JOHN MILLER,

Grievant,

v. **Docket No. 03-54-376**

WOOD COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, John Miller, filed this grievance against his employer, the Wood County Board of Education ("WCBOE") on December 16, 2003. This grievance deals with a fifteen-day suspension. The Statement of Grievance reads:

> **Grievant hereby grieves his suspension without pay by the Wood County Board of Education on December 10, 2003. The specific terms of the suspension are set forth in the written notice of suspension attached hereto as Exhibit A. (See footnote 1) Grievant contends that the Superintendent and the Board of Education violated its own policy #4154 by suspending him without pay effective December 10, 2003 for a period of six (6) days before a hearing was held before the Board. Policy #4154 specifically provides that a suspension may be imposed after a hearing at which a violation of the Policy is established. Grievant further contends that in light of his twenty-four years of service that the fifteen (15) day suspension is arbitrary, unreasonable and capricious and further the suspension without pay was arbitrary, unreasonable and capricious. Grievant further contends that the discipline provided for by Policy is in excess of that allowed by state law and is, therefore, not permitted.**
>
> **RELIEF SOUGHT: Grievant seeks a reduction in the length of his suspension, pay for the entire period of his suspension and the elimination of the requirement of drug testing**

This grievance was appealed directly to Level IV on December 16, 2003. A Level IV hearing was held on February 2, 2004, and this case became mature for decision onMarch 3, 2004, the date established for the parties' proposed findings of fact and conclusions of law. (See footnote 2) (See footnote 3)

Issues and Arguments

Respondent asserts Grievant was found to have marijuana in his truck parked on school property during school hours, and this marijuana was found during a school-wide drug search. Grievant received the maximum suspension allowed in the policy, but not the total penalty allowed by this policy.

Grievant asserts his due process rights were violated when he received a suspension without pay before he had a hearing before WCBOE. Grievant also maintains the penalty was too severe because of his twenty-four years of service with WCBOE without any other disciplinary actions. Grievant also asserts if a suspension is given, it should be with pay.

Grievant also argued at the pre-disciplinary hearing that there was no rational nexus. There was no need to establish a rational nexus in this case as the events occurred on school property. As stated by the West Virginia Supreme Court of Appeals, "[i]n order to dismiss a school board employee for acts performed at a time and place separate from employment, the Board must demonstrate a 'rational nexus' between the conduct performed outside the job and the duties the employee is to perform." Rogliano v. Fayette County Bd. of Educ., 347 S.E.2d 220, 224 (W. Va. 1986)(citing Syllabus Pt. 2, Golden v. Bd. of Educ., 169 W. Va. 63, 285 S.E.2d 665 (1981)). See Thurmond v. Steele, 225S.E.2d 210 (W. Va. 1976); Woo v. Putnam County Bd. of Educ., Docket No. 93-40-420 (June 2, 1994).

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact. The parties agreed to submit the record from the pre-disciplinary hearing held on December 9, 2003, into the record.

Findings of Fact

1. Grievant is employed as a teacher a Parkersburg High School ("PHS"). He has been at PHS for two years, and before that time he was at Hamilton Junior High School for fourteen years. He has taught for WCBOE for 24 years without any disciplinary action taken against him during that time.

2. Grievant signed a "Drug-Free Workplace Verification Statement" on October 20, 1993. This Statement says that the signer "agree[s] to abide by Drug-Free Workplace (See footnote 4) **Policy which states that the unlawful . . . possession or use of a controlled substance . . . is prohibited in the workplace." Resp. No. 3, at Level IV. WCBOE's Job Description for**

classroom teachers states a professional employee is expected to "[a]dhere to established laws, policies, rules and regulation." Resp. No. 11, at Level IV.

3. On November 20, 2003, there was a school-wide drug search at PHS, and this search included the school parking lot.

4. No drugs were found in the possession of any students. 5. When the officers and drug-sniffing dogs went to the parking lot, one dog alerted or "hit" on Grievant's truck. This dog was taken away and another dog was brought into the area. This dog also alerted or "hit" on Grievant's truck.

6. Grievant was notified by his principal to come to the parking lot.

7. When Grievant reached the parking lot, Detective Joe Martin, with the Parkersburg Police Department ("PPD"), told Grievant he could obtain a search warrant, and it would be public record, or Grievant could consent to a search of his truck.

8. Grievant gave his permission for his truck to be searched and gave his keys to the officers.

9. Officer Jerry Williams, the Juvenile Specialist for PPD, and Detective Martin searched Grievant's truck, one on each side. Officer Williams found residue of old marijuana on the floor on the passenger side. Detective Martin found what he believed were the ends of three marijuana cigarettes or "roaches" in the closed ashtray of Grievant's truck. He also found residue on the floor and seat on the driver's side.

10. In addition, Detective Martin found three hemostats, which are frequently referred to as "roach clips," as they are used to hold the very end of a marijuana cigarette, to keep from burning the fingers. These clips were found in the truck's console. **(See footnote 5)**

11. These clips were burnt on the ends. 12. Grievant stated the reason he had these clips is because he used them as tools. Grievant did have other tools in his truck, but these were behind his seat in a tool bag.

13. Both officers have experience in how marijuana looks and smells, and both believed the substance found in Grievant's truck was marijuana.

14. Grievant was issued a citation at the school site for possession marijuana.

15. Grievant was not asked, and he did not say at that time that the substance found and believed to be marijuana was not his.

16. When he returned to the station, Detective Martin tested the substance with a kit he was trained to use and had used in the past. This test proved positive for marijuana. (See footnote 6) Officer Williams watched Detective Martin perform this test, and saw the positive result. Resp. Nos. 4 & 5, at Level IV.

17. This substance has been sent to the state laboratory for additional testing, but these results are not back yet.

18. There has been no disposition of Grievant's criminal charges.

19. Superintendent William Niday met with Grievant and his representative on or about December 1, 2003, after Thanksgiving break and Grievant's sick leave. At this time, Grievant was advised of the charges, and given an opportunity to respond and to explain his side of the issue. 20. By letter dated December 2, 2003, Superintendent Niday temporarily suspended Grievant from December 2, 2003, to December 12, 2003, for a total of nine days, without pay for violation of Policy 4154 and pursuant to W. Va. Code §§ 18A-2-7 & 18A-2-8. Resp. No. 8, at Level IV. This letter informed Grievant he would be afforded a hearing before WCBOE on December 9, 2003, at 6:30 p.m.

21. Policy 4154 at 4.3.1 states, "Employees who violate the provision of the Drug Free Workplace Act or Drug-Free School and Communities Act shall be subject to disciplinary action consistent with State and Federal law up to and including termination for the first offense." Resp. No. 2, at Level IV.

22. Policy 4154 at 4.3.2 states, "

> **If the employee has been given his/her due process rights in accordance with State law and a violation of this policy has been determined, the following disciplinary sanctions shall be imposed upon the employee." The Policy then goes on to list the disciplinary sanctions that could be imposed upon the offender. Resp. No. 2, at Level IV.**

23. On December 9, WCBOE held a pre-disciplinary hearing, affirmed the prior suspension, and added days to make the suspension for fifteen days, the maximum allowed under Policy 4154.

24. Grievant was allowed to serve his suspension over a period of time to decrease the financial impact.

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

The first issue to address is credibility. Grievant says the marijuana found in his truck was not his and must have been put there by someone who borrowed his truck or by the mechanic who repaired his brakes "not long ago." Test. Grievant, Pre-disciplinary Hearing. Grievant noted several people borrowed his truck in the "late summer" of 2003. 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 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 7)** **See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.**

The undersigned Administrative Law Judge finds Grievant to be untruthful. The truck belonged to Grievant, and he drove it to school every day. Grievant certainly had a motive to lie, and his story was not plausible. The marijuana on the floor of the truck had been there for some time, and there were three roaches in his ashtray. The roach clips were found in the console, not in Grievant's tool bag behind his seat with the other tools. It is just not plausible this substance, on the floor, seat, and in the ashtray would be overlooked. Additionally, at the Level IV hearing, several of Grievant's answers were evasive and did not comport with his testimony at the pre-disciplinary hearing. II. Due process

Grievant asserts he should not have been suspended prior to the Board hearing, and Superintendent Niday's decision to do so was a violation of due process. This argument about Respondent's failure to provide required due process during this time is without merit.

The West Virginia Supreme Court of Appeals in Board of Education of the County of Mercer v. Wirt, 192 W.Va. 568, 453 S.E.2d 402 (1994), determined what due process is required to terminate a continuing contract of employment. A tenured employee is entitled to a pre-termination hearing, not a full adversarial hearing. An employee is also entitled to written notice of the charges and an explanation of the evidence. Id. at Syl. Pt. 3; W. Va. Code §18A-2-8. Additionally, Wirt found an employee is entitled to an opportunity to respond to the charges.

Grievant was given all these due process protections by Superintendent Niday, even though the disciplinary action was a fifteen-day suspension, not a termination. He had a pre-disciplinary conference/hearing with Superintendent Niday, written notice of the charges, through the citation, an explanation of the evidence, and an opportunity to respond. Additionally, Grievant had a representative with him. It was after this process Superintendent Niday wrote the temporary suspension letter. The due process Grievant received was

sufficient. See Santer v. Kanawha County Bd. of Educ., Docket No. 03-20- 092 (June 30, 2003). Of course, eight days later, Grievant had a hearing before WCBOE and was able to call witnesses.

III. Merits of the case

A. Was the substance found in Grievant's truck marijuana?

Grievant asserted the substance found in his truck was not marijuana, and if it was, he did not know it was there. WCBOE has proven the substance in Grievant's truck was marijuana by a preponderence of the evidence. First, two separate dogs "hit" on Grievant's truck. Second, two officers with training and experience in this area found what they believed to be marijuana. Third, the test for marijuana was positive and was performed by a trained officer who had experience with the test.

Additionally, Respondent's attorney cited to Franklin Cleckley's Handbook on Evidence for West Virginia Lawyers which states at Volume 2, § 7-1(D)(14) in its section on "Opinions and Expert Testimony":

> **A person who is familiar with the drug in issue and its physical and chemical property is permitted to give an opinion on the identity of the drug, whether the familiarity arises from formal or informal training and experience. . . . Generally, expert testimony is unnecessary to establish the nature of an alleged controlled substance.**

Given the evidence of record, the undersigned Administrative Law Judge finds by a preponderence of the evidence that the substance found in Grievant's truck was marijuana.

B. Charges

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 nolocontendere 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.**

Respondent labeled Grievant's behavior as insubordination and immorality.

1. 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 County Bd. 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).

In this case, WCBOE had a policy in place that was valid and reasonable, Grievant was aware of this policy as evidenced by his signature on the Drug-Free Workplace Verification Statement, and Grievant brought marijuana on school grounds in his truck. His actions were insubordinate.

2. Immorality

WCBOE also asserts Grievant's actions constituted immorality. The term immorality as used in the statute "connotes conduct 'not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior.'" Golden v. Bd. of Educ. of County of Harrison, 169 W. Va. 63, 285 S.E.2d 665, 668 (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 (MOCC. 1994)." Bell v. Mingo County Bd. of Educ.,

Docket No. 97-29-172 (Mar. 10, 1998); Petry v. Kanawha County Bd. of Educ., Docket No.96-20-380 (Mar. 18, 1997).

The answer to this question is simple. Possession of marijuana is illegal, and "not in conformity with accepted principles of right and wrong behavior." Golden, supra. As an illegal substance was found in Grievant's truck on school grounds, the charge of immorality is proven.

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 include consideration 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 CountyBd. 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, the undersigned Administrative Law Judge is unable to conclude Respondent abused its substantial discretion in designating the fifteen- day suspension without pay.

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

Conclusions of Law

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

2. A county board of education possesses the authority to suspend 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. The West Virginia Supreme Court of Appeals in Board of Education of the County of Mercer v. Wirt, 192 W.Va. 568, 453 S.E.2d 402 (1994), determined the due process required to terminate a continuing contract of employment. A tenured employee is entitled to a pre-termination hearing, not a full adversarial hearing, and an opportunity to respond to the charges. An employee is also entitled to written notice of the charges, and an explanation of the evidence. Id. at Syl. Pt. 3; W. Va. Code §18A-2-8.

4. Grievant received the due process protection required by law, even though the action was a suspension. Wirt, supra.

5. Insubordination and immorality 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).

6. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] anadministrative 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).

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

8. "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).

9. Grievant's behavior constituted insubordination, as he violated a reasonable and valid

policy, and he was aware of this policy.

10. The term immorality as used in the statute "connotes conduct 'not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior.'" Golden v. Bd. of Educ. of County of Harrison, 169 W. Va. 63, 285 S.E.2d 665, 668 (1981); Hayes v. Kanawha County Bd. of Educ., Docket No. 94-20-1143 (June 28, 1995).

11. "'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 (MOCC. 1994)." Bell v. Mingo County Bd. of Educ., Docket No. 97-29-172 (Mar. 10, 1998); Petry v. Kanawha County Bd. of Educ., Docket No.96-20-380 (Mar. 18, 1997).

12. As Respondent proved Grievant had marijuana in his truck on school property, immorality is proven by a preponderance of the evidence.

13. Grievant has not proven a violation of Policy 4154 by WCBOE.

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

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: March 16, 2004

Footnote: 1

No attachment A was received with the grievance form.

Footnote: 2

Grievant was represented by Joseph Albright, Esq., and Respondent was represented by counsel, Dean Furner, Esq. of Spilman, Thomas, and Battle.

Footnote: 3

Grievant's attorney did not submit proposed findings of fact and conclusions of law.

Footnote: 4

The workplace includes all school property. Resp. No. 2, at Level IV. Policy 4154.

Footnote: 5

The parties at times called these tools "alligator clips." The undersigned Administrative Law Judge takes administrative notice that alligator clips are usually insulated, and these implements were not.

Footnote: 6

Grievant's attorney asserted this test was not allowed into evidence in a court of law, but the testimony from Detective Martin was he had never testified about this test because the other times he had used it, the accused had pleaded guilty, and there was no need to testify.

Footnote: 7

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).