THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

CRAIG A. FINLEY,
Grievant,

v. **DOCKET NO. 2011-0728-BroED**

BROOKE COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed by Grievant, Craig A. Finley, at level three of the grievance procedure, on November 9, 2011, contesting his suspension without pay and subsequent termination of his employment by his employer, the Brooke County Board of Education. The relief sought by Grievant is, "reinstatement with compensation for lost wages with interest and all other benefits, pecuniary and nonpecuniary, lost as a result of Grievant's suspension and termination. Grievant also seeks the expunging of all references to his suspension and termination from his record."

A level three hearing was held before the undersigned Administrative Law Judge on January 19, 2011, in the Grievance Board's Westover office. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by David F. Cross, Esquire, Brooke County Chief Assistant Prosecuting Attorney. This matter became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on February 23, 2011.

Synopsis

Grievant's employment was terminated after he made inappropriate comments of a sexual nature to a co-worker and a student, and made both feel very uncomfortable, blew kisses to the student, offered students candy and gum, and while on an extra-curricular trip, he acted inappropriately toward waitresses in the presence of a co-worker. Grievant had previously received a 15 day suspension without pay for conduct of a similar nature, and he had been warned before about making inappropriate comments to female students and offering candy to students. Grievant's testimony denying the accusations was not credible.

The following Findings of Fact are made based upon the record developed at level three, which consisted of the transcript and exhibits from the termination hearing before the Brooke County Board of Education. No witnesses were presented at level three, and the undersigned did not personally observe any of the witnesses providing testimony.

Findings of Fact

1. Grievant began working for the Brooke County Board of Education ("BBOE") as a Bus Operator in 2000.

2. On April 17, 2003, a meeting was held with Grievant to discuss several complaints that had been filed by parents. Grievant had been giving candy to students, and had been commenting to a female student about her attire. It was alleged by a student that Grievant had told her that her shorts "fit nice," and that he liked it when girls wore dresses. Grievant was warned by Charles Baker, Superintendent of Brooke County

Schools, that he was to cease passing out candy to students and cease commenting on the attire worn by female students.

3. Grievant continued to give students candy and gum after being told not to do so, continuing to do so in the 2010-2011 school year.

4. On January 11, 2006, a female student who rode Grievant's bus gave a handwritten, two page, signed statement, which detailed why Grievant made her feel "very uncomfortable." The student stated that when she was in seventh grade Grievant would always close the door before she got on the bus, making her wait outside, and would then joke about it. The student's mother had complained to BBOE personnel about this at the time. Grievant would ask her to sit on the front seat. When she was in eighth grade he started missing her bus stop and made her stay on the bus until he had dropped all the other kids off. She stated, "I was very scared because I didn't know why he'd make me stay on." During the 2005-2006 school year he continually forgot to stop at her bus stop, causing her to begin standing up before her stop to make sure he "'remembers,'" but he would still "fly past my stop." She would tell Grievant to "'let me off now' about 3 times until he actually does. He always says '[n]o, stay on and I'll drop you off on the way back. It'll be quicker,' which isn't true." On January 20, 2006, Grievant was suspended for 15 days without pay for this behavior. Grievant did not grieve this suspension.

5. On September 18, 2010, Grievant drove the Brooke High School cross country team to a meet. On the way back they stopped at a Bob Evans Restaurant to eat. Grievant sat with Edward Fritz, the cross country coach. None of the student athletes were sitting at the table. Grievant asked the first waitress assigned to their table for her phone number, if she wanted his number, and if she wanted to go out with him, and made other

comments to her indicating that he wanted to have sex with her. After a while, this waitress was replaced by a second waitress to whom Grievant also made comments of a sexual nature. A third older waitress replaced the second waitress, and Grievant's comments ceased. Mr. Fritz found Grievant's comments and overall behavior to be so out of line that he was embarrassed by them, and believed the waitresses were uneasy and embarrassed, as evidenced by the fact that their faces turned red and they did not return.

6. Stacie Bennett has been employed by BBOE as a substitute bus operator for 11 years. In late September 2010, Ms. Bennett was talking to Grievant outside the bus garage. They were discussing a difficult turn onto a bridge when Grievant told Ms. Bennett several times that she had a "nice ass." This made Ms. Bennett uncomfortable, nervous, and embarrassed, and she reported the conversation to Superintendent Kathy Kidder-Wilkerson.

7. On September 21, 2010, Grievant blew kisses to a tenth grade female student, B.M.,[1] who was a passenger on his bus. On September 24, 2010, B.M. was chewing on a water bottle cap, and Grievant stated to her, in the presence of other students on the bus, that her "mouth was big enough to suck." Tr. p. 64. B.M. described Grievant as being too friendly, and looking at her in a way that made her feel uncomfortable. It was her observation that when she got on the bus Grievant would not be looking at her face, but rather would be looking down her shirt, and that he would watch her butt as she walked back to her seat. Tr. pp. 70-71.

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[1] Consistent with past practice, the student witnesses will be identified by their initials only.

8. R.S., a 15 year old, ninth grade student at Brooke High School who rides Grievant's bus, filed a complaint on September 27, 2010, alleging that Grievant had blown her kisses, called her "baby," and touched her butt on September 24, 2010, as she was departing the bus that evening. The testimony of R.S. was inconsistent and not credible. Grievant did not blow kisses to R.S., touch her butt, or call her "baby."

9. On September 29, 2010, Grievant was suspended by Superintendent Kidder-Wilkerson for 30 days without pay for insubordination, willful neglect of duty, cruelty, immorality and violation of BBOE's sexual harassment policy, and he was advised that the Superintendent would recommend to BBOE that Grievant's employment be terminated. The suspension letter states as follows:

> The insubordination charge results from your failure to uphold West Virginia Board of Education Policy 5902, the Employee Code of Conduct. You received continuing education on the contents of Policy 5902 on Tuesday, August 24, 2010 at Brooke High School. The willful neglect of duty charge results from failing to exhibit professional behavior by showing positive examples of communication. The cruelty charge results from your failure to maintain a safe and healthy environment, free from harassment, intimidation, bullying, and free from bias and discrimination. The immorality charge results from your failure to demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior. The sexual harassment charge results from inappropriate remarks to students and colleagues, and inappropriate touching of a student.

The letter goes on to detail the allegations made by Mr. Fritz, R.S., B.M., and Ms. Bennett.

10. At a meeting of the BBOE on November 5, 2010, the Board voted to uphold the 30 day suspension without pay, and to terminate Grievant's employment for insubordination, willful neglect of duty, cruelty, immorality, and violations of BBOE's sexual harassment policy.

11. BBOE has in place a "Racial, Sexual, Religious/Ethnic Harassment/Violence Policy," which applies to students and employees. Sexual harassment is defined to include "unwelcome behavior, verbal or written words or symbols directed at an individual because of gender," and "such conduct or communication has the purpose or effect of . . . creating an intimidating, hostile or offensive employment or educational environment." The Policy provides that an employee may be subject to discipline, including termination of his employment, for violation of this Policy.

12. Grievant had received good performance evaluations for several years.

13. Grievant filed a grievance in the summer of 2010 against BBOE.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995). A preponderance of the evidence is evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proven is more probable than not. *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in WEST VIRGINIA CODE § 18A-2-8, 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). WEST VIRGINIA CODE § 18A-2-8 provides that "[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 contendre to a felony charge."

The term immorality as used in the statute "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.'" *Golden v. Bd. of Educ. of County of Harrison*, 169 W. Va. 63, 285 S.E.2d 665, 668 (1981); *Hayes v. Kanawha County Bd. of Educ.*, Docket No. 94-20-1143 (June 28, 1995). "'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, [supra], citing Youngman v. Doerhoff*, 890 S.W.2d 330 (MOCC. 1994)." *Bell v. Mingo County Bd. of Educ.*, Docket No. 97-29-172 (Mar. 10, 1998); *Petry, supra.*

Insubordination has been defined as the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *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). In order to establish insubordination, the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid. *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). *See Santer v. Kanawha County Bd. of Educ.*, Docket No.

03-20-092 (June 30, 2003); *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).

"Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. *See Day v. Morgan Co. Health Dep't*, Docket No. 07-CHD-121 (Dec. 14, 2007). "An employee's belief that management's decisions are incorrect or the result of incompetence, absent a threat to the employee's health and safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. *Vickers v. Bd. of Directors/W. Va. State College,* Docket No. 97-BOD-122B (Aug. 7, 1998). *See Parker v. W. Va. Dep't of Health and Human Resources*, Docket No. 97-HHR-042B (Sept. 30, 1997)." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003).

"Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. *Adkins v. Cabell County Bd. of Educ.*, Docket No. 89-06-656 (May 23, 1990). This is a fairly heavy burden, given that Respondent must not only prove that the acts it alleges did occur, but also that the reason for Grievant's neglect of duty was more than simple negligence." *Tolliver v. Monroe County Bd. of Educ.*, Docket No. 01-31-493 (Dec. 26, 2001). Willful neglect of duty "is conduct

constituting a knowing and intentional act, rather than a negligent act.[2] *Williams v. Cabell County Bd. of Educ.*, Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ.*, Docket No. 95-29-151 (Aug. 24, 1995); *Hoover v. Lewis County Bd. of Educ.*, Docket No.93-21-427 (Feb. 24, 1994). Willful neglect of duty encompasses something more serious than incompetence. *Bd. of Educ. v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120, 122 (1990); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996)." *Geho v. Marshall County Bd. of Educ.*, Docket No. 2008-1395-MarED (Oct. 30, 2008).

"Cruelty is a deliberate act to inflict pain and/or suffering. Behavior which is directed toward a student, and which may include harassment, belittling, threatening, and/or grabbing, slapping, and restraining, without the need for self-defense, meets this definition. *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996)." *Wimmer v. Braxton County Bd. of Educ.*, Docket No. 2008-1497-BraED (Aug. 14, 2008).

Grievant was accused of making inappropriate comments to students and a co-worker, and of improper touching of a student. Grievant denied all of the accusations, or could not recall whether he had made comments he was accused of making, calling into question the credibility of Grievant and the witnesses against him. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed

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[2]"It is not the label a county board of education attaches to the conduct of the employee . . . that is determinative. The critical inquiry is whether the board's evidence is sufficient to substantiate that the employee actually engaged in the conduct." *Allen v. Monroe County Bd. of Educ.*, Docket No. 90-31-021 (July 11, 1990); *Duruttya v. Mingo County Bd. of Educ.*, Docket No. 29-88-104 (Feb. 28, 1990).

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*.

Grievant argued that the undersigned was prevented from making a credibility determination by the "failure of the Respondent to produce the witnesses at the level III hearing," citing *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). The undersigned cannot so easily dismiss the allegations against Grievant. This Grievance Board has recently been faced with this very same issue in *Fulmer v. Kanawha County Board of Education*, Docket No. 05-20-244 (October 29, 2008). In that case the Administrative Law Judge determined that even in circumstances where allegations of improper conduct had been made by a student against the grievant, "[t]he 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 witnesses' demeanor. Nevertheless, demeanor is only one of the factors to be considered in assessing the credibility of a witness. '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)." "In the absence of reliable demeanor and attitude evidence, less direct sources of information regarding [the witness'] truthfulness [may be] given great weight." *Id. See also, Tuttle v. Dep't of Transp.,* Docket No. 07-DOH-353 (Jan. 3, 2008)(aff'd Circuit Court of Kanawha County, Civil Action No. 08-AA-13)(hearsay rules applied where accuser provided a written statement only, but no sworn statement or testimony.)

Although the undersigned did not observe any of the witnesses, their testimony was given under oath, they were cross-examined by Grievant's counsel, and a transcript of the testimony was provided by a court reporter. Grievant presented no motive for any of the student witnesses or Mr. Fritz to make false accusations against him. On cross-examination it was suggested that Stacie Bennett would falsely accuse Grievant because she was a substitute bus operator just waiting for a regular bus operator to leave so she could take that job. The undersigned finds the testimony of Ms. Bennett, Mr. Fritz, and student B.M. to be straightforward and credible.

Mr. Fritz had no reason to make false statements about Grievant's conduct. He was sitting with Grievant at Bob Evans, and observed his conduct and the responses of the waitresses. His testimony was consistent and he had clearly been embarrassed by

Grievant's conduct. Grievant, on the other hand, described his own conduct toward the waitresses as friendly and joking, and did not recall making any comments to them that were inappropriate. He stated he did not recall whether he had made any comments that could have been considered "flirty," but he may have. Grievant's conduct toward these young women whom he did not even know clearly went beyond flirting, as evidenced by Mr. Fritz's embarrassment, and by the fact that two different waitresses declined to return to be subjected to Grievant's remarks.

Ms. Bennett stated clearly in her initial complaint that she did not normally complain, but that Grievant had "made it a point to tell me how nice my 'ass' is" three times during one conversation, and that he "checks it out often," which "makes me feel very uncomfortable at my workplace." She stated this was not the first time he had "made ignorant comments to me." In her testimony Ms. Bennett stated that she and Grievant were discussing the problems encountered with making a particular turn onto a bridge. Ms. Bennett told Grievant that the mechanic had told her, "'[a]s soon as your [ass][3] hits the last tree, turn the bus and you'll make it every time.'" She stated that Grievant then said he shouldn't say this, but, "'[y]ou have a nice ass.'" Tr. pp. 74-75. Grievant testified that Ms. Bennett was lying, and that he had responded, "Okay, that's nice.'" Tr. p. 131. This would be an odd response to Ms. Bennett's statement.

Ms. Bennett stated that Grievant had made comments to her throughout the years that she found inappropriate, and watched her butt when she walked, and that on one

[3] Ms. Bennett initially used the word "butt" when providing her testimony, but on cross-examination admitted, without hesitation, that it was she who had first said "ass" during the conversation, but was trying to "clean it up" a little bit in giving her testimony.

occasion when she was climbing onto the bus to clean the windshield, Grievant said he'd help her up, which made her uncomfortable, and she responded forcefully, "'[t]ouch me, and I'll kick you in the face. Don't touch me.'" Tr. pp. 76-77. Grievant did not recall Ms. Bennett ever telling him not to touch her. One would think that Ms. Bennett's remark would have left an impression on Grievant.

Ms. Bennett also testified that the previous school year she had transported a five or six year old girl home from school, and after she picked this child up and was waiting for the other children to board the bus, Grievant would walk over to her bus everyday and offer the child gum and talk to the child. On one occasion he seemed to want to touch the child. Another bus operator was present, Julie Smith, and she put her arm around the child and told Grievant not to touch her. Ms. Bennett also told Grievant not to touch the child when Grievant tried to help her off the bus, because she did not feel comfortable with the situation. Grievant did not remember this happening.

Ms. Bennett provided consistent, clear testimony about several different events involving Grievant, none of which sounded contrived. Grievant, on the other hand, remembered none of these events except the discussion about the bridge, and his explanation of his response made no sense. Ms. Bennett was a much more credible witness than Grievant.

Student B.M. is a tenth grade female student at Brooke High School, and rode on Grievant's bus one year. She testified without hesitation that Grievant tried to make her sit up front on several occasions, even though the high school students normally sit in the back of the bus, he told her jokes, and tried to give her candy or gum. She testified that

on September 21, 2010, Grievant blew her kisses, and on September 24, 2010, she was chewing on a water bottle cap, and Grievant stated to her, in the presence of other students on the bus, that her "mouth was big enough to suck." Tr. p. 64.[4] B.M. described Grievant as being too friendly, and looking at her in a way that made her feel uncomfortable. It was her observation that when she got on the bus Grievant would be looking down her shirt, and that he would watch her butt as she walked back to her seat. Tr. pp. 70-71. When asked on cross-examination how she could tell when someone was looking down her shirt or at her butt, as opposed to looking at her, she clearly and directly answered, "[t]hey're not looking at my face." Tr. pp. 72-73.

Grievant stated he did not recall blowing kisses to B.M., but did recall telling jokes to the students on the bus. He testified that he does watch the students until they sit down in order to assure that they sit down, and he watches them get off the bus and cross the road. He did not recall making a comment to B.M. about having a mouth big enough to suck, and stated he had *never* had a conversation with her. Grievant offered no explanation for B.M. to lie, and the undersigned finds his blanket denial of ever having a conversation with B.M. to lack credibility. The undersigned finds B.M.'s testimony more reliable than Grievant's.

The undersigned does not find the testimony of student R.S. that Grievant touched her on the butt, blew her kisses, and called her "baby," credible. R.S. is a 15 year old female student at Brooke High School. While Grievant did not suggest any reason why

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[4] Although B.M.'s mother had complained to BBOE personnel that Grievant had smacked B.M. on the butt, B.M. did not testify regarding this allegation, nor did any other witness.

R.S. would make up these serious allegations, R.S. changed her story on several important details during the course of her brief testimony. She testified first that Grievant does not drive the bus she rides, but did drive it a few weeks in September, then later testified that he always drove her bus. She testified that no one else was on the bus when Grievant touched her butt, then later testified that C.H. was on the bus, but she did not know why she was on the bus, and then testified that C.H. was going to her house that evening with her, and got off the bus with her. She testified first that she saw Grievant touch her butt, then that he slapped her butt. She testified that she saw him because she was facing forward before turning to start down the steps, then said she had already turned to go down the steps when he touched her butt. A statement was made at the hearing by an individual identified in the record as Mr. Bartz, that R.S. was a special education student, but no further information was provided with regard to her ability to perceive events and her ability to relate what she had experienced.

While student C.H., an 11th grade female student at Brooke High School who also rides Grievant's bus, corroborated that she also saw Grievant touch R.S.'s butt and blow her kisses, and that she heard him call R.S. "baby," the testimony of R.S. was so contradictory as to cast doubt on the testimony of both witnesses with regard to these allegations. C.H.'s testimony is further called into doubt by the fact that she stated she was right behind R.S. getting off the bus, which would have made it difficult for Grievant to reach between the two girls to touch R.S.'s butt. Had Grievant turned the video recorder on for this bus run as he is supposed to do, it would have been possible to at least determine whether Grievant blew a kiss, and possibly to have heard whether he called her

"baby," and it is troubling that Grievant "forgot" to turn the recorder on for the very same run that generated these serious allegations.

Grievant stated he did not recall calling R.S. "baby," touching her, or blowing kisses to her. He did not recall C.H. ever getting off at R.S.'s stop. Grievant stated that he has a medical condition which affects his memory, and that when he stated he did not recall, it was possible that he "may have done these things," but did not remember doing them. Tr. p. 143. He did state, however, that with regard to the allegation that he had touched R.S.'s butt, "I can say honestly, sir, that I did not touch her." Tr. p. 143.

Given the credible testimony of B.M., Ms. Bennett and Mr. Fritz regarding Grievant's conduct, and the 15 day suspension for similar, improper conduct, Respondent acted in accordance with the law in terminating Grievant's employment. Respondent proved the majority of the charges against Grievant, and those charges proven are sufficient to call into question Grievant's fitness to transport female students without supervision.

Although no argument was made with regard to the issue, Grievant suggested in the questioning of witnesses that he was fired because he had filed a grievance, and a finding of fact was included in the written argument filed by Grievant that he had filed a grievance.

To demonstrate a *prima facie* case of reprisal for filing a grievance, a grievant must establish by a preponderance of the evidence the following elements:

> 1) that he/she engaged in protected activity, *e.g.*, filing or participating in a grievance;
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> 2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

> 3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;
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> 4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or
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> 5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); *Gruen v. Bd. of Directors/Concord College*, Docket No. 95-BOD-281 (Mar. 6, 1997).

If a grievant establishes a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. *Webb, supra*.

While Grievant was fired shortly after he filed a grievance, the allegations were certainly not manufactured by his employer in an effort to support his termination. The allegations, if proven, raised a serious concern about whether Grievant should be allowed to continue to work unsupervised around female children.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in WEST VIRGINIA CODE § 18A-2-8, 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).

3. WEST VIRGINIA CODE § 18A-2-8 provides that "[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 contendre to a felony charge."

4. Respondent proved the charges of insubordination, immorality, cruelty, wilful neglect of duty, and violations of Respondent's sexual harassment policy.

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. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: March 16, 2011