MACKEY HIXON,

Grievant,

v. **Docket No. 01-54-115**

WOOD COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

___Mackey Hixon ("Grievant") filed this grievance directly at level four on April 2, 2001, challenging the termination of his employment as a custodian for Respondent Wood County Board of Education ("WCBOE"). After a continuance granted for good cause shown, a level four hearing was held in the Grievance Board's office in Westover, West Virginia, on July 9, 2001. Grievant was represented by counsel, William B. Richardson, Jr., and Respondent was also represented by counsel, Dean A. Furner. This matter became mature for consideration upon receipt of the parties' fact/law proposals on July 23, 2001.

The following findings of fact are made from a preponderance of the credible evidence of record.

Findings of Fact

1. Prior to his termination, Grievant had been employed by WCBOE for approximately 20 years. Most recently, he had been assigned to Hamilton Junior High School ("Hamilton") as a custodian for over ten years. 2. Since 1996, Grievant has received excellent evaluations as head custodian at Hamilton, including glowing comments about his performance and the great degree of concern he shows in caring for the school. (See footnote 1)

3. In 1994, a female student at Hamilton alleged that Grievant placed his face in her crotch while the two were alone in a restroom. She claimed that Grievant was "smelling" her for cigarette smoke, and that his face actually touched her body in the genital area. She complained to authorities, and Grievant was suspended while the Department of Health and Human Resources and police

conducted an investigation. Upon conclusion of the investigation, no charges were filed, and Grievant was returned to work without any disciplinary action being taken against him.

4. On December 6, 2000, WCBOE Superintendent Daniel Curry was notified that the Department of Health and Human Resources was investigating allegations against Grievant of sexual harassment and/or sexual abuse of a child. The following complaints had been made by K.S. (See footnote 2) , a female, 8th grade student at Hamilton:

> Sometime in December of 1999, Grievant allegedly invited K.S. to come with him to his office in the boiler room early in the morning before school started, under the pretense of giving her candy. Once there, K.S. claimed that Grievant hugged her.
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> Also in December of 1999, the day after the first incident described above, K.S. alleged that Grievant again invited her to the boiler room for candy. Once there, she claimed that Grievant hugged her, kissed her neck, and kissed her on the mouth. She also alleged he tried to put his tongue in her mouth, which she resisted. After kissing her, Grievant allegedly told hernot to tell anybody, because another girl had almost gotten him in trouble before.
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> At a school dance in late May of 2000, as K.S. and two of her friends were walking out of the girls' restroom, Grievant allegedly walked past and "grabbed" K.S.'s crotch. K.S.'s two friends were walking in front of her, and they did not see the incident K.S. claimed occurred.
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> In October of 2000, K.S. and a friend, D.H., were walking down the hall between classes, and, K.S. claims, Grievant came up behind her, stroked her buttocks, and said "nice butterflies," referring to the butterfly emblems on the back pockets of her jeans.
>
> In late November or early December of 2000, K.S. was sitting outside after school, and Grievant allegedly came by and asked her if she was cold. He then told her she should go get a jacket, followed her to her locker, and, once at the locker, put his hand on K.S.'s face and said "you know I love you."
>
> On two other occasions, K.S. claimed that Grievant tried to hold her hand in the presence of other students or teachers.

5. Prior to the incidents described above, K.S. described her relationship with Grievant as

friendly. She and Grievant made "small talk," such as talking about popular music groups.

6. Grievant's reputation around Hamilton with both students and teachers was for being friendly and jovial with everyone. He is the kind of person who will come up behind someone and tap them on the opposite shoulder, as a joke. He admits that he sometimes allows students to hug him and gives them candy, when asked, although he denied the allegations made by K.S.

7. K.S. suffers from bipolar disorder and severe depression, which was diagnosed prior to the incidents she alleged occurred between her and Grievant. She has attempted suicide numerous times and has received medical treatment over the past few years for her difficulties. 8. Three teachers, one of whom was described by K.S. as her "favorite teacher", do not believe that K.S. is always truthful. K.S. is known around Hamilton for being a troubled girl, for having problems with her peers, and she is often late for class.

9. K.S.'s testimony was not credible.

10. Although no criminal charges were filed against Grievant as a result of K.S.'s allegations, on March 28, 2001, Grievant was dismissed from employment with WCBOE for immorality, willful neglect of duty, and violations of WCBOE's harassment policy.

11. The allegations made against Grievant in 1994 were considered in Respondent's decision to terminate Grievant's employment.

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 defined as "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 proved is more probable than not." Black's Law Dictionary (6th ed. 1991), Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

The authority of a county board of education to dismiss an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, and must be exercised reasonably, not

arbitrarily or capriciously. Parham v. Raleigh County Bd. of Educ., 192 W.Va. 540, 453 S.E.2d 374 (1994), Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991); See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975). W. Va. Code § 18A-2-8 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 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 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., 506 S.E.2d 319 (W. Va. 1998).

To prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent one. 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). Although the West Virginia Supreme Court has not formulated a precise definition of willful neglect of duty, it does encompass something more serious than incompetence and requires "a knowing and intentional act, as distinguished from a negligent act." Chaddock, supra. Willful neglect of duty has also been defined as an employee's intentional and inexcusable failure to perform awork-related responsibility. Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990).

As a preliminary matter, Grievant contends that the 1994 allegations should not have been used against him when Respondent decided to terminate his employment. Respondent argued that this alleged incident, which was testified to by the alleged victim, shows that Grievant has a "lustful disposition towards children" and provides credibility to the testimony of K.S., whose allegations were largely unsupported by any other witnesses. As pointed out by Grievant, this Grievance Board has previously determined that an incident of alleged sexual harassment that occurred more than one

year prior to the next event alleged was "too far removed in time . . . to be alleged as a separate offense warranting disciplinary action, or to be charged as part of a pattern or practice." Lanham v. W. Va. Dep't of Transp., Docket No. 98-DOH-369 (Dec. 30, 1998). Likewise, the undersigned finds that an allegation that is over six years old and was never proven to be true, and for which Grievant was not disciplined, should not have been used as a basis for discipline against him in 2001. Moreover, this allegation is also too far removed from the incidents alleged recently to prove Grievant's alleged "predispositions" or to corroborate K.S.'s testimony. Accordingly, the allegations made as a result of the 1994 complaint against Grievant will not be considered in this Decision.

Grievant vehemently denies that he was ever alone in the boiler room with K.S. or that any of these incidents occurred. He only admits to seeing her at the dance in May of 2000 and being friendly around school with K.S. 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. McDowellCounty 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). Some factors to consider in assessing the credibility of a witness include the witness' demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the trier of fact should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the witness' information. Haddox v. Mason County Bd. of Educ., Docket No. 98-26-283 (Nov. 30, 1998). See Perdue v. Dep't of Health & Human Resources, Docket No. 93-HHR-050 (Feb. 4, 1994). See generally, Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit System Protection Board 152-53 (1984).

Grievant appeared quite forthright in his testimony, and no inconsistencies have been shown. On the other hand, K.S.'s credibility is somewhat questionable for a variety of reasons. First, all but one of the incidents she alleged to have occurred are totally uncorroborated by any other witnesses, in spite of taking place in public places with other people present. In fact, Markeeta Stephens, a teacher K.S. alleged saw Grievant try to hold her hand at a water fountain, testified she saw no such thing

occur. It is likewise difficult to believe that Grievant would escort K.S. through the school, in the presence of other students, to take her to the boiler room alone with him on two consecutive days. In addition, K.S. alleges Grievant also attempted to hold her hand during gym class in the presence of another student, who did not testify. Sarah Hilbert, the physical educationteacher, testified that she recalled K.S., who often "got hurt" and had to sit out of class, sitting outside and complaining that Grievant "scared her" on the day in question. Grievant admitted that he came up behind K.S. and touched her on the opposite shoulder, which occurred in the presence of several people. Ms. Hilbert testified credibly that she would not consider K.S. to be a truthful person. Along with the testimony of two other teachers who also stated that they have witnessed K.S.'s difficulties with honesty on occasion, her reputation for truthfulness has certainly been called into question.

The only incident alleged by K.S. which was supported by an eye witness was the occasion when Grievant supposedly touched her buttocks in the school hallway and made a comment about the butterflies on her back pockets. D.H. testified that K.S. was walking about 5 to 7 feet in front of her at the time, and she saw Grievant come toward K.S. from the side, touch her buttocks, and make the comment. However, it is difficult to believe that Grievant would commit such an act in a crowded hallway between classes and make such a comment loudly enough to be overheard by another student several feet away. It was also undisputed that, until recently (and for reasons unrelated to this grievance), K.S. and D.H. were extremely close friends, providing D.H. with a motivation for bias. It is also interesting that D.H. testified that, shortly after the "butterfly" incident, she saw Grievant touch K.S.'s breast. K.S. has been questioned on three different occasions concerning these matters--in a police statement, at Grievant's dismissal hearing, and at the level four hearing--and has not once claimed that Grievant ever touched her breast.

K.S. has testified twice that, shortly before his termination, Grievant came to one of her classes and asked her to sign a “folder thingy.” She described it as a brown folder with no other writing on it, and she stated that Grievant gave no explanation as to why sheneeded to sign it. She allegedly signed it, and Grievant left. The teacher of K.S.'s class testified that she had no recollection of Grievant coming to the class and having K.S. sign anything. This testimony is quite incredible, because it simply does not make sense. No explanation has been offered as to why Grievant would want K.S.'s signature. As with other testimony, this also brings K.S.'s credibility into question.

Cases in which the entire outcome hinges on witness credibility, especially when someone's job is

at stake, are very difficult to decide. While it is troubling to contemplate the possibility of placing a person with sexual predilections toward children back in a school, it is equally difficult to imagine taking away a long-term employee's livelihood because of a fabricated story from a troubled adolescent. In the instant case, the undersigned is simply unable to conclude that Respondent's evidence is more convincing than Grievant's, so it has failed to prove by a preponderance of the evidence that Grievant committed the acts alleged.

The following conclusions of law support the decision reached.

Conclusions of Law

1. 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).

2. The authority of a county board of education to dismiss an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, and must be exercised reasonably, not arbitrarily or capriciously. Parham v. Raleigh County Bd. of Educ., 192 W. Va. 540, 453 S.E.2d 374 (1994), Bell v. Kanawha County Bd. of Educ.,Docket No. 91-20-005 (Apr. 16, 1991); See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

3. An incident which allegedly occurred in 1994 was too far removed from the more recent allegations against Grievant to be used as the basis of discipline against him, to establish a pattern or practice, or to boost the credibility of current witnesses. See Lanham v. W. Va. Dep't of Transp., Docket No. 98-DOH-369 (Dec. 30, 1998).

4. A preponderance of the evidence is defined as "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 proved is more probable than not." Black's Law Dictionary (6th ed. 1991), Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993).

5. Some factors to consider in assessing the credibility of a witness include the witness' demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the trier of fact should consider the

presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the witness' information. Haddox v. Mason County Bd. of Educ., Docket No. 98-26-283 (Nov. 30, 1998). See Perdue v. Dep't of Health & Human Resources, Docket No. 93-HHR-050 (Feb. 4, 1994). See generally, Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit System Protection Board 152-53 (1984).

6. Respondent has failed to prove by a preponderance of the evidence that Grievant engaged in the conduct alleged by student K.S. in 1999 and 2000.

Accordingly, this grievance is **GRANTED**, and Respondent is **ORDERED** to reinstate Grievant to his previous position, with back pay and seniority, and to remove all records of the suspension and dismissal from his personnel file.

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

Date: August 10, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant's evaluations prior to 1996 were not introduced by either party.

Footnote: 2

Consistent with Grievance Board practice, the initials of minor students involved in the subject matter of this grievance will be used in lieu of identifying them by name.