DARRELL ATKINS,

Grievant,

v. **Docket No. 99-20-360**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Darrell Atkins, was employed as a teacher at Hayes Junior High School ("HJHS"), with the Kanawha County Board of Education ("KCBOE"). His Statement of Grievance reads:

> **Grievant was terminated from Kanawha County School[s]. He alleges that the school board's action was arbitrary and capricious and not based on factual information. RELIEF SOUGHT: Grievant is asking to be reinstated to his teaching position at Hayes Jr. High and asks for all back pay and benefits including coaching wages lost during track season.**

A pre-termination hearing was held on June 10, 1999, and by letter dated August 10, 1999, Superintendent Ronald Duerring advised Grievant that based on the findings in the pre-termination hearing he would recommend his termination to the board of education. On August 19, 1999, the Kanawha County Board of Education voted to terminate Grievant's employment, and Grievant was notified of this action by letter dated August 20, 1999. This grievance was filed directly to Level IV on August 26, 1999. A Level IV hearing was held on October 6, 1999. The parties agreed to admit the pre-termination hearing record in its entirety to be a portion of the record in this proceeding. This case became mature for decision on November 15, 1999, after receipt of the parties' proposed findings of fact and conclusions of law. **(See footnote 1)**

Issues and Arguments

Respondent argued the charges are proven, and with Grievant's history of inappropriate

remarks and actions, termination for sexual harassment was the correct course of action. Grievant denied all the charges, and stated he never said these remarks to the students in question, nor did he ever touch these students. Grievant also argued that since he was offered a settlement agreement and did not take it, he was terminated or punished, for this refusal. (See footnote 2)

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed as a teacher by the KCBOE for approximately 24 years. He has taught and been the girls' track coach at HJHS for approximately 9 years. He teaches Physical Education, Math, and Life Sports. 2. On or about March 6, 1992, Grievant was called into the office by then principal Samuel Lee to discuss his inappropriate actions toward eight female students. These students voiced multiple complaints about Grievant as follows: (See footnote 3)

> **"Mr. Atkins likes to touch me."**
>
> **"Mr. Atkins often stands at the entrance to the dressing room where he probably could see students dressing and yells for them to come out."**
>
> **"He has rubbed my back."**
>
> **"He has rubbed my stomach."**
>
> **"He attempts to hold my hands."**
>
> **"He asked me, 'Do you love me ' ".**
>
> **"He has said to me when I caught the ball one time in class that, 'You have great hands as someone said you did' ".**
>
> **"He is constantly hugging or trying to hug me."**
>
> **"In P E he has touched my legs."**
>
> **"Mr. Atkins uses profanity in class, 'shit', 'hell', damn', and 'get the hell out of here' ".**

Resp. Ex. No. 5, at the pre-termination hearing.

4. These students also indicated they did not run track the past year because of

Grievant's behavior.

5. Each of the above-stated concerns were discussed with Grievant, and Principal Lee informed Grievant "in no uncertain terms but pointedly and directly, that these actions could never occur again while I was principal at Hayes Junior High School." Id.

6. Principal Lee placed Grievant on notice that he would recommend his immediate suspension if there were further problems. Principal Lee found Grievant veryreceptive to his directions, and Grievant "promised that he would never again show his affection and stated that he was an affectionate person." Id.

7. This warning was not grieved.

8. On April 26, 1996, Principal Carla Williamson wrote Grievant to verify a conference that took place in her office on April 25, 1996.

9. At this conference, Grievant was informed of student allegations of preferential treatment toward females and inappropriate comments made toward female students. In this conference, Principal Williamson recommended Grievant:

> **(1) not get involved in [students] quarrels . . .;**
>
> **(2) refrain from making any comments about their bodies or their dress;**
>
> **(3) refrain from hugging, or placing your arms on the shoulders of female students, even in a fatherly manner.**

10. Principal Williamson indicated in the April 26, 1996 letter, her goal was to prevent embarrassing situations and to take preventive measures before problems arose. She noted if there were further problems she would be "forced to conduct an investigation in cooperation with the Department of Human Resources."

11. Grievant did not grieve this conference or the subsequent letter. (See footnote 4)

12. In January 1997, (See footnote 5) Principal Williamson received a complaint from three students about Grievant's inappropriate behavior with female students. An investigationwas begun after the sexual harassment complaints were filled out. One of the mothers, Mrs. RC, stated she did not wish a formal investigation, even though she believed the comments were inappropriate, but she thought just a conference would cure the problem. (See footnote 6) This situation was discussed with Grievant, but there was no memo to

commemorate the event.

13. Grievant did not grieve this discussion.

14. On May 5, 1997, the mother referred to in Finding of Fact 12, Mrs. RC, wrote to complain about Grievant's behavior toward her daughter, and stated Grievant had been vindictive toward her because of the complaint. She noted her daughter, who had an A in Grievant's Math class the first semester, received a D the second semester after she had made the complaint. This mother again noted the touching problem. Grievant was called in to discuss this problem, and he requested to continue the discussion when his representative was present. This request was granted, and Grievant again met with Principal Williamson and his representative a little while later. At that conference, Grievant agreed he was going to have to be careful and not touch any of the girls, and to watch what he said to them. Principal Williamson was satisfied with Grievant's response, and did not take the issue further. (Test. Principal Williamson, Pre-termination Hearing at 43).

15. Grievant did not grieve this conference, which can be viewed as a verbal warning.

16. During the Fall semester of 1998, CH was assigned as a student in Grievant's Life Sports class. 17. Sometime in late September 1998, Grievant overheard CH's friends compliment her on her new warm-up suit. Grievant's response was, "I like a lot of other things on her too, but if I said that I'd get fired."

18. While CH's attendance had not been stellar prior to this comment, after it was made, she frequently refused to "dress" for Grievant's class. She gave Grievant a series of excuses. By the end of the first six weeks, around the first of October, CH's grade had dropped drastically. Grievant reported CH's failure to dress, and CH received a one day suspension.

19. For a while after the suspension, CH dressed with more frequency, but by the end of the semester, she was failing Life Sports because of her failure to dress. **(See footnote 7)**

20. CH's mother was concerned about this failure and closely questioned her about the cause. CH told her about the comment, and the next day, December 3, 1998, CH, CH's mother, and CH's step-mother went to the school to complain. They also stated another student would be in to complain about Grievant's behavior later that same day.

21. CH was also uncomfortable because Grievant frequently touched or patted her shoulder, about every time she was near him.

22. CH had recently asked one of her friends, ST, if Grievant had ever said anything to her that she did not like when she was at track practice, and ST said he had.

23. ST also complained about Grievant's behavior on December 3, 1998. 24. Grievant swatted ST on the bottom and said good job during track practice. He also gave her frequent compliments about her dress, and one time slid his hand from her shoulder to just below her waist.

25. After the complaints were made, Dawn Mahon, the Assistant Attendance Director, was assigned to investigate the situation. These type of investigations are frequently assigned to her as a portion of her job duties.

26. Ms. Mahon interviewed students ST, CH, JE, AJ, and TS. TS, a male, stated he had heard the last part of a statement made by Grievant about CH. He reported Grievant as saying, "Something about if he finished saying it, he would get fired." (Trans., Pre-termination hearing at 28). **(See footnote 8)**

27. Ms. Mahon also interviewed another girl, AJ, who ST stated might have some information. AJ stated Grievant always puts his hands on her back, and it sometimes made her fell uncomfortable. She did not know if Grievant was "being nice or what." **(See footnote 9)** **Id. at 30. She noted she frequently saw Grievant touching other people on "the shoulders or something." Id. at 31.**

28. Ms. Mahon also interviewed another student, JE, who indicated "I don't see nothing. I mind my own business." Id.

29. Ms. Mahon did not interview Grievant. 30. During cross-examination at the Level IV hearing, the following exchange took place between Grievant and KCBOE's attorney:

Mr. Withrow: "Have ever heard anyone describe you as a touchy-feely person?"

Grievant: "Oh, yes. I'm a, I'm a . . .

Mr. Withrow: "How would describe . . .

Grievant: ". . . You know, just as a friendly way."

Mr. Withrow: "And are you touchy-feely around students?"

Grievant: "At times, you know, the ones who, who you know feel comfortable, but I try to avoid that."

Mr. Withrow: "How do you determine which students feel comfortable about you being touchy-feely and which ones don't?"

Grievant: "Why, I don't know . . . you can tell by their just by their manner."

31. Another student at HJHS, CN, told two teachers, Judy Wagoner and Toni Sayre, that ST had made up the story to get Grievant in trouble. CN gave this information to these teachers in early February and repeated it in late April. These teachers did not tell anyone about this information until they heard Grievant had been fired, and then they told Grievant during the Summer of 1999. (See footnote 10) CN did not say anything about CH when she talked to these teachers.

32. Grievant was evaluated by psychologist, Dr. Jeffery Harlow, at the request of KCBOE. This evaluation was done on two separate days and consisted of diagnostictesting, a complete history, a mental status exam, and behavioral observations. Dr. Harlow found Grievant's

> **primary personality traits are that of narcissism and hysteria. It is likely that he is extremely self-centered, expects and constantly seeks the attention of others, is self-serving in relationships, has poor judgement, and doesn't believe that social mores and limitations apply to him. Mr. Atkins tends to rationalize his inappropriate behavior, assumes that others know that he is innocent, and quickly (sic) to project blame on others. Results indicate that although he is charming, he tends to use others and maintains shallow relationships. He is overly concerned with his health and may react in an intensely emotional way to stressors. . . .**

33. In the Summary portion of this evaluation Dr. Harlow stated:

> **[Grievant] is a self-centered, narcissistic person with poor judgement who finds it very difficult to accept responsibility for his behavior and to control his behavior. He lacks insight and is very likely to blame others. He had great difficulty learning from his mistakes.**
>
> **Mr. Atkins' responses to questions about what he had learned from this current experience and the past fit the above-described pattern. He said he would only touch students with whom he was friends with their parents. He said the allegations had been proven false, that [it] was due to the "environment at Hayes Junior High" and its history, and the school board was wasting taxpayer's money in this matter. He continued, "The system is unfair and you can't trust anyone." When he returns to teaching, he plans on, "Keeping my hands in my pockets and keeping my comments to myself."**

34. Dr. Harlow's recommendation stated the following:

> **Since it is difficult for Mr. Atkins to learn from his experiences, it is recommended that before returning to work that he sign a contract in which he agrees, in writing, not to touch a female student or make sexually suggestive comments to them. Given Mr. Atkins' history at Hayes Junior High School, if it is administratively possible, it is recommended that he be assigned to another school. Finally, it is recommended that he attend psychotherapy sessions once every two weeks for the next six months with a board approved female psychotherapist.**

Discussion

___In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for

knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.; See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

I. Credibility

The first issue to address is credibility. Although some facts pertinent to this matter are not in dispute, the description of the specific events which generated this disciplinary action presented by Respondent's witnesses was diametrically opposed to Grievant'stestimony regarding the same events. An Administrative Law Judge is charged with assessing the credibility of the witnesses that appear before her. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). In these circumstances, where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Maxey v. McDowell County Bd. of Educ., Docket No. 97-33-208 (Apr. 30, 1998); Hurley v. Logan County Bd. of Educ., Docket No. 97-23-394 (Dec. 11, 1997). See Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR-066 (May 12, 1995). See also Harper v. Dep't of the Navy, 33 M.S.P.R. 490 (1987). “The fact that [some of] this testimony is offered in written form does not alter this responsibility.” Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996).

The United States Merit Systems Protection Board Handbook (“MSPB Handbook”) is helpful in setting out factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984). Some factors to consider in assessing a witness's testimony are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Id.

Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id. The student witnesses were capable of perceiving and communicating, and their accounts were plausible and consistent with their prior statements when they filed their complaints, and when they talked with Ms. Mahon. There was no demonstration of bias. The undersigned Administrative Law Judge had an opportunity to observe these witnesses, and found no problem with their demeanor. There was no discussion of the witnesses's honesty or lack thereof. These teenagers were clear about what they saw and did not see, and what they did and did not remember. They were clearly uncomfortable in the hearing setting, and with the topic of discussion. However, they answered the questions clearly. The undersigned Administrative Law Judge finds their testimony to be credible.

Grievant testified in his own behalf. He denied he had ever touched these students or said anything to them that was not proper. He did testify that he frequently complimented people on their dress, and that he did touch students who felt comfortable with being touched. The undersigned Administrative Law Judge finds Grievant's testimony to be less than credible. He admits to continuing to touch students after being given multiple warnings to stop this behavior, but then says he did not touch these two teenagers. He states he only touches students who are comfortable with his behavior, but is unclear how he is able to discern who is comfortable, and who is not. He was evasive about the prior conferences, and apparently has a poor memory about the details and directions he was given in these conferences, and the promises he made.

Dr. Harlow's report indicates Grievant lacks insight into his behavior, does not learn from past mistakes, and tends to blame others. His testimony at hearing was compatiblewith these findings. Grievant's testimony was self-serving, his memory was poor on prior warnings and their meanings, and his attitude was that he has never really done anything wrong. His testimony is found not to be believable.

II. Hearsay

The testimony of several witnesses is obviously hearsay, but relevant hearsay is admissible in administrative hearings. Gunnells v. Logan County Bd. of Educ., Docket No. 97-

23-055 (Dec. 9, 1997). See W. Va. Code §18-29-6. The key question is whether these statements are credible, and what weight, if any, to give this testimony.

In Borninkhof v. Department of Justice, 5 MSBP 150 (1981), the Merit Systems Protection Board identified several factors that affect the weight hearsay evidence should be accorded. These factors are: 1) the availability of persons with first hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. Id.; Sinsel v. Harrision County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996); Perdue, supra; Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't, Docket No. 90-8-115 (June 8, 1990). The testimony of AJ and TS, as reported in Ms. Mahon's investigation, can be afforded some weight as it corroborates the testimony of other witnesses and a pattern of behavior by Grievant. It is further noted that TS had moved to Ohio and could not be summoned by subpoena.

The hearsay testimony of the two teachers is more troubling in that it constitutes double hearsay, and was not reported until after Grievant's termination and never reported to anyone in authority who could "check out" the information. Accordingly, while not finding the teachers to be untruthful, the undersigned Administrative Law Judge finds this testimony can be afforded little weight, given the circumstances under which the testimony was received. Additionally, no reasons were given for Grievant not calling CN and presenting her testimony at the Level IV hearing.

III. Merits of the case

W. Va. Code §18A-2-8 identifies the types of action that can result in disciplinary action and provides, in pertinent part:

> **Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo**

contendere to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article.

The next issue to decide is whether Grievant's behavior substantiates the charges against him. The undersigned Administrative Law Judge finds the behavior of Grievant can be viewed under the following charges of W. Va. Code § 18A-2-8: immorality and insubordination.

A. Immorality

The term "immorality" in W. Va. 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 acceptable sexual behavior." Golden v. Bd. of Educ., 169 W. Va. 63, 285 S.E.2d 665 (1981). Conduct which constitutes prohibited sexual harassment is included within the proscription against immorality in W. Va. Code § 18A-2-8. Harry v. Marion County Bd. of Educ., 203 W.Va. 64, 506 S.E.2d 319 (1998). Further, "[m]isconduct by a school employee which can be characterized as sexual harassment can constitute a basis for the termination of the offending employee's employment." Id. at Syl. Pt. 2.

At the time of the alleged incidents, KCBOE had adopted an Administrative Regulation which explicitly prohibited sexual harassment. (Resp. Exh. No. 1 - Attachment, Pre-termination Hearing). This Regulation indicated sexual harassment is prohibited, and included unwelcome touching and inappropriate comments about one's body. Discipline for these types of sexual harassment may include reprimand, suspension, or termination.

Accordingly, the undersigned Administrative Law Judge is persuaded that the events described by ST and CH accurately portray Grievant's conduct. The conduct and comments described unquestionably represent behavior which a reasonable teenager would find offensive or embarrassing, and which would tend to interfere with their work, studies, or comfort level in the school setting. Bradley v. Cabell County Bd. of Educ., Docket No. 99-06-150 (Sept. 9, 1999). See Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993); Laneheart v. Logan County Bd. of Educ., Docket No. 97-23-088 (June 13, 1997). As previously discussed, conduct which involves prohibited sexual harassment also constitutes immorality as defined under W. Va. Code § 18A-2-8. Willis v. Jefferson County Bd. of Educ., Docket No. 96-19-230

(Oct. 28, 1998). See Harry, supra. Such conduct is prohibited by multiple provisions in KCBOE's Sexual Harassment Regulation. Further, Grievant's conduct was shown to be deliberate and intentional, not inadvertent, accidental, or resulting from a simple misunderstanding. See Bradley, supra; Burns v. McGregor Elec. Indus., 955 F.2d 559 (8th Cir. 1992); Wilson v. Wayne County, 856 F. Supp. 1254 (M.D. Tenn. 1994). Additionally, the conduct Grievant exhibited in this grievance was the same conduct he had previously been directed to cease. KCBOE has demonstrated by a preponderance of the credible evidence that Grievant engaged in the acts charged, and which led to his termination. KCBOE has also proven this conduct constitutes sexual harassment and immorality. Harry, supra.

B. Insubordination

One of the charges against Grievant is insubordination. Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Directors/So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ, Docket No. 94-01-394 (Jan 31, 1995). (Cf. Rogliano v. Fayette County Bd.of Educ., Docket No. 94-10-164 (Oct. 25, 1994), where it was determined that "Grievant was given ample opportunity and notice that disciplinary action would be taken against him . . . ."). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dep't, Docket No. 90-H-128 (Aug. 8, 1990).

Grievant knew what type of behavior was expected of him in regard to his interactions with the students in his charge. The letters, written reprimands, and counseling sessions he received clearly notified Grievant what types of actions were inappropriate and would not be allowed. Grievant's decision to disregard the explicit directions given to him by these documents and conferences constitutes insubordination. Additionally, Grievant was on notice that continued violations of the policies would result in disciplinary action, because

Grievant's prior principal, as well as Principal Williamson, had informed Grievant that such behavior was unacceptable. Thus, KCBOE has established Grievant knowingly violated policies and his supervisor's directions and was insubordinate. KCBOE has also demonstrated that Grievant's conduct was insubordinate because it involved a deliberate violation of KCBOE's Sexual Harassment Regulation.

IV. Mitigation/Severity of Penalty

The argument that Grievant's termination is excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997). Mitigation of a penalty is considered on a case by case basis. Conner v. Barbour County Bd. of Educ., Docket No. 95-01-031 (Sept. 29, 1995); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. Pingley v. Div. of Corrections., Docket No. 95-CORR-252 (July 23, 1996). This Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative LawJudge will not substitute her judgement for that of the employer. Tickett v. Cabell County Bd. of Educ., Docket No. 97-06-233 (Mar. 12, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997).

In assessing the above-cited factors and considering the proper standard of review, the undersigned Administrative Law Judge finds, that while Grievant's evaluations were satisfactory during his tenure with KCBOE, Grievant knew his actions were against KCBOE's Regulation and the expected behavior of a teacher. Grievant was repeatedly warned that continuation of these types of actions would result in disciplinary action, and Respondent demonstrated Grievant continued to violate the Regulation and expectations even after repeated warnings.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. An employer must establish the charges in a disciplinary matter by a preponderance of the evidence. W. Va. Code §18-29-6; Nicholson v. Logan County Bd. of Educ., Docket No. 95-23-129 (Oct. 18, 1995); Froats v. Hancock County Bd. of Educ., Docket No. 91-15-159 (Aug. 15, 1991).

2. A county board of education possesses the authority to terminate an employee, but this authority cannot be exercised in an arbitrary and capricious manner. W. Va. Code §18A-2-8; See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995). 3. It is not necessary for a board of education to identify an employee's offenses by the exact terms utilized in W. Va. Code § 18A-2-8, as long as the required written notice of charges specifically identifies the alleged acts of which the employee is accused.

4. Insubordination and immorality are among the causes listed in W. Va. Code §18A-2-8 for which an education employee may be disciplined. See Rovello v. Lewis County Bd. of Educ., 181 W. Va. 122, 381 S.E.2d 237 (1989); Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975); Woo v. Putnam County Bd. of Educ., Docket No. 93-40-420 (June 2, 1994), aff'd 202 W. Va. 409, 504 S.E.2d 644 (1998); Jones v. Mingo County Bd. of Educ., Docket No. 95-29-151 (Aug. 24, 1995).

5. Immorality connotes conduct which is "not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked, especially, not in conformance with the acceptable standards of proper sexual behavior," as defined in Webster's Dictionary. Golden v. Bd. of Educ., 169 W. Va. 63, 285 S.E.2d 665 (1981). Accord, Rosenburg v. Nicholas County Bd. of Educ., Docket No. 34- 86-125-1 (Aug. 4, 1986).

6. KCBOE properly determined Grievant's behavior constituted acts of immorality under W. Va. Code § 18A-2-8.

7. A county board of education may properly discipline an employee who violates the board's sexual harassment policy, and sexual harassment "may be considered as a species" of immorality . Harry v. Marion County Bd. of Educ., 203 W. Va. 64, 506 S.E.2d 319 (1998); Willis v. Jefferson County Bd. of Educ., Docket No. 96-19-230 (Oct. 28, 1998). 8. "Misconduct by a school employee which can be characterized as sexual harassment can constitute a basis for the termination of the offending employee's employment." Harry, supra.

9. KCBOE has met its burden of proof by a preponderence of the evidence and demonstrated Grievant is guilty of immorality and sexual harassment.

10. Insubordination includes "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Directors/So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989).

11. "Insubordination encompasses more than an explicit order and refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." Nicholson, supra; Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 20, 1988), aff'd 182 W. Va. 294, 387 S.E.2d 529 (1989).

12. In order to establish insubordination, the employer must demonstrate that the employee's failure to comply with a directive 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).

13. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health

Dep't, Docket No. 90-H-128 (Aug. 8, 1990), citing Meads v. Veterans Admin., 36 M.S.P.R. 574 (1988); Daniel v. U.S. Postal Serv., 16 M.S.P.R. 486 (1983); Davis v. Smithsonian Inst., 13 M.S.P.R. 77 (1983). 14. KCBOE properly determined Grievant's conduct which directly contravened multiple provisions in its policy prohibiting sexual harassment constituted insubordination under W. Va. Code § 18A-2-8. Id.

15. An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. Conner v. Barbour County Bd. of Educ., Docket No. 94- 01-394 (Jan. 31, 1995). See Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

16. When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997).

17. It is proper to review an employee's past performance evaluations, Improvement Plans, and disciplinary actions and warning letters, as well as the reoccurrence or continuation of identified problems when deciding whether the disciplinary action is appropriate. This review can establish an employee was on notice of his inappropriate behavior, and that a continuing pattern of behavior is present which hasproven not correctable. Jordan v. Mason County Bd. of Educ., Docket No. 99-26-080 (July 6, 1999). See Williams v. Cabell County Bd. of Educ., Docket No. 95-06-325 (Oct. 31, 1996).

18. Given Grievant was clearly informed of the applicable policies, and was repeatedly placed on notice that his behaviors were unacceptable, the penalty is not disproportionate or excessive nor is the penalty arbitrary and capricious. See Lanehart, supra; Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994); Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991).

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County. Any 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

_____

JANIS I. REYNOLDS

Administrative Law Judge

Dated: January 14, 2000

Footnote: 1

Grievant was represented by Rosemary Jenkins and Steve Angel from the West Virginia Federation of Teachers, and Respondent was represented by its attorney, JamesWithrow.

Footnote: 2

Respondent did not object at hearing the first time Grievant discussed this issue; however Respondent did object the second time stating Grievant's representative was misrepresenting what actually happened. Evidence of prior settlement discussions is usually not considered in subsequent legal proceedings, as the reasons for the offers and refusals is not pertinent to the decision-making process involved in administrative proceedings. Accordingly, the undersigned Administrative Law Judge will not consider this information. See Rule v. Dep't of Health and Human Resources, Docket No. 99-HHR-130 (Oct. 25,1999).

Footnote: 3

Grievant does not remember if he got a copy of the memo which outlines this meeting even though it was addressed to him. He did remember the conference, but did not remember all the specific comments. Principal Lee no longer works for KCBOE and did not testify during these proceedings.

Footnote: 4

Grievant agrees this conference occurred, but says the issue was later resolved. Grievant has apparently

confused the two incidents that occurred in 1996 and 1997. He also appears to have forgotten that the mother who complained in January 1997, called back in May 1997 to complain that Grievant had penalized her daughter for her prior complaint by giving her a very low grade in his math class during the second semester.

Footnote: 5

Although the parties stated the date as 1996, a detailed reading of the record indicates the parties must mean January 1997, as they refer to the January complaint as following the April 1996 complaint.

Footnote: 6

The type of behavior Mrs. RC complained about was not specified at hearing.

Footnote: 7

Grievant contacted the parents of some students who were have difficulty in his class. He did not contact CH's parents.

Footnote: 8

TS was not called by either party to testify at the Level IV hearing. He has moved to Ohio, and thus, he is outside the subpoena powers of the Grievance Board.

Footnote: 9

AJ was not called to testify, and did not fill out a complaint form.

Footnote: 10

These teachers believed Grievant was off due to illness.