JOHNNY SLOAN,

Grievant,

v. DOCKET NO. 02-20-381

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Johnny Sloan, was employed by Respondent, Kanawha County Board of Education ("KBOE"), as a custodian until his dismissal on November 12, 2002. This grievance was filed at Level IV on November 20, 2002, as is permitted by W. Va. Code § 18A-2-8, contesting the dismissal. The statement of grievance reads:

> The Respondent has dismissed the Grievant from his position as a regularly employed custodian on the basis of sexual harassment. The Grievant contends that he did not engage in sexual harassment. 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.

As relief Grievant seeks reinstatement into his custodian position, back pay, interest, lost benefits, and seniority. (See footnote 1)

The following Findings of Fact are made from the record developed at Level IV, which includes the record developed at the pre-disciplinary hearing.

Findings of Fact

1. At the time of his dismissal, Grievant had been employed by KBOE for 27 years as a custodian. During the 2001-2002 school year, Grievant worked at Bridgeview Elementary School. He was in his ninth year at that school.

2. During the 2001-2002 school year, Brenda Akers was employed as a classroom aide at

Bridgeview Elementary School. It was her second or third year at Bridgeview Elementary.

3. Each day Grievant was assigned to stand beside the trash cans while the students ate, and empty the students' trays into the trash cans after they had finished eating.

4. Ms. Akers was assigned to assist a special education student in the lunch room each day.

5. Ms. Akers did not assist the student during lunch. Everyday, over an extended period of time, she went to where Grievant was stationed while the student ate, and talked to Grievant for as much as 30 minutes.

6. During these daily conversations, Ms. Akers discussed personal matters with Grievant, such as her financial situation and what car her son should buy. She told Grievant she was having difficulty paying her bills, and needed a job which paid more money. She asked Grievant if he would loan her $200.00 one time, and $300.00 another time. Grievant did not loan her any money. She asked Grievant for advice, and they joked.

7. One time Ms. Akers' hand accidentally bumped Grievant in the groin area, and she made a joke of it. She would touch Grievant on the arm and shoulder from time to time, and rub his belly. At times Ms. Akers' body was touching Grievant's as they talked. Grievant had commented to Ms. Akers that she looked good in low cut tops, and she laughed. 8. Grievant felt comfortable with Ms. Akers, and thought she was interested in having a sexual relationship.

9. On August 13, 2002, Ms. Akers filed a complaint with KBOE, alleging that Grievant had made inappropriate comments to her on two occasions at school. Ms. Akers had already resigned her employment with KBOE at this time. Ms. Akers alleged Grievant had offered her a hundred dollars if she would engage in oral sex with him, with Grievant providing sexual gratification to Ms. Akers. She alleged that on a second occasion Grievant had made the same offer. She also alleged that on another occasion, Grievant had shown her a hundred dollar bill and said, “Here it is.”

10. Grievant admitted he had made these statements and shown Ms. Akers some money, acknowledged during the Level IV hearing that he should not have made these statements to Ms. Akers, apologized, and stated he would never do anything like this again, as he had learned his lesson. At the time Grievant made the statements to Ms. Akers he did not think he was doing anything wrong, because he thought she was interested in a relationship, and that they were friends.

11. When Grievant first made the offer to Ms. Akers they were standing at Grievant's work area in the cafeteria. She moved away from him, and did not respond. This occurred in approximately

April 2002. The second time he made the offer they were again at Grievant's work area in the cafeteria. She responded, “you wouldn't do your wife like that.” They continued to talk after she made this response, although Grievant could not recall what else was said.

12. The third offer was made by Grievant outside the school building. Grievant saw Ms. Akers outside the building in the front, near where he was stationed in the cafeteria. Ms. Akers had told him she always walked in the rear of the building, and he thought it was odd that she had changed her long established pattern, and thought she wanted to talk to him. He went out to talk to her. He showed her he had the money, andtold her there were places in the school building they could go. They walked to the end of the building, and Ms. Akers walked away from Grievant without responding. He took this as a no.

13. Grievant offered Ms. Akers the $100.00 because he knew she needed money, and he thought she was interested in having a sexual relationship with him.

14. After Grievant made these comments to Ms. Akers, she continued to stand with Grievant everyday at lunch time and talk and joke, as though nothing improper had happened.

15. Near the end of the school year, as Grievant was exiting the cafeteria, Ms. Akers was in the hallway, and she said she thought she had earned that $100.00. Grievant asked her how she had earned $100.00, and that was the end of that conversation.

16. Grievant had received sexual harassment training annually while an employee of KBOE.

17. Grievant received the highest rating possible on his performance evaluations over the preceding three years. For the preceding two years, he received the highest rating possible on all 22 categories in which his performance was rated.

18. Grievant was dismissed from his employment with KBOE on November 12, 2002, after an investigation by KBOE into the charges. Grievant had never been disciplined by KBOE before for any infraction.

19. KBOE dismissed Kenneth Cooper, a cook, on April 9, 2002, for theft, immorality, sexual harassment, and insubordination. The Superintendent had recommended a lengthy suspension. Mr. Cooper had become close friends with a female co-worker, loaning her money, transporting her to work, and giving her presents. He was obsessed with the co-worker, and occasionally followed her movements away from school. After observing the co-worker with another man at a store, Mr. Cooper became incensed, and confronted the co-worker outside the store about being with this man.

The next schoolday Mr. Cooper left the co-worker a juvenile note about being with this other man. Mr. Cooper talked to the principal about the co-worker, told him he was stressed and under a doctor's care, and the principal told him to follow his doctor's orders to stay home, and to stay away from the co-worker when he returned to work. An hour after this conversation, Mr. Cooper went to the school, went to the area where the co-worker was, and took a brass picture frame he had given her. Because he thought the co-worker owed him money, he also got into the zippered compartment of her purse and took four rings, all without the co- worker's knowledge or permission. The co-worker convinced Mr. Cooper to return one of the rings which her mother had given her. Mr. Cooper was arrested for committing larceny. After his dismissal, Mr. Cooper called staff and faculty to enlist their support, and several felt they were harassed by Mr. Cooper. Mr. Cooper also called parents and told them of the co-worker's drug problems, and that the principal had done nothing about it. Mr. Cooper had satisfactory evaluations. By decision dated July 31, 2002, the Grievance Board upheld the dismissal. The decision found that the credibility of Mr. Cooper's testimony was called into question. On August 23, 2002, KBOE rescinded the termination of Mr. Cooper's employment, and reduced the disciplinary action to a six month suspension, accompanied by a transfer to a different school, and counseling, as necessary.

Discussion

In disciplinary matters, the burden of proof is on the employer to substantiate the charges against an employee by a preponderance of the evidence. W. Va. Code § 18A-2- 8; Perkins v. Greenbrier County Bd. of Educ., Docket No. 94-13-019 (Aug. 12, 1994). The charges must be one or more of those listed in Code § 18A-2-8. Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995). A county board of education must act reasonably, not arbitrarily or capriciously. Rovello v. Lewis County Bd. of Educ., 181 W. Va. 122, 381 S.E.2d 237 (1989). Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). Code § 18A-2-8 provides that an employee may be suspended or dismissed at any time by a county board of education 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 charges shall be stated in writing served upon the employee within two days of presentation of said charges to the board.

Grievant was dismissed for immoral conduct and insubordination, in that he is alleged to have knowingly violated KBOE's sexual harassment policy.

"'Immorality' is defined as 'conduct not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior.' Golden v. Bd. of Educ. of County of Harrison, 285 S.E.2d 665 (W. Va. 1981)." Hayes v. Kanawha County Bd. of Educ., Docket No. 94-20-1143 (June 28, 1995). "'Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires at least an inference of conscious intent.' See Hayes, [supra], citing Youngman v. Doerhoff, 890 S.W.2d 330 (Mo. 1994)." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). Most of the cases before the Grievance Board in which immorality has been found have involved improper advances toward students, or other sexual misconduct. Sexual harassment has been found to be a "species of immorality." Harry v. Marion County Bd. of Educ., 203 W. Va. 64, 506 S.E.2d 319 (1998). KBOE pointed out that Grievant's offer of money for sexual favors was out of line with normal standards of decency and accepted standards of behavior.

The Supreme Court of Appeals of West Virginia has stated that 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 Board/Shepherd College, __ W. Va. __, 569 S.E.2d 456(2002). "[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." Id. "If an employer's policy forbids certain conduct, an order which directs an employee to engage in the banned conduct, is an unreasonable and/or invalid order. Id." Butts v. Higher Educ. Interim Governing Bd., Docket No. 01-HE-100R (Dec. 6, 2002). "[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." Butts, supra, 569 S.E.2d 456. "Failure to act must be based on a 'good faith belief.' Id." Butts, supra, Docket No. 01-HE-100R. "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. Veteran Admin., 36 M.S.P.R. 574 (1988). See also Daniel v. U. S. Postal Serv., 16 M.S.P.R. 486 (1983); Davis v. Smithsonian Inst., 13 M.S.P.R. 77 (1983).

KBOE's sexual harassment policy prohibits sexual harassment in the workplace and Grievant was aware of the policy and had sexual harassment training. Sexual harassment is defined in the policy to include, "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when: . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or education or creating an intimidating, hostile or offensive working or educational environment; . . .." It is clear Grievant was aware of the policy, and Grievant's offers certainly constitute requests for sexual favors and verbal conduct of a sexual nature. However, the policy's definition of sexual harassment does not end here. Ms. Akers was not called to testify either at the pre-disciplinary hearing or at Level IV, so the only evidence that Grievant's offers interfered in any way with Ms. Akers' work performance, or that theycreated an intimidating, hostile, or offensive working environment are the fact that she complained that she was sexually harassed, the letter sent by Ms. Akers, and the statement she gave to the investigator.

Ms. Akers' statement to the investigator is hearsay.

> Under W. Va. Code § 18-29-6, the formal rules of evidence are not applicable in grievance proceedings, except for the rules of privilege recognized by law. Hearsay evidence is generally admissible in grievance proceedings. The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings. Seddon v. W. Va. Dept. of Health, Docket No. 90-H-115 (June 8, 1990). Nonetheless, an administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. See Miller v. W. Va. Dept. of Health and Human Res., Docket No. 96-HHR-501 (Sept. 30, 1997); Harry v. Marion County Bd. of Educ., Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996); Seddon, supra.

> There are several factors to consider in determining the weight to be allocated to hearsay evidence, including: the availability of persons with first- hand knowledge to testify at the hearing; whether the declarant's out-of-court statements were in writing, were signed, or were in affidavit form; the employer's explanation for failing to obtain signed or sworn statements; whether the declarants were disinterested witnesses to the events and whether the statements were routinely made; the consistency of the declarants' accounts with other information in the case, their internal consistency, and their consistency with each other; whether corroboration for the statements can otherwise be found in the employer's records; the absence of contradictory evidence; and the credibility of the declarants when they made the statements attributed to them. See Borninkhof v. Dept. of Justice, 5 M.S.P.B. 150 (1981).

Gunnells v. Logan County Bd. of Educ., Docket No. 97-23-055 (Dec. 9, 1997).

Respondent presented no reason for its failure to call Ms. Akers as a witness so that she could explain under oath how upset she was by Grievant's behavior, and so she could be cross-examined. While her testimony was unnecessary to establish what Grievant had said to her, as Grievant admitted to the statements, her testimony was crucial to the determination of whether Grievant's statements truly were unwelcome, and whether they created a hostile work environment. Grievant's version of what occurred was markedly different from that of Ms. Akers with regard to the circumstances under which the statements were made by Grievant, and Ms. Akers' actions after the statements were made, which is one reason a witness should be presented for cross-examination. Ms. Akers' letter states that Grievant approached her while she was performing lunch room duty and offered her money for oral sex. Ms. Akers told the investigator that she was "standing by the door to the outside of the building when she was approached by Mr. Sloan." Grievant testified that he first made the proposition to Ms. Akers after she had approached him one day at his work area in the lunch room. All the witnesses were quite clear in their testimony that Ms. Akers never performed her assigned lunch room duty, rather she approached Grievant everyday while he was manning his work station. None of the witnesses ever saw Grievant approach Ms. Akers. Nowhere in the investigative report does it indicate that Ms. Akers ever mentioned the fact that she approached Grievant everyday at his work area and talked to him for up to 30 minutes; rather, the report states, "[s]he indicates that she would frequently be in the cafeteria to help out with the lunch duty and that the school custodian, Johnny Sloan, was usually present as well."

Ms. Akers stated in her complaint that Grievant had cornered her at the storeroom and shown her money, while Grievant stated he had followed Ms. Akers outside and shown her money. The complaint form states that she, "[w]alked away each time - - continued to steer away and avoid the individual for the remaining school year." She likewise told the investigator that in response to the offers she had avoided contact with Grievant. Grievant testified that Ms. Akers continued to be quite friendly with him after the offers, and continued to leave her duties each day at lunchtime to stand beside him and talk to him for up to 30 minutes, right up until the end of the school year. Sharon Gainer, cafeteria manager, and Regina Flinner, school counselor, both testified that Ms. Akers continued toapproach Grievant at his work area in the cafeteria and talk to him nearly everyday through the end of the school year, including the very last day of school.

Although Grievant could not recall every detail of what occurred, he admitted that he had in fact made the offers as alleged by Ms. Akers, apologized for his actions, and stated he would not make such a mistake again. Grievant could have simply denied it all, but he was candid enough to admit the truth, and his mistake. It will also be noted that Ms. Akers told the investigator that she had been under psychiatric care for the last two years, and requested that she be rehired by KBOE in a family support position, and that KBOE pay for her therapy and psychiatric visits, among other things. The undersigned finds Grievant to be a credible witness, and Ms. Akers' complaint and her statement to the investigator to be untruthful. Ms. Akers' statements that she resigned due to the sexual harassment, and she delayed reporting due to the emotional stress she suffered during the past several months due to the harassment are not credible given that she was untruthful about avoiding Grievant, and in fact, continued to talk to him everyday at lunchtime. This is not the type of response one would expect from someone who was intimidated or offended by Grievant's offers. Accordingly, Ms. Akers' statements will be given no weight. KBOE has not demonstrated that Grievant violated its sexual harassment policy.

The next issue is whether Grievant's offers constitute immorality. It is quite clear from the record that Ms. Akers' actions would lead a reasonable person to believe that she might be interested in a more friendly relationship. Nonetheless, Grievant's statements to Ms. Akers were inappropriate for the workplace, and as KBOE pointed out, the offer of money for sexual favors cannot be said to be "'in conformity with the acceptable standards of proper sexual behavior.'" Hayes, supra.

Grievant argued that dismissal was too severe a penalty under the circumstances presented here, pointing to his long career with KBOE, his outstanding evaluations, and the fact that he believed Ms. Akers was interested in a sexual relationship. "The argumenta 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).

"Whether 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). “[T]he appropriateness of a penalty, while depending upon resolution of questions of fact, is by no means a mere factual determination. Douglas v. Veterans Administration, 5 M.S.P.B. 280 (1981). Such a decision 'involves not only an ascertainment of the factual circumstances surrounding the violations but also the application of administrative judgement and discretion.' Id. citing Kulkin v.Bergland, 626 F.2d 181, 185 (1st Cir. 1980); Beall Const. Co. v. OSHRC, 507 F.2d 1041, 1046 (8th Cir. 1974). Because the imposition of a penalty results from an employer's administrative exercise of its discretion, said action may be the result of arbitrary and capricious decision-making or an abuse of discretion. See, Thompson v. U.S. Postal Service, 596 F. Supp. 628 (D.C. Va. 1984).” Feicht v. W. Va. Bureau of Employment Programs, Docket No. 93-BEP-253 (Dec. 9, 1993). "[M]itigation 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 theemployee'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).

Grievant also pointed to the fact that KBOE had reinstated another employee, arguing that Mr. Cooper's actions were worse than Grievant's in that he not only harassed a co-worker, but was also guilty of theft, and there were overtones of violence. KBOE argued that the facts of the two cases were somewhat similar, but not the same, and the Grievant and Mr. Cooper need not be treated the same.

> 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 was an outstanding 27 year service employee, with no prior discipline, who propositioned a female co-worker who left her work station everyday and stood close to him, telling him about her personal problems, joking, touching him, and asking him to loan her money, for 30 minutes at a time; and then Grievant admitted to his actions, and apologized. Grievant's co-workers testified as to what a supportive, good co-worker he was. Mr. Cooper was a satisfactory service employee, who stalked a female co-worker,stole items from her purse, and lied about what had happened while under oath. Mr. Cooper and Grievant are similarly situated in terms of their employment responsibilities. When one considers all the circumstances, which is what a board of education is supposed to do when deciding on an employee's livelihood, it is difficult to understand how Grievant's employment could be terminated. It is even more difficult to understand how KBOE could terminate Grievant's employment, yet reinstate Mr. Cooper. Certainly Mr. Cooper would seem to be more of a threat to his co-workers in the future than Grievant. The undersigned finds that while some punishment is appropriate, the penalty imposed was clearly disproportionate to the offense under the circumstances, and that Grievant has been subjected to disparate treatment.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. In disciplinary matters, the burden of proof is on the employer to substantiate the charges against an employee by a preponderance of the evidence. W. Va. Code § 18A-2-8; Perkins v. Greenbrier County Bd. of Educ., Docket No. 94-13-019 (Aug. 12, 1994). The charges must be one or more of those listed in Code § 18A-2-8. Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995). A county board of education must act reasonably, not arbitrarily or capriciously. Rovello v. Lewis County Bd. of Educ., 181 W. Va. 122, 381 S.E.2d 237 (1989). Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). That Code Section provides that an employee may be suspended or dismissed 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 charges shall be stated in writing served upon the employee within two days of presentation of said charges to the board.

2. "'Immorality' is defined as 'conduct not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior.' Golden v. Bd. of Educ. of County of Harrison, 285 S.E.2d 665 (W. Va. 1981)." Hayes v. Kanawha County Bd. of Educ., Docket No. 94-20-1143 (June 28, 1995). "'Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires at least an inference of conscious intent.' See Hayes, [supra], citing Youngman v. Doerhoff, 890 S.W.2d 330 (Mo. 1994)." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). Most of the cases before the Grievance Board in which immorality has been found have involved improper advances toward students, or other sexual misconduct. Sexual harassment has been found to be a "species of immorality." Harry v. Marion County Bd. of Educ., 203 W. Va. 64, 506 S.E.2d 319 (1998).

3. The Supreme Court of Appeals of West Virginia has stated that 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 Board/Shepherd College, __ W. Va. __, 569 S.E.2d 456 (2002). "[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." Id. "If an employer's policy forbids certain conduct, an order which directs an employee to engage in the banned conduct, is an unreasonable and/or invalid order. Id." Butts v. Higher Educ. Interim Governing Bd., Docket No. 01-HE-100R (Dec. 6, 2002). "[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." Butts, supra, 569S.E.2d 456. "Failure to act must be based on a 'good faith belief.' Id." Butts, supra, Docket No. 01-HE-100R. "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. Veteran Admin., 36 M.S.P.R. 574

(1988). See also Daniel v. U. S. Postal Serv., 16 M.S.P.R. 486 (1983); Davis v. Smithsonian Inst., 13 M.S.P.R. 77 (1983).

4. KBOE's sexual harassment policy prohibits sexual harassment in the workplace and Grievant was aware of the policy and had sexual harassment training. Sexual harassment is defined in the policy to include, “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when: . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or education or creating an intimidating, hostile or offensive working or educational environment; . . ..”

5. Respondent did not demonstrate that Grievant's offers were unwelcome, that they unreasonably interfered with Ms. Akers' work performance, or that they created an intimidating, hostile, or offensive working environment.

6. Grievant's offers of oral sex for money were not appropriate for the workplace, nor were they “'in conformity with the acceptable standards of proper sexual behavior.'” Hayes, supra. Grievant's offers constitute immorality.

7. “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). 8. "Whether 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). “[T]he appropriateness of a penalty, while depending upon resolution of questions of fact, is by no means a mere factual determination. Douglas v. Veterans Administration, 5 M.S.P.B. 280 (1981). Such a decision 'involves not only an ascertainment of the factual circumstances surrounding the violations but also the application of administrative judgement and discretion.' Id. citing Kulkin v.Bergland, 626 F.2d 181, 185 (1st Cir. 1980); Beall Const. Co. v. OSHRC, 507 F.2d 1041, 1046 (8th Cir. 1974). Because the imposition of a penalty results from an employer's administrative exercise of its discretion, said action may be the

result of arbitrary and capricious decision-making or an abuse of discretion. See, Thompson v. U.S. Postal Service, 596 F. Supp. 628 (D.C. Va. 1984)." Feicht v. W. Va. Bureau of Employment Programs, Docket No. 93-BEP-253 (Dec. 9, 1993). "[M]itigation 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).

9.

> 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. ofNavy, 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).

10.

> [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.

11. The penalty imposed was clearly disproportionate to the offense under the circumstances, and Grievant has been subjected to disparate treatment.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant to his position as a custodian, to pay him back pay and benefits from the date of his dismissal to the date of

his reinstatement, plus interest, less three days' pay, representing a three day suspension without pay, and to credit him with seniority and any other benefits from that date.

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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: March 24, 2003

Footnote: 1

A Level IV hearing was held on February 5, 2003. Grievant was represented by John Everett Roush, and Respondent was represented by James W. Withrow, Esquire. This grievance became mature for decision upon receipt of the last of the parties' written arguments on March 3, 2003.