# THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**JAMES HOOVER,**
**Grievant,**

**v.** **Docket No. 2008-1482-WirED**

**WIRT COUNTY BOARD OF EDUCATION,**
**Respondent.**

## D E C I S I O N

Grievant, James Hoover, was employed by the Wirt County Board of Education ("WCBOE") as a Principal. His Statement of Grievance reads, "wrongful termination/evaluation procedures[,] punishment did not fit."[1] The relief sought was reinstatement to his position. Grievant also sought a variety of other relief, some of which are not available at the Grievance Board.[2]

This grievance was filed directly to Level Three on April 22, 2008. Two days of hearing were held on July 28, 2008, and November 17, 2008. Grievant was represented by George Cosenza, Esq., and Richard Boothby, Esq., of Bowles Rice McDavid Graff and Love represented WCBOE. This matter became mature for decision on December 26, 2008, when the parties submitted proposed Findings of Facts and Conclusions of Law.

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[1]The issue of evaluation procedures was not addressed by the parties and will not be discussed in this decision.

[2]Grievant sought a public apology for himself and his family, "at least a three year contract," and tort-like damages. These types of relief are not available from the Grievance Board. *See Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (Mar. 30, 2004).

These proposals were not received by the undersigned Administrative Law Judge until January 6, 2009.

## Synopsis

Respondent asserts Grievant brought guns on school property violating WCBOE Policy GCR-RABC. Respondent avers this violation of policy was insubordination. Respondent also maintains Grievant violated the Employee Code of Conduct, the Code which outlines the required behavior for all school employees. Respondent contends Grievant's actions demonstrate a lack of judgement and Grievant cannot continue in his position as the leader/principal of Wirt County Middle School, as he is the administrator charged with enforcing policies and regulations.

Grievant has raised multiple arguments during the course of these proceedings. First, Grievant asserted Superintendent Daniel Metz gave him "implicit" permission to bring weapons on school property; thus, he engaged in no wrongdoing and maintains his behavior was appropriate. Second, Grievant also argued there was a second conversation with Superintendent Metz before Grievant went into the woods the first time. This conversation lasted thirty-five minutes, and during this conversation, Superintendent Metz gave Grievant this "implicit" permission. Grievant alleges this conversation has been erased from the school security videotape/CD. He maintains WCBOE tampered with the videotape/CD. Third, Grievant argues he was unaware of Policy GCR-RABC. Fourth, in his Statement of Grievance, Grievant also asserts the penalty was too severe. This issue was not addressed in his proposals.

In his proposals Grievant raised two additional arguments. In the first, Grievant alleged the original videotapes in question were intentionally destroyed, and if they had

been available, Grievant would have prevailed. Although not presented in evidence, Grievant's attorney stated in his proposals that he requested the prosecuting attorney to preserve the videotapes on October 22, 2007. There is no indication Grievant's attorney made any such request of WCBOE. At the request of the prosecuting attorney and law enforcement officials shortly after the incident, WCBOE made CD copies directly from the system. The system automatically rewrites itself after approximately 20 to 25 days. These copies were used at hearing and found to be free of any type of tampering. The undersigned Administrative Law Judge finds no evidence of the intentional "spoilation" alleged by Grievant on the part of WCBOE.

In the second argument, Grievant alleged Superintendent Metz twice admitted he had two conversations with Grievant about the guns, before he ever brought the weapons on school property. This argument will be addressed at this time. A review of the record clearly establishes this assertion is incorrect. At the pre-disciplinary hearing, Superintendent Metz said he and Grievant briefly discussed the issue once on October 8, 2007. Superintendent Metz testimony was the same at the Magistrate hearing on November 19, 2007. Superintendent's Exhs. 11 at 14 & 20. For the reasons discussed below, this grievance must be DENIED.

At the request of the parties, the pre-disciplinary hearing transcript and documents were included in the record. After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

## Findings of Fact

1. Grievant was hired as principal of Wirt County Middle School ("WCMS") in August of 2004.[3] Before the time of this incident, Grievant's evaluations were satisfactory, and at the end of the school year, Superintendent Metz wrote Grievant an excellent recommendation. Testimony Grievant - pre-disciplinary hearing at 100.

2. Monday, October 8, 2007, was an instructional enhancement day for WCMS, meaning students did not attend classes, but staff and Grievant were required to be present. Some students were at WCMS for tutoring.

3. On October 8, 2007, Grievant's friend, Tony McCloy, called him at school at approximately 11:16 a.m. Grievant was paged and took the call at 11:17 a.m. Mr. McCloy told Grievant there had been a hunting accident, and Mr. McCloy's future son-in-law was shot in the head. Mr. McCloy told Grievant he was carrying him out, and he asked Grievant to go to the area and pick up two rifles that had been left there. Grievant did not know at this time that Mr. McCloy had been the shooter.

4. Mr. McCloy is a convicted felon, and he is not allowed to possess firearms. Grievant was aware Mr. McCloy had some problems with the law in the past, but this conviction was before Grievant met Mr. McCloy.

5. At approximately 11:21 a.m., Grievant approached Superintendent Metz and told him there had been a hunting accident in the woods, and he needed to retrieve the guns. Superintendent Metz told Grievant to "be safe," and Grievant left. Luanne McVey, a teacher, was present during this conversation and confirmed the content. This communication was recorded on the school security system and lasted approximately

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[3]Grievant's proposals incorrectly state he was an Assistant Principal.

seven seconds. There is no audio with this system. Minutes after this conversation, Grievant left the building. Testimony Metz and McVey.

6. Contrary to Grievant's assertion, the issue of bringing guns on school property was never discussed, and Superintendent Metz did not give Grievant either implicit or explicit permission to engage in this behavior. Testimony Metz and McVey.

7. Contrary to Grievant's assertion (as outlined in the synopsis), there was only one conversation between Grievant and Superintendent Metz after Mr. McCloy's phone call and before Grievant left to go to the woods the first time. Additionally, there were no more conversations between Grievant and Superintendent Metz on October 8, 2007. Resp. Exh. - CD's from pre-disciplinary hearing. Resp. Level Three Exh. 2.

8. When Grievant left school the first time, he called a friend and a student, borrowed a four-wheeler, and went to the woods to look for the rifles. He found the weapons, separated the bullets from the rifles, and stowed the guns in his trunk and the ammunition in his glove box. At approximately 1:20 p.m., he returned to school and parked his car on school grounds with the rifles and ammunition inside.

9. Shortly thereafter, Mr. McCloy called Grievant again and asked him to return one rifle, the one without the scope, to the area where he found it because the Department of Natural Resources ("DNR") was searching the area for the firearms. The rifle Grievant was to return belonged to the victim of the shooting, not Mr. McCloy.

10. After this phone call, Grievant did not tell Superintendent Metz, but he again left school. He drove his car to the general area, took the gun, and because he was

physically unable to reach the spot where he originally found the gun, he just threw it somewhere in the general vicinity.[4]

11. On this second trip, Grievant did not ask to borrow the four-wheeler because he knew law enforcement was either in the woods or would be there, they would hear him, and he would be caught putting the gun back.[5] Testimony Metz at 27, pre-disciplinary hearing. After returning the victim's gun to the woods, Grievant then came back to school and parked his car on school grounds with the remaining rifle and ammunition inside his vehicle. Some time during October 8, 2008, before school was out, Grievant learned Mr. McCloy had shot the victim.

12. After school was out that day, Grievant returned to the woods and sought out DNR Officer Stan Hickman. He stated, "Listen, I've got myself into something that I shouldn't have." He talked to Officer Hickman, gave him Mr. McCloy's rifle and ammunition, and went with Officer Hickman to make a statement. Testimony Grievant - pre-disciplinary hearing at 90.

13. While Grievant had a practice of frequently calling Superintendent Metz to inform him of issues or problems, he did not call Superintendent Metz on either October 8 or 9, 2007, to tell him he had guns on school property or that he believed he had "got [him]self into something that [he] shouldn't have."

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[4]While Grievant is a young man, he is obese.

[5]Grievant's testimony differs on this point. When Grievant was asked this question under oath, he was unable to explain why he did not borrow the vehicle. Pre-disciplinary hearing transcript at 93 - 94 & 109 - 110; cross-examination at Level Three.

14. Superintendent Metz first learned the details about the shooting at a meeting in the Wirt County Prosecuting Attorney's office on late Tuesday afternoon, October 9, 2007.[6] The Wirt County Prosecuting Attorney initiated this meeting. At this meeting, Superintendent Metz learned an individual had been shot in the woods by Mr. McCloy, Grievant had retrieved the guns at Mr. McCloy's request, Grievant had returned the victim's gun at Mr. McCloy's request, and later in the day, Grievant had told Officer Hickman what he had done.

15. During the meeting at the Wirt County Prosecuting Attorney's office Superintendent Metz was asked if he knew there were guns on school property, and if he had given permission for them to be there. Superintendent Metz recounted the 11:21 a.m. conversation he had with Grievant, explained Grievant had not asked if he could bring guns on school property, and Superintendent Metz did not know Grievant had taken this action. He informed the Prosecuting Attorney that he had not given Grievant permission to have the weapons at the school. Superintendent Metz noted bringing guns on school property is prohibited by law and Wirt County Policy.

16. Wirt County Policy GCR-RABC adopted September 13, 1999, states:

> Employees of the Wirt County School system will abide by the tenets of the West Virginia Safe Schools Act, even if it is written to apply towards student behavior. Possession of weapons on school property or during school related activities is not permissible for students or staff members. The only possible exception is for approved situations where a weapon may be involved in an activity of educational value. . . . Such situations must be approved in advance in writing by the immediate supervisor of the person requiring such permission, in accordance with state law. . . .

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[6]Grievant did call Superintendent Metz during this meeting, but Superintendent Metz was unable to talk to Grievant at that time.

> Staff members who possess a weapon on school property will be subject to disciplinary action, up to and including termination. . . .
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> All employees of Wirt County Schools will fully cooperate with law enforcement during the investigation of incidents occurring on school property or while participating in activities associated with the Wirt County Schools. Failure to provide full cooperation to law enforcement officials acting in their official capacity, regarding a school-related incident, will be considered cause for disciplinary action.

(Emphasis added).

17. Contrary to Grievant's assertion, he was aware of the above-cited policy.[7]

18. Grievant was not at school on Tuesday, October 9, 2007, because of a prior engagement, but Superintendent Metz saw Grievant briefly before the Board meeting scheduled for that evening. Superintendent Metz told Grievant to go home and to see him first thing the next morning.

19. When Grievant was not at Superintendent Metz's office the next morning, October 10, 2007, Superintendent Metz called Grievant, and Grievant then came to his office. Grievant recounted the events of October 8, 2007. Grievant admitted he had brought guns on school property on two separate occasions and did not use the 4-wheeler

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[7]Grievant's testimony on this issue was very confusing. Grievant testified Superintendent Metz, when he was a principal, "drove it [the Policy] down onto the heads of the students." Testimony Grievant - pre-disciplinary hearing at 86. Grievant also testified Superintendent Metz had never told him to read the policy manuals, and he had not had time to read them. (Grievant had been employed as Principal of WCMS for over three years at the time of the incident.) Later, Grievant stated, "I, uh, I suppose that you know, I knew that there could possibly, you know, be something in place that prohibits that [guns on school property], but I had the only permission of the only person that I could get that from." Testimony Grievant - pre-disciplinary hearing at 89. At the Level Three hearing, Grievant stated he was never officially told about the policy, and he was not completely aware of the policy.

the second time because of the need to return the weapon quietly. Grievant did wonder if these actions were the right thing to do.[8] Testimony Metz and Grievant.

20. On October 16, 2007, Superintendent Metz wrote Grievant recounting the conversation with Grievant on October 10, 2007, and noted Grievant had twice brought guns on school property, and these acts violated the Employee Code of Conduct. Superintendent Metz noted that it appeared Grievant had committed a felony offense, and that criminal charges had been filed against Grievant on October 15, 2007. Superintendent Metz informed Grievant he was suspended without pay for thirty days, and this suspension would be extended indefinitely pending the disposition of all charges. Superintendent Metz noted this recommendation would be made to the WCBOE at the November 13, 2007, Board meeting. Grievant was offered the opportunity to be heard at that time. Superintendent's Exh. 1 pre-disciplinary hearing.

21. By letter dated November 14, 2007, Superintendent Metz informed Grievant, "the Board voted to ratify your 30-day suspension from your duties, without pay, and to continue your suspension, without pay, indefinitely, until the conclusion of the charges filed against you. At that time the Wirt County Board of Education will revisit your employment status." Superintendent's Exh. 2 pre-disciplinary hearing.

22. On April 1, 2008, after the criminal charges were dismissed, Superintendent Metz wrote Grievant and stated that based on his "prior confessed misconduct," Grievant was suspended for thirty days, effective immediately, and Superintendent Metz would recommend WCBOE approve the suspension and terminate Grievant's employment

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[8]Grievant testified Superintendent Metz gave him an eight-day suspension at this time, but there was no documentation submitted to support this contention.

contract. The charges against Grievant were outlined in the letter: 1) Grievant brought weapons onto school property in his vehicle; 2) Grievant replaced one of the weapons in the woods after his friend asked him to do so; 3) Grievant returned to school grounds with one weapon still in his car; and 4) Grievant violated Policy GCR-RABC and the Employee Code of Conduct. Grievant was informed he could request a pre-disciplinary hearing.

23. Grievant requested a pre-disciplinary hearing, and this hearing was held on April 16, 2008. Immediately after the hearing, WCBOE voted to terminate Grievant's contract. This vote was followed by a letter dated April 16, 2008, memorializing WCBOE's decision.

24. Contrary to Grievant's assertion, the October 8, 2007, security CD/videotape at WCMS has not been altered to remove a thirty-five minute conversation between Grievant and Superintendent Metz.[9] Testimony Metz, Sears, Villarreal, and Lanham.

## Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *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,

[9]During the Level Three hearing, Grievant's attorney asked to have his computer expert witness sit in during the testimony of Respondent's computer expert witness, Chris Imler. After the testimony of Mr. Villarreal, Grievant's expert witness did not testify, thus Mr. Villarreal's and Mr. Lanham's testimony was unrebutted.

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 Res.*, 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**

An issue that must be addressed is credibility, as Grievant asserted that Superintendent Metz and other witnesses were lying, the tape was "doctored," and Superintendent Metz gave Grievant implicit permission to have guns on school property, and this was all the permission he needed. Additionally, the undersigned Administrative Law Judge notes that portions of Grievant's testimony were implausible.

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 Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses, even if she/he did not observe the testimony, but reviewed the testimony by

means of a tape or transcript. *See Browning v. Mingo County Bd. of Educ.*, Docket No. 96-29-154 (Sept. 30, 1996); *Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./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.[10] *See Holmes v. Bd. of Directors/W.Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*. "[A] [f]actor to be considered in making and explaining credibility determinations is [the] possibility that [the] witness is biased and may consciously or unconsciously shade his or her testimony for or against one of the other witnesses or parties." *Chin v. Dep't of Treasury*, 44 M.S.P.R. 201 (1990).

The undersigned Administrative Law Judge finds Grievant was less than truthful in his testimony. First, Grievant repeatedly asserted he had two conversations with Superintendent Metz before he left for the woods the first time. He averred this second conversation was approximately thirty-five minutes long, and in this discussion, he detailed the situation in the woods and he was going to get the guns. Grievant alleged this

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[10]The undersigned Administrative Law Judge originally obtained this list of factors to use when assessing credibility from The United States Merit Systems Protection Board Handbook. Harold J. Asher and William C. Jackson, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-53 (1984).

conversation has been erased from the tapes. Grievant offered no proof for this assertion. Respondent presented the testimony of the installer of the equipment, and the manufacturer's representative of the security system, as well as documents, to support its conclusion that the system had not been tampered with. Superintendent Metz also testified that he only had the one, short conversation with Grievant that day about the guns, and Ms. McVey's testimony confirmed the length and content of that conversation.

It should be noted that Grievant was allowed to have his computer expert witness in the room while Respondent's computer expert witness, Chris Villarreal, testified about the security system and the safeguards and tests he had conducted to test the CD's validity. Mr. Villarreal found the CD had not been tampered with, and this testimony is deemed creditable.

After Mr. Villarreal's testimony, Grievant's expert witness did not testify, thus Respondent's evidence is unrebutted, and Grievant's assertions are unproven. As frequently stated by the Grievance Board, "[m]ere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998). *See Bryant v. Dep't of Motor Vehicles*, Docket No. 05-DMV-403 (Sept. 29, 2006). See discussion and findings in Synopsis in which Grievant's assertions that Superintendent Metz admitted there were two conversations were incorrect and not established by the evidence.

Second, Grievant's contention that he was given "implicit" permission from Superintendent Metz to bring the guns on campus; thus, his behavior is excused and any fault lies with Superintendent Metz, is absurd. Grievant did not ask permission to bring the weapons on school property, and Superintendent Metz did not give this permission.

Grievant told Superintendent Metz there had been an accident, and he needed to retrieve the guns. Superintendent Metz's response was "be safe." This response cannot be interpreted to mean, "Yes, you may bring the guns back to school property."

Third, it should be noted that Grievant's testimony, as a whole, lacked credibility. He indicated Superintendent Metz was "out to get him," but agreed Superintendent Metz had written him a glowing recommendation at the end of the 2006 - 2007 school year. Grievant could/would not explain why he did not use the noisy 4-wheeler to go into the woods the second time. His answers to this question were evasive and nonsensical. The undersigned Administrative Law Judge concluded that what Grievant initially told Superintendent Metz was correct. See Finding of Fact 11. Grievant did not use the vehicle because he knew DNR was looking for the guns - Mr. McCloy had told him so - and he was trying to return the weapon quietly. Thus, Grievant has not only been untruthful in this regard, but he was clearly aware that what he was doing was wrong.

Grievant presented himself as a completely up-front person, whose only problem was believing his friend. But he slipped into the woods to return the victim's gun and kept his friend's gun hidden. Grievant never informed Superintendent Metz of what he had done, and Superintendent Metz had to learn this information from the prosecuting attorney.

Less important, but further damaging Grievant's credibility, is the fact he never informed WCBOE of behavior that had resulted in a written reprimand from Calhoun County Board of Education just before he left that position. The incident which generated the written reprimand showed a serious lack of professional judgement. He explained he had not told WCBOE because he was told the written reprimand was to be removed. The

written reprimand, signed by Grievant, clearly states the document will remain in Grievant's personnel file permanently. Normally, the undersigned Administrative Law Judge would not note this document. But, as Grievant was so persistent in blaming everyone else for his errors, maintaining he was truthful in all things, and stating he had permission when he did not - this written reprimand further supports his lack of judgement, decreased capacity to appreciate his actions, and inability to accept responsibility for his behavior.

## II. Merits

### A. Standard of review

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 nolo contendere to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article.

It is not necessary for a board of education to identify an employee's offenses by the exact terms utilized in W. VA. CODE § 18A-2-8, as long as the required written notice of charges specifically identifies the alleged acts of which the employee is accused. *Jordan v. Mason County Bd. of Educ.*, Docket No. 99-26-080 (July 6, 1999). WCBOE provided Grievant written notice of the charges and indicated Grievant was guilty of insubordination.

### B. Insubordination

WCBOE labeled Grievant's behavior as 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.*, 212 W. Va. 209, 569 S.E.2d 456 (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). "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts, supra*. "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).

The elements identified in the *Butts* test are met: (a) Grievant did not follow WCBOE's Policy GCR-RABC; (b) Grievant was aware of this policy, as he was an administrator tasked with enforcing this policy; and (c) the Policy is reasonable and valid. WCBOE has demonstrated Grievant was insubordinate when he violated this Policy.

C. Employee Code of Conduct

The next issue to address is whether WCBOE has proven Grievant violated State Board of Education Policy 5902, the Employees' Code of Conduct.[11] While violation of a state Board of Education Policy is not included in the W. VA. CODE § 18A-2-8 list,

[11]Grievant did not assert he was unaware of this Policy

Grievant's behavior can be viewed as insubordination. *Domingues v. Fayette County Bd. of Educ.*, Docket No. 04-20-341 (Jan. 28, 2005).

The Employee Code of Conduct is found at W. VA. CODE R. § 126-162-4. In pertinent part, this Code of Conduct requires all West Virginia school employees to:

> 4.2.1. exhibit professional behavior by showing positive examples of preparedness, communication, fairness, punctuality, attendance, language, and appearance.
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> . . .
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> 4.2.3. maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination.
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> . . .
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> 4.2.6. demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior.
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> 4.2.7. comply with all Federal and West Virginia laws, policies, regulations and procedures.

As noted by the above-cited Code of Conduct, it is clear Grievant violated these requirements and has not conducted himself in a professional and responsible manner. He showed an amazing lack of judgement for one in his position. Grievant specifically did not "exhibit professional behavior by showing positive examples"; "maintain a safe and healthy environment"; "demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior"; and "comply with all Federal and West Virginia laws, policies, regulations and procedures." The undersigned Administrative Law Judge finds Grievant violated the Employee Code of Conduct, and the elements identified in the *Butts* test are satisfied. Respondent has met its burden of proof and demonstrated Grievant is guilty of insubordination for failure to follow this Code.

## III. Mitigation/Severity of Penalty

Although Grievant did not argue in his proposals that the penalty was excessive, this issue was raised in the Statement of Grievance and will be addressed. 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 Corr.*, 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 Res./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 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).

The undersigned Administrative Law Judge cannot find that termination was excessive with this set of facts, especially as Policy GCR-RABC specifically states, "Staff members who possess a weapon on school property will be subject to disciplinary action, up to and including termination." Additionally, Grievant's lack of remorse and understanding that his termination was the direct result of his own actions and poor judgement do not support a lesser penalty. Grievant violated county and state policies that Grievant, as principal, is required to enforce and uphold. The undersigned Administrative Law Judge cannot find WCBOE abused its substantial discretion.

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 Res.*, 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).

2. W. VA. CODE § 18A-2-8 identifies the types of behaviors for which a board may suspend or dismiss an employee. These behaviors are identified as: "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. . . ."

3. The State Board of Education's Employee Code of Conduct at 126 C. R. S. 162 directs all West Virginia school employees to "exhibit professional behavior by showing positive examples"; "maintain a safe and healthy environment"; "demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior"; and "comply with all Federal and West Virginia laws, policies, regulations and procedures."

4. Policy GCR-RABC narrowly limits the bringing of weapons on school grounds, requires written permission, and identifies the penalties for violation of the policy as including termination.

5. 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.*, 212 W. Va. 209, 569 S.E.2d 456 (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).

6. "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts, supra*.

7. "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). *Riddle, supra; Webb, supra*.

8. 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).

9. Respondent established Grievant was insubordinate as he was aware of the Employees Code of Conduct and Policy GCR-RABC and violated these policies.

10. 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).

11. "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).

12. "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 Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

13. 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).

14. Given the charges proven against Grievant, and notice in the policy that termination was one of the penalties that may be imposed for violation, the penalty is not disproportionate or excessive, arbitrary and capricious, or an abuse of discretion. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *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 Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *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 (eff. July 7, 2008).

**Date: February 12, 2009**

**Janis I. Reynolds**
**Administrative Law Judge**