WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

TYRONE KEITH PERSINGER,

Grievant,

v. **Docket No. 05-20-326**

KANAWHA COUNTY BOARD
OF EDUCATION,

Respondent.

DECISION

Tyrone "Keith" Persinger (hereinafter "Grievant") initiated this grievance on September 9, 2005, following the termination of his employment as a classroom teacher by the Kanawha County Board of Education ("BOE"). A pre-disciplinary hearing was conducted by Carole Lewis Bloom on June 15 and 28, 2005, following which Grievant was terminated by BOE action on September 7, 2005. Eight days of hearing were held at level four before Administrative Law Judge Paul Marteney on December 5-9, 2005, January 23 and 30, 2006, and April 23, 2006. Grievant was represented throughout these proceedings by counsel, Rebecca E. Mick, and Respondent was represented by counsel, James W. Withrow. (See footnote 1) Following the level four hearing, the parties submitted fact/law proposals on July 31, 2006, and August 15, 2006. (See footnote 2) Due to the resignation of Judge Marteney, this grievance was reassigned to the undersigned administrative law judge on August 16, 2007. However, because several items were missing from the record, specifically the numerous exhibits introduced at level four, the undersigned did not have the entire file for complete review until

September 19, 2007.

Synopsis

Grievant was terminated from his position as a classroom teacher following numerous allegations of sexual harassment of students, which surfaced in September of 2004. At least twelve students came forward and testified to numerous incidents, spanning approximately a 2-year period, in which Grievant poked or grabbed their breasts, patted or grabbed their buttocks, attempted to look down their shirts or pants, and made inappropriate comments of a sexual nature. The overwhelming, credible evidence submitted by the BOE established that most of the incidents likely occurred, and Grievant failed to prove any motivation which would explain such numerous allegations, if they have been contrived. Therefore, the BOE established by a preponderance of the evidence that Grievant's conduct violated its sexual harassment policy, and his termination was appropriate.

Preliminary Issues

It must be noted that, at the outset of the level four proceedings, Judge Marteney issued a Protective Order, dated October 20, 2005. Pursuant to the provisions of this Order, all documents and/or exhibits containing the identities of students involved in this matter were to be replaced with redacted versions. Therefore, prior to the reproduction of any such material included in this record for purposes of a circuit court appeal, the parties are directed to comply with the provisions of that Order. (See footnote 3)

A second matter which must be addressed is the Motion to Dismiss which was filed by the BOE on August 7, 2007. This Motion was made as a result of an agreement reached between Grievant and the Kanawha County Prosecuting Attorney, in which Grievant agreed not to seek employment in the West Virginia school system between July of 2007 and July of 2009, and he also agreed not to seek renewal of his teaching certificate when it expires in July of 2008, thus preventing him from ever again being employed as a teacher in this state. (See footnote 4) Accordingly, as a result of these conditions, it would be impossible for Grievant to be returned to his position at CHS, even if his termination were found to have been improper. However, Grievant's counsel, in a response submitted on September 5, 2007, contends that Grievant is still entitled to a ruling on the propriety of his

termination, in the event that back pay between September of 2004 and July of 2007 would be the appropriate remedy. "Relief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the [Grievance Board]. *Miraglia v. Ohio County Bd. of Educ.*, Docket No. 92-35-270 (Feb. 19, 1993). When there is no case in controversy, the Grievance Board will not issue advisory opinions. *Brackman v. Div. of Corr./Anthony Corr. Center,* Docket No. 02-CORR-104 (Feb. 20, 2003); *Gibb v. W. Va. Div. of Corr.*, Docket No. 98-CORR-152 (Sept. 30, 1998). However, because Grievant would be entitled to monetary relief, in the form of back pay and benefits, if his termination is determined to have been improper, a decision in this case would not be entirely advisory and would potentially provide substantive relief to Grievant. Accordingly, Respondent's motion must be DENIED.

The undersigned has reviewed the entirety of the record in this matter, including the transcript of the BOE hearing and the transcript of the eight days of hearing at level four. In addition, the undersigned has listened to the audio recordings of the level four hearing in order to assess the credibility of witnesses whose testimony contradicted one another. After a review of the evidence, I find that the following facts have been proven by a preponderance of the evidence.

Findings of Fact

1. At the time of his termination, Grievant had been employed by the BOE as a ninth grade "Honors" (See footnote 5) science teacher at Capital High School ("CHS") since August of 2000. 2. Grievant was a very popular teacher who had a comfortable rapport with his students. He was highly respected by his colleagues and administrators and was regarded as a talented, organized educator.

3. In early September of 2004, allegations were made by students that Grievant had engaged in inappropriate conduct toward them, including touching their bodies and making comments of a sexual nature. Grievant was suspended, with pay, on September 13, 2004, pending an investigation conducted by the BOE's investigator, Jeane Ann Herscher.

4. Upon conclusion of the investigation, during which Grievant and approximately twelve students were interviewed, the BOE notified Grievant of the specific allegations against him and scheduled a pre-disciplinary hearing.

5. Grievant elected not to participate in the hearing conduced by the BOE's hearing officer on

June 15 and 28, 2006. Students A.D., (See footnote 6) M.B., J.A., L.S., M.W., D.F., S.B., L.E., and A.N. testified during this hearing regarding Grievant's inappropriate conduct toward them.

6. M.B. was the first student to complain to CHS administrators about Grievant's conduct. She knew Grievant from being a student in his ninth grade science class during the 2001-2002 school year. He was the favorite teacher of many female students at the time, even though he frequently made comments about tight or short clothing, along with commenting about their breasts or buttocks. 7. In early September of 2004, M.B. was beginning her senior year at CHS, and was waiting in a counselor's office to discuss having her schedule changed. The counselor was not there, so M.B. waited alone in his office. Grievant entered the counselors' office suite, because he was to meet with all of the counselors regarding a project. M.B. asked Grievant some questions regarding an upcoming community service project, during which she would be assigned to help in his class, and asked what type of work she would be doing. In response, Grievant grabbed the side of M.B.'s stomach, and said “what are you best at?”

8. After Grievant held his meeting with the counselors that same day, Grievant returned to the counselor's office where M.B. was waiting, and they discussed something M.B. was showing him in a textbook. As they were talking, Grievant looked around to see if anyone was watching, then touched M.B.'s breast. M.B. responded with a surprised “Mr. Persinger!” Grievant laughed and asked her if she had lost weight.

9. M.B. told her parents about the incident, and she and her parents made a complaint to CHS officials the following day, prompting Grievant's suspension and the investigation.

10. A.D. was in Grievant's ninth grade science class during the 2002-2003 school year. She developed a good relationship with Grievant and considered him a friend, because he did not speak to them in an authoritative manner like other teachers. She continued to visit Grievant's classroom, even after ninth grade, using his computers to type papers or simply going there to avoid other classes. Grievant had a practice of writing permits for students, including A.D., to get out of class. 11. At the end of school during A.D.'s tenth grade year, in 2004, a car wash was being conducted in the front of the school. A.D. and another student, L.E., were in Grievant's classroom and asked him to bring his van around front for the car wash. Because Grievant's room is far from the location of the car wash, he proposed that A.D. and L.E. ride with him in the van around to the front of the school.

12. Once in the van, A.D. sat in the front with Grievant, and L.E. sat in the back. During the ride, Grievant reached over and rubbed A.D.'s thigh (she was wearing shorts). 13. A.D. also heard Grievant frequently comment about students' shirts being too low cut and, on one occasion, he “poked” her breast and told her to “cover that up.” On one occasion when she was waiting for Grievant to write her a permit to return to another class, he rubbed the back of her leg.

14. A.D. did not report Grievant's conduct prior to September of 2004, because she considered him a friend or a “peer,” his conduct was frequent and seemingly normal at the time, and she assumed what he was doing was not wrong, due to his continued popularity.

15. J.A. was also in Grievant's ninth grade science class in 2002-2003. As with other female students, J.A. was friendly with Grievant and visited his classroom throughout ninth and tenth grade.

16. On at least one occasion, Grievant commented that J.A.'s behind was small and her pants “hung off” it.

17. One day when J.A. was in tenth grade, J.A. went to see another teacher after school, because she needed help with an assignment. The teacher was unavailable, so she referred J.A. to Grievant for help. J.A. encountered Grievant in the hallway, where hewas walking and carrying his infant son. As they were walking side-by-side and talking, Grievant reached over and touched J.A.'s breast.

18. On the first day of school of the 2004-2005 school year, J.A. went to a counselor's office to discuss having her schedule changed. The counselor left the room to get another teacher to help her with a computer problem. That teacher, Stan White, came into the office and proceeded to work on the computer, with his back to the doorway. Grievant came to the doorway and spoke with J.A. At the time, J.A. was wearing a ruffled, layered skirt, and Grievant took his hand and “flipped” the skirt up several inches. Mr. White did not see what occurred, because his back was to Grievant and J.A.

19. Along with her own experiences, J.A. saw Grievant touch other students and heard him make inappropriate remarks. She did not report this prior to September of 2004, because the students viewed Grievant as their friend, and she did not want him to lose his job, knowing that he had a wife and children.

20. D.F. was in Grievant's science class in 2002-2003 and had a friendly relationship with him. She frequently visited his classroom throughout tenth grade, also.

21. Throughout D.F.'s tenth grade year, Grievant frequently and regularly commented that D.F.

had a large butt. He stated that she was in “the butt club” or the “big booty club.”

22. Also during tenth grade, D.F. was in HSTA (the “Health Sciences & Technology Academy”), of which Grievant was a faculty sponsor. One day after a HSTA meeting, D.F. was walking out with Grievant. He looked to see if anyone was around, grabbed her bottom, and said “Oh, you have ass.” 23. At the beginning of the 2004-2005 school year, D.F. and L.E. went back to the school after it had dismissed for the day, because D.F. had forgotten a book. When they returned to the school, the two girls went to their individual lockers, on separate ends of the building. D.F. encountered Grievant in the hallway, and he offered to show D.F. his new office. While they were in the office, with the door closed, Grievant touched D.F.'s breast and pulled her shirt out to try to look down it. D.F. pushed his hand away and left, returning to the car in an upset state, where she told L.E. what had transpired.

24. Sometimes when D.F. was “hanging out” in Grievant's classroom, he would throw things down her shirt, calling it “booby basketball.”

25. D.F. did not complain about Grievant's conduct prior to September 2004, because other students acted like it was “no big deal,” she did not want to be the one to “turn him in,” and she did not want him to lose his job.

26. B.S. was in Grievant's ninth grade science class in 2002-2003. During that school year, Grievant questioned B.S. about whether or not she had tan lines, after returning from a spring break trip.

27. B.S. often went to Grievant's room during first period when she was in tenth grade to get out of a class she did not like.

28. On her birthday, B. S. was asked to come to Grievant's classroom by E.S., who had a present for her. When B.S. opened the present, in the presence of E.S. and Grievant, E.S. said it was from her and Grievant. The gift was edible underwear and “love cuffs,” which were heart-shaped handcuffs.

29. Grievant once made a comment to B.S. that he had “seen her future” in a song entitled *Volvo Driving Soccer Mom* by the group, Everclear. This song and musicvideo are about a promiscuous high school girl who becomes a stripper, then gets married and settles down, becoming a “Volvo Driving Soccer Mom.”

30. During her tenth grade year, B.S. was in the hallway during class, when no one else was

around, and encountered Grievant. He stated “is that a keg in your pants, because I'd like to tap that ass.”

31. Until the “keg” comment, B.S. thought Grievant's comments to students were jokes, but she began to feel it was more serious after this particular comment. She and D.F. discussed reporting Grievant's conduct prior to September of 2004, but they never did.

32. M.V. was in Grievant's science class during the 2003-2004 school year.

33. On one occasion during class, M.V. was standing beside Grievant behind a large lab table in the front of the classroom, and he was seated on a stool. He put his hand between her thighs and wrapped his hand around her leg. The other students in class could not see this, because Grievant and M.V. were partially concealed by the lab table.

34. On another occasion when M.V. was in Grievant's class, she was the last person to leave the room, because she was straightening her desk. M.V. was wearing dress pants that zipped in the front, but did not button. Grievant partially unzipped M.V.'s pants, so that at least the top of her underwear was showing, revealing the slogan “Hello Kitty” written around the top of the waistband. Grievant made a comment about “petting the kitty,” and M.V. hurriedly left the room. 35. Throughout her ninth grade year, Grievant would poke M.V.'s breasts and make comments she felt were inappropriate. She did not report his conduct, because she was unsure to whom she should report it. (See footnote 7)

36. M.W. was also in Grievant's class during 2003-2004 and was friends with M.V

37. On several occasions during the 2003-2004 school year, Grievant touched M.W. on the breast or “smacked” her on the buttocks.

38. M.W. accompanied M.V. to Grievant's classroom on one occasion, so that M.V. could ask him a question. M.V. requested that M.W. come with her, because she was uncomfortable being alone with Grievant.

39. S.B. was a student in Grievant's science class in 2002-2003, and she was in Grievant's homeroom during the 2003-2004 school year.

40. Because Grievant was her favorite teacher, S.B. was in his classroom a lot, especially throughout tenth grade. She and D.F. would frequently go to Grievant's room during other classes, and Grievant would write them an excuse. They also ate lunch in his room periodically.

41. Throughout her tenth grade year, Grievant would grab S.B.'s butt as she was walking out of

class and frequently touch her breasts.

42. Grievant also played “booby basketball” with S.B.

43. Near the end of S.B.'s tenth grade year, Grievant gave her keys to the teacher's lounge to get some food. Grievant followed her in, closed the door, and touched her breasts. Grievant laughed about it and said he was checking to see if they were real. 44. S.B. did not report Grievant's conduct prior to September of 2004, because other girls said he was just joking around, they did not seem to take it seriously, and she did not want to be the one who got him into trouble. She was also afraid that her father would make her transfer to another high school.

45. K.W. was in Grievant's ninth grade science class during 2002-2003.

46. When K.W. was in tenth grade, she did not know any of the students in her homeroom class, so she would go to Grievant's classroom to visit during that period. On one occasion, she was walking toward the door and Grievant touched her buttocks. Another student, E.S., saw this occur, and said “It's okay, you're in the butt club.”

47. K.W. did not come forward with a complaint about Grievant's conduct, because it did not really bother her at the time.

48. G.F. was never a student in Grievant's class, but she was friendly with M.B., D.F., J.A. and L.E. She often heard D.F. and others discuss Grievant grabbing their behinds, and she told them they should stop spending time in his room. She refused to go with the others to visit Grievant's classroom, because she thought his relationships with the girls were inappropriate.

49. The students discussed above who were students in Grievant's 2002-2003 science class were friends and spent a lot of time together as a group. This group includes D.F., B.S., J.A., S.B., L.E. and L.S.

50. Students M.V. and M.W. were not friendly with the girls discussed above and were in a different grade.

51. M.B. was older than all of the other girls who witnessed Grievant's inappropriate behavior, although she was on speaking terms with some of them. 52. Students L.S., L.E., B.G. and A.N. also made complaints about Grievant making inappropriate comments and touching them inappropriately.

53. Student E.S. did not file a complaint against Grievant or testify in this proceeding. However, numerous students witnessed incidents in which Grievant touched E.S. on the buttocks and made

inappropriate, sexual remarks to her.

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). 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. W. Va. Code § 18A-2-8. “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).

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 ofacceptable sexual behavior." *Golden v. Bd. of Educ.*, 169 W. Va. 63, 285 S.E.2d 665 (1981). Conduct which constitutes prohibited sexual harassment is included within the proscription against immorality in W. Va. Code § 18A-2-8. *Harry v. Marion County Bd. of Educ.*, 203 W.Va. 64, 506 S.E.2d 319 (1998). Further, "[m]isconduct by a school employee which can be characterized as sexual harassment can constitute a basis for the termination of the offending employee's employment." *Id.* at Syl. Pt. 2. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Bradley v. Cabell County Bd. of Educ.*, Docket No. 99-06-150 (Sept. 9, 1999); *Laneheart v. Logan County Bd. of Educ.*, Docket No. 97- 23-088 (June 13, 1997).

At the time of the events in question, the BOE had an Administrative Regulation regarding the prohibition of sexual and other types of harassment. Examples of sexual harassment, as stated in this policy, include “unwelcome touching, grabbing or punching; inappropriate comments about one's body . . . [and] threats or demands for sexual favors[.]” Respondent contends that it has clearly proven by a preponderance of the evidence that Grievant repeatedly violated its sexual harassment

regulation, justifying the termination of his employment.

Grievant contends that the incidents described by the student witnesses either did not occur at all or did not occur as stated. Accordingly, because Grievant's testimony contradicts that of the students, credibility determinations must be made. 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. Dep't of Health & Human Res*., Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va.Dep't of Health & Human Res*., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ*., Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp*., Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999); *Perdue, supra*.

With very few exceptions, the undersigned found the student witnesses who forged complaints against Grievant to be credible, reliable witnesses. Their testimony was consistent with their written statements, the reports filed during the investigation, their testimony during the BOE hearing, and with one another's testimony. Conversely, Grievant's blanket denial of the majority of the allegations is simply not credible, especially in light of the sheer volume of incidents which were reported by the various students involved.

Grievant has made much of the alleged “inconsistent” testimony given by many of these students during the level four hearing. However, a witness's inability to recall exactly when and where a particular statement or action took place does not constitute evidencethat the reports were fabricated. Indeed, it became abundantly clear during the level four hearing that Grievant's inappropriate conduct was a regular, constant occurrence, spanning approximately a two-year period. Therefore, it would be quite normal that, with something being practically an everyday occurrence, it would be hard to recall the exact time and location where a particular statement was made. However, as to the majority of

Grievant's physical conduct, most of the students recalled these incidents with particularity. Moreover, one must keep in mind that the level four hearing was held more than a year after Grievant had been suspended and terminated, and at least two years or more after many of the incidents took place, logically affecting witnesses' ability to recall specific details.

Nevertheless, a few student witnesses were found not to be credible. According to counsel and the administrative law judge who presided at the level four hearing, student B.G. smelled of marijuana during her testimony. In addition, this student had dropped out of CHS and was attending an alternative program to get her high school diploma, and had apparently had behavioral issues in the past. Therefore, the undersigned finds her testimony not to be credible.

Students L.E. and L.S. are also found to not be believable, due to some problematic statements each has made. L.E. gave testimony contradictory to what was contained in the investigative report, which stated that L.E. complained that Grievant had improperly touched her, when she actually only witnessed Grievant's conduct toward others. Although this could have been a simple mistake in the investigative records, L.E.'s insistence that the written statement did not say what it actually did makes her less than credible. As to L.S., the undersigned simply does not believe that one of the incidents she described occurred as stated. She claimed that Grievant managed to place his entire hand down her pants, which she described as fitting “tight,” using a scooping motion, and touched the back of her genitals. It is simply not plausible that this occurred as described, especially in light of the allegedly tight fit of the pants. Accordingly, L.S. is found not to be credible.

Although Grievant would likely argue otherwise, three unreliable witnesses does not eradicate the credible evidence supplied by the numerous other students. While Grievant did produce other student witnesses who worked as teacher's aides (See footnote 8) in his classroom, who testified that they had never seen him do or say anything improper, this only demonstrates that they were not present when the conduct occurred or did not see it. One in particular, H.B., contradicted S.B.'s testimony that H.B., who was a senior teacher's assistant at the time, was involved in the “booby basketball” game. However, when S.B. testified to this incident, she did seem a little unclear as to who exactly was in the room at the time, and she could have been mistaken as to H.B.'s presence. Moreover, H.B. is found not to be a credible witness by virtue of her testimony that Grievant acted exactly like any other teacher, which contradicts the testimony of every single other witness in this case, including Grievant's, who all agreed that Grievant had a close personal relationship with many

of his students and related to them on a level which most other teachers did not. As to Grievant's own testimony, he has obviously been untruthful in denying that most of the incidents occurred. It is simply not plausible that this many students, some of whom do not even know each other, would fabricate this many stories of inappropriate behavior about a teacher for no apparent reason. In this regard, Grievant has provided little to no explanation, other than introducing a copy of the movie *Mean Girls* as an exhibit in this case. This is a film about high school girls scheming against each other, which has no probative value to this grievance. It defies logic that more than a dozen girls, some of whom are in different grades and social groups, would conspire against Grievant just because of a movie. In fact, not a single witness in this case gave any testimony regarding the movie or having discussed it with anyone. Moreover, Grievant's “theory” completely ignores the fact that every single witness, including the victims of his misconduct, testified that he was everyone's favorite teacher, including theirs, for most of his career at CHS. It is simply nonsensical that, if these students were going to “go after” a teacher just for “kicks,” they would pick the most popular teacher in school.

A specific example of the implausibility of Grievant's testimony can be found in his discussion of the *Volvo Driving Soccer Mom* song. He testified that he heard the song and made the statement to B.S., because she often said she would never change her ways and settle down. Grievant's allegation that he had no knowledge of the song's sexual connotation is simply not credible. The undersigned is familiar with both the song and music video, which are quite graphic. Throughout the song, the phrases “I used to be a bad girl,” and “where do all the porn stars go” are repeated many times. In addition, it discusses having sex in high school bathrooms, at prom, and in threesomes, and the video repeatedly shows images of sex and exotic dancing. It is simply not possible for anyoneto see or hear more than ten seconds of this song without realizing its sexual nature, and it was quite inappropriate for Grievant to compare a student to the song's subject.

Clearly, Grievant has every motivation to deny the many allegations raised against him, and no similar motivation has been established for the numerous students involved. Although Grievant introduced testimony from several of his colleagues, who all stated that Grievant was an extremely talented teacher whom they had never seen do or say anything inappropriate, this does not prove that the incidents did not occur. Quite logically, a teacher who is making comments of a sexual nature to students, along with touching their breasts and bottoms, is not going to do so in the presence of other teachers. In particular, Richard Parsons testified that he was a student teacher assigned to

Grievant's classroom for a 12-week period in the fall of 2002, and he saw nothing inappropriate occur. However, most of the allegations of misconduct occurred the following school year, in 2003-2004.

As previously discussed, conduct which involves prohibited sexual harassment also constitutes immorality as defined under W. Va. Code § 18A-2-8. *Willis v. Jefferson County Bd. of Educ.*, Docket No. 96-19-230 (Oct. 28, 1998). *See Harry, supra*. Such conduct is prohibited by Respondent's Sexual Harassment Policy. Further, Grievant's conduct was shown to be intentional, not inadvertent, accidental, or resulting from a simple misunderstanding. *See Bradley, supra*. Respondent has demonstrated by a preponderance of the credible evidence that Grievant engaged in the acts charged, and has also proven this conduct constitutes sexual harassment and immorality.

Grievant's behavior can also be viewed as insubordination. 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).

Grievant knew what type of behavior was and was not expected of him in regard to his interactions with the students in his charge. More importantly, he was well aware of Respondent's policy regarding sexual harassment and even testified to conducting training sessions on the subject. Therefore, the BOE has also demonstrated that Grievant's conduct was insubordinate, because it involved a deliberate and knowing violation of the BOE's policy against sexual harassment.

The following conclusions of law are appropriate in this case.

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. W. Va. Code § 18A-2-8. 3. Conduct which constitutes prohibited sexual harassment is included within the proscription against immorality in W. Va. Code § 18A-2-8. *Harry v. Marion County Bd. of Educ.*, 203 W.Va. 64, 506 S.E.2d 319 (1998).

4. "Misconduct by a school employee which can be characterized as sexual harassment can constitute a basis for the termination of the offending employee's employment." *Id.* at Syl. Pt. 2. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Bradley v. Cabell County Bd. of Educ.*, Docket No. 99-06-150 (Sept. 9, 1999); *Laneheart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13, 1997).

5. 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).

6. Respondent has proven by a preponderance of the evidence that Grievant engaged in prohibited sexual harassment of students, which constituted immorality and insubordination.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. (See footnote 9) 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 28, 2007

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Several of the student witnesses involved were also represented by counsel, but those representatives were not participants in the level four hearing.

Footnote: 2

Grievants' proposals were submitted beyond the agreed-upon deadline, and counsel made a motion to have those proposals accepted into the record. Because the file does not contain any record of an objection by Respondent, nor any ruling on the issue by Judge Marteney, the undersigned has considered these proposals and accepted them.

Footnote: 3

Grievant's written post-hearing submission, which is 130 pages long, uses the full names of the students throughout, rather than the agreed-upon initials and is one of the many documents which would have to be replaced with a redacted version.

Footnote: 4

In return, the prosecuting attorney agreed not to continue to prosecute Grievant on outstanding felony charges.

Footnote: 5

This course was referred to by many witnesses as "CATS-9."

Footnote: 6

Because all of the students involved were minors when the alleged incidents occurred, their initials have been used to protect their privacy.

Footnote: 7

Unlike other CHS students who testified in this matter, M.V. had apparently not received sexual harassment training since becoming a student at CHS.

Footnote: 8

There was an incredibly large amount of time spent during the hearing on the subject of the "Persinger's Princesses Club." Apparently, this was a nickname that the teacher's aides gave to themselves, as a group, and it does not appear to have any other significant relevance to this proceeding or the allegations against Grievant.

Footnote: 9

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va.

Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.