. Sutherland involving an allegation that another substitute teacher struck a child, T.B. (See footnote 3) Grievant was not present during the incident but observed red welt marks on the student. 6. On December 17, 1997, at Grievant's request, LMS Vice Principal Jack Bailey placed a video camera in Grievant's classroom for the purpose of deterring the students' unacceptable behavior in the classroom. Ordinarily, LCBE policy prohibits filming students in the classroom without parental consent.

7. That same day, LCBE Assistant Superintendent Brenda Skibo was investigating the prior day's incident. Grievant was aware that the child's parents were in the school, and became concerned when she was not called as a witness by Ms. Skibo.

8. Grievant determined that the investigation into the incident was not being handled properly, and began questioning the students in her classroom about the previous day's incident, as well as other allegations against the same substitute teacher, recording her questions and the children's responses on videotape. See G Ex F at L IV.

9. Grievant took the videotape home with her and did not reveal the contents or existence of the video to LCBE administrators or proper state authorities until April 1998. At that time, she called Superintendent Woolsey, complaining that LCBE had not terminated the substitute teacher in question.

10. Grievant subsequently provided the West Virginia Department of Health & Human Resources (DHHR) with a copy of the video. There was substantial local controversy over the allegations made in the video. See G Exs D & E.

11. At some point after Grievant received notice that her contract would not be renewed, DHHR completed its investigation into the allegations, and declined to pursue any action against the substitute teacher. Likewise, the Logan County Prosecuting Attorney had not pursued any criminal charges as of the date of the Level IV hearing. 11. At a date not specified during the 1997-98 school year, Grievant was arrested and charged with obstructing a police officer, resisting arrest, disorderly conduct, profanity, public intoxication, and refusal to submit to finger printing. Grievant acknowledges that she kicked a police officer while under arrest, and was thereupon maced by the officer. The charges against Grievant were later dismissed.

12. In a separate, subsequent incident, on April 4, 1998, Grievant was arrested for disorderly conduct, harassment and obstructing an officer. At the time of the Level IV hearing in this matter, those charges were still pending.

13. On January 15, 1998, LMS Assistant Principal Johnny Queen issued a Teacher Evaluation for Grievant's performance during the first semester of the 1997-98 school year. Grievant was rated “satisfactory” in all categories. See G Ex C at L IV.

14. Superintendent Woolsey determined that Grievant's contract as a substitute teacher would not be renewed for the 1998-99 school year. Assistant Superintendent Skibo sent written notice to

Grievant advising of this decision. (See footnote 4)

15. In making his decision, Superintendent Woolsey took into consideration the name-calling incident in Mr. Bowen's classroom, the incident where Grievant was allegedly “intoxicated” at a school board meeting, Grievant's videotaping of minor school children in the classroom without parental approval, and her two arrests by state authorities.

DISCUSSION

In the circumstances presented by this grievance, LCBE did not violate any applicable statute, policy, rule, regulation, or written agreement in its treatment of Grievant. If LCBE had terminated Grievant's contract as a substitute employee prior to the end of the 1997-98 school year, the county board would have been required to establish proper cause for such action. See Pennington v. Mingo County Bd. of Educ., Docket No. 92-29- 061 (June 16, 1992). In this case, LCBE simply exercised its discretion under W. Va. Code § 18A-2-8a not to renew Grievant's probationary contract for the 1998-99 school year. See Miller v. Bd. of Educ., 190 W. Va. 153, 437 S.E.2d 591 (1993); Underwood v. Marion County Bd. of Educ., Docket No. 94-24-535 (Jan. 30, 1995).

Ordinarily, county boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Syl. Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). Because W. Va. Code § 18A-2-8a gives broad discretion to the county board when determining whether or not to rehire a probationary employee, Grievant must establish that LCBE's decision in this instance was arbitrary and capricious. See Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991). Grievant may also claim that the action was taken in violation of some substantial public policy, which she has done through her allegation that she is the victim of retribution for her actions as a “whistle blower.” See, e.g., Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978). When reviewing a county board's decision under this “arbitrary and capricious” standard, the scope of this Grievance Board's review is relatively narrow, and is normally limited to determining whether relevant factors were considered in reaching the decision and whether there has been a clear error of judgment. See Bowman Transp. v. Arkansas- Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982); Gruen v. Bd. of Directors, Docket No. 95-BOD-281 (Mar. 6, 1997); Hill v. Kanawha County Bd. of Educ., Docket No. 94-20-537 (Mar. 22,

1995). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra, at 286.

In support of her contention that LCBE's decision was arbitrary and capricious, Grievant presented a number of mitigating and extenuating factors, while also refuting some of LCBE's allegations. One of these mitigating factors is Grievant's prior satisfactory performance as a classroom teacher. Further, a preponderance of the evidence indicates Grievant was not intoxicated, although she had been drinking, when she inadvertently walked in on the conclusion of a school board meeting at LMS. Likewise, a preponderance of the evidence indicates Grievant was not informed that it was against LCBE policy to videotape students in her classroom. (See footnote 5)

However, Grievant's claim that she is an innocent “whistle-blower” being punished for properly videotaping her students' complaints of alleged misconduct by anothersubstitute teacher is only partially supported by the facts. At the time of the videotaping, Grievant had already reported the incident involving T.B. to Principal Sutherland and Vice Principal Bailey. While that incident was under investigation, Grievant did not volunteer the additional information she obtained from her students regarding related allegations. Had LCBE been provided that information while considering appropriate action to take in regard to the T.B. incident, a different result might have been reached.

Instead, Grievant waited several months following LCBE's investigation of the T.B. incident, apparently (as suggested by her testimony) because she was concerned about the legality of videotaping her students, before bringing these additional charges to anyone's attention. Even then, she did not provide LCBE a reasonable opportunity to review the videotape and take appropriate action. She merely called Superintendent Woolsey, made some ambiguous comments which could have been either complaints or threats, and, shortly thereafter, turned the video over to officials of the West Virginia Department of Health and Human Resources.

On this basis, Grievant alleges that she was not rehired as a substitute teacher in retaliation for her “whistle-blowing” over the conduct of another substitute employee, who happened to be related to one of LCBE's Board members. An employee may qualify for protection as a "whistle-blower" in accordance with this state's “Whistle-blower Law,” W. Va. Code § 6C-1-1, et seq. That statute provides in § 6C-1-3(a) as follows:

> No employer may discharge, threaten or otherwise discriminate or retaliate against an employee by changing the employee's compensation, terms, conditions, location or privileges of employment because the employee, acting on his own volition, or a person acting on behalf of or under the direction of the employee, makes a good faith

> report or is aboutto report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste.

This Grievance Board has jurisdiction to adjudicate an employee's claims of retaliation in violation of the "Whistle-blower Law," although an administrative law judge may not provide those remedies which are reserved by the statute for award through the circuit courts. Coddington v. W. Va. Dep't of Health & Human Resources, Docket Nos. 93- 265/266/267 (May 19, 1994). See Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991). In general, a grievant alleging retaliation in violation of W. Va. Code § 6C-1-3, in order to establish a prima facie case, (See footnote 6) must prove:

> (1) that the employee engaged in activity protected by the statute;
>
> (2) that the employee's employer was aware of the protected activity;
>
> (3) that, thereafter, an adverse employment action was taken by the employer; and
>
> (4) that the adverse action was the result of retaliatory motivation or the action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

Coddington, supra. See Whatley v. Metropolitan Transit Auth., 632 F.2d 1325, 1328 (5th Cir. 1980); Hochstadt v. Worcester Foundation for Experimental Biology, Inc., 425 F.Supp. 318 (D. Mass. 1976), aff'd, 545 F.2d 222 (1st Cir. 1976); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Parker v. W. Va. Dep't ofHealth & Human Resources, Docket No. 91-HHR-282 (Apr. 22, 1992); Graley, supra; Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

If a Grievant establishes a prima facie case of retaliation, the inquiry then shifts toward determining if the employer has shown legitimate, non-retaliatory reasons for its actions. Coddington, supra; Graley, supra. See McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973); Mace v. Pizza Hut, Inc., 180 W. Va. 469, 377 S.E.2d 461 (1989); Frank's Shoe Store, supra; Parker, supra. If the Respondent successfully rebuts the claim of retaliation, Grievant may nonetheless establish by a preponderance of the evidence that the offered reasons are merely pretextual. Graley, supra. See

Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); Sheperdstown Vol. Fire Dep't v. W. Va. Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983).

Grievant ultimately reported “wrongdoing” within the meaning of W. Va. Code § 6C- 1-3(a), when she advised authorities of alleged child abuse. LCBE was undoubtedly aware of her protected activity, and Grievant's notice of non-renewal was sent within a month of Grievant's release of the videotape. Therefore, a prima facie case of retaliation will be inferred. See Coddington, supra.

However, LCBE provided several reasons for its decision not to renew Grievant's probationary contract as a substitute teacher. As a probationary employee Grievant was effectively serving at the will and pleasure of the Superintendent. LCBE's Superintendent rationally determined that Grievant's arrests and use of unsavory language toward another teacher in the presence of impressionable middle school students represented conduct which is inconsistent with a classroom teacher's position as a "role model" who is expectedto set a moral example for her students. See Hurley v. Logan County Bd. of Educ., Docket No. 97-23-394 (Dec. 11, 1997); Kitzmiller v. Harrison County Bd. of Educ., Docket No. 13- 88-189 (Mar. 31, 1989). See generally, Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Adler v. Bd. of Educ., 342 U.S. 485, 493 (1952); Bd. of Educ. v. Wood, 717 S.W.2d 837 (Ky. 1986).

Ultimately, resolution of Grievant's retaliation defense hinges on the employer's intent at the time it took the action being challenged. Grievant acknowledged that the incident where she called another teacher a “piece of shit” in front of his students occurred substantially as LCBE alleged. However, she argues that incident is being used as a pretext for her termination because it was considered by the Assistant Principal at LMS when he gave her a “satisfactory” teaching evaluation, and no disciplinary action was taken by LCBE at the time. Further, Grievant does not dispute LCBE's claims that she was twice arrested on a number of charges, and that she kicked a West Virginia State Trooper during her initial arrest, although the charges were not pursued. Grievant argues that those events, which took place when she was off duty and away from school property, have no bearing on her qualifications to teach. See Golden v. Bd. of Educ., 169 W. Va. 63, 285 S.E.2d 665 (1981).

Considering the evidence and arguments presented by the parties, the undersigned administrative law judge finds that Superintendent Woolsey would have taken the same action without regard to any protected activity by Grievant. See Skaggs v. Elk River Coal Co., 198 W. Va. 51, 479 S.E.2d 561 (1996). His testimony that no one incident, but an accumulation of incidents,

caused him to determine that Grievant's continued employmentwas not in the best interests of LCBE's students, was credible. Moreover, it is consistent with the approach other school officials charged with the education and welfare of students would reasonably be expected to take in such circumstances. While Grievant may have ultimately done the right thing by reporting her students' allegations of abuse to the proper authorities, this protected conduct was not the motivating factor in the decision not to renew her probationary contract. Moreover, even if its was a factor in the decision, LCBE established by a preponderance of the evidence that the same action would have been taken in regard to any substitute teacher who engaged in similar behavior. See Skaggs, supra.

While another individual might have determined that Grievant's otherwise satisfactory teaching performance offset her misconduct, the arbitrary and capricious standard of review does not permit an administrative law judge to simply substitute his judgment for that of the school board. See Bradley v. Bd. of Directors, Docket No. 96-BOD- 030 (Jan. 28, 1997); Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993). See generally, Bedford County Memorial Hosp. v. Health & Human Serv., 769 F.2d 1017 (4th Cir. 1985); Staton v. Wyoming County Bd. of Educ., 184 W. Va. 369, 400 S.E.2d 613 (1990). Likewise, Grievant did not establish that the reasons given by LCBE for the decision not to renew her probationary contract were merely pretexts for retaliation. See Gruen, supra.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, the grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious.

Syl. Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

3. Grievant's contract as a substitute teacher expired at the end of the 1997-98 school year. See Underwood v. Marion County Bd. of Educ., Docket No. 94-24-535 (Jan. 30, 1995); Ramey v. Lincoln County Bd. of Educ., Docket No. 94-02-002 (June 3, 1994).

4. An allegation of unlawful retaliation under this state's Whistle-blower Law applicable to public employees, W. Va. Code §§ 6C-1-1, et seq., is a matter properly within the jurisdiction of the West Virginia Education and State Employees Grievance Board. See W. Va. Code § 18-29-2(a); Coddington v. W. Va. Dep't of Health & Human Resources, Docket Nos. 93-265/266/267 (May 19, 1994); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

5. A grievant alleging retaliation in violation of W. Va. Code § 6C-1-3, in order to establish a prima facie case, must prove: (1) that the employee engaged in activity protected by the statute;

(2) that the employee's employer was aware of the protected activity;

(3) that, thereafter, an adverse employment action was taken by the employer; and

(4) that the adverse action was the result of retaliatory motivation or the action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

Coddington, supra. See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Graley, supra.

6. Although Grievant made out a prima facie case of retaliation for whistle blowing in regard to LCBE's action in deciding not to renew her probationary substitute teaching contract for the 1998-99 school year, LCBE established legitimate, non- retaliatory, non-pretextual reasons for these actions, so as to refute Grievant's claim of retaliation. See Skaggs v. Elk Run Coal Co., 198 W. Va. 51, 479 S.E.2d 561 (1996); Coddington, supra; Graley, supra; See also Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

7. Respondent Logan County Board of Education did not abuse its discretion, or act in an arbitrary and capricious manner, when Superintendent Woolsey decided not to recommend renewal of Grievant's contract as a probationary substitute school teacher.

Accordingly, this grievance is **DENIED**.

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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: December 11, 1998

Footnote: 1

The grievance form was not dated until the grievance was appealed to Level IV.

Footnote: 2

LCBE participated in that hearing via telephone. Grievant appeared pro se. LCBE was represented by its counsel, Brian R. Abraham.

Footnote: 3

Any minor students involved in this matter will be identified only by their initials, consistent with this Board's practice respecting the privacy of individuals in such circumstances. See, e.g., Hurley v. Logan County Bd. of Educ., Docket No. 97-23-394 (Dec. 11, 1997); Edwards v. McDowell County Bd. of Educ., Docket No. 93-33-118 (July 13, 1994); Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994).

Footnote: 4

It does not appear Grievant exercised her right under W. Va. Code § 18A-2-8a to request a statement of reasons from Superintendent Woolsey for his decision not to rehire her. Instead, Grievant initiated this grievance and heard Superintendent Woolsey's reasons stated for the first time at the Level II hearing in this matter. LCBE did not provide a copy of this notice for the record, as agreed during the Level IV hearing.

Footnote: 5

The videotape provided at Level IV recorded an adult male voice speaking to Grievant and exiting her classroom, just after the camera began recording. These circumstances indicate that this person was Vice Principal Bailey, who denied having provided Grievant with a videotape for the camera.

Footnote: 6

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th Ed. 1968).