RON LANHAM,

Grievant,

v. **Docket No. 01-20-577**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Ron Lanham, filed this grievance against his employer, the Kanawha County Board of Education ("KCBOE") directly to Level IV on November 13, 2001. The Statement of Grievance alleges:

> **Grievant, a regularly employed custodian at the time this incident occurred, is accused of the improper use of a computer and has been suspended for 10 days without pay. Grievant denies the allegations. Grievant alleges a violation of West Virginia Code § 18A-2-8.**
>
> **Relief Sought: Grievant seeks removal of any record of this suspension from his personnel records and all other records maintained by the Respondent, reimbursement of the ten days of wages, benefits, and regular employment seniority, and interest on all monetary sums.**

On June 27, 2001, Grievant was notified he was alleged to have accessed pornographic web sites on a school computer while on duty. A pre-disciplinary hearing was held on July 10 and 19, 2001, followed by a decision dated October 29, 2001, which found Grievant guilty of utilizing a school computer to access pornographic web sites and suspending him for ten days. This suspension was approved by KCBOE on November 5, 2001. Grievant filed the grievance directly to Level IV on November 14, 2001. A Level IV hearing was held on January 3, 2002. This case became mature for decision on February 6, 2002, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

The issue, as presented by the parties, is straight-forward. Respondent alleges Grievant utilized the school computer to access pornographic web sites. Grievant asserts he did not, and he does not even know how to use the Internet. Grievant also asserts, for the first time in his brief, that since the case is one of credibility, Respondent's failure to call a key witness, Tony Poindexter, at the Level IV hearing is a fatal flaw, and without this testimony KCBOE cannot meet its burden of proof. Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). As Respondent was without notice this argument would be made, there was no response. Grievant also implied Mr. Poindexter altered the computer in such a way as to make it appear Grievant was guilty of these acts even though Grievant did not demonstrate any reason for Mr. Poindexter to engage in these activities. Respondent pointed out Mr. Poindexter had no record of past problems, and Mr. Poindexter testified under oath he had not altered the computer's records in any way.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. At the time of the incident, Grievant was employed as a Custodian III at Roxalana Elementary School ("RES"). (See footnote 2)

2. RES was closed at the end of the school year, and the last day students attended classes was June 1, 2001. 3. Contrary to Grievant's testimony, at approximately 9:00 a.m. on June 15, 2001, computer technologist Tony Poindexter, went to RES to check on the computers that were to be moved because of the school's closure.

4. Mr. Poindexter knew all of the locks but one had been plugged, and he walked around the school trying to find a door his key would open.

5. While walking around RES, Mr. Poindexter saw, through a four foot by five foot picture window, Grievant on the school secretary's computer. On the screen was a naked, animated, dancing woman.

6. Mr. Poindexter's key would not open any of the doors as the locks had been changed, and Grievant was the only one who had a key.

7. Mr. Poindexter knocked on one of RES's doors, and Grievant came to let him in.

8. Mr. Poindexter asked to use the phone and went to the Secretary's office without Grievant. The computer was on, but the monitor had been turned off. Mr. Poindexter turned on the monitor, and the naked woman reappeared. He then turned off the monitor and left the room. He left RES shortly thereafter.

9. Later in the day, Mr. Poindexter told Tammy Burgess, the area computer teacher, what he had seen. Ms. Burgess reminded Mr. Poindexter he was required to tell Mr. Pat Law, then Director of Technology, about the incident.

10. Later on that same day, Mr. Poindexter informed Mr. Law about what he had seen, and Mr. Law directed Mr. Poindexter to go to RES and pick up the computer and check it out.

11. Mr. Poindexter picked up the computer on Monday, June 18, 2001. 12. Mr. Poindexter and another computer technologist examined the computer.

13. They found no pornographic, temporary Internet files, no pornographic history, no pornographic cookies, and no pornographic records in the cache.

14. Under favorites, they found a list of various pornographic web sites with titles such as Cyber Porn, Female XXX Gallery, Free Sex, and Pervert Girls. The dates these sites had last been accessed varied. The dates they had been accessed were June 1, 14, 15, 2001.

15. Later on that Monday, Mr. Law accessed the various sites listed under favorites and found them to possess hardcore pornographic materials. **(See footnote 3)**

16. Mr. Law also found these sites automatically added themselves to the favorites list without any action on his part. This feature is unusual, as it usually takes an intentional act on the part of the computer user to add a favorite.

17. Carol McKinney, the school secretary, had placed a password on her computer in March 2001, to keep the faculty from using her computer while she was away from her desk. This password was only necessary when the computer was first turned on. Ms. McKinney did not tell Grievant her password.

18. Grievant assisted Ms. McKinney during the school year when she had trouble working with the computer software. Grievant showed Ms. McKinney how to print certificates, use the digital camera and scanner to print out photographs, use graphics, and how to work with charts and spreadsheets. 19. Grievant assisted the computer teacher at RES with

various minor hardware problems. He diagnosed a problem with the hard drive and the power supply button.

20. Grievant assisted Principal Linda McCall with her computer, and if she got "stuck on something" Grievant would help her. Principal McCall noted Grievant also assisted Ms. McKinney and the computer teacher with computer problems.

21. On his evaluation dated May 21, 2001, the principal noted the following, "Mr. Lanham is very knowledgeable about any type of technology."

Discussion

___In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486(May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.; See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

The issues raised by the parties will be discussed one at a time, starting with the credibility issues.

I. Credibility

A. Failure to present key witness

The first issue to address is Grievant's argument that Respondent's presentation of a key

witness, Mr. Poindexter, only at the pre-disciplinary hearing and not at Level IV hearing is a fatal flaw, and accordingly, KCBOE cannot meet its burden of proof. Grievant cites Landy, supra, to support this argument. Grievant agreed at Level IV to the admission into evidence of the pre-disciplinary hearing transcript, and also relied on its contents in his brief. Further, Grievant was represented by the same counsel at the pre-disciplinary hearing as at the pre-disciplinary hearing, and he cross-examined Mr. Poindexter at that hearing without any limitation or restriction.

After a review of the Landy case, the undersigned Administrative Law Judge finds it to be distinguishable from the instant grievance. In Landy, the administrative law judge put the respondent on notice that the outcome of the case might depend on the conclusions reached about the veracity of two key, teenage witnesses, and Respondent still elected to proceed without calling these individuals. That administrative law judge also found that while the pre-disciplinary hearing had some probative value, it was not sufficient to meet the board of education's burden of proof. No such admonition was given in thiscase, as the undersigned Administrative Law Judge was aware that such sworn testimony is frequently admitted by the parties, and the parties had agreed on the record at the start of the Level IV hearing to admit the record from the pre-disciplinary hearing. (See footnote 4)

Additionally, the two witnesses in Landy were the only ones whose testimony would call into question the veracity of the grievant. Such was not the case in this grievance, and the corroborating testimony was presented both at the pre-disciplinary hearing and at the Level IV hearing. The undersigned Administrative Law Judge notes that since the Landy decision was issued, the Grievance Board has held that the fact that testimony is offered in written form does not alter the responsibility of the administrative law judge to make credibility determinations about the testimony. Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996). Of course, the undersigned Administrative Law Judge does agree that making credibility decision based on the written word requires care and close attention to the exact wording used without any additions or suppositions. Accordingly, the undersigned Administrative Law Judge finds the failure to recall Mr. Poindexter at the Level IV hearing does not result in a fatal flaw that renders it impossible for KCBOE to prove its case.

B. Credibility of witnesses

Although some facts pertinent to this matter are not in dispute, the description of the specific events which generated this disciplinary action presented by Mr. Poindexter was diametrically opposed to Grievant's testimony regarding the same events. Some of Mr.Poindexter's testimony was supported by the testimony of Mr. Law. It is also noted the testimony of Grievant and Ms. McKinney changed from the pre-disciplinary hearing to the Level IV hearing.

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 Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). In these circumstances, where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Maxey v. McDowell County Bd. of Educ., Docket No. 97-33-208 (Apr. 30, 1998); Hurley v. Logan County Bd. of Educ., Docket No. 97-23-394 (Dec. 11, 1997). See Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR-066 (May 12, 1995). See also Harper v. Dep't of the Navy, 33 M.S.P.R. 490 (1987). As previously stated, "the fact that [some of] this testimony is offered in written form does not alter this responsibility." Browning, supra.

The United States Merit Systems Protection Board Handbook ("MSPB Handbook") has set out factors to examine when assessing credibility, and this Grievance Board has recognized these factors as helpful. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984). Some factors to consider in assessing a witness's testimony are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Id. 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. Id.

In applying these factors to Mr. Poindexter's testimony, the undersigned Administrative Law Judge makes the following assessments. Mr. Poindexter did not appear before the undersigned Administrative Law Judge so his testimony must be judged from the pre-

suspension hearing transcript. Mr. Poindexter communicated clearly, no evidence was presented to indicate Mr. Poindexter was lacking in honesty or untruthful; he was not a party to this action, only a witness; and there was no suggestion he had any bias or interest his testimony. His testimony at the pre-disciplinary hearing was consistent; there was no evidence to any misstatement of fact; and his information was plausible.

At the Level IV hearing, a key issue became when events occurred on June 15, 2001. At the pre-disciplinary hearing, Grievant testified he left school at approximately 7:30 - 7:45 a.m., and returned at 8:00 - 8:15 a.m. to find Mr. Poindexter waiting for him. He stated Ms. Burgess arrived at 9:00 a.m. and left with Mr. Poindexter, and Ms. McKinney arrived at 9:30 - 9:45 a.m. At Level IV, Grievant testified he went home from 8:00 - 8:15 a.m. and returned at 8:30 - 8:45 a.m. and found Mr. Poindexter waiting, and Ms. Burgess arrived at 9:15 - 9:30 a.m.

Both Mr. Poindexter and Mr. Law testified Mr. Poindexter was in an eight o'clock meeting on June 15, 2001, until 9:00 a.m., and Mr. Poindexter testified he arrived at RES around 9:00 a.m. It is clear Grievant's testimony is incorrect; Mr. Poindexter could not have been in a meeting and also arrived at RES at 8:15 a.m. Ms. Burgess testified she was not at RES on June, 15, 2001. At the pre-disciplinary hearing, Ms. McKinney stated she arrived at RES on Thursday, June 14, 2001, around 9:00 a.m., and did not touch her computer, but worked on packing up her office. She stated she came earlier on Thursday than on Friday, because she had a lot to do. She also testified she arrived on Friday, June 15, 2001, at 10:00 a.m. or a little later, and started unplugging the computer at 10:45 - 11:00 a.m., and left around noon. At the Level IV hearing, Ms. McKinney's testimony changed, and she testified she arrived at RES on June 15, 2001, around 8:15 - 9:15 a.m. She also testified she was confused about what she did on which day. She stated she did not see Mr. Poindexter or Ms. Burgess on either day.

The undersigned Administrative Law Judge finds Ms. McKinney did indeed confuse her days in her testimony at Level IV. If she had been at RES when she said she was on Friday, she would have seen Mr. Poindexter whether Grievant's testimony is believed or whether Mr. Poindexter's is correct. The undersigned Administrative Law Judge also finds Mr. Poindexter's time frame to be the correct one. Mr. Poindexter arrived while Grievant was on the computer, around 9:00 a.m., observed Grievant on the computer, then checked the computer and found pornographic materials, left, and Grievant last accessed pornographic

materials after Mr. Poindexter left, but before Ms. McKinney unplugged her computer.

As for Grievant's testimony that he did not know how to access the Internet, this testimony is not believable and undermines the veracity of all of his testimony. Grievant is clearly conversant with computers, and how they work. He demonstrated this ability frequently at RES, to the point this aptitude was identified on his custodial evaluation. Accordingly, the undersigned Administrative Law Judge finds Grievant's testimony to be less than credible on key points.

III. Merits of the case

W. Va. Code §18A-2-8 identifies the types of conduct that can result in disciplinary action and provides, in pertinent part:

> **Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article.**

It is not necessary for Respondent to label an employee's behavior, but it is essential the employee know what the charges are. Grievant did not assert he was unaware of the reason for his suspension. Grievant's behavior can be viewed under the following just causes contained in W. Va. Code § 18A-2-8: insubordination and immorality.

A. Insubordination

Insubordination involves 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). This Grievance Board has previously recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988) (citing Weber v. Buncombe County Bd. of Educ., 266 S.E.2d 42 (N.C. 1980)). In order toestablish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination.

Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

Respondent indicated there was a computer policy in effect at the time of this incident, but because Grievant was a custodian he was not approved to operate the computer, and he was not asked to sign a use agreement.

Respondent has met its burden of proof and demonstrated Grievant accessed pornographic web sites on the school's computer. This act is one of insubordination as it demonstrates a "willful disregard for implied directions of an employer." Sexton, supra. In this day and age, any reasonably prudent employee is aware obtaining this information on a computer at work is inappropriate. It is also clear that Grievant knew this behavior was wrong, as he went to the trouble of deleting a variety of files to keep his behavior hidden.

B. Immorality

The term "immorality" in W. Va. Code § 18A-2-8 connotes conduct "not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially not in conformity with the acceptable standards of acceptable sexual behavior." Golden v. Bd. of Educ., 169 W. Va. 63, 285 S.E.2d 665 (1981). Grievant's accessing of hard core pornographic material on an elementary school computer is not in conformity with acceptable standards and acceptable principles of rightand wrong. Again, Grievant knew his behavior was wrong, as he attempted to erase all information that would demonstrate his actions. KCBOE has proven this conduct constitutes immorality. KCBOE has proven by a preponderance of the credible evidence that Grievant engaged in the acts charged, which led to his suspension.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be

determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR- 486 (May 17, 1993). Where the evidence equally supports both sides, the employer hasnot met its burden. Id.; See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

2. An Administrative Law Judge is charged with assessing the credibility of the witnesses that appear before her. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

3. Where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Maxey v. McDowell County Bd. of Educ., Docket No. 97-33-208 (Apr. 30, 1998); Hurley v. Logan County Bd. of Educ., Docket No. 97-23-394 (Dec. 11, 1997). See Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR-066 (May 12, 1995). See also Harper v. Dep't of the Navy, 33 M.S.P.R. 490 (1987).

4. "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).

5. The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code §18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

6. W. Va. Code §18A-2-8 is the applicable statute and provides, in pertinent part:

> **Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for:**

> **Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea of nolo contendere to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article.**

7. Insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988) (citing Weber v. Buncombe County Bd. of Educ., 266 S.E.2d 42 (N.C. 1980)).

8. Immorality connotes conduct which is "not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked, especially, not in conformance with the acceptable standards of proper sexual behavior," as defined in Webster's Dictionary. Golden v. Bd. of Educ., 169 W. Va. 63, 285 S.E.2d 665 (1981). Accord, Rosenburg v. Nicholas County Bd. of Educ., Docket No. 34- 86-125-1 (Aug. 4, 1986).

9. Respondent met its burden of proof and has proven Grievant accessed hard core pornographic web sites on RES's computer.

10. KCBOE properly suspended Grievant for accessing pornographic materials on an elementary school computer, and these acts constituted acts of insubordination and immorality under W. Va. Code § 18A-2-8.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: February 28, 2002

Footnote: 1

Grievant was represented by Attorney John Roush from the West Virginia School Service Personnel Association, and Respondent was represented by KCBOE's attorney, James Withrow.

Footnote: 2

Grievant is now employed in the Maintenance Department.

Footnote: 3

Multiple exhibits were introduced with examples of the type of pornographic materials contained on the web sites.

Footnote: 4

It is unclear from the Landy decision whether the testimony given at that pre- disciplinary hearing was sworn. It was called testimony, but not sworn testimony.