THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JILL KIMBLE,
Grievant,

v. **Docket No. 2009-1640-KanED**

KANAWHA COUNTY BOARD
OF EDUCATION,
Respondent.

DECISION

Grievant Jill Kimble filed a grievance against her employer, Kanawha County Board of Education, on June 9, 2009. The statement of grievance reads:

> Grievant, a regularly employed school cook, also held an extracurricular assignment as cheerleading coach at Riverside High School. Grievant has been suspended without pay and dismissed from employment as a school cook as well as a cheerleading coach for allegations pertaining to her employment as a cheerleading coach. Grievant contends that the Respondent has failed to prove all the charges, that the Respondent has failed to establish a rational nexus between any allegations and her regular employment as a school cook, and that dismissal from her regular employment as well as from her extracurricular assignment is too harsh a penalty for any allegations that are proven. Grievant additionally alleges that the Respondent has not terminated the regular employment of other employees for allegations pertaining to their extracurricular assignment. Grievant alleges a violation of WEST VIRGINIA CODE §18A-2-8 and §18A-2-7.

For relief Grievant seeks, "reinstatement to her employment as a school cook, retroactive wages, benefits, and seniority, and the removal of any documents pertaining to this suspension without pay and dismissal from her employment records. Grievant also seeks an award of interest on all monetary sums."

A level three hearing was held on August 19, 2009, at the Grievance Board's Charleston Office. Grievant was represented by John Roush, Esq., West Virginia School Service Personnel Association, and Respondent was represented by James W. Withrow,

Esq., General Counsel. This case became mature on September 21, 2009, upon the parties' submissions of Findings of Fact and Conclusions of Law.[1]

Synopsis

Grievant worked as head cook at Mary Ingles Elementary School. She also held an extracurricular position as head cheerleading coach at Riverside High School. Respondent terminated Grievant from both of her positions . Respondent asserts Grievant participated in an unauthorized overnight, out of county trip with the cheerleaders. Respondent argues that, while on this unauthorized trip, Grievant permitted the cheerleaders to behave in an inappropriate manner by allowing them to get into the hot tub topless. Respondent further avers Grievant posted on MySpace a photo of the cheerleaders, albeit fully clothed, but referring to them as "hoes."[2] Respondent asserts that this behavior violated the sexual harassment policy.

Grievant argues the trip was not a school function, but instead, a Christmas party organized by a cheerleader mother. Grievant asserts she was there only to assist the parent. Grievant avers that she did not know the cheerleaders were in the hot tub topless, and when she became aware of that fact, she immediately told the girls it was inappropriate. Lastly, Grievant concedes referring to the young women as "hoes" was not in the best taste, yet it does not constitute sexual harassment.

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[1]On September 21, 2009, Respondent also filed a Motion to Reopen the Record for purposes of calling additional witnesses. Grievant filed a written objection to the Motion. After thorough consideration of the pleadings submitted by the parties, the Motion was denied on October 6, 2009.

[2]The term "hoes" (spelled by Grievant as "hoes") is short for whores. From the testimony, it appears as if young women frequently refer to their friends in this derogatory manner. Whether it is offensive depends on the relationship between the two individuals.

This grievance is denied in part, and granted in part.

Findings of Fact

1. Grievant is employed by Respondent as a head cook, and she also holds a year to year extracurricular contract as the cheerleading coach at Riverside High School.

2. In 2007, Grievant took the cheerleaders to a rented cabin in Nicholas County for an overnight Christmas party without Respondent's permission.

3. Subsequent to that trip, Paula Potter, the Principal at Riverside High School, advised Grievant that such a trip required prior approval of the administration.

4. While Grievant was the head cheerleading coach, the cheerleaders had a Christmas party every year.

5. During the 2008-2009 school year, Grievant advised the cheerleaders there would not be a Christmas party.

6. In December 2008, the cheerleaders went to the same cabin in Nicholas County for an overnight party. No other students were present.

7. The cabin was rented by a Kim Chestnut, a cheerleading mother.

8. Grievant and Ms. Chestnut were the only two adults charged with overseeing the cheerleaders at the party. These two individuals were the two chaperones for the Christmas party that occurred in 2007.

9. The cheerleaders played games, ate pizza and talked, just as they had done at the Christmas party in 2007.

10. The cabin had a secluded outdoor hot tub.

11. Most of the cheerleaders got into the hot tub. Initially, they had on bathing suits, but they eventually took off their tops.

12. Grievant got into the hot tub with the cheerleaders and was present when the young women were topless. Grievant wore a t-shirt and cut off jeans at all times.

13. A picture was taken of Grievant and nine cheerleaders in the hot tub. The nine cheerleaders were topless with their hands covering their breasts.

14. Grievant was sitting in the hot tub beside a young lady who was topless. There were at least two young women in front of her also topless.

15. In early 2009, a cheerleading parent found a camera that contained several pictures of this party. One such picture was of the cheerleaders in the hot tub topless.[3]

16. The parent took the camera to Melanie Williams, the assistant cheerleading coach, who took it to Dr. Potter, the principal.

17. Grievant posted pictures of the party on her MySpace. In all the pictures posted on the internet, the cheerleaders were completely clothed. One picture had the young ladies in sweat pants and sweat shirts wearing Santa hats sitting on a bannister. Under this picture, the caption read, "my girls acting like their self...hoes." Another such picture had the caption "my girls at our christmas (sic) party."

18. On May 27, 2009, Grievant was suspended without pay and was informed the Superintendent, Ronald E. Duerring, Ed.D., was recommending her termination.

19. On June 2, 2009, Grievant was terminated from her extracurricular position, as well as her position as head cook.

20. A cook does not supervise children and has limited interaction with students.

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[3]When this picture came to Respondent's attention, it contacted the appropriate authorities to determine if the picture constituted child pornography, and was told it did not.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *Hoover v. Lewis County Board of Education*, Docket No. 93-21-427; *Landy v. Raleigh County Board of Education*, Docket No. 89-41-232. A preponderance of the evidence is defined as "evidence which is 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." *Black's Law Dictionary* (6th ed. 1991); *Leichliter v. West Virginia Department of Health & Human Resources*, Docket No. 92-HHR-486. Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

WEST VIRGINIA CODE § 18A-2-7 provides that "[t]he superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter." WEST VIRGINIA CODE § 18A-2-8 goes on to state, in part, that:

> (a) 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.

Dismissal of an employee under WEST VIRGINIA CODE § 18A-2-8 "must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously." Syl. Pt. 3, in part, *Beverlin v. Board of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975); Syl. Pt. 4, in part, *Maxey v. McDowell County Board of Education*, 212 W. Va. 668, 575

S.E.2d 278 (2002); Syl. Pt. 7, in part, *Alderman v. Pocahontas County Bd. of Educ.*, __ W.Va. __, 675 S.E.2d 907 (2009).

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions are closely related to actions that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

Respondent asserts Grievant's actions constitute insubordination, immorality, and sexual harassment, as stated in the suspension letter dated May 27, 2009.

Insubordination

Insubordination includes "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). 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 Co. 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).

Grievant has been head coach for the cheerleaders at Riverside High School for at least four years. She testified that over the last few years the cheerleaders have had Christmas parties, and she always organized them. Prior to the 2007-2008 school year, these parties had taken place at a restaurant or someone's home. However, in 2007-2008, Grievant rented a cabin and took the cheerleaders on an overnight trip. Upon their return, Ms. Potter explained to Grievant that out of county school trips had to be approved by the administration.

During the 2008-2009 school year, Grievant told the girls there would be no Christmas party. Grievant testified at the lower level that the cheerleaders knew what happened in 2007-2008, and knew why Grievant was not going to have a Christmas party in 2008-2009. Within a week, Ms. Chestnut rented the same cabin as the previous year. Only cheerleaders went to this party, just as the year before. Only Grievant and Ms. Chestnut chaperoned, just as the previous year. The cheerleaders played games and ate pizza, just as the year before. Lastly, upon return from the party, Grievant posted a picture of the cheerleaders sitting on a bannister in sweat pants, sweat shirts and Santa hats with a caption that read, "my girls at our christmas (sic) party."

Clearly, this was a cheerleading Christmas party orchestrated to circumvent the administration's required approval. It is ironic that for the last few years the cheerleaders had a Christmas party organized by Grievant, except for the 2008-2009 school year. Grievant made a production of telling the cheerleaders there would be no party, and in her testimony, intimated the reason was due to the approval requirement from the

administration. Yet, the cheerleaders, and only cheerleaders, went to the same cabin as the previous year and engaged in the same activities as the year before. Also very telling is the caption on Grievant's MySpace saying, "my girls at our christmas (sic) party." Clearly Grievant's intent was to have an overnight Christmas party with the cheerleaders out of county without obtaining the proper approval.

Grievant knew the procedure for allowing out of county trips. By her own admission she had to obtain approval for a cheerleading function held in another county. Grievant had been told by Ms. Potter the previous year she needed prior approval to take the cheerleaders out of county, so Grievant was well aware of the requirements. She just decided not to follow them, and instead had Ms. Chestnut put the cabin in her name.

Respondent has sustained its burden and proved Grievant was insubordinate by having a cheerleading party out of the county without requesting and obtaining prior approval.

Immorality

The term "immorality" in WEST VIRGINIA CODE § 18A-2-8 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 acceptable sexual behavior." *Golden v. Bd. of Educ.*, 169 W. Va. 63, 69, 285 S.E.2d 665, 669 (1981). *Accord Rosenburg v. Nicholas County Bd. of Educ.*, Docket No. 34-86-125-1 (Aug. 4, 1986). The conduct need not be of a sexual nature. *See James v. West Virginia Bd. of Regents*, 322 F. Supp. 217 (S.D. W. Va. 1971), *aff'd*, 448 F.2d 785 (4th Cir. 1971); *Bledsoe v. Wyoming County Bd. of Educ.*, 183 W. Va. 190, 394 S.E.2d 885 (1990); *Smith*

v. Kanawha Co. Bd. of Educ., Docket No. 2008-0286-KanEd (July 18, 2008); *Powell v. Hardy Co. Bd. of Educ.*, Docket No. 04-16-412 (April 4, 2005).

"'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).

Respondent asserts Grievant engaged in immoral conduct by allowing the cheerleaders to be in the hot tub topless. Grievant argues she did not initially know they were topless. This argument is completely contradicted by the photograph. There is absolutely no way Grievant did not know these young ladies had partially disrobed. The undersigned also finds Grievant's assertions that she told the girls to get dressed incredible. In the picture, Grievant is looking right at the camera surrounded by half naked cheerleaders. Clearly she knew what they were doing.

While for the undersigned, it is disconcerting that a parent and a cheerleading coach would condone young ladies getting in the hot tub topless, one would be remiss to ignore several facts. First, this was a party attended only by females. There was no sexual component to the toplessness. The young ladies testified they were all very close to each other as teammates. They went to cheer competitions and games and changed clothes in front of each other often. Therefore, they thought nothing of disrobing in front of each other, much like football players and wrestlers.

For all these reasons, Grievant's inaction, while questionable, does not constitute immorality.

Sexual Harassment

Respondent contends Grievant's use of the term "hoes" in reference to the cheerleaders on her MySpace page violates their sexual harassment policy. As examples of sexual harassment, their policy lists the following:

> Sexually suggestive or obscene letters or notes; sexual rumors or name calling; unwelcome touching, grabbing or punching; inappropriate comments about one's body; dirty jokes or stories; dehumanizing graffiti; display of suggestive pictures, cartoons or objects; threats or demands for sexual favors; assault or attempted assault which is gender based, including any attempt by an employee to develop a romantic relationship with a student; and peer and same sex harassment.
>
> 50.04 Kanawha County School Administrative Regulation G50A.

This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13,1997). The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, at 22, (1993). Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiffs position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 81,118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (quoting *Harris,* supra); These circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance," but are by no means limited to them, and "no single factor is required." *Harris,* supra at p.23. "The hostility *vel non* of a workplace does not depend on any particular kind of conduct; indeed,

'[a] worker need not be propositioned, touched offensively, or harassed by sexual innuendo in order to have been sexually harassed.' *Quick v. Donaldson Co.,* 90 F.3d. 1372, 1379 (8th Cir. 1996)." *Billings v. Town of Grafton*, 515 F. 3d 39 (1st Cir. 2008).

While highly inappropriate, the one time use of the term "hoes" on Grievant's MySpace page does not rise to the level of sexual harassment, and this allegation undermines the seriousness of sexual harassment claims.

All of the cheerleaders testified they were not insulted by the use of the term. Once again, this team of cheerleaders was very close to each other and their coach. The cheerleaders think nothing of referring to each other in this manner, and while some cheerleaders conceded it was inappropriate, they were not offended by such language.

Grievant's use of the term "hoes" in reference to the cheerleaders is absolutely improper. As a coach, Grievant is a role model to these young women. Language shapes people's ideas about themselves and their environment. While, from the testimony, it seems common place for these young ladies to reference female friends as "hoes," Grievant should be teaching them to have more respect for themselves. Coincidentally, Grievant testified that she continually talked to the cheerleaders encouraging them to be more modest, attempting to be a good role model. Yet, she turns around and refers to them as "hoes" on the internet. If it is true that children learn from what they see, Grievant has set a sad example.

While Grievant is not a good role model for these young ladies, referencing them as "hoes" on the internet does not equate to sexual harassment.

Rational Nexus

> In order to discipline a school employee for acts performed at a time and place separate from his employment, the board must demonstrate a "rational nexus" between the conduct performed outside the job and the duties the employee is to perform. A rational nexus exists if the conduct performed outside of the job directly affects the performance of the occupational responsibilities of the employee. Misdemeanor criminal acts directly involving a school board employee's occupational responsibilities constitute a rational nexus for which an employee may be dismissed.

Reed v. Summers County Bd. of Educ., Docket No. 06-45-002 (Jan. 26, 2006)(footnotes omitted). In *Reed*, the Administrative Law Judge upheld the respondent's conclusion that there was a rational nexus between the grievant's off-duty misconduct where he had pled guilty to a misdemeanor charge of impersonating a conservation officer, in violation of W. VA. CODE § 20-7-7, and to nine counts of passing worthless checks, totaling $643.92, and his job as a custodian on night shift, where he often worked alone and had keys to the facilities. In *Rogliano v. Fayette County Board of Education*, 176 W. Va. 700, 347 S.E.2d 220 (1986), the Supreme Court of Appeals of West Virginia stated that a "'rational nexus' exists in at least two circumstances:

> (1) if the conduct directly affects the performance of the occupational responsibilities of the teacher; or (2) if, without contribution on the part of school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the particular teacher to discharge the responsibilities of the teaching position."

Id. [347 S.E.2d] at 224(citations omitted).

The Court in *Powell v. Paine,* 221 W. Va. 458, 655 S.E.2d 204 (2007), further stated:

> The teacher in *Golden* [supra.] had been charged with felony shoplifting and

> pled no contest to the misdemeanor offense of petty theft. Thus the discipline was for conduct occurring outside of the school setting. We observed in *Golden* it would be an unwarranted intrusion on a teacher's right to privacy to discipline a teacher solely on evidence that statutorily delineated misconduct occurred outside of the school environment. To overcome the privacy interest, a legitimate interest of the school board has to be at stake, that is, there must be additional evidence of a resulting unfavorable impact on the teacher's fitness to teach or upon the school community. *Id.* at 69, 285 S.E.2d at 669. We further observed that dismissal based solely on the off-the-job misconduct of a teacher and not its effect on the teacher's fitness to teach or upon the school community would result in a statute which would be void for vagueness under substantive due process constitutional standards.

Id. at 68-69, 285 S.E.2d at 669.

In this case, there was no evidence that Grievant had become the subject of any notoriety. The remaining inquiry then is whether the conduct directly affected the performance of Grievant's responsibilities as a cook. Respondent asserts her position as cook is affected because she has daily contact with students. However, it does concede that, as a cook, she has no direct supervisory role.

As a cook, Grievant has limited contact with children, and she provides no supervision. Grievant is a cook in a different school, and the incidental contact she has with students as a cook rules out any rational nexus being established. Respondent has failed to carry its burden.

This grievance is DENIED, in part, in that Respondent met its burden in proving Grievant was insubordinate for taking the cheerleaders out of county without approval in her role as the cheerleading coach. Therefore, her termination as head cheerleading coach is upheld. This grievance is GRANTED in part, in that Respondent has failed to meet its burden of showing a rational nexus between Grievant's actions as cheerleading coach and her full-time position as cook. Therefore, Grievant prevails.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *Hoover v. Lewis County Board of Education*, Docket No. 93-21-427; *Landy v. Raleigh County Board of Education*, Docket No. 89-41-232. A preponderance of the evidence is defined as "evidence which is 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." *Black's Law Dictionary* (6th ed. 1991); *Leichliter v. West Virginia Department of Health & Human Resources*, Docket No. 92-HHR-486. Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

2. WEST VIRGINIA CODE § 18A-2-7 provides that "[t]he superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter."

3. WEST VIRGINIA CODE § 18A-2-8 goes on to state, in part, that:

> (a) 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.

4. Dismissal of an employee under WEST VIRGINIA CODE § 18A-2-8 "must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously." Syl. Pt. 3, in part, *Beverlin v. Board of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975); Syl. Pt. 4, in part, *Maxey v. McDowell County Board of Education*, 212

W. Va. 668, 575 S.E.2d 278 (2002); Syl. Pt. 7, in part, *Alderman v. Pocahontas County Bd. of Educ.*, __ W.Va. __, 675 S.E.2d 907(2009).

5. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions are closely related to actions that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

6. Insubordination includes "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). 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 Co. 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).

7. Respondent proved Grievant was insubordinate by taking the cheerleaders on an out of county trip without the requisite approval.

8. The term “immorality” in WEST VIRGINIA CODE § 18A-2-8 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 acceptable sexual behavior.” *Golden v. Bd. of Educ.*, 169 W. Va. 63, 69, 285 S.E.2d 665, 669 (1981). *Accord Rosenburg v. Nicholas County Bd. of Educ.*, Docket No. 34-86-125-1 (Aug. 4, 1986). The conduct need not be of a sexual nature. *See James v. West Virginia Bd. of Regents*, 322 F. Supp. 217 (S.D. W. Va. 1971), *aff'd*, 448 F.2d 785 (4th Cir. 1971); *Bledsoe v. Wyoming County Bd. of Educ.*, 183 W. Va. 190, 394 S.E.2d 885 (1990); *Smith v. Kanawha Co. Bd. of Educ.*, Docket No. 2008-0286-KanEd (July 18, 2008); *Powell v. Hardy Co. Bd. of Educ.*, Docket No. 04-16-412 (April 4, 2005).

9. “‘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).

10. Respondent failed to carry its burden of proving Grievant engaged in immoral conduct.

11. This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13,1997). The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, at 22, (1993). Instead, "the objective

severity of harassment should be judged from the perspective of a reasonable person in the plaintiffs position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 81,118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (quoting *Harris,* supra); These circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance," but are by no means limited to them, and "no single factor is required." *Harris,* supra at p.23. "The hostility *vel non* of a workplace does not depend on any particular kind of conduct; indeed, '[a] worker need not be propositioned, touched offensively, or harassed by sexual innuendo in order to have been sexually harassed.' *Quick v. Donaldson Co.,* 90 F.3d. 1372, 1379 (8th Cir. 1996)." *Billings v. Town of Grafton*, 515 F. 3d 39 (1st Cir. 2008).

12. Respondent failed to carry its burden of proving Grievant's conduct constituted sexual harassment.

13. In order to discipline a school employee for acts performed at a time and place separate from his employment, the board must demonstrate a "rational nexus" between the conduct performed outside the job and the duties the employee is to perform. A rational nexus exists if the conduct performed outside of the job directly affects the performance of the occupational responsibilities of the employee. Misdemeanor criminal acts directly involving a school board employee's occupational responsibilities constitute a rational nexus for which an employee may be dismissed. *Reed v. Summers County Bd. of Educ.*, Docket No. 06-45-002 (Jan. 26, 2006)(footnotes omitted).

14. In *Rogliano v. Fayette County Board of Education*, 176 W. Va. 700, 347 S.E.2d 220 (1986), the Supreme Court of Appeals of West Virginia stated that a "'rational nexus' exists in at least two circumstances:

> (1) if the conduct directly affects the performance of the occupational responsibilities of the teacher; or (2) if, without contribution on the part of school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the particular teacher to discharge the responsibilities of the teaching position." *Id.* [347 S.E.2d] at 224(citations omitted).

15. The Court in *Powell v. Paine,* 221 W. Va. 458, 655 S.E.2d 204 (2007), further stated:

> The teacher in *Golden* [supra.] had been charged with felony shoplifting and pled no contest to the misdemeanor offense of petty theft. Thus the discipline was for conduct occurring outside of the school setting. We observed in *Golden* it would be an unwarranted intrusion on a teacher's right to privacy to discipline a teacher solely on evidence that statutorily delineated misconduct occurred outside of the school environment. To overcome the privacy interest, a legitimate interest of the school board has to be at stake, that is, there must be additional evidence of a resulting unfavorable impact on the teacher's fitness to teach or upon the school community. *Id.* at 69, 285 S.E.2d at 669. We further observed that dismissal based solely on the off-the-job misconduct of a teacher and not its effect on the teacher's fitness to teach or upon the school community would result in a statute which would be void for vagueness under substantive due process constitutional standards.

Id. at 68-69, 285 S.E.2d at 669.

16. Respondent failed to prove a rational nexus between Grievant's behavior as the cheerleading coach and her position as cook.

Therefore, this grievance is **DENIED**, in part, in that Respondent met its burden in proving Grievant was insubordinate for taking the cheerleaders out of county without approval in her role as the cheerleading coach. Therefore, her termination as head cheerleading coach is upheld. This grievance is **GRANTED** in part, in that Respondent has

failed to meet its burden of showing a rational nexus between Grievant's actions a cheerleading coach and her full time position as cook. Respondent is **ORDERED** to reinstate Grievant to her position as head cook for the Kanawha County Board of Education, and to pay her back pay from the date of her dismissal to the date she is reinstated plus interest at the statutory rate; and to restore all benefits, including seniority. Grievant's request to remove any mention of this from her personnel file is **DENIED**, as this information may need to be reviewed if she should apply for any coaching position in the future.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. 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) to serve a copy of the appeal petition upon 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 § 6.20 (2008).

DATE: November 30, 2009

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Wendy A. Elswick
Administrative Law Judge