HASKELL HOLLEY,

Grievant,

v. **DOCKET NO. 03-22-326**

LINCOLN COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant Haskell Holley filed this grievance against his employer, the Lincoln County Board of Education (Respondent) on August 20, 2003, stating: “I wish to grieve my termination by the Lincoln County Board of Education.” Grievant stated the relief sought as: “Reinstatement to my teaching position with the Lincoln County Board of Education.”

A level four hearing was held in the Grievance Board's Charleston office on January 16, 2004 and March 8, 2004. Grievant was represented by counsel, James Haviland and Rebecca Mick of Crandall Pyles Haviland and Turner, LLP. Respondent was represented by counsel, Gregory Bailey of Bowles Rice McDavid Graff & Love, PLLC. This matter became mature for decision on April 23, 2004, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Based on a preponderance of the credible evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant was employed by Respondent as a classroom teacher at Hamlin Elementary School. He had taught in Lincoln County for 29 years.

2. Sherri Woods is the Principal of Hamlin Elementary School and William Grizzell is Lincoln County's Superintendent of Schools.

3. On August 1, 2003, Mr. Grizzell informed Grievant by letter that he would recommend the

termination of Grievant's employment to the Board. This letter stated, in part:

> The investigation into allegations that you engaged in inappropriate conduct toward students has now been concluded. Specifically, it has been alleged that you: have smacked female students on the buttocks; allowed female students to sit on your lap; stating [sic] to female students that “you love” them; kicked students in the buttocks; grabbed students by the arms and wrists; shoved a female student into a book case; flipped students over your shoulder; engaged in disparate treatment of male and female students by generally providing favorable treatment to female students; referred to male students as “stupid”, “ignorant” and other demeaning terms; and inspected the personal belongings of students without permission.
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> . . .
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> The most recent misconduct on your part reveals that you continue to have significant shortcomings in attending to the well-being of students who have been placed in your charge. Parents have a right to expect that school personnel place a high premium on the appropriate treatment of their children. The District cannot afford to tolerate second and third chances with respect to incidences of inappropriate physical contact with students. You were on notice of the district's expectation that you refrain from such conduct for at least 15 years.
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> . . .
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> During the course of an investigation during the 2001/2002 school year I observed your classroom, along with Principal Woods. You completely darkened the room and allowed students to work on an overhead projector. You positioned yourself so that students were required to climb over your legs to exit the room when going to the bathroom. You permitted students to sit on your lap. Following this observation I directed you to ceasedarkening your room, to cease positioning yourself in such a manner that close physical contact with students was required for them to exit the room, and to cease allowing students to sit on your lap. In direct contradiction to my instructions, you requested that a female student sit on your lap for the class picture for the 2002/2003 yearbook.
>
> I am satisfied, based upon the consistency of the statements of multiple witnesses who provided information during the investigation of your conduct, that you have engaged in all of the conduct that has been outlined above in varying degrees of culpability.
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> Finally, I note that your conduct has been the subject of a significant level of notoriety, none of which may be attributed to the District. A number of parents have appeared at Board of Education meetings to protest your possible assignment as a

teacher for their children. I have concluded that, based upon such notoriety, your ability to meet your responsibilities as a classroom teacher has been fatally compromised.

4. In October, 1988 Grievant was reprimanded for acting inappropriately in kissing and hugging a 6th grade female student. He filed a grievance challenging the reprimand, which grievance was denied at all levels. (See footnote 1)

5. The initial student complaints that prompted Mr. Smith's investigation started when a group of male students got together to discuss how to get Grievant in trouble. Early in April, 2003 one of Grievant's students, Joseph Hill, gave a letter to Guidance Counselor Lori Holder, stating, “My fellow students and I can no longer trust Haskell Holley. We do not feel safe with him. Please help us.” With the note was a sheet of paper with the question, “Do you feel safe with Mr. Holley being a teacher.” Written on this sheet were comments by several students such as, “Not at all.” “No way.” “Heck No.” “I don't.” “No No No way.” “Especially with the front and back door shut.” “I don't feel safe with the doors open or shut.” 6. The male students pressured the females into making accusations of sexual harassment.

7. Ms. Holder spoke to student Cassie Adkins, who reported that Grievant had smacked her on the buttocks, which made her uncomfortable. Grievant denies he did this. An unnamed student who was interviewed reported overhearing Miss Adkins say she would “get rich” and “go for all he's got.”

8. Whitney Cooper was one of Grievant's students who complained to Ms. Holder that she felt uncomfortable in Grievant's classroom. She saw Grievant smack student Cassie Adkins on the buttocks as she passed his desk. On another occasion, she was “playing around” with Grievant when he pushed her toward a bookcase hard enough that she ran into it. Grievant denies this could have occurred.

9. Miss Cooper admitted that she lied to Ms. Holder about feeling uncomfortable in Grievant's classroom because of peer pressure. Several of the male students told the females that, if they were called to the office, they should make up something to get Grievant fired.

10. When these allegations arose, Respondent contacted the W. Va. Department of Health and Human Resources (DHHR) and Mr. Grizzell also directed Lincoln County Title IX Coordinator Doug Smith to conduct an internal investigation. Grievant was suspended, with pay, pending the outcome of the investigation.

11. Mr. Smith and three other school employees interviewed 19 current and former students, and some adults, who consistently stated Grievant allowed students to sit on his lap, flipped them over his shoulder, told students he loved them, and treated male students worse than female students. 12. The DHHR interviewed several students, and found no abuse or neglect to have occurred. It did conclude Grievant's “actions are deemed inappropriate but do not constitute abuse and neglect. Classroom management, sensitivity and sexual harassment issues are present and could be addressed with training.”

13. In November, 2001, Mr. Grizzell received a complaint from a parent about Grievant's classroom setup. The parent complained that Grievant taught in the dark and had covered his windows, and that he had positioned his chair so that students had to climb over his lap to get to the bathroom. Mr. Grizzell went to see the classroom with Ms. Woods on a faculty senate day when students were not present. Grievant admitted he permitted students to sit on his lap while working from an overhead projector. Mr. Grizzell directed Grievant to cease allowing students to sit on his lap.

14. No children were required to climb over Grievant's lap to get to the bathroom.

15. Grievant's classroom has only one window, beside the door, approximately 15 inches wide by 7 feet tall. It had a short curtain at the top and Grievant had posted the class schedule and class list on the window.

16. Grievant had a policy, approved by Ms. Woods, of requiring students to take home papers reflecting poor work to be signed by their parents. The students were to bring back the signed paper the next day, and if they did not, they were sent to “D-hall (See footnote 2) .” If the student did not bring the paper back the next day, Grievant took him or her to Ms. Woods' office. 17. Prior to the initial complaints being made, Joe Hill, one of Grievant's students, had an encounter with Grievant while working in the computer lab. After Grievant observed him repeatedly making a mistake on an assignment, Grievant struck him on the shoulder. The student reported this to his aunt and Ms. Woods.

18. In Grievant's opinion, his female students were generally better-behaved than his male students. It was usually male students who were sent to D-hall or taken to the principal's office

19. On the Tuesday immediately prior to Grievant's suspension, he had taken a group of students to Ms. Woods office, where one of the boys admitted that the boys had been getting together and planning things to aggravate Grievant, such as not bringing back their papers when they

should.

20. Grievant would allow female students, except one he thought was too heavy, to sit on his knee. On occasion, he would run his fingers through their hair to straighten out tangles. He denies asking them to sit on his knee.

21. On April 23, 2003, a front-page story appeared in the Lincoln Journal newspaper about Grievant's suspension pending the investigation. Mr. Grizzell is quoted extensively.

22. An April 30, 2003, article in the same newspaper that essentially repeated the allegations and stated no criminal charges would be filed. It further quoted Mr. Grizzell as saying no similar allegations appeared in Mr. Holley's personnel file from the past.

23. On May, 14, 2003, the Lincoln Journal ran an article that said a meeting between the Department of Health and Human Resources and Mr. Grizzell would takeplace that week to discuss the allegations against Grievant, and cited Mr. Grizzell as the source of its information.

24. A May 21, 2003, Lincoln Journal article detailed Grievant's transfer to the central office, and repeated the allegation that he had “inappropriately touched at least one female student.”

25. On the 2002/2003 Yearbook page for Mr. Holley's sixth-grade class, a group picture of the class shows Grievant seated behind his desk with the students gathered around him. A female student is sitting on his lap. Exhibit D-7.

26. Grievant had a habit of “flipping” students over his shoulder, by picking up the student, flipping the student over his shoulder, and setting the student back down. He did this mainly to female students, but very occasionally to male students.

27. On occasion, when a student had done something particularly well, Grievant would tell the student he loved her.

28. Most students and some coworkers reported that Grievant often made disparaging remarks to students, including calling them “stupid” or “ignorant.” He sometimes read students' incorrect answers to problems aloud in class.

29. Grievant's students, male and female, generally thought he was a good teacher who prepared them well for the seventh grade.

30. Grievant's recent past evaluations show no need for improvement.

31. In February, 1989 Grievant received negative ratings on a performance evaluation, and filed a grievance to have those marks changed. His grievance was granted at level three.

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DISCUSSION

"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." *Graham v. Putnam County Bd. of Educ.*, Docket No. 99-40-206 (Sept. 30, 1999). West Virginia 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.

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). Respondent's reasons for its termination of Grievant's employment are set forth in the termination letter as quoted above, and Respondent argues both that it met its burden of proving those charges and that termination is an appropriate punishment. Respondent also alleges that Grievant has gained such notoriety that his separation from employment is justified. Grievant contends that Respondent has blown his actions out of proportion, that Respondent has failed to state a claim that supports disciplinary action under W. Va. Code § 18A-2-8, and has caused the notoriety of which it complains. **I. Credibility**

A major issue in this case is whether the students who complained about Grievant's behavior are credible. There are several instances where Grievant's and his students' testimony or accounts of events diverge. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dept. of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dept. of Health and Human Resources*, Docket No. 95-HHR-066 (May 12, 1995).

The undersigned is charged with assessing the credibility of the witnesses, and where the

evidence has been submitted on the record, this is an especially difficult task, as the undersigned has not had the opportunity to observe the witness' demeanor. "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). Relevant hearsay is admissible in administrative hearings. *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (Dec. 9, 1997). Much of the evidence Respondent presented was such hearsay, and while admissible and credible, its weight varies inversely with its remoteness from the actual source.

Nevertheless, demeanor is only one of the factors to be considered in assessing the credibility of a witness. Other factors include the witness' 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 ornonexistence of any fact testified to by the witness, and the plausibility of witness' information. *See Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994).

Grievant's credibility is diminished both by his self-interest, and by his failure to admit the readily-apparent. As an example, Grievant's refusal to admit that a student sitting on his knee is sitting on his lap calls into question his versions of everything else. This fact makes it necessary to question whether his version of other events also edits out anything that could have a negative connotation. In addition, he demonstrates a selective memory about instances that more than one eyewitness saw occur, such as the incident where he smacked Miss Adkins' buttocks. While he readily admits incidents he feels are not probative of his misconduct, he stops short of denying those that are, saying he can't remember if he did the act or why he would have.

The students also lack credibility in many instances, and one student, Miss Cooper, actually admitted lying when she initially stated she felt uncomfortable in Grievant's classroom. The boys, whether justified by Grievant's particular harshness toward them or not, definitely conspired to cause trouble for Grievant and attempted to influence the girls to lodge inflammatory complaints. They planned to cause trouble for Grievant. While this detracts from the weight of Respondent's concerns about the overall classroom climate, certain specific incidents were witnessed and consistently testified to by more than one person. As Respondent points out, though, the students' motivation for reporting things that actually occurred has little bearing on the propriety of those things.

A few of the student witnesses who testified at the termination hearing also testified at the level four grievance hearing, specifically so the undersigned could observe theirdemeanor, an important component of any credibility determination. In weighing the testimonies of all the witnesses, these above factors have been taken into consideration, with the resolution of any inconsistencies set forth above in the Findings of Fact.

II. Misconduct

Most of the factual basis for Respondent's action is undisputed. Beginning with Grievant's prior disciplinary action. In 1988, Grievant was reprimanded for improper contact with a female student. He challenged that action and lost, and the reprimand and resulting order to abstain from such contact has remained in his file. While this was, as Grievant points out, fifteen years ago, the injunction remains in effect. It is, however, significant that Grievant has had no subsequent, similar accounts of misconduct since that time, with the exception of the current allegations.

In Grievant's termination letter, Respondent sets forth the charges against him that it now has the burden of proving:

> Specifically, it has been alleged that you: have smacked female students on the buttocks; allowed female students to sit on your lap; stating [sic] to female students that “you love” them; kicked students in the buttocks; grabbed students by the arms and wrists; shoved a female student into a book case; flipped students over you shoulder; engaged in disparate treatment of male and female students by generally providing favorable treatment to female students; referred to male students as “stupid”, “ignorant” and other demeaning terms; and inspected the personal belongings of students without permission.

. . .

> During the course of an investigation during the 2001/2002 school year I observed your classroom, along with Principal Woods. You completely darkened the room and allowed students to work on an overhead projector. You positioned yourself so that students were required to climb over your legs to exit the room when going to the bathroom. You permitted students to sit on your lap. Following this observation I directed you to cease darkening your room, to cease positioning yourself in such a manner thatclose physical contact with students was required for them to exit the room, and to cease allowing students to sit on your lap. In direct contradiction to my instructions, you requested that a female student sit on your lap for the class picture for the 2002/2003 yearbook.

The bulk of Respondent's evidence is in the form of hearsay and conclusory reports, rather than

the direct testimony of students. As such, it is not very reliable. The Grievance Board has applied the following factors in assessing hearsay testimony: 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. (See footnote 3) *Gunnells, supra*; *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-8-115 (June 8, 1990).

Only a few of the nineteen persons interviewed by Mr. Smith testified as witnesses at the level four hearing or the pretermination hearing. There were, apparently, written statements from each of the students interviewed, but Respondent chose to enter only the investigative report, which summarized the statements and did not quote extensively from them. The students who did testify were consistent with reported statements, but thereport fails to identify any of the student declarants by anything other than a number, so it is impossible to positively correlate witnesses with their reported versions of events. (See footnote 4) As is discussed elsewhere, at least one of the students in the class admitted lying, and they were all under tremendous peer pressure to come up with a strong complaint against Grievant. Accordingly, more weight is given to the testimony of witnesses who testified before the undersigned than on the investigative report's conclusions and summaries about the witnesses' concerns.

Despite the dearth of strong, credible, first-hand evidence about Grievant's conduct, Grievant himself admits to letting female students sit on his lap, and to telling students he loves them. He also admits to flipping students over his shoulder. Respondent falls short of actually accusing Grievant of being a pedophile, but clearly raises the implication and points to the students' complaints that they feel “uncomfortable.”

Regarding the lap-sitting, Respondent has proven this through Grievant's admission, although he claims the students sat on his knee and not his lap. As Respondent points out, though, the knees are part of the lap. Grievant makes the distinction, no doubt, in order to quell the sexual connotation

inherent in the image of a young girl sitting on the lap of an older man, but his characterization does not change the reality of what happened. There is absolutely no evidence that Grievant's contact with his students had a sexual component or that Grievant had a prurient intent. Instead, Respondent leaves that up to what intent may be inferred from the actions. Grievant's openness about his actions belie the inference to some extent. Whether Grievant's running his fingers through students'hair was grooming or groping is also left up to inference but again, no corroborating evidence of intent was introduced.

Likewise, Respondent's contention that Grievant's contact with one of the students' buttocks was immoral has not been proven. The evidence suggests this was nothing more than horseplay, more like a swat than a grab. If this were immoral conduct by a teacher, most school football coaches would be facing termination. The “flipping” incidents are also in the nature of horseplay, although Respondent alludes to the possibility that inappropriate body parts could easily be touched while it happens, it produced no evidence this ever happened. While students were sometimes flipped unexpectedly, they were just as likely to ask to be flipped, and the evidence shows Grievant also flipped male students.

Respondent has not proven Grievant's motivations, but it has proven Grievant's actions were insubordinate. Grievant was given a direct order not to allow students to sit on his lap. Respondent not only has the admission of Grievant and the uncontroverted testimony of his students, it has physical evidence in the form of a yearbook photograph. Insubordination is one of the grounds listed in W. Va. Code § 18A-2-8 that may form a basis for suspension or dismissal. Although Grievant repeatedly states he did not ask the students to sit on his lap, that distinction is of no consequence _ he was under an absolute order not to allow students on his lap.

Respondent's other accusations fall into two categories: those designed to imply immoral conduct by Grievant, and those designed to show unsatisfactory teaching performance. When Mr. Grizzell gave Grievant his termination letter, he did not specifically list his reasons in terms of the enumerated grounds in W. Va. Code § 18A-2-8, but did listspecific acts of Grievant he found to be improper. This makes it necessary for the undersigned to fit the acts into the proper categories.

Examples of what Respondent would characterize as immoral conduct would be Grievant's physical contact with female students when they were on his lap, when he stroked their hair, and when he smacked Miss Adkins on the buttocks. Also, Respondent seems to lump in this category

instances where Grievant told students he loved them. Again, Respondent has not met its burden of proving the immorality of this conduct, as it has offered no evidence whatsoever of Grievant's motive or state of mind. It relies instead on the inherent implications such conduct raises and the resulting "uncomfortable" feeling of the students. A mere implication is insufficient to sustain such a serious charge.

While, at first blush, the allegations do raise the question of more sinister motives, a review of the totality of the evidence indicates it is more likely Grievant simply has poor judgment in fostering a caring learning environment for his students, or at least those students he perceives as not being troublemakers. A teacher acting *in loco parentis* does have duty to foster a warm, caring environment for his charges, and it would be a shame to create a classroom environment devoid of all human contact. However, teachers must avoid all appearance of impropriety, and Grievant's bias against his troublesome male students creates the insinuations that his favoritism of the females carries connotations it does not have. His students all believe he is a good teacher, and much of the horseplay is mutual. At worst, his conduct is *sexist*, but Respondent failed to prove it was *sexual.*

In order for Respondent to dismiss Grievant for the conduct it believes was immoral, it must fit the actions to the word. "Immorality is an imprecise word which means different things to different people, but in essence it also connotes conduct 'not in conformity withaccepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior.' [Citation omitted.]" *Kennard v. Tucker County Bd. of* Educ., Docket No. 01-47-591/628 (Mar. 12. 2002); *Golden v. Board of Education of County of Harrison*, 169 W. Va. 63, 67, 285 S.E.2d 665, 668 (1981); *Snodgrass v. Wetzel County Bd. of Educ.*, Docket No. 97-52-384 (Dec. 15, 1997); *Harry v. Marion County Bd. of Educ.*, 203 W. Va. 64; 506 S.E.2d 319 (1998). "'Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires at least an inference of conscious intent.' *See Hayes v. Kanawha County Bd. of Educ.*, Docket No. 94-20-1143 (June 28, 1995), citing *Youngman v. Doerhoff*, 890 S.W.2d 330 (Mo. 1994)." *Kennard supra; Wahl v. Mineral County Bd. of Educ.*, Docket No. 98-28-175 (Sep. 14, 1998).

Respondent's evidence does meet its burden of proving Grievant's conduct in flipping students, allowing them to sit on his lap, combing through their hair, or telling them he loves them was immoral. Certainly this conduct is questionable and rightfully raises suspicions about a teacher's motives, but it

is not always wrong. Teachers may be playful, caring and supportive without being lascivious. There is evidence, through the protests of parents, that his conduct does not fit the community norm, but those parents were reacting more to sensationalist rumor and less than to complete information. Grievant's conduct was willful, and with intent, but Respondent did not prove by a preponderance of the evidence what that intent was. Grievant's disparate treatment of male and female students, and his use of derogatory or demeaning terms to refer to students are both examples of unsatisfactory performance. Whether Grievant's disdain for his male students or their animosity toward him came first is of little consequence, since Grievant is the responsible adult and teacher in the classroom relationship. Whether he perceives his strictness with the students as good discipline or whether he actually dislikes the students is likewise without bearing on the propriety of his behavior. However, since these are performance issues that Grievant has not been charged with correcting on a performance evaluation, they cannot form the basis for this suspension or dismissal, although his failure to improve them in the future could result in those disciplinary actions. Those performance issues do not fit into any other of the W. Va. Code § 18A-2-8 grounds for discipline.

These charges could conceivably be considered cruelty, but fail to rise to the level of harm needed to sustain that charge. "[I]n order for a teacher to be guilty of cruelty, there must be a specific intent to inflict pain and suffering (usually directly upon a student), and such cases have involved patterns of physical and/or emotional abuse." *Snodgrass v. Wetzel County Bd. of Educ.*, Docket No. 97-52-384 (Dec. 15, 1997). *See Sinsel, supra*. *See also Eggleston v. Greenbrier County Bd. of Educ.*, Docket No. 94-13-395 (Dec. 29, 1994); *Pinson v. Cabell County Bd. of Educ.*, Docket No. 06-87-100-1 (July 21, 1987). Grievant is not charged with such motives, but instead seems to be a misguided disciplinarian responding to legitimate behavioral issues.

The allegation that Grievant went through his student's personal effects does not easily fit into any of the categories described in W. Va. Code § 18A-2-8. Grievant admitted doing this in order to look for seditious notes, but in doing so he crossed the line betweenclassroom management and invasion of privacy. "Public school students in West Virginia are entitled under *U.S. Const*. amend. IV and *W. Va. Const*. art. III, § 6, to security against unreasonable searches and seizures conducted in the schools by school principals, teachers and other school authorities." Syllabus point 2, *State v. Joseph T.*, 175 W. Va. 598, 336 S.E.2d 728 (1985). Grievant's claimed reasons fall far short of the reasonableness requirement adopted by the Supreme Court in *Joseph T.*, which generally requires a

suspicion the student has violated a law or school rule. However, this again, is more of a performance-related issue, and Respondent has not attempted to fit it into one of the other categories of disciplinary offenses.

Lastly, Grievant's changed 1989 evaluation is also a non-issue. Respondent claims something is amiss because certain scores were marked out and replaced by better scores. However, the evidence shows Grievant filed and prevailed in a grievance related to those scores, and the ratings were changed at the behest of the Board.

III. Notoriety

Superintendent Grizzell stated in his termination letter to Grievant, “your conduct has been the subject of a significant level of notoriety, none of which may be attributed to the District.” However, the April 23, 2003, newspaper article contains numerous quotes of Superintendent Grizzell. Although the reporter claims to have learned from a parent that Grievant had been suspended for “inappropriately touching at least one female student,” Superintendent Grizzell is quoted extensively talking about the investigation process for “these types of allegations.” In any event, there was substantial newsmedia coverage of the accusations against Grievant, and several concerned parents attended Board meetingsto speak out against Grievant's employment. Some even threatened to homeschool their children if they were assigned to his class.

However, notoriety in and of itself is not a grounds for termination. The Grievance Board has found, in connection with misconduct outside the workplace, notoriety can create a rational nexus between the conduct and the employee's employment, justifying dismissal for the conduct, “if, without contribution on the part of school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the particular teacher to discharge the responsibilities of the teaching position. *Rogliano v. Fayette County Bd. of Educ.*, 176 W. Va. 700, 347 S.E.2d 220 (1986); *Golden v. Bd. of Educ*., 169 W.Va. 63, 285 S.E.2d 665 (1981).” *Snodgrass, supra.*

In other words, notoriety is an enhancing factor used to relate, in most cases a criminal conviction or indictment, to the employee's employment relationship, and it must be created without contribution from the employer. Further, in past cases where it has been considered, the community had something more than rumor and innuendo to go on, such as a proven criminal act or definite sexual misconduct. Such is not the case here. Also, in this case, the employer's contribution cannot be

ignored. Although Respondent characterizes Mr. Grizzell's contact with the news media as *de minimus,* he did give more than a simple “no comment.” While he did seek to reassure that Grievant had no similar conduct in his past record, he gave credence to the subject of the ongoing rumors.

The parental concerns and involvement this notoriety brought forth could be seen as a substantial impairment of Grievant's capability to discharge his duties. However, this alone is not sufficient to sustain a dismissal, and the findings set forth above should serve to alleviate any misconceptions brought on by reliance on rumor and sensationalist news reporting.

IV. Mitigation

Grievant argues that, even if Respondent has proven its allegations, it has not proven the nefarious implications it urges be applied to those events, and the penalty of termination is therefore too harsh. 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).

"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 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'sassessment 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 proven insubordination on the part of Grievant. Insubordination is one of the grounds listed in W. Va. Code § 18A-2-8 that may form a basis for suspension or dismissal, so even

if no other allegation were proven, Respondent's decision to dismiss could be justified. However, insubordination must rise to a certain level of willful defiance in order to justify dismissal. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Butts v. Higher Educ. Interim Governing Bd.,* 212 W. Va. 209, 569 S.E.2d 456 (2002). *See 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). “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.” *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).

In this case, there was a flagrant disregard for the order, but not to the authority behind the order. Grievant, in his mind, complied with the intent behind the order not to allow students on his lap, rightly perceiving Respondent's concern about contact in a sexual way. He saw the knee as a non-sexual contact, addressing the implied concern if not the explicit order. His failure to comply merits some punishment, but not dismissal. He has a long history of excellent teaching with Respondent. Without evaluations, Grievant was not clearly advised against the performance-related conduct upon which his dismissal was based, and it cannot be used to enhance a relatively minor infraction of classroom decorum. As the DHHR pointed out in its conclusions, Grievant's issues could be addressed with training and monitoring.

Also, Mr. Grizzell admonished Grievant for allowing students to sit on his lap when he visited Grievant's room with a concerned parent. Faced with Grievant's admission that this had indeed happened, Mr. Grizzell apparently saw no reason to impose any discipline whatsoever, although Grievant at that time was just as insubordinate as has been proven in this case. Only when it needed to enhance its charges to support dismissal did the insubordination become a serious issue to Respondent.

Further, Grievant's prospects for rehabilitation are high. While Respondent notes it is unlikely he will change, given his fifteen-year-old injunction against similar behavior, this again ignores the distinction between Respondent's implications and its direct order. Grievant knew Respondent was concerned about apparent sexual misconduct, knew he had no such intent, and bent the rule in order

to address the implied injunction if not the actual one. DHHR found Grievant's behavior could be corrected with counseling and retraining. Also, Grievant has volunteered to undergo counseling to address the concerns of Respondent, and with no past harm in evidence, there is little risk of future harm, especially with retraining.

The following conclusions of law support this discussion.

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. An employee of a county board of education may be suspended or dismissed only 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. If the disciplinary action is taken for unsatisfactory performance, it must follow an employee performance evaluation. W. Va. Code § 18A-2-8.

3. "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)." *Graham v. Putnam County Bd. of Educ.*, Docket No. 99-40-206 (Sep. 30, 1999).

4. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002). *See Riddle v. Bd. of Directors, So. W. Va. Community College*, DocketNo. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89- 004 (May 1, 1989).

5. "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." *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).

6. "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).

7. Relevant hearsay is admissible in administrative hearings. *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (Dec. 9, 1997).

8. The Grievance Board has applied the following factors in assessing hearsay testimony: 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. (See footnote 5) *Gunnells, supra*; *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-8-115 (June 8, 1990).

9. "Immorality is an imprecise word which means different things to different people, but in essence it also 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 proper sexual behavior.' [Citation omitted.]" *Kennard v. Tucker County Bd. of* Educ., Docket No. 01-47-591/628 (Mar. 12. 2002); *Golden v. Board of Education of County of Harrison*, 169 W. Va. 63, 67, 285 S.E.2d 665, 668 (1981); *Snodgrass v. Wetzel County Bd. of Educ.*, Docket No. 97-52- 384 (Dec. 15, 1997); *Harry v. Marion County Bd. of Educ.*, 203 W. Va. 64; 506 S.E.2d 319 (1998).

10. "'Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires at least an inference of conscious intent.' *See Hayes v. Kanawha County Bd. of Educ.*, Docket No. 94-20-1143 (June 28, 1995), citing *Youngman v. Doerhoff*, 890 S.W.2d 330 (Mo. 1994)." *Kennard supra; Wahl v. Mineral County Bd. of Educ.*, Docket No. 98-28-175 (Sep. 14, 1998). 11. "[I]n order for a teacher to be guilty of cruelty, there must be a specific intent to inflict pain and suffering (usually directly upon a student), and such cases have involved patterns of physical and/or emotional abuse." *Snodgrass v. Wetzel County Bd. of*

Educ., Docket No. 97-52-384 (Dec. 15, 1997). *See Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996). *See also Eggleston v. Greenbrier County Bd. of Educ.*,Docket No. 94-13-395 (Dec. 29, 1994); *Pinson v. Cabell County Bd. of Educ.*, Docket No. 06-87-100-1 (July 21, 1987).

12. Notoriety in and of itself is not a grounds for termination. Notoriety can create a rational nexus between outside conduct and the employee's employment, justifying dismissal for the conduct, "if, without contribution on the part of school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the particular teacher to discharge the responsibilities of the teaching position. *Rogliano v. Fayette County Bd. of Educ.*, 176 W. Va. 700, 347 S.E.2d 220 (1986); *Golden v. Bd. of Educ*., 169 W.Va. 63, 285 S.E.2d 665 (1981)." *Snodgrass, supra.*

13. 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).

14. "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. SummersCounty 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).

15. "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).

16. Respondent has not met its burden of proving offenses for which Grievant may be terminated, with the exception of insubordination with regard to allowing students to sit on his lap.

17. Dismissal is a disproportionate discipline for this offense given Grievant's long service, past evaluations, and prospects for rehabilitation.

For the foregoing reasons, this grievance is hereby **GRANTED**. Grievant's dismissal is hereby commuted to a suspension without pay for the period from his termination to date. Respondent is ordered to reinstate Grievant to his former position. (See footnote 6) Respondent is further ordered to develop an improvement plan to address Grievant's performance-related issues, and Grievant is ordered to comply with such plan. Grievant has volunteered to undergo counseling, and he is hereby Ordered to do so. Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Lincoln 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: June 17, 2004

M. Paul Marteney

Administrative Law Judge

Footnote: 1

See Holley v. Lincoln County Bd. of Educ., Docket No. 89-22-79 (June 16, 1989).

Footnote: 2

This term was not explained, but it is assumed it means detention.

Footnote: 3

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing hearsay. See Borninkhof v. Department of Justice, 5 MSBP 150 (1981).

Footnote: 4

This problem is especially evident in the report by one identified student that another unidentified student stated she was "going to get rich."

Footnote: 5

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing hearsay. See Borninkhof v. Department of Justice,5 MSBP 150 (1981).

Footnote: 6

After this decision was structurally complete, but before its issuance, Respondent's attorney provided information that Grievant's teaching certificate had been permanently revoked. As this decision by the State Board of Education was based on separate proceedings and different evidence, it has no bearing on the outcome of the Grievance. However, implementation of the relief granted herein is stayed pending the outcome of those proceedings.