BARBARA HINKLE,

Grievant,

v. **Docket No. 02-12-130**

GRANT COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Barbara Hinkle, employed by the Grant County Board of Education (GCBE or Respondent) as a teacher, filed a level four grievance on May 15, 2002, in which she challenged a one-day suspension. Grievant asserts violations of W. Va. Code §§ 18A- 2-8, 18-29-4, and GCBE Disciplinary Policies for Students. For relief, Grievant requests that the suspension be rescinded, that she be awarded back pay and benefits, and her record expunged. An evidentiary hearing was conducted in the Grievance Board's Elkins office on August 8, 2002, at which time Grievant was represented by John W. Cooper, Esq., of Cooper, Preston & Douglas, and GCBE was represented by Dennis V. DiBenedetto, Esq. The matter became mature for decision upon receipt of final post-hearing submissions filed by GCBE on September 17, 2002.

The following facts are derived from the record in its entirety.

Findings of Fact

1. Grievant has a total of twenty-four years of teaching experience, and has been employed by GCBE for approximately seventeen of those years. During the 2001- 2002, school year Grievant was assigned to teach at the Maysville Elementary School (MES). 2. On February 26, 2002, Grievant was scheduled for afternoon bus duty. At 3:10 p.m. approximately one hundred and forty students at MES reported to the gymnasium (gym) and lined up according to the bus they rode. As the arrival of each bus was announced over the public address system, Grievant walked the students down the hallway to the foyer where the school secretary would see they all got on the bus.

3. Grievant was the only staff member on bus duty on February 26, 2002, leaving the students in the gym unsupervised while she escorted students down the hall.

4. Upon her return to the gym, Grievant found student C. C., a first grader, out of line and

running about the gym. (See footnote 1) Taking his elbow and/or shoulder, Grievant directed C. C. to go to a penalty area next to the wall.

5. C. C. was released to return to his line, but again failed to stay in his designated area. On this occasion, C. C. was again sent to the penalty area where Grievant approached him, placed her hand on his chin and raised his face to her, and asked him if he knew what he was doing wrong. This action was consistent with Respondent's implementation of a “responsible students program,” a form of character education which requires that students acknowledge and take responsibility for their actions.

6. C. C.'s bus was announced, and he left school for the day at approximately 3:50 p. m. The videotape taken from the student's bus does not reflect that he was crying or otherwise upset. There are no marks visible on his face, and none were observed the following day. 7. At 4:10 p. m, C. C., along with his older brother and sister, who also attended MES and were in the gym during the incident, arrived at their home and reported the matter to their mother, representing that C. C. had been very upset.

8. C. C.'s mother called MES Principal Mark Nicol who investigated the matter and determined that Grievant had made inappropriate physical contact with the student's face.

9. Superintendent Marsha Carr-Lambert was notified of the situation by C. C.'s mother and Mr. Nicol. The Superintendent advised Grievant by letter dated March 12, 2002, in pertinent part:

Upon review of the student testimony, administrator's testimony and observation, as well as the meeting held at the school, it would seem apparent that contact between you as the teacher and the student was made. It is also apparent that you were angry when you made contact with the child. The first contact was on the arm of the child and the second contact was on the face. Neither contact resulted in an injury to the child. At most, there was enough force to redden the skin for a short period of time.

As educator's [sic] we are all aware that physical contact with a child in an aggressive manner is prohibited.

Based on my review of this particular investigation as supplied by the administrator, I will be recommending to the board that one day without pay suspension be issued.

10. At a meeting on March 26, 2002, GCBE accepted the recommendation of the

Superintendent, and affirmed the suspension, “based upon [Grievant's] misconduct in grabbing a student . . . in an inappropriate and unacceptable manner.”

11. Grievant had incurred no prior disciplinary action during her teaching career.

Discussion

In disciplinary matters, the employer bears the burden of proving 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 and Human Res., 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.

Respondent asserts that it has authority to suspend an employee for reasons other than those specifically set forth in W. Va. Code § 18A-2-8, so long as it does not act in a manner which is arbitrary and capricious. In the present case, Respondent argues that the suspension was appropriate because Grievant failed to followed Board policy on “Student Discipline” when she grabbed the student by the arm or shoulder and on the face.

Grievant asserts that the type of action in this matter is not addressed in either of the Student Discipline Policies, and identifies many discrepancies in the testimony of Respondent's witnesses. Grievant further presents the general background of C. C. and his siblings relating to numerous disciplinary measures they had incurred, including an incident in which his sister had accused another faculty member of sexual misconduct. Grievant concludes that GCBE imposed an excessive measure of discipline upon her out of concern they would be subject to a civil lawsuit.

The authority of a county board of education to suspend an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, and must beexercised 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.

Grievant's account of the incident is plausible and credible. She admits touching the student's face to lift it so that eye contact would be made. Grievant further admits that she was somewhat frustrated with the student, but denies that she was angry with him. M.N., a student who observed the action, confirmed that Grievant was not angry at the time. The undersigned does not believe that Grievant exhibited such force in this act to leave red marks on the student's face some twenty minutes later when he arrived at home. Marks of that intensity would surely have been noticed by the secretary as the student went out the door, and/or the bus driver as the student boarded the bus. There were no bruises or other marks observed on the student's face the following day. Grievant did not engage in corporal punishment, violate the “Student Discipline” policy, or otherwise act improperly. Further, Grievant did not engage in any of the causes for suspension listed in W. Va. Code § 18A-2-8.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of proving 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 and Human Res., 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.

2. Respondent failed to prove by a preponderance of the evidence that Grievant had violated any student disciplinary policies, had otherwise acted in anger or applied any undue force upon the student.

Accordingly, the grievance is **GRANTED**, and GCBE Ordered to rescind the suspension, and provide Grievant all back pay with interest and benefits to which she is entitled.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Grant 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: September 24, 2002 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Consistent with Grievance Board practice, students will be identified only by their initials.