BETTY OLSON,

Grievant,

v v.

Docket No. 02-20-380

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Betty Olson, filed this grievance directly to Level IV on November 20, 2002, against her employer the Kanawha County Board of Education ("KCBOE"). Her Statement of Grievance reads:

> The Respondent has dismissed the Grievant from her position as a regularly employed secretary at the Respondent's Regulatory Training Center (RTC) on the following grounds: (1) failure to timely deposit $140.00 in cash; (2) the unauthorized purchase of party supplies; & (3) the unauthorized signature of her supervisor's name to RTC checks. The Grievant denies all of the allegations. The Grievant additionally, contends that the Respondent has engaged in disparate treatment[,] and that dismissal by the Respondent is too harsh a penalty. The Grievant alleges a violation of West Virginia Code §[§] 18A-2-8 and 18A-2-7.
>
> Relief sought: Grievant seeks reinstatement to her employment as a regularly employed secretary, retroactive wages, benefits and regular employment seniority. The Grievant also seeks interest on all monetary sums.

A Level IV hearing was held March 17, 2003, and this case became mature for decision on April 14, 2003, after receipt of the parties proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Respondent asserts Grievant was terminated for good cause, and it has met its burden of proof and demonstrated Grievant signed checks without authorization, failed to deposit money in a timely manner, and purchased party supplies without authorization. (See footnote 2) Grievant makes

several arguments. First, Grievant maintains she did not do any of the things of which she is accused. Second, she asserts other employees were engaged in wrongdoing, including her supervisor, Betty Jarrett, and she has received disparate treatment. Grievant also asserts the punishment is too harsh. (See footnote 3) Retaliation was specifically not asserted by Grievant. (See footnote 4)

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

Findings of Fact

1. Grievant was employed by KCBOE as a Secretary in its Regulatory Training Center ("RTC") until her termination on November 12, 2002. She had worked twenty years for KCBOE, the last four years at the RTC. Many of these years were in food service. 2. The RTC is associated with KCBOE's Vocational and Adult Education Department and provides safety training to Kanawha County Schools and private entities.

3. Grievant was suspended, with pay, by letter dated July 30, 2002, while KCBOE investigated the charges. These charges were "[a]lleged financial irregularities, including a cash deposit, [and] purchases and issuance of checks." Resp. No. 1, at Level IV.

4. After Grievant was suspended, she spoke to Superintendent Duerring and reported what she believed to be wrongdoing on the part of her supervisor, Ms. Jarrett. Grievant asserted Ms. Jarrett had approved overtime not worked, hired a computer person inappropriately, and mishandled money for landscaping.

5. Superintendent Duerring directed Assistant Superintendent Pat Law to investigate all these allegations and also directed the Accounting Department to review RTC's books. Dr. Law found no wrongdoing on the part of Ms. Jarrett. The accounting review, dated October 3, 2002, revealed some problems, and RTC was directed to correct these. Several of the noted problems related to the reasons for Grievant's suspension and subsequent dismissal. Grt. No. 4 at Level IV.

6. Dr. Law's investigation into the charges against Grievant revealed significant problems, and on August 12, 2002, Superintendent Duerring again wrote Grievant notifying her that a pre-disciplinary hearing would be held on August 22, 2002. Superintendent Duerring noted the charges against Grievant dealt with financial irregularities and they were: "1) failure to deposit $140.00 in

cash; 2) unauthorized purchase of a Sony digital camera; 3) unauthorized purchase of party supplies; and 4) unauthorized signature of your supervisor's name to RTC checks." 7. After this pre-disciplinary hearing, the Hearing Examiner found Grievant was guilty of all charges, with the exception of purchasing the camera. Superintendent Duerring recommended Grievant's termination, and KCBOE approved this recommendation.

8. One of Grievant's job duties at the RTC was the preparation of checks and money for deposit. Tammy Oxley also assisted in this task.

9. In most instances, Ms. Jarrett would take the deposits to the bank.

10. On Friday, June 21, 2002, Ms. Jarrett was told by Ms. Oxley there was $140.00 in cash, as well as the normal checks. Ms. Jarrett directed her to lock it up, and she would take it to the bank on Monday.

11. KCBOE's regulations require weekly deposits and deposits of $200.00 or more must be made daily.

12. Grievant returned from a week's vacation on June 24, 2002. There were many things piled up on her desk to do. She volunteered to take the deposit to the bank, as she had some other errands to run.

13. This deposit should have been for $7,340.00 in checks and $140.00 in cash.

14. Later that day after Grievant returned from the bank, Ms. Jarrett checked the deposit slip made up by Grievant in the RTC ledger, and she found the June 24, 2002, deposit slip did not list any cash to be deposited. The deposit slip only listed the checks, and the total amount was only for the checks.

15. On June 26, 2002, Ms. Jarrett asked Grievant if she had deposited the money, and Grievant confirmed she had. 16. Ms. Jarrett obtained a copy of the bank's deposit slip and found no cash was listed to be deposited on this slip as well.

17. Later, when Ms. Jarrett again checked the deposit slip made up by Grievant in the RTC ledger, she found $140.00 in cash had been added to the June 24, 2001 slip, and the amount to be deposited had been corrected in the total.

18. On June 27, 2002, Grievant created an RTC receipt for the $140.00.

19. Grievant also created another deposit slip for the $140.00, and dated this slip June 27, 2002. On this slip she made the notation "correction on deposit," thus, RTC now had two deposit slips

with the $140.00 cash on them. On July 1, 2002, she deposited $140.00 in the bank. (See footnote 5)

20. Grievant told several stories about what happened to this cash. She told Ms. Jarrett she found the cash between the passenger seat and the car door. She stated at hearing that the bank missed the money at the time of the deposit and did not take it out of the money bag, and she did not notice the money either. (See footnote 6) Grievant also indicated her failure to note the cash on the first deposit slip was just a mistake.

21. When the original deposit slip was returned from the bank, Grievant added $140.00 beside the currency portion of this deposit slip, and the notation "corrected." 22. Grievant never told Ms. Jarrett about finding the money until later and did not tell her the actions she had taken with the slips and books. (See footnote 7)

23. During the last year of her employ, Grievant signed Ms. Jarrett's name to four RTC checks. After the first occasion on January 16, 2002, Grievant reported what she had done to Ms. Jarrett. This check was signed to pay for pizza for an elementary school party. Grievant was instructed by Ms. Jarrett to never do this again.

24. Contrary to Grievant's testimony, Grievant did not have the authority to sign Ms. Jarrett's name to RTC checks. No one has ever been given this authority.

25. Ms. Jarrett did not know Grievant had signed her name to the three other checks dated April 10, 2002, May 6, 2002, and June 11, 2002, until after she started checking the books after the deposit incident.

26. Grievant admits she signed Ms. Jarrett's name to these three other checks.

27. One of these other checks was also for pizza, and Ms. Jarrett did not understand why Grievant would sign this check, as she was there the day of this party.

28. On the order for the camera, Grievant also signed Ms. Jarrett's initials indicating the purchase was approved. It is RTC policy that all items that are outside the normal course of business, or are expensive, are to be personally approved by Ms. Jarrett.

29. Grievant also signed the check for this camera. Included in the amount of the check were other items, some of which would not be used by the RTC.

30. Grievant's name is on the receipt for this order, but Grievant testified she did not sign for it. The camera cannot be found at RTC. 31. On May 7, 2002, when Ms. Jarrett was out of the office, Grievant told the other people in the office it was a shame Ms. Jarrett was gone, as this would

be a good day to buy the supplies for the party they planned to have for their students.

32. Grievant asked Ms. Oxley to sign Ms. Jarrett's name to a check, and she did. (See footnote 8) Grievant took this check to a party store called Celebrations and purchased $105.21 of goods.

33. The number of people expected attend this party was approximately fifteen. Included in this purchase was $37.00 dollars for napkins, $19.60 for cups, and $11.75 for plates. No left over napkins, etc. have been located. (See footnote 9)

34. Ms. Jarrett would not have approved the purchase of all these things or the expenditure of this much money from the RTC's budget, as she planned for RTC to cover the cost of the food.

35. Grievant had a shower for her niece shortly after this purchase.

36. Cindy Ballard works as a part-time instructor at the RTC. During July and August 2001, she worked many hours of overtime in preparation for a big grant RTC had received. There is no indication the work was not done, or Ms. Ballard did not work the hours recorded.

37. When there was work to be done at RTC, Ms. Jarrett frequently asked her staff if they knew of anyone who could perform the needed services. (See footnote 10) When there wasa great amount of computer work to be done, including the development of a Web site, Ms. Ballard told Ms. Jarrett her husband could perform the work for eighteen dollars an hour. Ms. Jarrett called around to a variety of places that provided such services and found their charges were approximately $40 - $45 dollars per hour. She hired Mr. Ballard as a temporary worker to provide these services, and he worked many hours. (See footnote 11)

38. Ms. Jarrett also hired Grievant's sister and husband to provide cleaning services and her mother to provide catering. Ms. Oxley's husband was hired to perform some outside work.

39. When Ms. Oxley's husband did not return to finish the outside work, Ms. Jarrett hired her brother to perform some maintenance tasks and to do some landscaping.

40. In the Spring of 2002, Ms. Jarrett's brother planted bushes and daylilies. He had to replant many of this greenery because vandals tore up the first planting. The Summer of 2002 had drought-like conditions and no one watered the newly planted shrubs.

41. Dr. Law investigated whether the number of plants bought matched the amount planted. He found no discrepancy.

42. Grievant submitted a picture of the front of the RTC taken by her husband on July 30, 2002, the day of her suspension. While there does appear to be less than the number of shrubs

purchased, this picture is taken from a distance and an angle making it impossible to identify objects accurately.

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).

I. Credibility and hearsay

Because the testimony of the parties is in conflict, there is a need to assess the credibility of these individuals. Because Ms. Oxley was not called by either party, the statements attributed to her are hearsay. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR- 066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). “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).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. (See footnote 12) See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

Some of the comments attributed to Ms. Oxley are obviously hearsay, but relevant hearsay is admissible in administrative hearings. Gunnells v. Logan County Bd. of Educ.,Docket No. 97-23-055 (Dec. 9, 1997). The key question is whether these statements are credible, and what weight, if any, to give these statements.

The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. (See footnote 13) Id.; Sinsel v. Harrision County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996); Perdue, supra; Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't, Docket No. 90-8-115 (June 8, 1990).

In assessing the testimony presented, the undersigned Administrative Law Judge had difficulty accepting Grievant's version of the facts. For example, Grievant testified she never was told she had authority to sign checks, but believed she had this authority because Ms. Jarrett had said each employee was to do what was needed for the effective functioning of the RTC. This conclusion and reasoning on the part of Grievant just do not make sense, and are not born out by the evidence. What the evidence does reveal is:Grievant did not have the authority to sign Ms. Jarrett's name to checks, and she signed four checks, only one of which Grievant told Ms. Jarrett she had signed.

Additionally, Grievant's testimony and explanations do not stand up to scrutiny. First, Grievant had been clearly told not to write any more checks. Second, Grievant did not tell Ms. Jarrett she had written the other three checks. Third, Grievant did not call Ms. Jarrett's cell phone and seek permission. Fourth, she waited until Ms. Jarrett was gone to buy the supplies from Celebrations.

Grievant's testimony about the Celebrations purchases is also disturbing in terms of credibility. Grievant says the store miscalculated the purchase of napkins, and the amount should have been $3.70, not $37.00. She testified the reason she did not catch this big mistake is because the store also miscalculated the amount for the balloons which should have been calculated as $60.00, instead of $21.89. Putting aside the question of why anyone would think it was appropriate to spend $60.00 on balloons for a party paid for by a KCBOE organization, the whole story just does not ring true. Additionally, no one has ever found the supplies that must have been left over given that the number of people who attended the party was small and the amount of supplies would have resulted in plates and cups being left over.

These factors and events would indicate Grievant knew she was not to do these things, and plants the suspicion that "something funny" was happening. Further, Grievant's story about the cash deposit also does not ring true and is implausible. Additionally, if there was an innocent problem with the deposit, why did Grievant keep changing theforms, why did she not tell Ms. Jarrett what was going on, and why did she not deposit the money on June 27, 2002, as the deposit slip indicates it was going to be? (See footnote 14)

Another issue of credibility should be addressed. Grievant says Ms. Ballard told Ms. Oxley to sign the Celebrations check. Ms. Oxley told Dr. Law Grievant asked her to sign this check. Ms. Ballard denies she made such a statement, but agrees she said Ms. Oxley did a good job of copying Ms. Jarrett's signature, and she should sign Ms. Jarrett's name to all the RTC's certificates. Employees do sign certificates for Ms. Jarrett. Deanna Taylor- Pitman, who was a temporary employee and is no longer an employee at the RTC, testified Ms. Ballard told Ms. Oxley to sign this check. After a review of all this testimony and hearsay, and the demeanor of the witnesses, the undersigned Administrative Law Judge finds Grievant told Ms. Oxley to sign the Celebrations check, and Ms. Taylor-Pitman confused two separate events. Additionally, even if this account is accepted as true, this act would still not be acceptable behavior and financial practice. Grievant had been told she was not to sign checks, so why would she think it appropriate to use a check signed by a temporary worker? (See

footnote 15)

II. 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.

The next issue to decide is whether the evidence substantiates the charges against Grievant. The parties did not label Grievant's behavior. The undersigned Administrative Law Judge finds the behavior of Grievant can be viewed under the following charges of W. Va. Code § 18A-2-8: insubordination and/or willful neglect of duty.

A. Insubordination

Grievant is accused of insubordination. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." Butts v. Higher Educ. Interim Governing Bd., 569 S.E.2d 456 (W. Va. 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). Insubordination involves the “willful failure or refusal to obey reasonable orders of a superior entitled to give such order.” Riddle, supra; Webb, supra.

In order to establish insubordination, an employer must demonstrate 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 CountyBd. of Educ, Docket No. 94-01-394 (Jan. 31, 1995). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dep't, Docket No. 90-H-128 (Aug. 8, 1990).

This issue is clear. Grievant disobeyed an order of her supervisor and/or failed to follow a board of education policy, when she continued to sign checks without authority, after she had been directed not to do so. The charge of insubordination is proven. Grievant did not have authority to sign checks,

she had been told not to do this, she did not tell Ms. Jarrett she continued this behavior, and she signed checks under circumstances that could appear to be a misuse of funds.

B. Willful Neglect of Duty

Respondent must prove a charge of willful neglect of duty by a preponderance of the evidence. Arbaugh v. Putnam County Bd. of Educ., Docket No. 90-40-437 (May 22, 1991). Although the West Virginia Supreme Court of Appeals has not formulated a precise definition of "willful neglect of duty," it does encompass something more serious than incompetence and imports "a knowing and intentional act, as distinguished from a negligent act." Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990). Hence, to prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Chaddock, supra.

The same reasoning stated in the insubordination discussion applies to this charge. The failure to deposit the cash properly can be seen as willful neglect of duty. Even if Grievant's version of the facts is accepted as true, she would still be guilty of willful neglect of duty. She did not write the cash amount on the deposit slip, she did not double checkto see if the deposit slip was correct, she did not check the deposit slip she received from the bank to see if it was correct, she did not check the money bag to see if there was anything left in it, and she did not deposit the money as soon as she found out it had not been placed in the bank, but waited until the first of the month and after the start of the new fiscal year. Additionally, again accepting Grievant's version of what happened at the party store, Grievant neglected her duty to check the amount she was charged was correct. These actions must be considered "knowing and intentional." KCBOE has proven the offense of willful neglect of duty.

III. Disparate Treatment

Grievant has alleged disparate treatment.

> For an employee to prevail on a claim of disparate treatment [in discipline], he must establish that there is no rational basis for distinguishing specific penalties for the same or substantially similar misconduct. The misconduct brought into question must be similar or more serious than that with which the grievant is charged. Clark v. Dept. of Navy, 6 MSPB 24 (1981). The grievant must also show that the other employee's disciplinary record is similar to his own. Clancy v. Dept. of Navy, 6 MSPB 173 (1981). Finally, the grievant must establish that his position is similar to that of the other employee to whom he is compared with respect to the trust and responsibility expected of his position. Rohn v. Dept. of Army, 30 MSPR 157 (1986).

McVicker v. Kanawha County Bd. of Educ., Docket No. 95-20-339 (Feb. 9, 1996).

> [T]he burden is on the employer to come forward with a reason why a difference in treatment exists once the grievant identifies a disparity in the result for the same offense. Drummer v. General Services Administration, 22 MSPR 432 (1984). Only when the established misconduct is sufficiently egregious is the disparate treatment doctrine immaterial. In other words, if an employee's punishment is appropriate to the seriousness of the offense, an allegation of disparate treatment presents no basis for reversal. Quander v. Dept. of Justice, SF07528311002 (1984). An agency may impose valid sanctions that are different if its decision is based upon management's full consideration of all relevant factors. Gilmore v. Dept. of Army, 7 MSPB 155 (1981).

McVicker, supra.

Grievant has not proven any disparate treatment, as she has not demonstrated any wrongdoing by another employee who was not similarly disciplined. The facts reveal the signer of the Celebrations check was terminated as well. Grievant has not shown wrongdoing by Ms. Jarrett.

IV. Mitigation/Severity of Penalty

The argument Grievant's termination is 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).

"When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997). Mitigation of a penalty is considered on a case by case basis. Conner v. Barbour County Bd. of Educ., Docket No. 95-01-031 (Sept. 29, 1995); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also includeconsideration of an employee's long service with a history of otherwise satisfactory work performance. Pingley v. Div. of Corrections, Docket No. 95-CORR-252 (July 23, 1996). This 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 Resources/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 will 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).

In assessing the above-cited factors, I find the employer has substantial discretion to determine a penalty, and the undersigned Administrative Law Judge cannot substitute her judgement for that of Respondent. The undersigned Administrative Law Judge is unable to conclude Respondent abused its substantial discretion in designating the penalty in question. An employer must have complete trust in the individuals handling its funds. Grievant abused this trust.

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. LewisCounty 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).

2. A county board of education possesses the authority to terminate an employee, but this authority cannot be exercised in an arbitrary and capricious manner. W. Va. Code §18A-2-8. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23- 235 (Dec. 29, 1995).

3. Insubordination and willful neglect of duty are among the causes listed in W. Va. Code §18A-2-8 for which an education employee may be disciplined. See Rovello v. Lewis County Bd. of Educ., 181 W. Va. 122, 381 S.E.2d 237 (1989); Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975); Woo v. Putnam County Bd. of Educ.,Docket No. 93-40-420 (June 2, 1994), aff'd 202 W. Va. 409, 504 S.E.2d 644 (1998); Jones v. Mingo County Bd. of Educ., Docket No. 95-29-151 (Aug. 24, 1995).

4. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." Butts v. Higher Educ. Interim Governing Bd. 569 S.E.2d 456 (W. Va. 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).

5. “Insubordination encompasses more than an explicit order and refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer.” Nicholson, supra; Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 20, 1988), aff'd 182 W. Va. 294, 387 S.E.2d 529 (1989).

6. “Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions.” Reynolds v. Kanawha-Charleston Health Dep't, Docket No. 90-H-128 (Aug. 8, 1990), citing Meads v. Veterans Admin., 36 M.S.P.R. 574 (1988); Daniel v. U.S. Postal Serv., 16 M.S.P.R. 486 (1983); Davis v. Smithsonian Inc., 13 M.S.P.R. 77 (1983).

7. KCBOE properly determined Grievant's conduct constituted insubordination under W. Va. Code § 18A-2-8. Butts, supra.

8. To prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990). 9. "Willful neglect of duty," encompasses something more serious than incompetence and imports "a knowing and intentional act, as distinguished from a negligent act." Chaddock, supra.

10. KCBOE has met its burden of proof by a preponderence of the evidence and demonstrated Grievant is guilty of willful neglect of duty under W. Va. Code § 18A-2-8.

11.

> For an employee to prevail on a claim of disparate treatment [in discipline], he must establish that there is no rational basis for distinguishing specific penalties for the same or substantially similar misconduct. The misconduct brought into question must be similar or more serious than that with which the grievant is charged. Clark v. Dept. of Navy, 6 MSPB 24 (1981). The grievant must also show that the other employee's disciplinary record is similar to his own. Clancy v. Dept. of Navy, 6 MSPB 173 (1981). Finally, the grievant must establish that his position is similar to that of the other employee to whom he is compared with respect to the trust and responsibility expected of his position. Rohn v. Dept. of Army, 30 MSPR 157 (1986).

McVicker v. Kanawha County Bd. of Educ., Docket No. 95-20-339 (Feb. 9, 1996).

12.

> [T]he burden is on the employer to come forward with a reason why a difference in treatment exists once the grievant identifies a disparity in the result for the same offense. Drummer v. General Services Administration, 22 MSPR 432 (1984). Only when the established misconduct is sufficiently egregious is the disparate treatment doctrine immaterial. In other words, if an employee's punishment is appropriate to the seriousness of the offense, an allegation of disparate treatment presents no basis for reversal. Quander v. Dept. of Justice, SF07528311002 (1984). An agency may impose valid sanctions that are different if its decision is based upon management's full consideration of all relevant factors. Gilmore v. Dept. of Army, 7 MSPB 155 (1981).

McVicker, supra.

13. Grievant has not demonstrated any disparate treatment. 14. An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. Conner v. Barbour County Bd. of Educ., Docket No. 94- 01-394 (Jan. 31, 1995). See Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

15. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5,

1997).

16. "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

17. Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will 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).

18. Given the charges proven against Grievant, the penalty is not disproportionate or excessive, nor is the penalty arbitrary and capricious. See Lanehart, supra; Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994); Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha. 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 theBoard 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: May 30, 2003

Footnote: 1

Grievant was represented by Attorney John Roush from the West Virginia School Service Personnel Association, and the Board was represented by Attorney James Withrow. Additionally, Billie Jo Streyle, who represents KCBOE in the civil

suit filed by Grievant, attended the hearing.

Footnote: 2

Grievant was also accused of purchasing a digital camera without authorization. This camera is no longer on RTC's premises. This purchase was found not proven by the pre-disciplinary Hearing Examiner, and this finding was accepted by Superintendent Duerring. Accordingly, this charge will not be addressed. However, since Grievant admitted she did sign the check for the purchase of this camera, and she also signed the director's initials as having authorized the purchase, these facts will be addressed in this Decision.

Footnote: 3

Neither party addressed the issue of whether Grievant's behavior was correctable, and thus, she was entitled to an Improvement Plan. Upon a review of Maxey v. McDowell County Board of Education, No. 30440, (W. Va. December 3, 2003), the undersigned Administrative Law Judge finds this behavior was not correctable. Grievant had been told not to sign her supervisor's name to checks, and she continued to do so. It is unclear what could be accomplished by an Improvement Plan in this set of facts. Additionally, Grievant's behavior created a lack of trust, and many of her duties involved the handling of money. An Improvement Plan could not resolve or correct this issue.

Footnote: 4

Apparently this issue is to be addressed in her civil suit.

Footnote: 5

Grievant's assertion that she deposited the money on June 27, 2002, does not comport with the bank records, as this slip indicates the deposit was received July 1, 2002 at 3:17 p.m. Other deposits were credited the same day they were made.

Footnote: 6

It is unclear from the record when Grievant noticed the money.

Footnote: 7

Because Ms. Jarrett was concerned about what was going on, she watched Grievant's actions with the money and deposits.

Footnote: 8

Ms. Oxley's employment was terminated as well as the Grievant's.

Footnote: 9

See additional discussion of this purchase at 13, infra.

Footnote: 10

Ms. Jarrett checked with KCBOE's Technology Department and discovered their services are mostly in the area of

hardware installation. Schools are expected to developtheir own Web sites.

Footnote: 11

Mr. Ballard is now a full-time employee covered under a sharing contract with Marshall University.

Footnote: 12

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).

Footnote: 13

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

Footnote: 14

Grievant's attorney's argument about Ms. Jarrett turning state's evidence, as asserted for the first time in the post-hearing submissions, is not understood by the undersigned Administrative Law Judge. Additionally, Grievant's attorney agrees there was no evidence to support this argument.

Footnote: 15

Grievant's argument that Ms. Ballard was in charge in Ms. Jarrett's absence also is incorrect. Ms. Ballard was a part-time employee, and she testified Grievant was in charge in Ms. Jarrett's absence, and she would not be as she was not there all the time and Grievant was full-time.