HAROLD E. MALONEY, JR.,

Grievant,

v. **DOCKET NO. 02-31-367**

MONROE COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

In a grievance filed November 8, 2002, Grievant alleged the Monroe County Board of Education (MCBOE or the Board) policy on Sexual Harassment/Violence had been applied erroneously, that MCBOE had violated W. Va. Code § 18A-2-12 by failing to provide him with any performance evaluations or standards of performance, and that he had not been informed of the specific nature of his alleged violation of MCBOE's policies prior to a disciplinary hearing, all resulting in the Board improperly suspending Grievant for a period of 45 days. Grievant stated his relief sought as follows:

> Any reference to Sexual Harassment should be removed from my record.
>
> If the Board of Education wishes to continue my suspension for the 45 day period, they should specify the complaint, reference the specific portion of the policy or law they are working with, and specify a corrective action that I may take to prevent a further occurrence.
>
> If they have no specific grounds for suspension nor a way to define the standards I should meet in the future, remuneration of the $70 per day I am losing under my current contract would be appropriate.

An after-the-fact hearing on the Superintendent's recommendation to suspend Grievant was held on October 28, 2002 before the Board. Grievant appeared *pro se*, andRespondent appeared by Dr. Lyn Guy, Superintendent. In accordance with W. Va. Code § 18A-2-8, Grievant appealed the Board's decision to ratify and lengthen the suspension directly to Level IV, and the parties agreed to submit

the matter based on the record developed at the Board meeting, supplemented by their proposed findings of fact and conclusions of law. Grievant submitted his own brief on December 12, 2002, and Respondent's brief was submitted by its counsel, Gregory W. Bailey, Esq. of Bowles Rice McDavid Graff & Love, PLLC, on December 26, 2002, whereupon the matter became mature for decision.

I find the following facts have been proven by a preponderance of the evidence:

FINDINGS OF FACT

1. Grievant is employed by Respondent as a substitute classroom teacher and as a homebound instructor, and has been so employed for about two years.

2. On October 21, 2002, he was informed by letter from Superintendent Guy that:

> I have just completed an investigation into an allegation that you violated Monroe County Policy GBEA and JG-1 Sexual Harassment/Violence Policy by making comments of an inappropriate sexual nature on October 9, 2002, in a seventh period classroom at James Monroe High School.

. . .

> You were afforded an opportunity to respond to these allegations and have admitted to making the statements in question, specifically, carrying through an analogy to the day's homecoming event as being similar to a girl losing her virginity, or a boy raping a girl. Further, your comments about your wife spanking you, and your “joke” that you liked it when she did that, were highly inappropriate. These comments caused a great deal of consternation among the female students in the class. When one of them told you that such comments were wrong and upsetting, you continued with the analogy.

3. The letter further informed Grievant that he was to be suspended from substitute teaching for a period of 30 calendar days, but would be permitted to continue homebound instruction “simply because that instruction is supervised by another adult in the home, and because I do not believe your behavior is threatening to individual students.”

4. Following the Board hearing on October 28, 2002, the Board voted to suspend Grievant from substitute teaching for a period of 45 days. The Board did not explain its decision to extend the suspension recommended by the Superintendent.

5. At the Board hearing, Superintendent Guy stated that the portion of MCBOE Sexual Harassment/Violence Policy GBEA and JG-1 (the Policy) that her October 21 letter referred to was section 2.1.3, which states:

2.1 Sexual Harassment- Sexual harassment consists of unwelcome sexual advances, requests for sexual favors, sexually motivated physical conduct or other verbal or physical communication of a sexual nature when:

. . .

2.1.3 such conduct has the purpose or effect of substantially interfering with an individuals academic, professional or employment performance or creating an intimidating, hostile or offensive academic or work environment.

6. On October 9, 2002, Grievant was substituting for a ninth-grade math teacher at James Monroe High School. On that day, the students were participating in a homecoming activity in which each female student wore a pink string on her finger, which she had to give up to a male student if she talked to him that day. At the end of the day, the male student with the most strings won a football, and the females who still had their strings were rewarded with a piece of candy.

7. During the seventh-period class, the last class of the day, Grievant had exhausted the teacher's lesson plan after 20 minutes of teaching the 55-minute class. Instead of expanding on the provided math lesson, Grievant initiated a discussion of “current events,” including the day's homecoming game.

8. As he had in three other classes that day, Grievant opined that being boyfriend and girlfriend was like practicing for marriage, and that each should be building a relationship and helping each other and protecting each other from the outside world. He suggested that if a girl's boyfriend took her string first thing in the morning, maybe he wasn't considering himself part of a team and she should consider getting herself another boyfriend, and if she were his daughter, he would consider the boyfriend “a slug.” Trans., p. 38-39.

9. At this point, a female student in the front of the room pointed out to Grievant that his discussion had caused another female student in the back of the room to cry. When he confronted her, she said her boyfriend was not like that. After further discussion, in which the student stated she did not like the direction the discussion was going, Grievant simply told the student that if anything he said “did not apply, she should let it on the table and not pick it up.” At this point, a male student told Grievant to “shut up.”

10. Grievant responded by saying, “we don't say 'shut up' in my house, if I were to say that, my

wife would spank me, and actually I'd kind of like that." Trans., p. 40.

11. After this, about half-way through the period, there was an announcement made over the public address system that the boys who had gathered many strings were to report to see who won the football. Then there was an announcement that the girls who still had their strings were to report to get their candy.

12. Grievant re-initiated the discussion of the string game, making a direct analogy between a girl's giving up her string to losing her virginity, and stated that a boy's using aggression to coerce a girl into speaking compared to rape. 13. Several of the students in the class made complaints to their regular teacher who reported the complaints to the principal. Superintendent Guy and Lisa Agee (See footnote 1) met with nine students from the class, eight of whom corroborated the complaints. The ninth student was reading and not paying attention.

14. During the interviews, a female student recalled a similar incident in which Grievant had made questionable remarks in another class the prior year. Superintendent Guy reviewed her records (See footnote 2) and found Grievant had received a verbal reprimand from the principal of Mountain View School, where Grievant had been substituting in an eighth grade West Virginia History class. The principal informed Superintendent Guy of the reprimand at the time, and she recorded it on her planner.

15. Grievant described that incident as a discussion of the holocaust in which he tried to balance what he saw as an anti-German, pro-Jewish bias to the videos the students had been watching by saying that "all civilizations do something like that." The example he used was, "when the American soldiers went out west after the civil war, they rode into the Indian villages and killed the women and children and sometimes they mutilated their body parts to wrap their saddle horns[.]" Trans., p. 33. He believed this comment provided "a balance for all those pictures of the holocaust" and got the students' attention. *Id.*

16. The Policy contains procedural requirements for reporting and investigating complaints of sexual harassment or violence. Sections 3 and 4 of the Policy require the principal to "see that the complaint is committed to writing before the close of the nextworking day." If the complaint is against an employee, the principal is to notify the Human Rights Officer, who will conduct the investigation and prepare a written report of the investigation for the superintendent. None of these requirements were met for either the October 9, 2002 incident or the earlier incident described in Finding of Fact

No. 15 above. 17. Section 4.3 of the Policy states in part: “To ascertain whether alleged behavior constitutes sexual harassment/violence, consideration will be given to the situation, the nature of the sexual advances, the relationships between the parties involved, and the conditions in which the alleged incidents occurred.”

18. The State Board of Education's Code of Employee Conduct, Policy 5902 (126 C.S.R. 162), which Grievant attached to his proposed findings and so is obviously aware of, applies to Grievant. It states in part:

> 3.2. These regulations also require that West Virginia public school employees respond immediately to incidents of bullying, harassment, intimidation, substance abuse and/or violence or any other code of conduct violation that impacts negatively on students in a manner that addresses incidents, deters future incidents, and affirms respect for individuals.
>
> 4.2 All West Virginia school employees shall:
>
> 4.2.1. exhibit professional behavior by showing positive examples of preparedness, communication, fairness, punctuality, attendance, language and appearance.
>
> 4.2.2. contribute, cooperate, and participate in creating an environment in which all employees/students are accepted and provided the opportunity to achieve at the highest levels in all areas of development.
>
> 4.2.3. maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination.
>
> 4.2.4. create a culture of caring through understanding and support.
>
> 4.2.5. immediately intervene in any code of conduct violation, that has a negative impact on students, in a manner that preserves confidentiality and the dignity of each person.
>
> 4.2.6. demonstrate responsible citizenship by maintaining a high

standard of conduct, self-control, and moral/ethical behavior.

DISCUSSION

This is a disciplinary matter in which Respondent 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). Although Grievant stated in his Statement of Grievance and level four brief that he is not sure exactly what it was that he did wrong, the October 21, 2002, letter informing him of his suspension states in its first sentence that he ". . . violated Monroe County Policy GBEA and JG-1 Sexual Harassment/Violence Policy by making comments of an inappropriate sexual nature on October 9, 2002, in a seventh period classroom at James Monroe High School."

Although the policy characterizes certain conduct as improper and subject to disciplinary action, the actual authority of a school board to suspend an employee comes from W. Va. Code §18A-2-8, which states in 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 behavior described by Superintendent Guy as the basis for Grievant's suspension may be characterized as both immorality and insubordination. In such cases,the proper focus is whether the charge of misconduct has been proven, not the label attached to such conduct. Bradley v. Cabell County Bd. of Educ., Docket No. 99-06-150 (Sep. 9, 1999). "Conduct which constitutes prohibited sexual harassment is included within the proscription against immorality in W. Va. Code § 18A-2-8. Harry v. Marion County Bd. of Educ., 203 W. Va. 64, 506 S.E.2d 319 (1998)." Jones v. Braxton County Bd. of Educ., Docket No. 00-04-220 (Dec. 29, 2000). Insubordination includes "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); Jones, *supra*. Both the Policy and the

Employee Code of Conduct are reasonable orders that Grievant chose not to obey.

The facts of the matter are largely undisputed, as Grievant admitted to making the offending remarks. Therefore, the primary questions are whether Grievant's remarks violated the Policy and whether the Respondent's procedural violations of the Policy were material.

There were two separate instances characterized as violations of the Policy by Dr. Guy. The first was Grievant's using the string game as an allegory for loss of virginity and rape; the second was his remark that he might enjoy a spanking from his wife. Both statements showed remarkably poor judgment. But for the reasons stated below, the first incident, while highly inappropriate, did not violate the Policy, while the second certainly did.

Superintendent Guy presented no evidence at the Board Hearing such as written complaints, investigative reports, prior disciplinary records, or even notes from her investigative interviews. The testimony of Ms. Agee, who was present at the interviews,was not presented to corroborate her recollection of the student statements. The teacher to whom the original complaints were made did not testify. Dr. Guy's testimony, and that of the only other Board witness, was unsworn. No referral was made to a human rights officer, and no written report of the investigation was made. No documentation of a prior verbal reprimand was provided, so it cannot be conclusively proven exactly what the violation was. Grievant recalled it being merely an admonishment by a mentor not to teach above the students' grade level, and Superintendent Guy did not characterize it as punishment for violation of the Policy, merely as a reprimand for making improper comments.

I find these defects in following the requirements of Respondent's own policy to be immaterial, given Grievant's admission of the acts in question. Grievant himself did admit on the record that he made the statements in question on both October 9, 2002 and the prior incident, and it is his version of events that is accepted as fact, as it is deemed the most reliable. Respondent's procedural omissions could have worked in Grievant's favor, since it is his version of events on which this decision is based.

It is well settled that "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). Grievant must show that the procedural error, more likely than not, influenced the outcome. Otherwise, if the same result would have inevitably been reached, the procedural violation will be considered as "harmless error." Dadisman v. W. Va. Div. of Rehabilitation Serv., Docket Nos.

98-RS-023/040 (Mar. 25, 1999). See Vosberg v. Civil Serv. Comm'n, 166 W. Va. 488, 275 S.E.2d 640 (1981); McFadden v. W. Va. Dep't of Health & Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995). See generally Parker v. Defense Logistics Agency, 1 M.S.P.B. 489 (1980); Bradley, *supra.* Respondent's failure to properly investigate and report on the incidents in question was harmless error, as Grievant's admission of the act precludes dispute.

The relevant part of the Policy proscribes “verbal or physical conduct or communication of a sexual nature” when it has the purpose or effect of substantially interfering with an individual's academic performance or creating an intimidating, hostile or offensive academic environment. As stated in the Policy, every complaint must be examined in context. Not every academic discussion that mentions sex or sexuality is harassment; some is legitimate education on an important subject. Grievant initiated a discussion of the string game in order to kill time in a math class, and what initially upset the students was his discussion of dating and his insensitivity to the crying student, not his mention of the sexual overtones of the game. However, he went on to describe the game in sexual terms that were entirely inappropriate and rather than contributing to an environment of learning, created a very uncomfortable environment for the students. Grievant stated, "Certainly the words I used were unwelcome, but there was no threat. Why were they unwelcome? Was there enough of a grain of truth in what I said to make the students feel uncomfortable? Probably. . . . Life is not always comfortable, but that doesn't make it sexual harassment." Trans., p. 29.

Grievant correctly points out that for some students, the game was a thinly-veiled analogy in which "girls prone to attack were having their vulnerability reinforced [and] boys prone to aggression were having their feeling of invulnerability reinforced." Trans., p. 42. Superintendent Guy even acknowledged that she hoped she would never be "in a hearing trying to explain why a high school is conducting a game like this" and that she "saw the overtones in it as well." Trans., pp. 46-47. However, Grievant fails to admit any wrongdoing, claiming he was only a catalyst and not the cause. Hopefully, if Grievantsubstitutes in a chemistry class, he will not teach that catalysts have a choice whether to react or not. Grievant is not a catalyst, he is a teacher who is expected to use sound judgment to foster learning in a welcome environment. He is responsible for his own actions and cannot pass the blame on to "the physical environment of the day."

Grievant related during his testimony at the Board hearing that the game caused a great deal of disruption both in his class and in the halls outside. He mentioned in one class, he had a male

student that "poked, pushed, knocked books off the desk, and bumped the writing arm of a girl with a string every time I [he] turned [his] back on him," until she yelled at him to stop and said "Mr. Maloney, do something!" Grievant did nothing. Trans., p. 38. Another female student complained that between classes she had been accosted by a group of boys in the hall, who held her in place until she asked to leave, whereupon they physically held her and took her string. Grievant admitted, "I didn't do anything. I told her I couldn't help her, it was a game put on by the school." Trans., p. 37. Throughout the day he received reports of girls "being poked, prodded, having their books knocked out of their hands, being physically assaulted to get them to talk." Trans., p. 37. Grievant consistently failed to demonstrate the responsibility and authority required of a teacher when his students are being treated in such a manner, and whether other teachers are allowing such behavior or not does not justify Grievant's lack of discipline.

In order to establish insubordination, the employer must not only demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, but that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Jones v. Mingo County Bd. of Educ., Docket No. 95-29-151 (Aug 24, 1995); Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). However, the West VirginiaSupreme Court of Appeals has found that “for there to be "insubordination," the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid. Butts v. Higher Education Governing Board/Shepherd College 569 S.E.2d 456 (W. Va. 2002).

In this case, the outcome turns on the evaluation of Grievant's wilfulness. “Although the cases are not clear as to what constitutes 'wilfulness,' the cases seem to suggest that for 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. *See* Annotation, Dismissal of Teacher - 'Insubordination', 73 A.L.R.3d § 3 (1977).” Butts, *supra*. There was no evidence in the record that Grievant's motivation was other than an extremely misguided attempt to further class discussion over current and interesting topics. Therefore, Respondent did not meet its burden of proving the wilfulness element of insubordination.

On the other hand, Grievant overtly violated both the Code of Conduct and, as discussed below,

the Sexual Harassment/Violence Policy. He did not "maintain a safe and healthy environment, free from harassment, intimidation, [or] bullying," his insensitivity did not "create a culture of caring through understanding and support," and he failed to "demonstrate responsible citizenship by maintaining a high standard of conduct, self- control, and moral/ethical behavior." 126 C.S.R. 162 §§ 4.2.3, 4.2.4 and 4.2.6. While this infraction may have merited some form of discipline, Respondent chose to overlook the Code of Conduct violation and instead relied on the Policy. Grievant's comment to his class that he might enjoy a spanking brooks little discussion. It has been held by the Grievance Board that such innuendo constitutes sexual harassment. *See*, Jones, *supra*. While Grievant believes his comment was a proper way to "break the tension" caused by a student telling him to "shut up," it was entirely improper and unacceptable. In a similar case in which a teacher was responding to ill-mannered students, the Grievance Board found, "While it is hard not to be somewhat sympathetic to a teacher faced with the occasional rowdy and abusive behavior from students, teachers' emotions and attempts at humor must not be allowed to dictate their actions. Although the students apparently provoked most of the alleged incidents, the Grievant, a professional, had a greater responsibility than the students to act appropriately. Grooms v. Raleigh County Bd. of Educ., Docket No. 90-41-482 (Apr. 30,1991); Brown v. Mercer County Bd. of Educ., Docket No. 98-27-113 (July 31, 1998)." Jones, supra.

Grievant's complaint that Respondent violated W. Va. Code § 18A-2-12 by failing to provide him with performance evaluations to guide his behavior has no bearing on the discipline he received for his conduct, but the claim is not wholly without merit. That section requires the state Board of Education to develop a written system of evaluation for the performance of professional personnel, applied uniformly by the counties. That section also includes procedural protections for teachers whose performance is found to be unsatisfactory. In this case, it was Grievant's conduct, not his teaching performance, that was found to be deficient, so the requirements of § 18A-2-12 concerning a notice of deficiencies and remediation plan do not apply.

Looking at State Board of Education Policy 5310, 126 C.S.R 142, substitute teachers are implicitly excluded from the group of professional personnel for whom regular evaluations are required. Policy 5310, in section 4.9, defines “classroom teacher” as “theprofessional educator who has a direct instructional relationship with pupils.” “Professional educators” are, according to W. Va. Code § 18A-1-1, the same thing as “teachers” as defined in W. Va. Code § 18-1-1. That definition, in

subsection (g), describes teachers, supervisors, principals, superintendents, and “any other person regularly employed for instructional purposes in a public school in this state.” Substitute teachers are not “regularly employed,” hence are not “classroom teachers” as contemplated by Policy 5310. Therefore, although it would certainly be beneficial, county boards of education are not required to provide regular performance evaluations of substitute teachers.

Grievant avers that his suspension and the inclusion of a sexual harassment charge on his record are overkill given the nature of his violations and the connotation that "sexual harassment” carries. An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense, and 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, supra. See Domingues v. Fayette County Bd. of Educ., Docket No. 91-10-426 (Sept. 30, 1992); Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989); Bradley, *supra*.

Given Grievant's lack of contrition, inability to accept responsibility for his own actions, and failure to understand exactly what it is he did wrong, it is impossible to conclude that this disciplinary action was entirely unwarranted. Even after the suspension was imposed and his shortcomings were explained in detail, Grievant has still not received the "wake up call" that he needs in order to realize that his professional judgment has gotten him into trouble on multiple occasions in the past, so he may wish to moderate his behavior or use a more conservative judgement as to what constitutes "teaching" in thefuture. Further, Respondent pointed out that as a substitute teacher, Grievant does not teach every day. In the past year, Grievant was called out about 20 times. His suspension was for a period of 45 calendar days, rather than 45 working days, and it is entirely uncertain how many paid days he would miss. Grievant provided no evidence at Level IV that would support his contention that 45 days was overly oppressive. Also, he was allowed to continue his duties as a homebound instructor.

It is unfortunate that Grievant's off-hand and thoughtless remark carries the connotation of sexual harassment, given the much more heinous conduct that term unusually implies. But although not all of the acts Respondent disciplined Grievant for were sexual harassment, and giving little weight to Grievant's verbal reprimand for prior improper comments, Grievant has not proven this punishment is disproportionate to his offense.

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).

2. 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. W. Va. Code § 18A-2-8.

3. In cases where the statutory language of W. Va. Code § 18A-2-8 is not used by the employer, the proper focus is whether the charge of misconduct has been proven,not the label attached to such conduct. Willis v. Jefferson County Bd. of Educ., Docket No. 96-19-230 (Oct. 28, 1998); Russell v. Kanawha County Bd. of Educ., Docket No. 9-20-415 (Jan. 24, 1991); Bradley v. Cabell County Bd. of Educ., Docket No. 99-06-150 (Sep. 9, 1999).

4. “Conduct which constitutes prohibited sexual harassment is included within the proscription against immorality in W. Va. Code § 18A-2-8. Harry v. Marion County Bd. of Educ., 203 W. Va. 64, 506 S.E.2d 319 (1998).” Jones v. Braxton County Bd. of Educ., Docket No. 00-04-220 (Dec. 29, 2000).

5. Grievant's comment to his ninth-grade class regarding his possible enjoyment of a spanking by his wife constitutes a violation Respondent's Sexual Harassment/Violence policy, hence was immoral.

6. Insubordination includes "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); Jones, *supra*.

7. In order to establish insubordination, the employer must not only demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, but that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Jones v. Mingo County Bd. of Educ., Docket No. 95-

29-151 (Aug 24, 1995); Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

8. “[F]or there to be "insubordination," the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful;and (c) the order (or rule or regulation) must be reasonable and valid. Butts v. Higher Education Governing Board/Shepherd College 569 S.E.2d 456 (W. Va. 2002).

9. “[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. *See* Annotation, Dismissal of Teacher - 'Insubordination', 73 A.L.R.3d § 3 (1977).” Butts, *supra*.

10. Grievant's failure to uphold the Employee Code of Conduct and his violation of the Sexual Harassment/Violence Policy were not insubordinate.

11. It is well settled that "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). Grievant must show that the procedural error, more likely than not, influenced the outcome. Otherwise, if the same result would have inevitably been reached, the procedural violation will be considered as "harmless error." Dadisman v. W. Va. Div. of Rehabilitation Serv., Docket Nos. 98-RS-023/040 (Mar. 25, 1999). See Vosberg v. Civil Serv. Comm'n, 166 W. Va. 488, 275 S.E.2d 640 (1981); McFadden v. W. Va. Dep't of Health & Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995). See generally Parker v. Defense Logistics Agency, 1 M.S.P.B. 489 (1980); Bradley, *supra.*

12. Respondent's failure to follow its own investigatory procedures was harmless error on the facts of this grievance.

13. Substitute teachers are implicitly excluded from the group of professional personnel for whom regular evaluations are required by state Board Of Education Policy 5310, 126 C.S.R 142.

14. An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense, and 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, supra. See Domingues v. Fayette County Bd. of Educ., Docket No. 91-10-426 (Sept. 30,

1992); Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989); Bradley, *supra*.

15. Grievant did not demonstrate that the penalty imposed was excessive, disproportionate of an abuse of the employer's discretion.

For the foregoing reasons, this grievance is hereby **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Monroe 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.

Date: January 14, 2003 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Ms. Agee's title and position are not identified in the transcript.

Footnote: 2

Superintendent Guy stated personnel files are not kept on substitute teachers, but notes are kept of incidents that may have a bearing on the employee later on.