SYBLE WILKERSON,

Grievant,

v. **Docket No. 99-22-420**

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

On October 6, 1999, Syble Wilkerson (Grievant) submitted this grievance directly to Level IV, in accordance with W. Va. Code § 18A-2-8, challenging her suspension by Respondent Lincoln Board of Education (LCBE). On December 2 and 20, 1999, a Level IV hearing was conducted in this Grievance Board's office in Charleston, West Virginia.[1] At the conclusion of that hearing, the parties agreed on a briefing schedule, and this matter became mature for decision on January 27, 2000, upon receipt of the parties' written post-hearing arguments.[2]

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[1]Grievant was represented by counsel, John Roush, of the West Virginia School Service Personnel Association. LCBE was likewise represented by counsel, James W. Gabehart.

[2]On March 20, 2000, during a post-hearing telephone conference, counsel for the parties stipulated to accuracy, but not relevancy, of certain facts to be derived from the testimony of former LCBE Superintendent Rick Powell on December 20, 1999. It was agreed that the stipulation would replace any transcript from the second day of hearing, as the recording of that testimony could not be located by the Grievance Board.

BACKGROUND

Grievant is employed by LCBE as a special education aide assigned to Griffithsville Elementary School (GES). On September 14, 1999, LCBE Superintendent Peggy Adkins notified Grievant she was being suspended with pay for allegedly slapping a student assigned to her classroom on September 13, 1999. The notice further indicated that an investigation into this allegation would be conducted by Stephen Priestley, Principal of GES, and Doug Smith, LCBE's Special Education Director, and a report completed within 10 business days. R Ex 2.

An investigation was conducted pursuant to Superintendent Adkins' directions, and a report submitted to Superintendent Adkins on September 23, 1999. R Ex 1. On September 24, 1999, after reviewing that report, Superintendent Adkins issued the following notice to Grievant:

> As you know, by my letter to you dated September 14,1999, you were suspended with pay pending an investigation of the incident of September 13, 1999 wherein you were alleged to have slapped a student in Mrs. Warren's classroom. I have now received a report of the investigation conducted by Special Education Director Doug Smith and Principal Stephen Priestley, a copy of which is enclosed for your review.
>
> In light of the results of the investigation, it appears to be undisputed that you slapped the student in question at least once, an action which can not be tolerated or justified. Under the circumstances, pursuant to the provisions of W. Va. Code 18A-2-7 & 8, you are hereby advised that your suspension with pay is now, effective immediately, a suspension without pay pending a final resolution of this matter. This matter will be brought before the Board of Education at the next regular meeting on October 4, 1999 at 6:00 p.m., at which time the Board will hear the results of the investigation and address the question of further action to be taken regarding this matter. You may appear to respond to the charges which have been made against you. If you have any questions, please do not hesitate to contact me.

R Ex 3.

Grievant appeared before LCBE at a hearing conducted on October 4, 1999, pursuant to the notice from Superintendent Adkins. LCBE voted to ratify the 10-day suspension without pay Grievant had already served, and added an additional 30-day suspension, resulting in a total 40-day suspension without pay. LCBE also directed that Grievant undergo appropriate remedial training. This grievance was filed to challenge that decision.

In disciplinary matters, the employer bears the burden of establishing the charges 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); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). Moreover, the authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975). A preponderance of the evidence is evidence which is 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 proven is more probable than not. It may not be determined by the number of witnesses, but by the greater weight of all evidence presented, which means that such factors as opportunity for knowledge, information possessed, and manner of testifying determines the weight accorded to testimony rather than the greater number of witnesses. See Black's Law Dictionary 1344-45 (4th ed. 1968); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

In accordance with the preponderance of the evidence standard previously discussed, the following pertinent facts were established in this matter.

FINDINGS OF FACT

1. Grievant is employed by the Lincoln County Board of Education (LCBE) as a supervisory special education aide assigned to Griffithsville Elementary School (GES).

2. Stephen Priestley is Principal at GES.

3. Grievant is assigned to assist Carol Warren, a special education teacher who teaches students with sever and profound handicaps in a self-contained classroom. Normally, one special education teacher and one special education aide are assigned to that classroom. Grievant has worked with Ms. Warren for the past eight years.

4. Grievant has been employed by LCBE for 18 years. She has been employed as a special education aide for approximately 12 years. Grievant has not been subject to any previous disciplinary action while employed by LCBE.

5. On Friday, September 10, 1999, Ms. Warren notified Principal Priestley that she would be absent on Monday, September 13, because she had been subpoenaed to appear in court as a prosecution witness in a criminal case. She also called the appropriate individual in LCBE's Central Office two weeks prior to September 13 to advise of her upcoming absence, so that a substitute teacher could be called.

6. LCBE was unable to find a substitute teacher to replace Ms. Warren on September 13.

7. Principal Priestley did not become aware that LCBE could not locate a substitute for Ms. Warren until the morning of September 13, when Grievant came to him at approximately 8:00 A.M., and asked who was going to substitute in Ms. Warren's

classroom that day. Principal Priestley then called the LCBE Central Office, and was told no substitute was available that day.

8. Principal Priestley made arrangements for Abbie McClure, another supervisory special education aide, to assist Grievant in Ms. Warren's classroom. He then left GES in compliance with a separate subpoena to appear as a witness in an unrelated criminal trial.

9. Shortly after Principal Priestley left GES, another special education teacher had to leave the building due to a personal emergency. As a result, Ms. McClure had to return to her regular classroom, so there would be at least one aide with those children.

10. Grievant was left alone in the classroom except for a parent volunteer, T.S.[3], the mother of one of the special education students in Ms. Warren's classroom. Grievant and T.S. had four special education students in their care.

11. Shortly before noon, one of the students, D.A., a severely mentally impaired eight-year-old boy, was acting out, assaulting another student, J.S., by painfully twisting her arm. Earlier that morning, D.A. had hurt another student, A.T., who is blind, by similarly twisting her arm. Because D.A. was determined to be essentially out of control, Grievant attempted to restrain him in a "time-out chair," a practice which was normally followed by the classroom teacher when the student would not behave.[4]

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[3]Consistent with the practice of this Grievance Board, the students and families involved in this matter will be identified only by their initials. 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).

[4]There was no allegation that this action was improper, or violated any applicable rules. D.A. has a history of aggressive behavior toward his teachers and fellow students.

12. Ordinarily, Grievant is not responsible for imposing discipline on the students. That function is normally performed by Ms. Warren.

13. In the course of restraining D.A. in the time-out chair, D.A. struck Grievant sharply on the head with his hand. Grievant reacted spontaneously by striking D.A., slapping him once on the side of the face.

14. Prior to this incident, Grievant was considered by her supervisors to be an excellent employee. In the course of her duties as a special education aide, Grievant had been struck by students on numerous occasions, but did not respond with violence toward any student.

15. When Principal Priestly returned to GES, Grievant reported to him that she had "slapped" D.A. Principal Priestly examined D.A. and observed no injury which warranted further examination by a school nurse or other referral for medical treatment.

16. Principal Priestley reported the incident to D.A.'s mother, state Child Protective Service personnel, and Douglas Smith, LCBE's Director of Special Education.

17. On the following day, LCBE Superintendent Peggy Adkins directed Mr. Smith and Principal Priestley to investigate the incident.

18. Mr. Smith and Principal Priestley spoke with Ms. Warren, Grievant, T.S., and D.A.'s mother. On September 20, 1999, they made a written report to Superintendent Adkins in which they concluded that Grievant struck D.A. once on the face. R Ex 1.

19. Mr. Smith verbally recommended to Superintendent Adkins that some disciplinary action "much less than termination" be taken against Grievant.

20. Superintendent Adkins' notice to Grievant advising that her suspension with pay was being converted to a suspension without pay, and that the matter would be

presented to LCBE for further disciplinary action did not specify what penalty, if any, the Superintendent was recommending to the county board of education, beyond the 10-day suspension without pay that would accrue between the notice and the scheduled board meeting.

21. After a hearing on October 4, 1999, LCBE added a 30-day suspension without pay to the 10-day suspension without pay Grievant had received at that point in time. Thus, Grievant was suspended without pay for 40 days as a result of her actions on September 13, 1999.

22. In February 1998, LCBE suspended a substitute teacher for at least 30 days while criminal charges of child abuse were pending for battery against a student. The employee was reinstated on LCBE's substitute list in 1999. G Ex D.

23. In May of 1991, LCBE suspended a bus operator for 15 days for "physically striking a student."

24. During the 1998-99 school year, it was reported to LCBE Superintendent Rick Powell that a teacher, R.W., slapped a student based upon verbal provocation while on an extracurricular field trip with the high school speech team. Mr. Powell met with the teacher, who did not deny the allegation she struck the student with her open hand on the side of his face.

25. The teacher agreed to take three days of leave without pay. No formal disciplinary action was documented in the employee's personnel record, nor was this action approved by LCBE.

DISCUSSION

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

> [A] board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a plea of nolo contendere to a felony charge.

In the correspondence which notified Grievant she was being suspended, LCBE did not specify which of the specific causes in the statute it was relying upon to support this disciplinary action. However, LCBE argued at Level IV that Grievant's conduct constituted cruelty and willful neglect of duty, two of the causes listed in W. Va. Code § 18A-2-8 for which a school employee may be suspended. In such cases, the proper focus is whether the charge of misconduct has been proven, not the label attached to such conduct. Lake v. Barbour County Bd. of Educ., Docket No. 99-01-294 (Jan. 31, 2000); Bradley v. Cabell County Bd. of Educ., Docket No. 99-06-150 (Sept. 9, 1999); Willis v. Jefferson County Bd. of Educ., Docket No. 96-19-230 (Oct. 28, 1998); Russell v. Kanawha County Bd. of Educ., Docket No. 9-20-415 (Jan. 24, 1991). See Jordan v. Mason County Bd. of Educ., Docket No. 99-22-080 (July 6, 1999).

Cruelty includes deliberately seeking to inflict pain and suffering. Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990). Behavior directed toward a student, to include slapping the student, without the need for self-defense, meets this definition. Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996). See Eggleston v. Greenbrier County Bd. of Educ., Docket No. 94-13-395 (Dec. 29, 1994). In order to establish that an employee engaged in willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25,

1995); Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990).

LCBE established by a preponderance of the evidence that Grievant responded to D.A.'s act of striking her in the head by striking him back on the cheek. Grievant acknowledged that what she called a "reflex" to being struck by D.A. was a voluntary, spontaneous act. Although Grievant's act was not premeditated, in that she certainly did not plan to harm D.A., it was not an accident, or the result of carelessness or negligence. Therefore, her action in striking D.A. was intentional. Because D.A. is a severely mentally impaired special education student, Grievant's reaction cannot be categorized as self-defense, nor has Grievant ever attempted to categorize her conduct in that fashion. Grievant simply lost control for one moment when it was her duty to maintain control, regardless of the provocation presented. Thus, Grievant's conduct constitutes cruelty and willful neglect of duty which is prohibited under W. Va. Code § 18A-2-8. See Eggleston, supra; Sinsel, supra.

Having established that LCBE had good cause to discipline Grievant in accordance with W. Va. Code § 18A-2-8, the remaining issue presented by this grievance is whether the penalty imposed, a 40-day suspension without pay, was excessive under all the facts and circumstances presented. Grievant contends a 40-day suspension is unduly harsh, and disproportionate to the offense she committed. In assessing the particular penalty imposed by a county board, this Grievance Board will consider whether the punishment imposed was clearly excessive in light of the employee's past work record, as well as the clarity of existing rules or prohibitions regarding the situation in question, and any mitigating circumstances, all of which must be determined on a case-by-case basis. Williams v.

Kanawha County Bd. of Educ., Docket No. 98-20-321 (Oct. 20, 1999); Maxey v. McDowell County Bd. of Educ., Docket No. 97-33-208 (Apr. 30, 1998); 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). When the penalty imposed is so clearly excessive as to be arbitrary and capricious, this Grievance Board has authority to rescind or reduce the penalty imposed. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Best v. Univ. of W. Va. Bd. of Trustees, Docket No. 91-BOT-216 (Oct. 11, 1991); Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). See Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990); Rovello v. Lewis County Bd. of Educ., 181 W. Va. 122, 381 S.E.2d 237 (1989); Stone v. W. Va. Div. of Corrections, Docket No. 99-CORR-390 (Feb. 10, 2000). See also Douglas v. Veterans Admin., 5 M.S.P.B. 313 (1981).

W. Va. Code § 18-29-5(b) provides that "[h]earing examiners are hereby authorized and shall have the power to . . . provide such relief as is deemed fair and equitable in accordance with the provisions of this article, and such other powers as will provide for the effective resolution of grievances not inconsistent with any rules or regulations of the board or the provisions of this article." The Supreme Court of Appeals of West Virginia has observed that, by enacting this particular provision, "[c]learly the Legislature intended to give the examiners who hear the grievances the power to fashion any relief they deem necessary to remedy wrongs done to educational employees by state agencies." Graf v. W. Va. Univ., 189 W. Va. 214, 429 S.E.2d 426 (1992).

As previously discussed, the Superintendent's failure to specify the causes for which Grievant was being disciplined is not significant, given that Grievant was specifically

informed that she was suspended for slapping a student in her classroom on a specific date. Thereafter, Superintendent Adkins properly notified Grievant that her suspension with pay was being converted to a suspension without pay. However, it is problematic that the Superintendent failed to indicate what penalty, if any, she was recommending to LCBE. There is no evidence in the record that Superintendent Adkins ever made a specific recommendation to LCBE regarding the appropriate penalty. Thus, the matter of Grievant's punishment for this one incident of cruelty and willful neglect of duty was submitted to LCBE without any meaningful recommendation from the Superintendent as to what penalty would be appropriate.

Ordinarily, the Superintendent is expected to make a recommendation to the county board based upon her knowledge of the employment record of the individual, how the offense committed by that employee compares with offenses committed by other employees, and the punishments previously meted out for those offenses. No such analysis was presented in this case. Further, the county board's rationale for its action is not documented in the record. Thus, it does not appear that a number of mitigating and extenuating circumstances were appropriately factored into the punishment equation in this matter. See generally, Douglas, supra.

In particular, this was Grievant's first offense. Not only had Grievant never been previously disciplined for striking children or any other offense, Ms. Warren and Principal Priestley testified that Grievant was particularly effective in dealing with children. Thus, Grievant's conduct on September 13 must be considered highly atypical. Further, the day when this offense occurred was anything but business as usual at GES. The regular classroom teacher was absent, no qualified substitute was available, and the special

education aide Principal Priestley assigned to assist Grievant in caring for four special education students, was forced to return to her regular classroom, because a second special education teacher had to leave the school.

Accordingly, instead of Grievant and a qualified special education teacher dealing with four special education students, this task was left to Grievant and a parent. The parent volunteer assisting Grievant at the time of the incident, other than having experience as the parent of one of the special education students in the classroom, apparently had no special training to enable her to provide any meaningful assistance to Grievant, other than helping to control her own child. By the time Grievant had her altercation with D.A., her normal patience was no doubt worn thin. Further, she was necessarily required to discipline D.A., a task she did not ordinarily perform as a classroom aide to a special education teacher.

It should also be noted that Grievant was the first person to report this incident to Principal Priestley or anyone else. Having observed her testimony, it is apparent to the undersigned that Grievant is truly remorseful for what she did to D.A., and still has difficulty understanding why she was unable to control her emotions, and refrain from responding to being struck by a student, a circumstance she agrees happens frequently when dealing with mentally impaired special education students.

During the previous school year, a teacher admittedly struck a high school student in response to a verbal provocation. LCBE's former Superintendent allowed that employee to forfeit three days' pay, and no formal suspension action was taken or proposed to the county board. A bus operator who struck a student nearly nine years ago received a 15-day suspension. A substitute teacher was suspended while criminal battery charges were

pending, a situation which is not meaningfully comparable to the offense involved here. There was no evidence that LCBE has adopted any standard for imposing like penalties for like offenses.

In Sinsel, supra, the employee, a professional educator, was terminated for a third offense of striking a student and related conduct. The employee was issued a written reprimand for her first offense of striking a child on the head, and a 10-day suspension for her second offense of striking a child on the face, and threatening to knock him "on his ass." Although a suspension is warranted in this case, the 40-day suspension imposed by LCBE, given the mitigating and extenuating circumstances previously discussed, is clearly disproportionate to the offense committed, and excessive for correcting the conduct of this employee. See Hoover, supra. Given the totality of the circumstances in which this offense occurred, a 10-day suspension is the greatest penalty that should have been imposed on Grievant. Accordingly, her penalty will be reduced to a suspension of that duration. See Graf, supra; Bell, supra.

In addition to the foregoing discussion, the following conclusions of law are appropriate in this matter.

CONCLUSIONS OF LAW

1. The employer must establish the charges in a disciplinary matter by a preponderance of the evidence. W. Va. Code § 18-29-6; Froats v. Hancock County Bd. of Educ., Docket No. 91-15-159 (Aug. 15, 1991); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

2. Cruelty and willful neglect of duty are among the causes in W. Va. Code § 18A-2-8 for which a school employee may be disciplined. Lake v. Barbour County Bd.

of Educ., Docket No. 99-01-294 (Jan. 31, 2000); Jones v. Preston County Bd. of Educ., Docket No. 99-39-017 (Mar. 16, 1999). See Eggleston v. Greenbrier County Bd. of Educ., Docket No. 94-13-395 (Dec. 29, 1994).

3. Cruelty includes deliberately seeking to inflict pain and suffering. Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990). Behavior directed toward a student, to include slapping the student, without the need for self-defense, meets this definition. Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996).

4. Willful neglect of duty involves conduct constituting a knowing and intentional act, rather than a negligent act. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990).

5. The Lincoln County Board of Education established by a preponderance of the evidence that Grievant engaged in cruelty and willful neglect of duty by spontaneously striking an 8-year-old special education student on the side of the face after the student hit Grievant on the head. See Sinsel, supra; Hoover, supra.

6. The West Virginia Education and State Employees Grievance Board has authority to reduce or rescind an imposition of discipline upon an employee that is so clearly excessive as to be arbitrary or capricious. Hoover, supra; Best v. Univ. of W. Va. Bd. of Trustees, Docket No. 91-BOT-216 (Oct. 11, 1991).

7. Given the extensive mitigating and extenuating circumstances surrounding this offense, Grievant's previously unblemished record as an aide, and the Superintendent's failure to recommend a specific penalty, the 40-day suspension imposed

on Grievant for a first offense of striking a special education student was so clearly excessive as to be arbitrary and capricious.

Accordingly, this grievance is **GRANTED**, in part. Respondent Lincoln County Board of Education is hereby **ORDERED** to reduce the penalty imposed on Grievant to a 10-day suspension without pay. Further, Respondent shall pay Grievant back pay with interest for the additional 30 days she was suspended without pay, and adjust her seniority accordingly. All other relief is **DENIED**.

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

LEWIS G. BREWER
ADMINISTRATIVE LAW JUDGE

Dated: March 27, 2000