THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

LINDA HAMMER,

Grievant,

Docket No. 2008-0302-GreED

GREENBRIER COUNTY BOARD

OF EDUCATION,

Respondent.

D E C I S I O N

Grievant Linda Hammer, a bus operator employed by the Respondent Greenbrier County Board of Education ("BOE" or "Respondent"), grieves her one-day suspension without pay for a third violation of the BOE's uniform policy. The Grievant was notified by letter dated May 24, 2007, that the suspension _ for a violation on May 23, 2007 _ was to be served on May 25, 2007, and it was served on that date. The Grievant, a vocal critic of the uniform policy, (See footnote 1) presented evidence of a cervical and nerve condition which made it painful for her to wear the uniform shirts which the Respondent issues to its bus operators, without modifications to relieve pressure on her neck.

Grievant was provided with a post-suspension hearing before the BOE, which was initially scheduled in June, and took place on August 14, 2007. At the conclusion of thehearing, the

BOE voted to uphold the Grievant's suspension. On August 15, 2007, Respondent's Superintendent, John Curry, directed a letter to Ms. Hammer's counsel at the time, Michael Anderson, advising the Grievant of her right to appeal the BOE's action to this Board. Her Level Three grievance form was filed on August 28, 2008. (See footnote 2) **Her grievance states, in pertinent part:**

> **The G contends that the R selectively enforces [its dress code] policy and does not uniformly enforce this policy upon all regularly employed school bus operators. In addition, the G contends that she has a demonstrated medical condition that requires accommodation in the form of modifications of the dress code policy as it applies to the Grievant. The Respondent has granted such a modification to at least two male regularly employed school bus operators. The Respondent also has contributed to a level of confusion regarding its dress code policy as it had disseminated, by its own agents, a revised policy which had apparently not been promulgated by the Respondent.**

> **The G alleges violations of West Virginia Code § 6C-2-2(g)(1); (g)(1)(I); (g)(1)(iii); (g)(1)(iv); and the "Americans with Disabilities" Act.**

The Grievant sought "reversal of Respondent's action of August 14, 2007; reimbursement of lost wages, benefits, and seniority; removal of any reference to this suspension from Grievant's personnel file and / or other files maintained by the Respondent; and interest on all monetary sums."

The Level Three hearing was scheduled and continued a number of times. The undersigned, to whom the case was reassigned on March 4, 2008, convened the Level Three hearing in Beckley on March 10, 2008. The Grievant appeared in person and by hercounsel, Kimberly A. Levy of the West Virginia School Service Personnel Association. Respondent appeared by its Superintendent, John Curry, and its counsel, Erwin L. Conrad. During the hearing, the parties stipulated that the record remain open until March 21, 2008, for supplementation with documents not available at the hearing. The case became mature for decision on April 21, 2008, the deadline for the parties' submission of proposed findings of fact and conclusions of law, which both parties submitted.

Summary

The Respondent's superintendent suspended the Grievant for one day without pay for

failure to wear her bus operator's uniform, without giving her a pre-suspension opportunity to respond to the charge against her. The Respondent school board later upheld the superintendent's action, following a hearing. The Grievant had a legitimate disability-related reason for not wearing the uniform provided by the Respondent, but the Respondent's failure to afford her pre-suspension due process requires that her grievance be granted, without relying on the merits of the case. If the merits were reached, the result would be the same, because the Respondent did not sufficiently accommodate the Grievant's disability. Grievance granted; suspension vacated.

After thorough review of the record, the undersigned finds the following facts:

Findings of Fact

1 1. Grievant has a continuing contract of employment with Respondent as a bus operator.

2 2. Around September 15, 2006, the Grievant provided Respondent's then Transportation Director, Kenny Baker, with a letter from her physician, Marlene A. Wager,D.O., the text of which was: "Please excuse above-named individual from wearing the uniform required for bus operators."

3 3. Following a reprimand in early January 2007 for failure to wear the uniform, the Grievant submitted to Respondent a letter over the signature of Deborah Schmidt, D.O., dated January 12, 2007, which stated:

> **To whom it may concern: Ms. Hammer needs to be medically excused from wearing the required bus driver uniform. She is being evaluated and treated for cervical impingement syndrome and the weight of the uniform's collar and the stiffness of the name tag and collar cause an increase in neck pain.**

4 4. There followed a number of communications among the Grievant, Respondent's director of personnel, the County Superintendent, and counsel for Respondent regarding how to accommodate the condition described by the Grievant's physicians.

5 5. The Respondent has not disputed the authenticity of the disability described in the Grievant's physicians' letters, nor its obligation to make reasonable accommodation for the disability. The Grievant is found to suffer from the condition described in her physicians' letters, a condition which makes the Respondent's standard uniforms painful for her to wear

without adjustments to their design.

6 6. Respondent's personnel director arranged to have his dry cleaner alter several uniform shirts in a manner which he thought would meet the needs described by the Grievant, and in the physicians' letters. He apparently did so without direct communication with the Grievant.

7 7. The Respondent eventually delivered to the Grievant several uniform shirts, or smocks, which had been altered by the dry clearner. The collars had been removed fromthe shirts, as had the name tag on the portion of the shirts which covers the chest. These shirts, which were exhibited during the hearing, had a crude appearance which, in the undersigned's experience, most closely resembled prison uniform shirts.

8 8. In using the term "name tag" in her letter, it is clear that Dr. Schmidt meant to refer to the tag (or label) located in the collar of the shirt (the part which irritated the nerves in Grievant's neck), and not to the nameplate which appears on the portion of the shirt which covers the chest. This resulted in a misunderstanding, and the dry cleaner's removal of the nameplates from the shirts left unattractive, discolored patches on them.

9 9. On May 23, 2007, the Grievant was observed on the job and not wearing a uniform.

10 10. The Grievant was notified by letter dated May 24, 2007, that she was suspended, without pay, for one day for the May 23 violation. The suspension was served on May 25, 2007.

11 11. The uniforms which the Respondent had modified at the time of the suspension did not adequately accommodate the Grievant's disability.

12 12. Respondent failed to provide the Grievant with an opportunity for a pre-suspension hearing or meeting, or other opportunity to respond to the charges, prior to the imposition of the suspension.

13 13. The Grievant was offered a hearing on her suspension before the Board of Education on June 11, 2007. At the Grievant's request, the hearing was held on August 14, 2007. The Board of Education upheld the Grievant's suspension.

14 14. At some time before the Level Three hearing, the Grievant asked to design her own uniform shirt, and the Respondent agreed. She wore it at the Level Three hearing,where the Respondent acknowledged that it was satisfactory. The Grievant's design resembled a

vest more than a shirt, with oversize arm holes, no fabric anywhere near the neck, and an open front.

15 15. The large arm holes and open front permit the Grievant to operate her bus, including the control which opens and closes the door, and to move about in the driver's seat, without having the fabric of the uniform restrict her movements in a way which irritates the nerves in her neck.

Discussion

The burden of proof on the Grievant's suspension rests with the employer, who must meet that burden by proving the charges against the employee by a preponderance of the evidence. 156 C.S.R. §156-1-3 (2006); *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). The employer has the burden of proving each element of a disciplinary action by a preponderance of the evidence. *Morrison v. W. Va. Bureau of Commerce*, Docket No. 97-DOL-490 (Jan. 15, 1998). Where the evidence supports both sides equally, the employer has not met its burden. *Leichliter, supra.* "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Id*.

The authority of a county board of education to suspend an employee must be based on one or more of the causes listed in W. Va. Code § 18A-2-8 (2007) and must be exercised reasonably, not arbitrarily or capriciously. Syl. Pt. 2, *Parham v. Raleigh County Bd. of Educ.*, 192 W. Va. 540, 453 S.E.2d 374 (1994); Syl. Pt. 3, *Beverlin v. Bd. of Educ*., 158 W. Va. 1067, 216 S.E.2d 554 (1975)*; Bell v. Kanawha County Bd. of Educ*., Docket No.91-20-005 (Apr. 16, 1991). W. Va. Code § 18A-2-8(a) (2007) provides:

> **Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea of nolo contendere to a felony charge.**

W. Va. Code § 18A-2-8(b) (2007) provides, in part, that when an employee is suspended or dismissed for the causes listed in the statute, "[t]he charges shall be stated in writing served upon the employee within two days of presentation of said charges to the board." The

Grievant argues that her right to due process of law was violated when she was suspended "prior to the review of the superintendent's recommendation by the board of education."

> **[A]n allegation that an employer failed to follow a specific procedural requirement in accomplishing a disciplinary action is an affirmative defense, and Grievant has the burden of establishing the facts to support such allegation by a preponderance of the evidence.**

***Bradley v. Cabell County Bd. of Educ.*, Docket No. 99-06-150 (Sept. 9, 1999). On cross examination, County School Superintendent Curry appeared to suggest that a meeting between him and the Grievant took place prior to her serving the suspension on May 25, 2007. If that was his testimony, and the record is less than clear, it was a bare mention, and the facts regarding any such meeting were not developed in Mr. Curry's testimony. In its proposed findings and conclusions submitted to the undersigned, the Respondent did not contend that any such meeting took place.**

The Grievant, on the other hand, testified to her specific recollection that she learned about her suspension for the first time on May 24, 2007, the day before she served it, and the day after the infraction (May 23, 2007). The Grievant did not dispute that she was outof uniform on May 23. The Grievant denied that she was given any opportunity to discuss her suspension before it was imposed, and her testimony on this point (and in general) is found to be credible. To the extent the issue is contested (and it is not clear that the Respondent does contest it), the Grievant has met her burden to prove that there was no pre-suspension hearing, meeting, or conversation, that is, no prior opportunity for her to respond to the charges which formed the basis for her suspension.

The Grievant's objection to the procedure used to suspend her challenges the superintendent's unilateral action, and Respondent's provision of a hearing only after the suspension had been served. As is discussed in greater detail below, the Due Process Clause of the West Virginia Constitution, as interpreted by the Supreme Court of Appeals, and by this Board and its predecessor, requires prior due process before a suspension involving a loss of pay may be imposed "unless a compelling public policy dictates otherwise. . . ." Syl. pt. 2 (in part), *North v. West Virginia Board of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977). The entire syllabus point is:

> **Applicable standards for procedural due process, outside the criminal area, may depend upon the particular circumstances of a given case. However, there are certain fundamental principles in regard to procedural due process embodied in Article III, Section 10 of the West Virginia Constitution, which are; First, the more valuable the right sought to be deprived, the more safeguards will be interposed. Second, due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise. Third, a temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation.**

***Id*. (emphasis supplied).**

An employee has a recognized entitlement or property interest not only in continued employment but also in the right to receive his or her benefits and pay. *Memphis Light, Gas & Water Division v. Craft* , 436 U.S. 1, 20 (1978). "[S]chool employees have a propertyinterest in continued uninterrupted employment and due process safeguards must be provided when a county board of education seeks to deprive employees of that interest." *Knauff v. Kanawha County Bd. of Educ.* , Docket No. 20-88-095 (Jan. 10, 1989).

> **Under our Due Process Clause, a State civil service classified employee, who is suspended for thirty days or less on charges amounting to misconduct or delinquency, is entitled, prior to suspension, to receive written notice of the reasons for suspension and an opportunity to reply either orally or in writing, unless the suspension arises in a situation where there is a continuing danger to persons or property or to the orderly conduct of the affairs of the agency, in which case an immediate suspension may be warranted; and in such case, the necessary notice and rudimentary hearing should follow as soon as practicable.**

Syl. Pt. 7, *Waite v. Civil Service Commission*, 161 W. Va. 154, 241 S.E.2d 164 (1977). The Grievant's employment status is equivalent to that involved in *Waite*. At the time of her suspension, Grievant had a continuing contract for employment pursuant to W. Va. Code § 18A-2-5 (2007), which establishes her constitutionally protected property interest in her job. *See Beverlin v. Board of Educ*., 158 W. Va. 1067, 216 S.E.2d 554, 557 (1975). *North, supra*, 233 S.E.2d at 416.

In *Clarke v. W. Va. Bd. of Regents,* 166 W. Va. 702, 279 S.E.2d 169, 175 (1981), the Supreme Court of Appeals explained its approach to interpreting the requirements of the Due Process Clause of the West Virginia Constitution:

> **In *North v. West Virginia Board of Regents, supra*, we said that before a *student* can be expelled from a state-supported university, he is entitled to a "formal written notice of charges; sufficient opportunity to prepare to rebut the charges; opportunity to have retained counsel at any hearings on the charges, to confront his accusers, and to present evidence on his own behalf; an**

> **unbiased hearing tribunal; and an adequate record of the proceedings." Syl. pt. 3 (in part), *233 S.E.2d 411*. The *North* criteria, however, are not rigid standards. They represent only the touchstones by which we test the adequacy of procedures in a particular case. Outside of the criminal field, due process is a flexible concept which requires courts to balance competinginterests in determining the protection to be accorded one facing a deprivation of rights. *Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L..Ed.2d 18 (1976)*; *North, supra. See also Cafeteria Workers v. McElroy, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961)*. This court has embraced an approach which effectively serves to balance these interests.**

> **In *Waite, supra*, we summarized some broad principles relating to the scope of due process procedures that would be made available in given cases.**

> > **The extent of due process protection affordable for a property interest requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of a property interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the functions involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.**

> **Syl. pt. 5, *Waite, supra. See also, Mathews v. Eldridge, supra; State ex rel. McLendon v. Morton, supra.***

Although "due process is a flexible concept," *Clarke, supra,* it is not flexible enough to accommodate the absence of pre-disciplinary due process which occurred here.

Under the authority quoted above, and particularly under Syllabus Point 7 of *Waite*, it seems clear that West Virginia's Due Process Clause requires written charges and some opportunity for the employee to respond to them before the imposition of a suspension which deprives the employee of wages or salary, at least in the case of this one-day suspension.

Both Grievance Board decisions and decisions of the Supreme Court of Appeals discuss the concept of *de minimis* failures to provide due process.

> **The *de minimis* concept was specifically discussed in *Goss v. Lopez*, *supra*, and the Court held that a ten-day suspension from school was not such a minimal deprivation that no due process procedure need be afforded. In *North v. Board of Regents*, *supra*, we adopted the *Goss* rule in interpreting our State's Due Process Clause. There, we concluded, as did *Goss*, that the extent of the deprivation would be a relevant consideration in determining the extent of the due process procedures afforded.**

> We conclude that a ten-day suspension is not so minimal a deprivation of appellant's property interest in continued uninterrupted employment to require no due process procedural protection.

Waite, supra, 241 S.E.2d at 169.

Grievance Board precedent has reached the same conclusion regarding suspensions without pay:

> [A] tenured employee is entitled to a pre-suspension hearing, not a full adversarial hearing, and an opportunity to respond to the charges, when the suspension is without pay. [Citation omitted.] An employee is also entitled to written notice of the charges and an explanation of the evidence. *Wirt* , *supra* . In other words, the Board was required to provide a pre-suspension hearing, explanation of the evidence, and an opportunity for Grievant to respond. . . .

Starkey v. Jefferson County Board of Education, Docket No. 02-19-010 (April 8, 2002).

In addition to the loss of pay, which implicates the Grievant's property interest, accusing her of disobeying, without good reason, a lawful policy adopted by her employer implicates her constitutionally protected liberty interest.

> A liberty interest is grounded in the due process clauses of the United States Constitution, and the West Virginia Constitution . . . . A liberty interest has been defined as "the interest an individual has in being free to move about, live and work at his chosen vocation without the burden of an unjustified label of infamy." Syl Pt. 2, *Waite* [*v. Civil Service Commission*, 161 W. Va. 154, 241 S.E.2d 164 (1978 [sic])]. *See Bd. of Regents v. Roth* , 408 U.S. 564 (1972). Moreover, "a liberty interest is implicated when the State makes a charge against an individual that might seriously damage his standing and associations in his community or places a stigma or other disability on him that forecloses future employment opportunities." *Waite, supra.*

Shriver v. Regional Jail and Correctional Facility Authority, Docket No. 98-RJA-359 (March29, 1999).

Finally, there is another interest which militates in favor of more, rather than less, due process in the case of this suspension. That is the Grievant's claim that she resisted wearing the uniform because her diagnosed condition made it painful to do so without modifications to the uniform's design. This claim was conceded by the Respondent and has therefore been proven. The risk that Grievant might be suspended even though she had a legitimate, indeed a statutory basis, (See footnote 3) known to the Respondent, to act as she did, likewise weighs in favor of greater due process than was provided here.

A meeting between the superintendent and the Grievant before imposition of the suspension might have resulted in a resolution such as the one the parties had reached before they arrived in Beckley for the Level Three hearing (an adequately modified uniform, designed by the Grievant and acceptable to her employer). The superintendent testified that he alone could suspend a bus operator for the infraction involved here. The record does not establish that the superintendent had ever talked directly to the Grievant about the surrounding facts and circumstances. Particularly because the parties were in agreement by the time of the Level Three hearing, it appears entirely possible that they might have come to the same conclusion at a pre-termination meeting. At the very least, it is possible the superintendent would have concluded that the Grievant had a legitimate, disability- related reason for declining to wear the versions of the uniform provided to her up to that time. As a result, it cannot be said that a pre-termination meeting, conference, or hearingwould not have led to a different result.

Under all of these circumstances, and in the face of the authority cited above, including *Waite*'s Syllabus Point 7, which applies the prior due process requirement to suspensions of "less than thirty days," *id.*, the undersigned concludes that a one-day suspension, without pay, in the presence of a legitimate disability-based reason for Grievant's challenged conduct, is not *de minimis*, so as to justify dispensing with due process until after the fact. (See footnote 4) **The undersigned further concludes that the suspension imposed in this case violated the Grievant's due process rights under the West Virginia Constitution.**

This grievance must be granted on the basis that Grievant's due process rights were violated. However, the record discussed above would also support the same decision on the basis that Grievant's disability was not sufficiently accommodated by the Respondent, and that she was disciplined instead of having her need for accommodation properly addressed.

Conclusions of Law

1 1. The burden of proof on the Grievant's suspension rests with the employer,who must meet that burden by proving the charges against the employee by a preponderance of the evidence. 156 C.S.R. §156-1-3 (2006); *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). The employer has the burden of proving each element

of a disciplinary action by a preponderance of the evidence. *Morrison v. W. Va. Bureau of Commerce*, Docket No. 97-DOL-490 (Jan. 15, 1998). Where the evidence supports both sides equally, the employer has not met its burden. *Leichliter, supra.* "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Id*.

2 2. The authority of a county board of education to suspend an employee must be based on one or more of the causes listed in W. Va. Code § 18A-2-8(a) (2007) and must be exercised reasonably, not arbitrarily or capriciously. Syl. Pt. 2, *Parham v. Raleigh County Bd. of Educ.*, 192 W. Va. 540, 453 S.E.2d 374 (1994); Syl, Pt. 3, *Beverlin v. Bd. of Educ*., 158 W. Va. 1067, 216 S.E.2d 554 (1975)*; Bell v. Kanawha County Bd. of Educ*., Docket No. 91-20-005 (Apr. 16, 1991). W. Va. Code § 18A-2-8(b) (2007) provides, in part, that when an employee is suspended or dismissed for the causes listed in the statute, "[t]he charges shall be stated in writing served upon the employee within two days of presentation of said charges to the board."

3 3. "[A]n allegation that an employer failed to follow a specific procedural requirement in accomplishing a disciplinary action is an affirmative defense, and Grievant has the burden of establishing the facts to support such allegation by a preponderance of the evidence." *Bradley v. Cabell County Bd. of Educ.*, Docket No. 99-06-150 (Sept. 9, 1999). 4 4. The Grievant has met her burden to prove that there was no pre-suspension hearing, meeting, or conversation, that is, no prior opportunity for her to respond to the charges which formed the basis for her suspension.

5 5. The Due Process Clause of the West Virginia Constitution, as interpreted by the Supreme Court of Appeals, and by this Board and its predecessor, requires prior due process before a suspension involving a loss of pay may be imposed “unless a compelling public policy dictates otherwise. . . .” Syl. pt. 2 (in part), *North v. West Virginia Board of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977).

6 6. "[S]chool employees have a property interest in continued uninterrupted employment and due process safeguards must be provided when a county board of education seeks to deprive employees of that interest." *Knauff v. Kanawha County Bd. of Educ.* , Docket No. 20-88-095 (Jan. 10, 1989).

7 7. "Applicable standards for procedural due process, outside the criminal area, may depend upon the particular circumstances of a given case. However, there are certain fundamental principles in regard to procedural due process embodied in Article III, Section 10 of the West Virginia Constitution, which are: . . . Due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise. . . ." Syl. pt. 2 (in part), *North v. West Virginia Board of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977) (emphasis supplied).

8 8. "[S]chool employees have a property interest in continued uninterrupted employment and due process safeguards must be provided when a county board of education seeks to deprive employees of that interest." *Knauff v. Kanawha County Bd. ofEduc.* , Docket No. 20-88-095 (Jan. 10, 1989).

9 9.

> **Under our Due Process Clause, a State civil service classified employee, who is suspended for thirty days or less on charges amounting to misconduct or delinquency, is entitled, prior to suspension, to receive written notice of the reasons for suspension and an opportunity to reply either orally or in writing, unless the suspension arises in a situation where there is a continuing danger to persons or property or to the orderly conduct of the affairs of the agency, in which case an immediate suspension may be warranted; and in such case, the necessary notice and rudimentary hearing should follow as soon as practicable.**

Syl. Pt. 7, *Waite v. Civil Service Commission*, 161 W. Va. 154, 241 S.E.2d 164 (1977). The Grievant's employment status is equivalent to that involved in *Waite*. At the time of her suspension, Grievant had a continuing contract for employment pursuant to W. Va. Code § 18A-2-5 (2007), which establishes her constitutional property interest in her job. *See Beverlin v. Board of Educ*., 158 W. Va. 1067, 216 S.E.2d 554, 557 (1975). *North, supra*, 233 S.E.2d at 416.

10 10. Although "due process is a flexible concept," *Clarke, supra,* it is not flexible enough to accommodate the absence of due process altogether, as occurred here. Under the authority quoted above, particularly Syllabus Point 7 of *Waite, supra*, West Virginia's Due Process Clause requires written charges and some opportunity for the employee to respond to them before the imposition of a suspension which deprives the employee of wages or salary, at least in the case of this one-day suspension.

11 11.

> **[A] tenured employee is entitled to a pre-suspension hearing, not a full adversarial hearing, and an opportunity to respond to thecharges, when the suspension is without pay. [Citation omitted.] An employee is also entitled to written notice of the charges and an explanation of the evidence. *Wirt* , *supra* . In other words, the Board was required to provide a pre-suspension hearing, explanation of the evidence, and an opportunity for Grievant to respond. . . .**

***Starkey v. Jefferson County Board of Education,* Docket No. 02-19-010 (April 8, 2002).**

12 12. In addition to the loss of pay, which implicates the Grievant's property interest, accusing her of disobeying a lawful policy adopted by her employer, without good reason, implicates her constitutionally protected liberty interest. *Shriver v. Regional Jail and Correctional Facility Authority*, Docket No. 98-RJA-359 (March 29, 1999).

13 13. The risk that Grievant might be suspended even though she had a legitimate, indeed a statutory basis, known to the Respondent, to act as she did, likewise weighs in favor of greater due process than was provided here.

14 14. Under all of these circumstances, and In the face of the authority cited above, including *Waite*'s Syllabus Point 7, *supra*, applying the prior due process requirement to suspensions of "less than thirty days," *id.*, the undersigned concludes that a one-day suspension, without pay, in the presence of a legitimate disability-based reason for Grievant's challenged conduct, is not *de minimis*, so as to justify dispensing with due process until after the fact. (See footnote 5) **The undersigned further concludes that the suspensionimposed in this case violated the Grievant's due process rights under the West Virginia Constitution.**

15 15. This grievance must be granted on the basis that Grievant's due process rights were violated. However, the record discussed above would also support the same decision on the basis that Grievant's disability was not sufficiently accommodated by the Respondent, and that she was disciplined instead of having her need for accommodation properly addressed.

Accordingly, the grievance is GRANTED, and the Grievant's suspension is VACATED. The Respondent is DIRECTED to reinstate the seniority, salary, and benefits attributable to the Grievant's suspension, together with legal interest on any sums, and to remove references to the suspension from the records which Respondent maintains on the Grievant.

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 Order. W. Va. Code § 6C-2-5 (2007). Neither the West Virginia Public 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) (2008) to serve a copy of the appeal petition on the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.19 (eff. Dec. 27, 2007) and Rule 2(e) of the West Virginia Rules of Procedure forAdministrative Appeals.

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Thomas J. Gillooly

Administrative Law Judge

Date: May 21, 2008

Footnote: 1

The Respondent has focused much attention on a prior grievance involving the uniform policy, which the Grievant lost. Hammer v. Greenbrier County Bd. of Educ., Docket No. 01-13-352 (Nov. 21, 2001). The prior grievance has little bearing on this one, in light of the dispositive procedural issue discussed infra, but also because Respondent chose not to challenge the authenticity or good faith of Grievant's claim of disability. The Respondent cannot consistently argue that the Grievant merely dislikes wearing the uniform unless it also discredits her medical basis for challenging it. This the Respondent chose not to do. With an unchallenged medical basis to demand alterations to the uniform, the Grievant's sentiments on the uniform policy in general are immaterial.

Footnote: 2

"An employee may proceed directly to level three upon the agreement of the employee and the chief administrator or when discharged, suspended without pay or demoted or reclassified resulting in a loss of compensation or benefits." W. Va. Code § 6C-2-4(a)(3) (2007).

Footnote: 3

W. Va. Code §§ 5-11-1 to 5-11-21; C. S. R. §§ 77-1-4.4 to 77-1- 4.6 (1994); 42 U.S.C. § 12101 - 12213; 29 C.F.R. § 1630.2(o) (the Americans with Disabilities Act ("ADA") and its West Virginia counterpart, and the associated regulations).

Footnote: 4

It goes without saying that this is not the sort of case which would support a conclusion that there was "a continuing danger to persons or property or to the orderly conduct of the affairs of the agency." North, supra. Not surprisingly, the record contains no evidence of any such danger. In Knauff, supra, it was held that absent

"compelling circumstances, clearly apparent on the record," the grievant was entitled to respond to the charges prior to the imposition of the suspension, and the suspension was overturned. W. Va. Code § 18A-2-7(c) (2007), which permits a superintendent to impose a suspension which is ". . . temporary only pending a hearing upon charges filed . . . with the board of education . . . " has been held to pertain only to circumstances which warrant such immediate action. Pauley v. Kanawha County Board of Educ., Docket No. 99-20-462 (Feb. 29, 2000); See Allison v. Kanawha County Board of Educ., Docket No. 20-86-273-1 (Dec.30, 1986).

Footnote: 5

It goes without saying that this is not the sort of case which would support a conclusion that there was "a continuing danger to persons or property or to the orderly conduct of the affairs of the agency." North, supra. Not surprisingly, the record contains no evidence of any such danger. In Knauff, supra, it was held that absent "compelling circumstances, clearly apparent on the record," the grievant was entitled to respond to the charges prior to the imposition of the suspension, and the suspension was overturned. W. Va. Code § 18A-2-7(c) (2007), which permits a superintendent to impose a suspension which is ". . . temporary only pending a hearing upon charges filed . . . with the board ofeducation . . . " has been held to pertain only to circumstances which warrant such immediate action. Pauley v. Kanawha County Board of Educ., Docket No. 99-20-462 (Feb. 29, 2000); See Allison v. Kanawha County Board of Educ., Docket No. 20-86-273-1 (Dec.30, 1986).