THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

CECIL WILLIAM MORRIS,
Grievant,

v. **DOCKET NO. 2012-1498-CONS**

HARRISON COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Two grievances were filed by Grievant, Cecil William Morris, against his employer, Harrison County Board of Education, contesting a 24-day suspension without pay. The first grievance was filed directly to level three on June 20, 2012. The second grievance was filed at level one of the grievance procedure on or about June 22, 2012. That grievance proceeded through level one, where it was denied, and Grievant appealed to level two on July 16, 2012.[1] The statements of grievance are multiple pages in length, but both were essentially contesting the suspension, and the two grievances were consolidated by Order dated August 16, 2012, with the later grievance being moved to level three. The relief sought by Grievant is multiple pages, and requests the rescission of the suspension, lost salary and benefits, with interest, legal fees,[2] discipline of the Superintendent for

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[1] The year on the postmark is 2009, which is obviously a mistake.

[2] It is well established that the Grievance Board does not have the authority to award attorney fees. *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996). WEST VIRGINIA CODE § 6C-2-6 is entitled, "Allocation of expenses and attorney's fees." It specifically states: "(a) Any expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring

violation of Grievant's rights, an investigation of the Superintendent's recommendation, that retaliation cease,[3] punitive damages against Assistant Superintendent Greg Moore and that he and others be required to attend sensitivity training, and an apology, among other things.[4]

Two days of hearing were held at level three before the undersigned Administrative Law Judge, on January 7 and March 27, 2013, in the Grievance Board's Westover office. Grievant was represented by Sharon Brisbin, and Respondent was represented by Susan L. Deniker, Esquire, Steptoe & Johnson, PLLC. This matter became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on May 1, 2013.

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the expense." The undersigned would note that, although Grievant's representative repeatedly stated in her written argument that Grievant was "forced" to hire an attorney, it is clear that this was Grievant's choice.

[3] On review of the record and the written argument, the undersigned was unable to determine what Grievant alleges as retaliation.

[4] Grievant's representative asserted in her written argument that Grievant's reputation had been permanently damaged, and that he suffered "extreme mental, physical, and emotional damage . . . which is documented in his medical files [and] has been a detriment to his permanent health." No such documentation regarding Grievant's health was placed in the record, nor was any evidence of damage to Grievant's reputation placed in the record. Even if such were demonstrated, it is clear that the Grievance Board has never awarded punitive or tort-like damages for pain and suffering in making an employee whole. *Miker v. W. Va. Univ.*, Docket No. 06-HE-133 (July 18, 2006)*; Spangler v. Cabell County Bd. of Educ.,* Docket No. 03-06-375 (Mar. 15, 2004); *Walls v. Kanawha County Bd. of Educ.*, Docket No. 98-20-325 (Dec. 30, 1998); *Hall v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-433 (Sept. 12, 1997); *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997).

Synopsis

Grievant was suspended for 24 days without pay for placing his hands on a student's neck and shoulders on February 24, 2012, in an attempt to massage her neck after she said it hurt, and for tickling children and letting them tickle him around the mid-section, and pulling a child toward him to give her a big hug. Respondent proved that Grievant engaged in these actions, that the actions constituted inappropriate behavior, and that the actions were not simply unsatisfactory performance. Grievant did not demonstrate that his rights were violated in any way, or that the penalty imposed was too severe.

The following Findings of Fact are made based upon the record developed at level three.

Findings of Fact

1. Grievant has been employed by the Harrison County Board of Education ("HBOE") as a teacher since 1994. He is certified in Elementary Education, K-8, and teaches Physical Education and Health at Norwood Elementary School.

2. On February 24, 2012, students T.B. and A.D.[5] were in the gymnasium, along with a number of other students, and were under Grievant's supervision. T. B. is a second grade student, and A.D. is also a student at Norwood Elementary School.

3. Nancy Harvey has been a second grade teacher at Norwood Elementary School for 22 years, she has been a teacher for 30 years, and she has known Grievant for more than 20 years. Her class was in the gymnasium being supervised by Grievant during her planning period. When she went to the gymnasium to get her students she observed

[5] As is the Grievance Board's practice, the two minor students will be referred to in this decision only by their initials.

that T.B. was crying. She heard Grievant tell T.B. to come over to him and she did so. She could not see what Grievant was doing after that, but heard another student ask Grievant what he was doing, to which he responded that he was manipulating T.B.'s neck.

4. Ms. Harvey was asked on February 27, 2012, by Norwood Elementary School Principal Dora Stutler to provide a written statement of what she had observed in the gymnasium on February 24, 2012, and she did so that same day. Ms. Harvey's written statement is consistent with her testimony as set forth in the preceding Finding of Fact.

5. Jacci Smith has been a kindergarten teacher at Norwood Elementary School for 13 years, and has known Grievant for many years. Ms. Smith took her class to the gymnasium at around 1:10 p.m. When she arrived, Grievant's back was toward her. Grievant turned around, and she could see that he was rubbing T.B.'s shoulders. She could see T.B.'s ponytail moving back and forth, she heard T.B. make a nervous giggling sound and then a noise like "ouch," and she heard T.B. ask Grievant to stop, but he did not do so. She saw that T.B. was crying, and she appeared to be in pain. Grievant told her that he was tickling T.B. and she jerked away and her neck popped. Ms. Smith was concerned that T.B. was hurt, and went to see her team leader, Tonya Blackburn, later that afternoon, to tell her what she had witnessed and that she thought T.B. was hurt. Both Ms. Blackburn and Ms. Smith then went to Principal Stutler's office, and Ms. Smith reported what she had witnessed.

6. Ms. Smith was asked on February 27, 2012, by Ms. Stutler to provide a written statement of what she had observed in the gymnasium on February 24, 2012, and she did so that same day. Ms. Smith's written statement is consistent with her testimony as set forth in the preceding Finding of Fact.

7. Before Ms. Smith went to Principal Stutler's office, T.B. reported to Principal Stutler's office. She was crying and said her neck was hurt. T.B. told Principal Stutler that Grievant had placed his hands on her neck and her neck cracked. Principal Stutler put ice on her neck and had her secretary call T.B.'s parents to come and get her.

8. Principal Stutler went to the gymnasium and asked Grievant what had happened with T.B. Grievant told her he was tickling A.D. and T.B., and that T.B. flipped her head back and hurt her neck. A student interrupted Grievant, and while he was dealing with the student Principal Stutler left before Grievant had finished his explanation.

9. Principal Stutler then went to A.D.'s classroom and talked to her in the hall. A.D. told Principal Stutler that Grievant had his hands on T.B.'s neck and she was crying.

10. The gymnasium also serves as the cafeteria and is used for multiple functions, and there is a video camera in the room for student safety. The camera is not hidden, it is always on, and Grievant was aware of the camera. The incident with T.B. on February 24, 2012, was captured on videotape from this camera. Principal Stutler has access to the captured videotape from the computer in her office. When Ms. Smith and Ms. Blackburn came to Principal Stutler's office, the three of them watched the videotape from the gymnasium for all or part of the class period when T.B. was in the gymnasium. They observed Grievant placing his hands on T.B.'s neck and moving it back and forth. They also observed students poking Grievant in the mid-section, Grievant tickling students, and Grievant pulling A.D. toward him into a big hug.

11. Based on her training and experience, Ms. Smith did not believe that Grievant's touching of T.B. or A.D. was appropriate, and it made her uncomfortable. Ms. Smith has been taught to redirect children when they attempt to hug her, and believed all

teachers have been trained to do so, and she has been trained on inappropriate touching of children.

12. Principal Stutler has told the teachers at Norwood Elementary School not to put themselves in compromising situations, and she has explained what is considered inappropriate touching. Every year she presents the Employee Code of Conduct to all staff at the school and goes over the harassment, sexual harassment and intimidation policies. She did not believe Grievant had provided a safe and positive environment for the children in his care.

13. Ms. Harvey watched the videotape of Grievant's February 24, 2012 interactions with A.D. and T.B. and found his hugging and touching of A.D. and his touching of T.B.'s neck and shoulders to be inappropriate based on her experience as an educator.

14. Principal Stutler completed an Accident Report on February 24, 2012, which described the accident as "child was in gym - gym teacher was grabbing her neck to tickle her, moved neck around several times." The injury was described as a neck injury. Although Grievant should have completed an Accident Report, he did not do so, and Principal Stutler has completed them many times.

15. Principal Stutler also reported the incident to the West Virginia Department of Health and Human Resources, as she believed was required of her as a mandatory reporter of possible child abuse.

16. Principal Stutler called HBOE Superintendent Susan Collins on February 24, 2012, and told her what had occurred in the gymnasium that day with T.B.

17. Principal Stutler spoke with T.B.'s mother on February 25 and/or 26, 2012, and was told that the parents did not want their two children to have any contact with Grievant. T.B.'s mother called Principal Stutler several times thereafter and mentioned in these conversations getting a restraining order against Grievant, filing a lawsuit, and filing criminal charges against Grievant.

18. Superintendent Collins found Grievant's actions as shown on the videotape disturbing and inappropriate. Superintendent Collins spoke with T.B.'s parents on several occasions, and they expressed to her that they did not want their children around Grievant.

19. On February 26, 2012, Superintendent Collins told Ms. Stutler to tell Grievant to report to her office at 8:30 a.m. on February 27, 2012, and to offer him a substitute for the day. Grievant was so advised by Ms. Stutler, and he accepted the offer of a substitute for the day.

20. Grievant contacted his representative with the American Federation of Teachers ("AFT"), Rosemary Jenkins, regarding the meeting to be held in Superintendent Collins' office at 8:30 a.m. on February 27, 2012. Ms. Jenkins advised Grievant that he should not attend this meeting without representation. Ms. Jenkins then attempted to get the meeting time changed so that she could attend in person, as she was in Charleston, West Virginia. Ms. Jenkins called Superintendent Collins, but she did not agree to delay the meeting to give Ms. Jenkins time to attend in person. Ms. Jenkins was allowed to participate in the meeting by telephone as Grievant's representative. Assistant Superintendent Greg Moore also told Ms. Jenkins that he would contact the local AFT President, Andrea Alfred, as HBOE had an arrangement with her that she would sit in on

meetings as the representative, if the usual representative could not attend. Ms. Alfred did attend the meeting in person.[6]

21. Grievant contacted the minister at his church, David Frame, who is an attorney in Harrison County, and asked if he would accompany him to the meeting, and he did so. Mr. Frame had not been retained as Grievant's lawyer at that time, but he did participate in the meeting. Mr. Frame found Superintendent Collins to be rude, abusive, and arrogant during the meeting, and was embarrassed for Grievant by Superintendent Collins' behavior. Assistant Superintendent Moore observed that Mr. Frame and Superintendent Collins seemed to be sparring over who was going to be in charge of the meeting. After this meeting, Mr. Frame offered some legal advice and wrote some letters for Grievant.

22. It was made clear to Grievant at the February 27, 2012 meeting, what actions of his would be further investigated. At the end of the meeting Superintendent Collins told Grievant he would be on paid suspension while the investigation continued. By letter dated February 27, 2012, Grievant was advised that he was being suspended with pay, "due to

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[6] Although it is not clear, it appears that Grievant's representative may be asserting in her written argument that Grievant did not contact Ms. Jenkins, but rather, Superintendent Collins assumed that Grievant was represented by AFT and contacted her. The undersigned had a difficult time understanding what was being said throughout the written argument. However, if this is the assertion being made, it simply is not true. Grievant's representative also argued that it was a violation of Grievant's rights for Respondent to call Ms. Alfred to participate in the meeting, as Grievant had a right to choose his representation. The fact is, Grievant had representation of his choosing at this meeting, and there is no evidence in the record that either Grievant or either of the representatives participating in this meeting (See Finding of Fact Number 21) objected to Ms. Alfred's presence; and the record does reflect that no one recalled Ms. Alfred saying anything during the meeting.

issues surrounding your actions during physical education class on the afternoon of Friday, February 24, 2012," and that an investigation would be continuing into this matter.

23. Vickie Shahady was asked by Assistant Superintendent Moore to interview T.B. Ms. Shahady is a Diagnostician for HBOE, and she also serves as the Title IX Coordinator, as needed.[7] In her capacity as Title IX Coordinator, she conducts interviews of students. Ms. Shahady interviewed T.B. in the presence of T.B.'s mother. T.B. told Ms. Shahady that Grievant had grabbed her shoulders as she was walking past him, and when she tried to pull away from him, she heard her neck crack. T.B. told Ms. Shahady that she had asked Grievant to stop and that her neck had cracked, and he then started shaking her head and moving her shoulders. T.B. told Ms. Shahady she had again asked Grievant to stop, and told him he was hurting her. T.B. also told Ms. Shahady that Grievant had tickled her on her sides, and that he tickles the students, but they do not mind. T.B.'s mother told Ms. Shahady that she had taken T.B. to see a doctor, and that the diagnosis was inflammation and tightness in the muscle. Treatment prescribed was Motrin and a moist heating pad.

24. Ms. Shahady viewed the videotape of the incident for the first time on the Thursday before she gave her testimony at the level three hearing. She found the videotape to be generally consistent with T.B.'s statements to her.

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[7] Grievant's representative asserted in her written argument that Respondent made false representations to Grievant about Ms. Shahady's job title, that Grievant had questioned the qualifications of a Diagnostician to conduct an interview, and the Grievant's representative had obtained information that showed that Ms. Shahady is a Diagnostician on a full-time basis, and not the Title IX Coordinator. None of these assertions are supported by evidence which was properly placed in the record, and as such must be disregarded. Even if true, they have no bearing on the issues in this grievance, but represent merely another attempt to obfuscate the real issue.

25. Ms. Shahady believed that it was commonly known to all educators that hands are not to be placed on a child. She pointed out that teachers are not even allowed to put Calamine lotion on a child. She believed that the appropriate response when a child reports that her neck is injured is to escort the child to the Principal or school Nurse. She also pointed out that tickling could be considered a form of harassment, and that whether a particular act of touching is inappropriate depends on the facts of the situation. She had been trained to be cautious about any touching of students.

26. Sometime near the end of March 2012, Assistant Superintendent Moore called Ms. Jenkins and told her that he wanted to put the suspension with pay on the Board agenda, because the Board would need to approve a suspension with pay of more than 30 days, and they were approaching that. At a meeting of HBOE held on April 3, 2012, Grievant's suspension with pay was continued "until the completion of the superintendent's investigation pending further investigation and a successful agreement with the employee is resolved." Assistant Superintendent Moore advised Ms. Jenkins that the Board had approved the extension of the suspension with pay. Ms. Jenkins did not advise Assistant Superintendent Moore that she was not representing Grievant, and Ms. Jenkins thought that she was still acting as Grievant's representative at that time. Ms. Jenkins sent a letter to Respondent sometime in May 2012, stating that AFT was no longer representing Grievant.[8]

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[8] Grievant's representative stated in her written argument that, "[t]he Grievant never used AFT representative after [the February 27] meeting and advised Mr. Moore by phone and in writing of this decision." The record contains absolutely no evidence to support this conclusion, and the written argument itself at page 20 states that Ms. Jenkins called Grievant on April 25, 2012, and that AFT did not represent Grievant as of May 8, 2012. Grievant's representative also asserted that neither Grievant's attorney who appeared on

27. Matthew J. Croft, an investigator employed by the Department of Health and Human Resources, conducted an investigation of the February 24, 2012 incident involving T.B. Mr. Croft concluded his investigation on March 30, 2012, and sent Grievant his findings by letter dated April 4, 2012. Mr. Croft sent Ms. Stutler a copy of his report by letter dated March 30, 2012. Mr. Croft concluded that child abuse had not occurred.

28. Ms. Stutler did not receive Mr. Croft's report until she returned to work from spring break, which was the week of April 9 through 13, 2012. She provided Assistant Superintendent Moore with a copy of the report on Monday, April 16, 2012.[9] Assistant Superintendent Moore then asked Respondent's attorney to contact Mr. Frame to schedule a pre-disciplinary conference.

29. By letter dated April 22, 2012, Grievant was notified that a pre-disciplinary conference had been scheduled for April 25, 2012, at 8:30 a.m., at the office of HBOE Superintendent Susan Collins. The letter stated that Grievant could bring counsel or a

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his behalf at the June 5, 2012 hearing before the Board (See Finding of Fact Number 33) or "Grievant's representative" was made aware of the April 3, 2012 Board action. There is likewise no evidence in the record to support this assertion. Further, it is unclear who is being referred to as "Grievant's representative," and Grievant's attorney at the June 5, 2012 hearing was not representing Grievant until after Mr. Frame stepped out of the picture after the April 25, 2012 pre-disciplinary conference (See Findings of Fact Numbers 29 and 32).

[9] Grievant's representative asserted in her written argument that Superintendent Collins received Mr. Croft's report on April 3, 2012, and suggested some impropriety in asking HBOE on that same date to extend the suspension with pay when she knew the investigation had been completed. The record does not contain any evidence that Superintendent Collins received this report on April 3, 2012. Superintendent Collins testified that she received this report after spring break. Grievant's representative stated at the hearing that Mr. Croft had told her when he had mailed the report and to whom, but she was advised by the undersigned at the hearing that these statements would not be considered evidence.

representative to this conference. Mr. Frame attended the pre-disciplinary conference on April 25, 2012, as Grievant's attorney representative.

30. Superintendent Collins decided to recommend to HBOE that Grievant be suspended for the remainder of the school year due to the severity of his actions, and the need to get through the end of the school year. It was her observation that a lot of people were angry and upset by the situation, and needed time to heal. She felt Grievant should not have wrapped his arms around A.D., but should have redirected the child, and that if he thought T.B. was injured, he should have contacted Principal Stutler rather than chancing further injury by manipulating her neck.

31. By letter dated April 26, 2012, Grievant was notified that Superintendent Collins would recommend to HBOE that Grievant be suspended without pay for 24 working days, effective immediately, for inappropriate interaction with students on February 24, 2012, and that he had the right to request a hearing before the Board.[10]

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[10] Grievant's representative asserted that, because the words used in this letter were different from those used in the letter suspending Grievant with pay, that the "charges" kept changing. It was clear from the beginning what actions Grievant had taken that were considered improper, and that has not changed. "Where an act of misconduct is asserted in a notice of dismissal, it should be identified by date, specific or approximate, unless the characteristics are so singular that there is no reasonable doubt when it occurred. If an act of misconduct involves persons or property, these must be identified to the extent that the accused employee will have no reasonable doubt as to their identity." Syl. Pt. 2, *Clarke v. W. Va. Bd. of Regents*, 279 S.E.2d 169 (W. Va. 1981), citing Syl. Pts. 4 and 5 of *Snyder v. Civil Serv. Comm'n*, 238 S.E.2d 842 (W. Va. 1977). This is all that is required. Further, "[i]t 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

32. Grievant requested a hearing before the Board, and the hearing was scheduled for May 14, 2012. The Board meeting was then rescheduled to May 21, 2012. Mr. Frame was no longer representing Grievant, and Grievant's new attorney was not available on that date. The hearing was scheduled for the next Board meeting agreeable to Grievant's attorney.

33. Grievant was notified by letter dated May 28, 2012, that a hearing would be held on June 5, 2012, at 6:00 p.m., before HBOE, on the Superintendent's recommendation that he be suspended without pay. The hearing was held on June 5, 2012, and was closed to the public as it involved a personnel matter and a student would be referred to during the hearing. Grievant was represented by an attorney at this hearing, and the attorney did not object to the hearing being closed, nor did he object to the hearing going forward for any reason. Grievant's attorney did not place any objection on the record that HBOE had failed to provide any information he had requested prior to the hearing.[11]

34. At the conclusion of the June 5, 2012 hearing, HBOE voted to uphold the Superintendent's recommendation, and by letter dated June 11, 2012, Grievant was notified that HBOE had voted at its June 5, 2012 meeting to uphold the Superintendent's recommendation that Grievant be suspended without pay for 24 days, through the end of the 2011-2012 school year.

35. Grievant admitted that it was stupid of him to place his hands of T.B.'s neck and that his actions toward her were inappropriate. In particular, he knew it was

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[11] Other than the assertions of Grievant's representative, which are not evidence, the record does not reflect that Grievant ever made a request for information before the Board hearing.

inappropriate to grab T.B.'s head and move it. He stated he did not know why he had done it, and admitted that T.B. had told him her neck was hurting and that he tried to maneuver her neck. He did not know she was crying.

36. Grievant wears cartoon ties to work at times, and has a Pillsbury doughboy tie that he wears. This has resulted in students poking him in the stomach like the doughboy is poked in television commercials, and he would respond by going, "Tee hee," and poking the students back. He did not believe this was improper. Grievant did not believe this was tickling. Grievant admitted that he hugs students, but did not think it was improper to do so as no one had ever told him specifically not to do so. Grievant admitted that he knew he needed to be cautious in touching students.

37. Assistant Superintendent Moore has been an educator for 25 years. He viewed the physical contact with the students on February 24, 2012, as inappropriate and egregious.

38. During the period of his suspension with pay, Grievant received his full salary and benefits and continued to accrue seniority and other benefits as if he were working in his position.

39. Based on her years of experience as a representative, Ms. Jenkins told Grievant that it was possible he would be facing charges of sexual harassment or sexual misconduct and inappropriate touching. No HBOE personnel told Ms. Jenkins this, and she did not tell Grievant that HBOE personnel said this. She may have also advised him that it was possible he could lose his certification to teach, because she wanted him to be aware of the seriousness of the situation. No HBOE personnel told her this, and she did not tell Grievant that HBOE personnel had said this. Ms. Jenkins told Grievant he might

consider transferring to another school because if the parents are upset, it is not a good situation for the teacher, but this was not suggested to her by HBOE personnel and she did not tell Grievant it was.[12]

40. During both the February 27 and April 25, 2012 conferences, Superintendent Collins advised Grievant that he could save face by retiring or resigning, and that he would be embarrassed when the video was shown. There was also some discussion during these meetings about Grievant bidding into another job.

41. During the April 25, 2012 meeting, Assistant Superintendent Moore told Grievant that there would be a witch-hunt against him by the parents at Norwood Elementary School. He made this statement because he had seen this happen on many occasions.

42. In February 2011, a Board member provided Principal Stutler with an email sent by an unidentified person and told her the allegations against Grievant in the email needed to be addressed. She told the Board member the matter needed to be addressed by Superintendent Collins. The email also made allegations about another employee, and Grievant was not allowed to look at the email. The allegations about Grievant were generally that he was treating children in a military style. Grievant was not disciplined as a result of this email.

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[12] Grievant's representative stated in her written argument that Ms. Jenkins told Grievant "she had just talked to Mr. Moore and the charges against him were sexual misconduct and unlawful touching and that he had better resign immediately." There is no evidence in the record to support this assertion.

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); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). 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." In the instant case, Respondent suspended Grievant for his actions toward T.B. and A.D. on February 24, 2012. Respondent argued that these actions constituted cruelty and insubordination, inasmuch as Grievant's actions violated the Employee Code of Conduct. Grievant argued that Respondent had to identify a specific policy that had been violated.

The undersigned has reviewed the written argument provided by both parties, and is appalled by the many assertions made by Grievant's representative that are not supported by the evidence presented at the level three hearing. In fact, the written argument in many places attempts to present new facts which were not testified to by any witness. These instances are so numerous and outrageous that the undersigned declines to specifically address each and every misrepresentation of the facts, but will simply rely on the findings of fact made in this decision, which are derived from the evidence in the record. The undersigned conducted two days of hearing on this matter, and it should have been crystal clear that the purpose of this was to receive evidence under oath and allow the parties the opportunity to cross-examine the witnesses and test their veracity. To the extent that arguments made are based on evidence not placed in the record, these will not be addressed. This improper conduct, together with the many specious arguments put forward by Grievant's representative, many of which have been dismissed in footnotes throughout this decision, appear to the undersigned to be an attempt to obfuscate the issues in order to move the focus away from the real issue in this case, which is Grievant's improper conduct.

"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). While Grievant's actions were deliberate, he did not intend to inflict pain or suffering. He did, however, grab T.B. and to some extent restrain her, and he caused her pain. Grievant's

actions may be found to constitute cruelty. *Wimmer v. Braxton County Bd. of Educ.*, Docket No. 2008-1497-BraED (Aug. 14, 2008).

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." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(*per curiam*). *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). "[F]or there to be '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, supra.* In other words, there must be not only a refusal to obey a reasonable and valid order, but the refusal must be wilful. *Id.* "[F]or a refusal to obey to be 'wilful,' the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." *Id.* There is no requirement here that there be a specific written policy or procedure in place that is violated.

Several of Respondent's witnesses testified that Grievant's actions violated the Employee Code of Conduct. "`[A]n employee who violates [the Employee Code of Conduct] by failing to 'exhibit professional behavior,' 'maintain a[n] environment, free from harassment [and] intimidation,' 'create a culture of caring through understanding and support,' or 'demonstrate responsible citizenship by maintaining a high standard of conduct, self-control[,]' has engaged in insubordinate conduct as contemplated by W. Va.

Code § 18A-2-8. *Domingues v. Fayette County Bd. of Educ.,* Docket No. 04-10-341 (Jan. 28, 2005).' *Booth & Ware v. Randolph County Bd. of Educ.,* Docket No. 04-42-418 (Mar. 28, 2005)." *Thomas v. Greenbrier County Bd. of Educ.*, Docket No. 05-13-433 (Mar. 17, 2006).

The Employee Code of Conduct is found in the West Virginia Code of State Regulations, §126-162-4. It **requires** all West Virginia school employees to:

> 4.2.1. exhibit professional behavior by showing positive examples of preparedness, communication, fairness, punctuality, attendance, language, and appearance.
>
> 4.2.2. contribute, cooperate, and participate in creating an environment in which all employees/students are accepted and are provided the opportunity to achieve at the highest levels in all areas of development.
>
> 4.2.3. maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination.
>
> 4.2.4. create a culture of caring through understanding and support.
>
> 4.2.5 immediately intervene in any code of conduct violation, that has a negative impact on students, in a manner that preserves confidentiality and the dignity of each person.
>
> 4.2.6. demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior.
>
> 4.2.7. comply with all Federal and West Virginia laws, policies, regulations and procedures.

Grievant did not maintain a safe and healthy environment free from intimidation. His actions toward T.B. were clearly inappropriate, and he was hurting her. Whether his actions caused her injury or not, he could have injured her further, and he knew this. Further, Grievant admitted that he had been instructed to be cautious in touching students,

and he knew he should not have attempted to manipulate T.B.'s neck. In addition, the tickling of students, or poking them when they poke him, while no doubt enjoyed by the students, is unprofessional horseplay, and it was only a matter of time until such horseplay resulted in an injury or serious complaint. Grievant's actions constitute insubordination.

Grievant's actions seem to the undersigned, however, to fall more closely within the definition of wilful neglect of duty. "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. *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).

In this case, Grievant had a duty to assure the safety of the students, which he intentionally failed to carry out by his inappropriate actions toward T.B. Respondent proved

the charges against Grievant. *See, Jordan v. Mason County Bd. of Educ.,* Docket No. 99-26-080 (July 6, 1999).

Grievant argued that his conduct was correctable, and that he should have been placed on an improvement plan. Respondent argued that this was not a performance issue, but poor judgment. WEST VIRGINIA CODE Section 18A-2-8(b) provides that "[a] charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article. The charges shall be stated in writing served upon the employee within two days of presentation of the charges to the board." The Supreme Court of Appeals of West Virginia has stated regarding the application of the evaluation and improvement procedures, "The factor triggering the application of the evaluation procedure and correction period is 'correctable' conduct. What is 'correctable' conduct does not lend itself to an exact definition but must . . . be understood to mean an offense or conduct which affects professional competency." *Maxey v. McDowell County Bd. of Educ.,* 212 W. Va. 668, 575 S.E.2d 278 (2002). "'[T]he factor which distinguishes willful neglect of duty and insubordination from unsatisfactory performance is that the employee knows [his] responsibilities, and is competent to perform them, but elects not to complete them. When an employee's performance is unacceptable because [he] does not know the standard to be met, or what is required to meet the standards, and [his] behavior can be corrected, the behavior is unsatisfactory performance. *Bierer v. Jefferson County Bd. of Educ.*, Docket No. 01-19-595 (May 17, 2002).' *Waggoner v. Cabell County Bd. of Educ.,* Docket No. 2008-1570-CabED (Oct. 31, 2008)." *Hale v. Lewis County Bd. of Educ.,* Docket No. 2012-1238-LewED (Dec. 5, 2012), *aff'd,* Cir. Ct. of Kanawha County, Civil Action No. 13-AA-2 (Apr. 18, 2013).

Grievant admitted that his actions as they relate to T.B. were wrong. He showed complete disregard for the safety of T.B. by moving her neck when he knew he did not have the training to do so, and did not know what her injury was. Further, Grievant made no effort after this to make sure T.B. was not hurt. While he seemed to question whether it was proper for Principal Stutler to complete an accident report, he took no action whatsoever to properly report what had occurred, even though T.B. specifically complained in his presence of being hurt. Although Grievant certainly by all accounts loves children, in this instance he showed complete disregard for T.B.'s welfare. Grievant's actions cannot be characterized as unsatisfactory performance.

Grievant argued that his rights were violated several times and in various ways during the course of the investigation and decision-making process. These many arguments will next be addressed.

It appears that Grievant may be arguing that he was not allowed representation at the February 27, 2012, investigatory meeting with Superintendent Collins. WEST VIRGINIA CODE § 6C-2-3(g) addresses representation, and states:

> An employee may designate a representative who may be present at any step of the [grievance] procedure as well as at any meeting that is held with the employee for the purpose of discussing or considering disciplinary action.

This Code Section gives employees the right to representation during pre-disciplinary conferences. The Grievance Board has found that this statutory provision does not give an employee the right to representation at an investigatory meeting, except in certain instances. *Knight v. Dep't of Health and Human Res.*, Docket No. 2008-0981-DHHR (Aug. 6, 2009). "When a statute does not mention representation, the presence of an attorney or union representative is at the discretion of the employer. *Swiger [v. Civil Serv. Comm'r*,

179 W. Va. 133, 365 S.E.2d 797 (1988)*]*." *Id.* "The roles/duties of an investigator must be kept separate from the roles/duties of the individual who considers whether disciplinary action should or will be taken. If the individual who conducts the investigatory interview or questioning is also the one who could decide or recommend disciplinary action, the employee has the right to representation during this conference or interview." *Id.* In this instance, the Superintendent conducted the February 27, 2012 conference, which, although it could not be called an investigatory interview, was certainly part of the investigation into the incident. Grievant was entitled to representation during this meeting, and, he had representation. Grievant, in fact, testified that he was allowed representation at both conferences, and that he was allowed to present his side at both conferences.

Grievant argued that his suspension with pay for 30 days initially and then as extended by the Board violated Grievant's constitutional rights, although no authority for this proposition was cited. WEST VIRGINIA CODE § 18A-2-7 states that "[t]he superintendent, subject only to approval of the board, shall have authority to . . . suspend school personnel." Further, and of particular pertinence to the instant case, that statute provides in subsection (c) as follows:

> The superintendent's authority to suspend school personnel shall be temporary only pending a hearing upon charges filed by the superintendent with the board of education and such period of suspension shall not exceed thirty days unless extended by order of the board.

The Grievance Board has addressed the issues of an extended suspension with pay.

> Although the question presented involved the propriety of an indefinite suspension *without pay*, the reasoning set forth in *Blaney [v. Wood County Bd. of Educ.,* Docket No. 03-54-169 (Jan. 16, 2004)*],* is helpful. Citing a decision of the Merit Systems Protection Board, a federal employment law tribunal, it was noted:

> The most essential criterion of an action, if it is to meet the definition of "suspension" . . . is that it be "temporary." Accordingly, while the exact duration of an indefinite suspension may not be ascertainable, such an action must have a condition subsequent such as the completion of a trial or investigation which will terminate the suspension.

Id. (Citing Martin v. Customs Serv., 12 MSPR 12, 10 MSPB 568 (1982)). The administrative law judge in *Blaney, supra*, concluded that it was not improper for the board of education to suspend the grievant indefinitely, without pay, pending a criminal investigation into the charges against him. As in the instant case, the board had yet to hold a hearing regarding the charges against its employee.

As pointed out by Respondent, Grievant has not suffered any harm by virtue of his suspension. Indeed, the United States Supreme Court, in discussing the due process protections to which employees are entitled prior to being subject to disciplinary actions, suggested in *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), that an employer should suspend an employee *with pay* if it believes that its best interests would be served by removing the employee from the work site without a pre-termination hearing. Of course, in the instant case termination has not even been proposed or recommended at this time, so it is unclear if "pre-termination" is even implicated. Nevertheless, it is clear that temporary suspensions, either with or without pay, are sanctioned by the legal system as an appropriate mechanism for protecting an employee's rights during an investigation.

Hays v. Hampshire County Bd. of Educ., Docket No. 03-14-327 (Jan. 30, 2004). Grievant demonstrated nothing improper about suspending him with pay while the investigation was conducted.

Grievant next questioned the length of time between the completion of Mr. Croft's report and the next meeting with Superintendent Collins, after which he was suspended without pay. As noted in *Hays, supra.*, Grievant suffered no harm during this time period, as his suspension was with pay. Further, the record reflects that Assistant Superintendent Moore did not receive the report until the Monday after spring break, on April 16, 2012, and the meeting was held within seven working days, giving Respondent sufficient time to

evaluate what had occurred, contact Grievant and his representative at that time regarding scheduling, and send Grievant written notice. The undersigned does not find that an inordinate delay occurred.

Grievant asserted that his constitutional rights had been violated by use of the video surveillance to support disciplinary action. Video monitoring of employees by their employers has been addressed by the courts, and has been found constitutional in certain settings. *Vega-Rodriguez v. Puerto Rico Tel. Co.,* 110 F. 3d 174 (1st Cir. 1997).

> Employers possess a legitimate interest in the efficient operation of the workplace, *see* [*O'Connor v. Ortega,* 480 U.S. 709, 94 L. Ed. 2d 714, 107 S. Ct. 1492 (1987)] at 723, and one attribute of this interest is that supervisors may monitor at will that which is in plain view within an open work area. Here, moreover, this attribute has a greater claim on our allegiance because the employer acted overtly in establishing the video surveillance: PRTC notified its work force in advance that video cameras would be installed and disclosed the cameras' field of vision. Hence, the affected workers were on clear notice from the outset that any movements they might make and any objects they might display within the work area would be exposed to the employer's sight.
>
> . . .
>
> video surveillance is a rational means to advance the employer's legitimate, work-related interest in monitoring employee performance. *See O'Connor* ("Public employers have a direct and overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner."); *Alinovi v. Worcester Sch. Comm.*, 777 F.2d 776, 782 (1st Cir. 1985) (stating that an employee's privacy interest may be lessened due to a "supervisor's legitimate oversight responsibilities and the special duties that may be owed by the employee by virtue of his employment").

Rodriguez, supra. (Footnotes omitted.) Applying this constitutional analysis to this case, the undersigned concludes that Grievant had no reasonable expectation of privacy in the gymnasium, and his actions with students could be recorded, and may constitutionally be

used to evaluate his behavior. *Gross v. Kanawha County Bd. of Educ.*, Docket No. 02-20-090 (Aug. 30, 2002).

Finally, Grievant argued the penalty imposed was too severe, given Grievant's "exemplary" work record, and that other teachers in the school hug children and are not punished for it. "The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was 'clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995)(citations omitted). The Grievance Board has held that "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 Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). "Respondent has substantial

discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall not substitute her judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997)." *Meadows, supra.*

While Grievant's actions in hugging A.D., tickling children, and permitting children to tickle him constituted unacceptable conduct in today's world, the undersigned has no doubt that these actions alone would not have resulted in a 24-day suspension without pay. The primary concern here was Grievant's actions toward T.B. This was a serious matter. The parents were so upset that both T.B. and their other child were allowed to transfer to another school for the next school year so they would have no contact with Grievant. [13] Superintendent Collins and the members of the Board of Education found this to be a very serious matter, and felt that Grievant should not be returned to school for the remainder of the year. While Grievant did not act maliciously, he could have seriously injured T.B. Despite the fact that he had no previous suspension in his long record, the undersigned cannot find that Respondent abused its substantial discretion. *See, Conner v. Barbour County Bd. of Educ.,* 200 W. Va. 405, 489 S.E.2d 787 (1997)(*per curiam); Wimmer, supra* (three week suspension without pay imposed for grabbing a student's head and turning it toward the school bus window); *Jordan, supra* (teacher dismissed when he engaged in horseplay with clipboard, resulting in injury to student after having been warned previously).

In addition, Grievant argued that the penalty imposed was discriminatory, as other similarly-situated employees had received less than a 24-day suspension for their conduct.

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[13] Grievant returned to his position at Norwood Elementary School at the beginning of the 2012-2013 school year.

For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant pointed to three instances in his written argument. With regard to two of these instances, the information in the written argument is not in the record of this proceeding. As noted earlier, Grievant's written argument cannot be substituted for testimony given under oath at a hearing and subject to cross-examination. These baseless assertions must be disregarded. The third instance related to a matter about which a grievance was filed, and there is a level three Decision, written by the undersigned in that matter. The synopsis of that level three Decision states the situation as follows:

> Grievant, an Industrial Arts teacher at Liberty High School, was suspended for five days without pay for leaving the school without obtaining permission from an Assistant Principal at the school, and leaving his last class period of students to be monitored by another teacher. One of Grievant's students was struck in the head with an object by another student in Grievant's absence, and the student required stitches. Grievant had attempted to contact the one administrator who was at Liberty High School to obtain permission before he left to pick up a donated piece of equipment, but was

> not able to locate him. Grievant then asked the Faculty Senate President if he would cover his class if he did not return by the time his class started, and if he could leave. The Faculty Senate President told Grievant he could go, and that he would cover his class. Grievant had covered the Faculty Senate President's class the previous day when he had to leave the building, and they had covered each other's classes in this way for many years. Liberty High School has had a written practice in place which specifically states that the Faculty Senate President may grant a teacher permission to leave the school when the Principal and Assistant Principals are not available. Respondent did not prove the charges against Grievant.

Caloccia v. Harrison County Bd. of Educ., Docket No. 2011-0743-HarED (July 20, 2011). The Findings of Fact from that Decision state that the Superintendent had recommended a 30-day suspension. It is obvious that Grievant's conduct is not in any way similar to that of Mr. Caloccia. Grievant did not demonstrate discrimination in the penalty imposed.

It appears that Grievant may also be arguing that he has been subjected to harassment by Superintendent Collins. WEST VIRGINIA CODE § 6C-2-2(l) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." What constitutes harassment varies based upon the factual situation in each individual grievance. *Sellers v. Wetzel County Bd. of Educ.*, Docket No. 97-52-183 (Sept. 30, 1997). "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96-BOT-462 (Aug. 29, 1997)." *Pauley v. Lincoln County Bd. of Educ.*, Docket No. 98-22-495 (Jan. 29, 1999). A single incident does not constitute harassment. *Johnson v. Dep't of Health and Human Res.*, Docket No. 98-HHR-302 (Mar. 18, 1999); *Metz v. Wood County Bd. of Educ.*, Docket No. 97-54-463 (July 6, 1998).

In this case, Superintendent Collins was responding to a serious situation. While she may have made some statements during the course of the proceedings that intimidated Grievant and that he took as inappropriate, it must be kept in mind that this was an investigation into improper conduct with a student, and Grievant had created a situation that resulted in the parents threatening legal action. Grievant admitted his actions were stupid, and Superintendent Collins no doubt agreed with him. Superintendent Collins needed to find a way to deal with a difficult situation. She certainly did not create any unreasonable expectations for Grievant. Grievant also pointed to the situation in 2011 where he was apparently questioned about an anonymous email, and found this to be inappropriate. The undersigned finds nothing wrong with a supervisor investigating the merits of an anonymous complaint. Grievant was not disciplined, and that was the end of it.

Grievant did testify that he has been told too many times he needs to resign, apparently by Superintendent Collins. This type of comment to Grievant would be unprofessional, and Superintendent Collins should avoid making any comments to Grievant which could be construed as a suggestion that he resign. By the same token, it appears to the undersigned that Grievant has misunderstood things that have been said to him by various people, including Superintendent Collins, Assistant Superintendent Moore, and his representative Rosemary Jenkins, so all blame cannot go on Superintendent Collins' shoulders. Grievant needs to listen more carefully to the information that is being conveyed to him and not make assumptions that are not true. Grievant has not demonstrated that he has been subjected to harassment.

A final issue raised by Grievant is that he continues to assert that his pay and benefits were docked for more than 24 days. Respondent acknowledged that this could have occurred because of the wording of the suspension without pay, which was 24 days through the end of the school year, and that because of snow days, through the end of the school year could have been more than 24 days when payroll personnel were doing calculations. Respondent assured the undersigned that if Grievant had been docked more than 24 days, this would be corrected, and the undersigned advised the parties that they needed to work this out. Respondent's personnel did a detailed calculation and explanation to demonstrate that Grievant had been properly paid, yet Grievant's representative has continued to insist that she knew how to calculate Grievant's pay, her calculations show that Grievant was not properly paid, and she submitted a list of questions to Respondent regarding the calculations. She asserted that she did not believe she was going to get an answer from Respondent, and that Mr. Moore was supposed to set up a meeting with Ms. Reider to review the information. Respondent responded on June 3, 2013, that Mr. Moore had, in fact, assisted with scheduling a meeting between payroll personnel and Grievant's representative, but that Grievant's representative failed to show up for the meeting and has not responded to any telephone calls since then. Given the misrepresentations in the written argument, the undersigned has no confidence in the representations of Grievant's representative that Grievant was not properly paid. Respondent is responsible for properly calculating the pay of all its employees and is in the better position to do so. The undersigned concludes that it is more likely than not that Grievant was properly paid.

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. "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).

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." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569

S.E.2d 456 (2002)(*per curiam*). *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). "[F]or there to be '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, supra.* In other words, there must be not only a refusal to obey a reasonable and valid order, but the refusal must be wilful. *Id.* "[F]or a refusal to obey to be 'wilful,' the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." *Id.* There is no requirement here that there be a specific written policy or procedure in place that is violated.

6. "`[A]n employee who violates [the Employee Code of Conduct] by failing to 'exhibit professional behavior,' 'maintain a[n] environment, free from harassment [and] intimidation,' 'create a culture of caring through understanding and support,' or 'demonstrate responsible citizenship by maintaining a high standard of conduct, self-control[,]' has engaged in insubordinate conduct as contemplated by W. Va. Code § 18A-2-8. *Domingues v. Fayette County Bd. of Educ.,* Docket No. 04-10-341 (Jan. 28, 2005).' *Booth & Ware v. Randolph County Bd. of Educ.,* Docket No. 04-42-418 (Mar. 28, 2005)." *Thomas v. Greenbrier County Bd. of Educ.*, Docket No. 05-13-433 (Mar. 17, 2006).

7. "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.[14] *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).

8. Respondent proved the charges against Grievant and that they constituted cruelty, insubordination, and wilful neglect of duty.

9. "The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was 'clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

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[14] "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).

10. In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995)(citations omitted). The Grievance Board has held that "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 Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). "Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall not substitute her judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997)." *Meadows, supra.*

11. Grievant did not demonstrate that the penalty imposed was clearly excessive.

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: June 13, 2013