THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

THOMAS SNODGRASS,
Grievant,

v. **Docket No. 2009-1691-WetED**

WETZEL COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant Thomas Snodgrass filed this grievance on June 22, 2009, against his employer, Respondent Wetzel County Board of Education, following the June 18, 2009, approval of the County Superintendent's recommendation that Grievant be terminated from his employment. Grievant's Statement of Grievance reads, in pertinent part, as follows:

> The adverse employment action which is the subject of this grievance was grounded upon allegations that:
>
> 1. the Grievant violated the Superintendent's order that he "not communicate with any staff or students regarding" allegations that he violated Westest II protocols;
> 2. the Grievant failed to conduct himself in accordance with the April 27, 2009 Examiner's/Scribe's Secure Materials and Test Procedures Agreement pertaining to the Westest II;
> 3. the Grievant made inappropriate, derogatory, and racist remarks in the presence of his students with respect to special needs students and students of color;
> 4. the Grievant falsified grades for several students; and
> 5. the Grievant was found to have sexually explicit photographs embedded in the memory of the computer located in his science classroom.
>
> The Grievant denies that he engaged in any conduct sufficient to warrant dismissal under W. Va. Code, 18A-2-8; and more specifically denies: that he communicated with or attempted to communicate with any staff or student regarding the Westest allegations; that he violated any aspect of the Westest II protocols; that he made derogatory or racial remarks in the presence of his students regarding special needs students and students of color; that he falsified student grades; or that he had any knowledge of the sexually explicit

> photographs found to be embedded in the memory of the computer located in his science classroom.

Grievant's Relief Sought reads as follows:

> Grievant requests the West Virginia Public Employee's Grievance Board to conduct a hearing upon this grievance; determine that the preponderance of evidence does not support the conclusion that the Grievant engaged in conduct such as to warrant dismissal under W. Va. Code, 18A-2-8; and order that the Grievant be reinstated to his position as a science teacher at Hundred High School with all back pay and benefits.

A level three hearing was conducted before the undersigned Administrative Law Judge over a five-day period on November 17 and 18, 2009, and February 23, 24 and 25, 2010, at the Wetzel County Board of Education in New Martinsville, West Virginia. Grievant appeared in person and by his counsel, Wray V. Voegelin, Esquire, Cassidy, Myers, Cogan & Voegelin, L.C. Respondent Board of Education appeared by its counsel, Richard S. Boothby, Esquire, Bowles, Rice, McDavid, Graff & Love, LLP. This case became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on May 19, 2010.

Case History

By correspondence dated May 29, 2009, Superintendent William Jones provided Grievant with notice that he was suspended with pay pending an investigation into allegations of inappropriate conduct during the administration of the WESTEST 2. Subsequently, by correspondence dated June 3, 2009, Superintendent Jones provided Grievant with notice that he would be recommending to the Wetzel County Board of Education that his employment contract be terminated on the basis of an alleged violation of the WESTEST 2 procedures agreement, and an allegation regarding the

Superintendent's directive for Grievant not to discuss with any staff or student the WESTEST 2 allegation.

By correspondence dated June 9, 2009, Superintendent Jones provided Grievant with notice that he was also alleged to have made inappropriate remarks regarding special needs students and students of color and Superintendent Jones was going to recommend that the Board of Education terminate his employment on the basis of those remarks. The Superintendent also alleged that Grievant had falsified grades by entering final grades for students with no recorded school work and that the alleged falsification of grades would be another ground for the recommendation that he be discharged from employment. Thereafter, by correspondence dated June 17, 2009, Superintendent Jones provided Grievant's counsel with notice that the West Virginia Department of Education had discovered obscene photographs on the hard drive from the science classroom computer, and further advised that the photographs were deemed to constitute grounds for further disciplinary action by way of termination of Grievant's employment.

On June 18, 2009, a hearing was convened by the Board of Education for the purpose of entertaining Superintendent Jones' recommendation that Grievant's employment be terminated on the grounds outlined in the Superintendent's letters. Grievant was provided with written confirmation on June 19, 2009, that the Board of Education had upheld the Superintendent's recommendation. Shortly thereafter, this grievance was filed directly to level three as permitted by W. VA. CODE § 6C-2-4(a)(4).

Synopsis

Grievant, a high school science teacher at Hundred High, was accused of disclosing science questions for the science portion of the WESTEST 2 on the day prior to the day

of the test. Revealing test question information amounts to cheating under Policy 2340, and is grounds for termination. Grievant was also accused of insubordination for his alleged attempt to communicate with two students involved in the investigation of the WESTEST cheating charge. Following the investigation into cheating, Grievant was also accused of assigning false final grades to alternative education students, making inappropriate statements about special education students and homosexuals, and viewing obscene images and visiting internet dating sites on his classroom computer during school hours. While the charge of cheating on the WESTEST 2 was not proven by a preponderance of the evidence, three of the remaining accusations were proven and supported the Board of Education's action in terminating Grievant's employment pursuant to W. VA. CODE § 18A-2-8. Accordingly, this grievance is denied.

Based upon the record of this grievance the undersigned makes the following findings of fact.

Findings of Fact

1. Grievant is a licensed teacher in West Virginia holding a professional administrative certificate and professional teaching certificates in biological sciences, general science, and social studies. Grievant was employed by Respondent as a full-time science teacher at Hundred High School.

2. Grievant was also employed by Respondent as a homebound teacher, working between 17 to 25 hours per month preparing for and instructing a homebound student.

3. Grievant is also employed as a full-time miner by GMS Mine Repair & Maintenance to work at its Enlow Fork mine in Washington County, Pennsylvania.

Grievant also owns and operates a farm in Mannington, West Virginia, raising and selling beef cattle.

4. Grievant was involved in a previous grievance proceeding with Respondent arising out of a domestic dispute during the summer of June 1997. That grievance was not resolved until March of 2002, at which time Grievant's employment with Respondent was reinstated, and he was assigned a position as science teacher at Hundred High School where he also served as assistant football coach, girls' basketball coach, and boys' baseball team coach for several seasons. Grievant perceived that his relationship with the administration remained strained after his reinstatement.

5. The initial complaint in this case was that Grievant had violated the WESTEST 2 testing procedures agreement. Prior to May of 2009 Grievant had proctored the various standardized tests during the course of his employment, and had previously served as a proctor for the WESTEST since that test was adopted for use in West Virginia. Grievant had not been involved in any problem relating to his administration of the various standardized tests that he proctored during his twenty-five years as a teacher.

6. In May of 2009 Grievant was required to serve as a proctor during the WESTEST 2 testing that was to be conducted on a state-wide basis. In conjunction with the administration of the WESTEST to his students in May of 2009, Grievant signed the Examiner/Scribe's Secure Materials and Test Procedures Agreement. Grievant acknowledged that if he were to review the WESTEST 2 and then give the students questions and answers from the test, that conduct would be a violation of the agreement which could result in termination of his employment and the potential revocation of his teacher's license.

7. The initial allegation that Grievant had violated the testing procedure agreement for the WESTEST 2 was made by a 7th grade student who had been removed from Grievant's class on multiple occasions before making the accusation. This student informed the investigative team that he had heard two students saying that Grievant had provided students with questions and answers to portions of the WESTEST. This student admitted that he had no direct knowledge of the allegations against Grievant and did not receive any information about the contents of the WESTEST from Grievant.

8. Upon receiving information that Grievant was alleged to have violated the WESTEST testing procedure agreement, Superintendent Jones worked with John Morrison and Larry White, Investigators for the State Department of Education, who began their investigation at Hundred High School on May 28, 2009. Mr. Morrison and Mr. White conducted student surveys and student interviews as part of their investigation. In addition, Grievant's classroom computer was sent to Jimmy Daniels, a certified forensic computer examiner at the State Department of Education.

9. Upon completion of the investigation, Superintendent Jones advised the Board of Education that he had concluded that Grievant had violated the agreement regarding the WESTEST and that Grievant was subject to dismissal on the grounds of insubordination.

10. The Superintendent's conclusion that Grievant had violated the WESTEST procedures agreement by providing students with questions and answers from the WESTEST was based on the answers to the student survey form and the interviews of students.

11. John Morrison and Larry White developed a survey to be answered by certain students at Hundred High School as part of the investigation. This survey form was provided to students about one week after the WESTEST.

12. The purpose of the survey was to assist in determining whether Grievant cheated on the WESTEST. The key question was: “At any time last week did anyone give you questions or answers regarding the science portion of the WESTEST 2 before or during testing?” The fact that many students answered in the affirmative and identified Grievant as the responsible party played a part in the recommendation for termination.

13. By the time students completed the survey form, there was already rumor and innuendo at the school regarding the allegation that Grievant had given questions and answers to students in violation of the WESTEST procedures agreement. Mr. Morrison acknowledged that by the time students were interviewed regarding the allegation, most of the students were aware of the reason they were being called into the interview.

14. Members of Grievant’s science class indicated that by the time they were interviewed by the Superintendent that they had heard the rumor that Grievant had allegedly cheated on the WESTEST.

15. The Benchmark test is a study booklet that was developed by the Department of Education for the specific purpose of preparing students to do well on the WESTEST, and the booklet contains questions and answers that were designed to relate to the principles and concepts that are covered on the WESTEST 2. The Benchmark tests have actual sample questions and answers that resemble the types of questions and answers that are in the WESTEST 2.

16. Samuel Snyder, Principal of Hundred High School, encouraged teachers to prepare students for the WESTEST 2 including using the Benchmark sample questions and reviewing information that show the Content Standard Objectives ("CSO") which contain the specific information that the WESTEST is designed to test.

17. Principal Snyder provided Grievant with the Benchmark sample test, and he encouraged Grievant to use them to get the students ready for the science portion of the WESTEST 2.

18. Bonnie McGlumphy, building level coordinator for the WESTEST, indicated that preparing students for the WESTEST by going over the CSOs and Benchmark tests was accepted as standard procedure.

19. Ms. McGlumphy further acknowledged that the Benchmark test is accessed through the Acuity website that is set up by the State and that she helped show Grievant how to access it on a computer so that he could have a Benchmark test for his use.

20. The CSOs contain the specific type of information which the students will be tested on by the WESTEST. Principal Snyder agreed that if Grievant had gone through the topics and the general concepts that are covered by the CSOs, the students in his science class could expect to see those concepts and topics on the WESTEST. In addition, it would be appropriate for teachers to review the information contained in the CSOs for the science classes in preparation for the WESTEST.

21. Sonya White, West Virginia Department of Education, is assigned to the acuity project which is a testing software program to prepare students for formative and summative assessment. Ms. White also assists in the preparation of the Benchmark tests which are developed to assist students to prepare for the WESTEST.

22. Ms. White explained that the questions that appear on the WESTEST are aligned to the CSOs in that each CSO contains the concept that is to be conveyed by the teacher to the students, and then the WESTEST is used to determine whether the teacher has conveyed that information.

23. Teachers use the CSOs in preparing students for the WESTEST, and teachers may also use Acuity exams (Benchmark tests) and other materials to help get students ready for the WESTEST.

24. Superintendent Jones conceded that if Grievant used the Benchmark exam to give students questions and answers regarding the science portion of the WESTEST during preparation, the only correct answer to survey question three for any student who was present for those preparation sessions would be yes, and it would be anticipated that the person identified would be Grievant. This fundamental flaw rendered the surveys useless.

25. Respondent also relied upon statements given by students alleging that Grievant provided questions and answers from the WESTEST in violation of the Procedures Agreement.

26. Some students interviewed during the investigation alleged that Grievant discussed specific questions and answers at the time he was proctoring the exam, and during the WESTEST preparation sessions in Grievant's science class; other students offered no incriminating evidence against Grievant.

27. Superintendent Jones believed the students' statements demonstrated two possible ways that Grievant could have accomplished the alleged violation of the WESTEST Procedures Agreement: either by referring to pieces of white index card paper

upon which he had written down the questions and answers or looking directly at the WESTEST 2 and reading questions directly from the test.

28. A student in Grievant's 6th period class gave a statement to the investigators that when she came into the 6th period class on Wednesday before the science portion of the WESTEST, Grievant was reading the questions out of the WESTEST 2 booklet to the other students.

29. This student went on to relate to Superintendent Jones and the investigators that when Grievant was reading questions and answers directly from the WESTEST 2 booklet she specifically remembered a question relating to the type of energy held by a ball going up in the air and coming down, that answer was kinetic energy. Nevertheless, Superintendent Jones acknowledged that neither he, nor any member of the investigative team, looked at the WESTEST to determine whether there was a question related to the movement of a ball and kinetic energy.

30. The question about kinetic energy on the WESTEST did not have anything to do with a ball going up in the air and coming down with an answer being kinetic energy. The actual question on the WESTEST is not similar to the example about a ball going up in the air.

31. Mr. White, West Virginia Department of Education, admitted that the students alleging that Grievant was reading questions and answers directly from the WESTEST may have been mistaken, because Grievant could have been looking at the examiner's manual that he was supposed to be using during the administration of the WESTEST.

32. Another student stated that during the 6th period class Grievant read over answers to the WESTEST and was giving out answers relating to compression and

decompression. He further told Superintendent Jones that when he took the WESTEST the next day, the exact questions and answers were on the test. Nevertheless, Superintendent Jones admitted that he was unable to find any questions and answers relating to compression and decompression in the WESTEST 2.

33. One of Grievant's students alleged that Grievant was reading questions and answers from small pieces of white paper on the day before the science portion of the WESTEST 2.

34. When this student gave his statement to the investigators, he provided a specific question that he recalled being on the WESTEST, and indicated that Grievant told the students in the class that the answer to the question would be the letter B. Superintendent Jones was astonished that Grievant would actually give the answer with a specific letter. However, when directed to the specific question in the WESTEST referenced by this student's example, Superintendent Jones had to agree that there was no letter B, as the possible answers to the specific example given by the student were F, G, H, and J.

35. This student also told the investigators about a question and answer related to the consumption of fuel by various modes of transportation. Grievant was alleged to have told the class that the correct answer was that the automobile had the best fuel mileage. Superintendent Jones acknowledged that none of the answers to that question indicated that the automobile had the best fuel mileage, and the correct answer to the question was that the airplane is more fuel efficient than the helicopter.

36. Another student in the same 7th period science class as the prior student indicated that Grievant did not tell students specific answers and questions from

WESTEST, but rather reviewed the Benchmark and Acuity examples. When this student took the WESTEST some of the concepts and ideas that Grievant had used for preparation did appear on the WESTEST, and that she felt his preparation was helpful.

37. Most of the students making the cheating accusations against Grievant were overheard to say that they were going to fabricate the story that Grievant provided them with questions and answers because they did not like Grievant and wanted to get him fired.

38. Grievant did not give the students specific questions and answers that actually appeared on the WESTEST, but rather reviewed general concepts which later appeared on the WESTEST, and during the preparation sessions for the WESTEST Grievant used sample questions and answers from the Benchmark test.

39. The slips of white paper contained key words designed to remind Grievant of the materials set out on the CSOs, and did not contain questions and answers from the WESTEST.

40. Superintendent Jones twice provided Grievant with written instruction not to communicate or attempt to communicate with any staff or students regarding the allegation of cheating on the WESTEST.

41. Grievant contacted Joey Kirkpatrick, not a student at the time, and asked him to contact his girlfriend and two other students at the school. Mr. Kirkpatrick provided Superintendent Jones with information that Grievant had asked him to contact Hundred High School students to see if they could find out anything about the charge of cheating.

42. After Grievant was suspended, Rebecca Goff, a special education teacher who had taught a science course with Grievant, was asked by Principal Snyder to finalize the grades for Grievant's students. Ms. Goff could find only one grade book for Grievant's

students on the lab table in the front of the science classroom. Ms. Goff averaged the grades and reported these final grades.

43. Ms. Goff also noticed that while the alternative education students had final grades in Grievant's grade book, there were no grades recorded for their completed work, quizzes, tests, and so on.

44. William Farrell, an alternative education teacher, worked with the alternative education students after school each day. Mr. Farrell explained that the regular education teachers were to send class assignments for the alternative education students to him. Once the students completed the assignments, Mr. Farrell would return the completed student work to the regular education teachers so that they could grade and return the student's work.

45. Grievant did not return graded alternative education student work to Mr. Farrell, which led to concerns that the work was not getting graded. Grievant would, on occasion, provide Mr. Farrell with oral feedback on students' grades. Oddly, more often than not, Grievant would tell Mr. Farrell that an alternative education student had a 65.

46. One alternative education student and the student's mother expressed their desire to have the student returned to his regular education schedule at a meeting with the school administration and Grievant. To do so, the student needed passing grades to be considered for return to regular education. At the meeting, Grievant indicated the alternative education student had a 52% in science although he was not able to produce any documentation in support of the grade.

47. As an alternative education student, his grades in his other subjects for the grading period were 85% English, 86% World History, 76% Geometry, and 75% Health.

48. While looking for the alternative education student's work in Grievant's classroom, Mr. Farrell discovered a large amount of ungraded alternative education student papers in Grievant's classroom.

49. Grievant uniformly assigned a grade of 65 (D) to alternative education students without having graded any of their class work, and without any other basis for how well or poorly the students did on their science work. Grievant produced a grade book at the level three proceedings, but its authenticity was called into question.

50. Superintendent Jones informed the Board of Education that based on students' reports, an allegation surfaced that Grievant had made derogatory statements in class about homosexuals, African-Americans, and mentally challenged individuals.

51. While some students indicated that Grievant did make inappropriate remarks, others denied that Grievant engaged in such conduct.

52. James Daniels, Department of Education computer expert, provided Superintendent Jones with nine images that were attached to the Superintendent's correspondence to Grievant dated June 17, 2009, and would be used as an additional ground for disciplinary action. Mr. Daniels found the nine images in the computer's hard drive's delete file, and those same images were later introduced into evidence against Grievant during the Board of Education hearing conducted on June 18, 2009.

53. Following Grievant's termination from employment on June 18, 2009, Mr. Daniels continued his review of the hard drive from the science classroom computer; upon completion of the review, he provided counsel for Respondent with documents contained

in Respondent's Exhibit 1 and 1a approximately one week before the Level Three proceeding on November 17, 2009.[1]

54. Superintendent Jones acknowledged that the documents were submitted as evidence in support of the decision to discharge Grievant on the basis of sexually explicit materials found on the computer located in the science classroom. The documents demonstrate that Grievant visited dating web sites on a classroom computer, in particular, there were conversations with women of a sexual nature going on during the time Grievant was supposed to be teaching.

55. Grievant offered the testimony of various students that claimed to have created the pornographic images on Grievant's classroom computer; however, their accounts were not supported by the create date on the images. In addition, Grievant offered the testimony of students claiming to be the ones responsible for visiting the dating web sites; however, their accounts were not supported by the contents of the actual e-mails and were unpersuasive. These accounts actually damaged Grievant's blanket denial that he engaged in dating e-mails during school hours based upon a close review of the e-mail content.

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[1]Grievant's counsel complained of the late disclosure of this material, which was sent to his office by Respondent just prior to the hearing, at this proceeding; however, he did not move for a continuance in order to have additional time to prepare. The undersigned did not rule on the Exhibit's admissibility until Grievant and counsel had additional time to digest this information, which was apparently accomplished during the three months between the November 2009 hearing and the February 2010 hearing dates.

DISCUSSION

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *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 determines the weight of the testimony." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). 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 & 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*.

W. VA. 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." W. VA. 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 W. VA. 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).

Respondent's charges against Grievant are that the Grievant violated the Superintendent's order that he not communicate with any staff or students regarding allegations that he violated WESTEST 2 protocols; the Grievant failed to conduct himself in accordance with the April 27, 2009 Examiner's/Scribe's Secure Materials and Test Procedures Agreement pertaining to the WESTEST 2; the Grievant made inappropriate, derogatory, and racist remarks in the presence of his students; the Grievant falsified grades for several alternative education students; and that material found on the computer in Grievant's classroom is such as to warrant discharge from employment.

Turning first to the charge that Grievant violated the Superintendent's instruction not to communicate with any staff or student regarding WESTEST 2 protocol violations, although not specifically stated, it appears that, if proven, Grievant's violation of this order could be considered insubordination. "It is not the label a county board of education attaches to the conduct of the employee in the termination notice that is determinative. The critical inquiry is whether the board's evidence is sufficient to substantiate that the employee actually engaged in the conduct." *Allen v. Monroe County Bd. of Educ.*, Docket

No. 90-31-021 (July 11, 1990); *Duruttya v. Mingo County Bd. of Educ.*, Docket No. 29-88-104 (Feb. 28, 1990).

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." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *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*.

The undersigned finds that Respondent has proven by a preponderance of the evidence this first charge of insubordination against Grievant. Superintendent Jones twice gave written instruction to Grievant not to communicate with any staff or students regarding this matter. Grievant violated those direct orders by asking Joey Kirkpatrick to communicate with two Hundred High School students about the ongoing investigation. On May 29, 2009, Mr. Kirkpatrick met with Superintendent Jones and provided a statement confirming these events in writing, which he reviewed, and signed as accurate. The record establishes that Mr. Kirkpatrick was asked by Grievant to contact students in an attempt to find out what was going on with the investigation in an effort to help Grievant get this information. While Grievant argued that he was not insubordinate because he did not directly contact any Hundred High School students, Mr. Kirkpatrick did so on his instruction.

Using Mr. Kirkpatrick to do what Grievant was prohibited from doing is a deliberate circumvention of the Superintendent's directive.

The next charge is that Grievant was insubordinate by failing to conduct himself in accordance with the April 27, 2009, Examiner's/Scribe's Secure Materials and Test Procedures Agreement relating to the WESTEST 2. Respondent's evidence on this charge consists almost entirely of the transcripts of the testimony of the accusing students, and the testimony of students at level three. The only witnesses who can testify to the acts alleged are Grievant and the accusing students, and their versions of events are diametrically opposed. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Resources,* Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human 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. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

The undersigned does not find the testimony of the accusing students to be credible in this case. In reviewing the above factors the undersigned bases this on their attitude toward the action, the presence of bias, and the plausibility of the information. Various student statements were recorded during the course of the investigation roughly one week after the science portion of the WESTEST 2 was completed, offered into evidence during the Board of Education hearing of June 18, 2009, and presented at the level three grievance proceeding.

The initial allegation that Grievant had violated the testing procedure agreement for the WESTEST 2 was made by a 7th grade student who had been removed from Grievant's class on multiple occasions before making the accusation. This student informed the investigative team that he had heard two students saying that Grievant had provided students with questions and answers to portions of the WESTEST. This student admitted that he had no direct knowledge of the allegations against Grievant and did not receive any information about the contents of the WESTEST from Grievant.

A student in Grievant's 6th period class gave a statement to the investigators that when she came into the 6th period class on Wednesday before the science portion of the WESTEST, Grievant was reading the questions out of the WESTEST 2 booklet to the other students. This student went on to relate to Superintendent Jones and the investigators that when Grievant was reading questions and answers directly from the WESTEST 2 booklet she specifically remembered a question relating to the type of energy held by a ball going up in the air and coming down, the answer was kinetic energy.

Nevertheless, Superintendent Jones acknowledged that neither he, nor any member of the investigative team, looked at the WESTEST to determine whether there was a question related to the movement of a ball and kinetic energy. The question about kinetic energy on the WESTEST did not have anything to do with a ball going up in the air and coming down with an answer being kinetic energy. The actual question on the WESTEST is not similar to the example about a ball going up in the air.

Another student stated that during the 6th period class Grievant read over answers to the WESTEST and was giving out answers relating to compression and decompression. He further told Superintendent Jones that when he took the WESTEST the next day, the exact questions and answers were on the test. Nevertheless, Superintendent Jones admitted that he was unable to find any questions and answers relating to compression and decompression in the WESTEST 2.

One of Grievant's students alleged that Grievant was reading questions and answers from small pieces of white paper on the day before the science portion of the WESTEST 2. When this student gave his statement to the investigators, he provided a specific question that he recalled being on the WESTEST, and indicated that Grievant told the students in the class that the answer to the question would be the letter B. Superintendent Jones was astonished that Grievant would actually give the answer with a specific letter. However, when directed to the specific question in the WESTEST referenced by this student's example, Superintendent Jones had to agree that there was no letter B, as the possible answers to the specific example given by the student were F, G, H, and J.

This student also told the investigators about a question and answer related to the consumption of fuel by various modes of transportation. Grievant was alleged to have told the class that the correct answer was that the automobile had the best fuel mileage. Superintendent Jones acknowledged that none of the answers to that question indicated that the automobile had the best fuel mileage, and the correct answer to the question was that the airplane is more fuel efficient than the helicopter.

The credible evidence in this case also established that most of the students making the cheating accusations against Grievant were overheard to say that they were going to fabricate the story that Grievant provided them with questions and answers because they did not like Grievant and wanted to get him fired. In addition, Mr. White, West Virginia Department of Education, admitted that the students alleging that Grievant was reading questions and answers directly from the WESTEST may have been mistaken, because Grievant could have been looking at the examiner's manual that he was supposed to be using during the administration of the WESTEST.

The record of this case establishes it is more likely than not that Grievant did not give the students specific questions and answers that actually appeared on the WESTEST, but rather reviewed general concepts which later appeared on the WESTEST, and during the preparation sessions for the WESTEST Grievant used sample questions and answers from the Benchmark test. The credible evidence coming from the students indicated that Grievant did not tell students specific answers and questions from WESTEST, but rather reviewed the Benchmark and Acuity examples. When these students took the WESTEST some of the concepts and ideas that Grievant had used for preparation did appear on the WESTEST, and they felt his preparation was helpful.

Superintendent Jones' conclusion that Grievant had violated the WESTEST procedures agreement by providing students with questions and answers from the WESTEST was also based on the answers to the student survey form. John Morrison and Larry White, Investigators for the State Department of Education, developed a survey to be answered by certain students at Hundred High School as part of the investigation. This survey form was provided to students about one week after the WESTEST. The purpose of the survey was to assist in determining whether Grievant cheated on the WESTEST. The key question was: "At any time last week did anyone give you questions or answers regarding the science portion of the WESTEST 2 before or during testing?" The fact that many students answered in the affirmative and identified Grievant as the responsible party played a role in the recommendation for termination.

By the time students completed the survey form, there was already rumor and innuendo at the school regarding the allegation that Grievant had given questions and answers to students in violation of the WESTEST procedures agreement. Mr. Morrison acknowledged that by the time students were interviewed regarding the allegation, most of the students were aware of the reason they were being called into the interview. Superintendent Jones conceded that if Grievant used the Benchmark exam to give students questions and answers regarding the science portion of the WESTEST during preparation, the only correct answer to survey question three for any student who was present for those preparation sessions would be yes, and it would be anticipated that the person identified would be Grievant.

A closer look at the surveys reveals that some of those that answered yes to the question, and identified Grievant, went on to explain that Grievant used examples and

general concepts, not specific questions and answers. Those students that did make the accusation that specific questions and answers were provided conveniently went on to make other accusations against Grievant, while other students commented that all they knew about the charge was based on rumors. This survey provides no evidence of any weight because of its flaws, students' comments are based upon bias and rumors, and can be further discounted by the various students' comments which support a finding that Grievant merely reviewed examples and concepts.

The next charge is that Grievant made inappropriate, derogatory, and racist remarks in the presence of his students and that such conduct showed a violation of the code of conduct such as to constitute insubordination. The record of this case does not establish that it is more likely than not that Grievant made inappropriate and unprofessional remarks about special education students, homosexuals, and African-Americans. Many of Grievant's students testified in this matter that they had never heard Grievant make any derogatory comments about special needs students, homosexuals, or African-Americans during science class. As noted above, the students that did make these accusations were overheard to say that they hated the Grievant and would do anything to get Grievant in trouble. Students that were in the same classroom as those that made the accusations testified that they had not seen nor heard Grievant tormenting, bothering, or degrading any student. Once again, the credible evidence in this grievance does not support this charge by a preponderance of the evidence.

The next charge is that Grievant willfully neglected his duties by failing to grade the science work assigned to certain alternative education students and by submitting final grades for those students without any supporting data. To prove a willful neglect of duty,

the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. *Williams v. Cabell County Bd. of Educ.*, Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ.*, Docket No. 95029-151 (Aug. 24, 1995).

The undersigned finds that Respondent has established this charge by a preponderance of the evidence. The record of this case demonstrates that Grievant assigned grades to alternative education students without having graded any of their work. Rather than grading the work he assigned to these students, Grievant consistently gave the alternative education students a grade of 65 (D).

After Grievant was suspended, Rebecca Goff, a special education teacher who had taught a science course with Grievant, was asked by Principal Snyder to finalize the grades for Grievant's students. Ms. Goff could find only one grade book for Grievant's students on the lab table in the front of the science classroom. Ms. Goff averaged the grades and reported these final grades. Ms. Goff also noticed that while the alternative education students had final grades in Grievant's grade book, there were no grades recorded for their completed work, quizzes, tests, and so on. Mr. Farrell, the alternative education teacher, explained that when pressing Grievant for a student's grade, he would often tell Mr. Farrell the grade was 65.

Grievant produced an "Alternative Education Grade Book" at the level three hearing. This grade book is a Squibb's Class Record Book No. 9. Grievant explained that he obtained the Squibb's No. 9 from the school. Clearly, Grievant has every motivation to deny the many allegations raised against him; however, this is the point in the proceeding when addressing the final two charges that he begins to lose credibility. Mary Ann Pethtel,

Hundred High School secretary, confirmed that the Squibb's No. 9 has never been ordered or stocked at the school since she became school secretary in August 1995. Ms. Pethtel double checked this information by making a search of order forms, inventory sheets, and purchase orders. She was also certain that no vendor had ever left grade books at Hundred High School.

Grievant indicated that he often used a separate grade book for alternative education students in the past. Ms. Pethtel was asked by Superintendent Jones to gather Grievant's grade books from prior years. She was unable to locate any "Alternative Education Grade Book" for Grievant at the school, three of his regular grade books were located, each a Squibb's 18F Class Record Book.

As is often the case in situations such as this, the coverup is much worse than the crime. Grievant had every reason to produce a grade book which would seem to answer this charge; however, his story lacks credibility due to the presence of interest and motive which appears to have clouded his judgment. In addition, the plausibility of the Grievant's information was totally discounted by the rebuttal of Respondent concerning the uncontested fact that Grievant would have been unable to use a grade book such as he claims.

Grievant argued that even if these allegations were true, these allegations were of unsatisfactory job performance, which require that Grievant be given notice of his deficiencies through the evaluation and improvement plan process. The undersigned recognizes that when grounds for a school employee's dismissal include charges relating to incompetency or conduct which is deemed correctable, the county board must establish that it complied with provisions of West Virginia Department of Education Policy 5310

requiring it to inform the employee of his deficiencies and afford him a reasonable period to improve. *Mason County Bd. of Educ. v. State Supt. of Schools*, 165 W. Va. 732, 739, 274 S.E.2d 435, 439 (1980); *See also Maxey v. McDowell County Board of Education*, 575 S.E.2d 278, 2002 W.Va. LEXIS 226 (2002); *McMann v. Jefferson County Bd. of Educ.* Docket No. 2009-1340-JefED (Oct. 21, 2009).

The key to this analysis is whether or not the conduct is correctable, under the facts and circumstances of this case, the undersigned believes that it is not. The substantiated willful acts of neglect, such as choosing to assign a 65 D to students without grading their work, would not seem to encompass incompetence or unsatisfactory performance which could be corrected through an improvement plan. In addition, Grievant's actions exhibited poor judgment and a dishonest fabrication of evidence to cover those actions, which are usually traits that cannot simply be called to someone's attention and corrected. *Hopkins v. Monroe County Bd. of Educ.*, Docket No. 05-31-192 (Aug. 23, 2005).

Finally, the charge that material found on the computer in Grievant's classroom is such as to warrant discharge from employment. During the proceedings before the Board of Education the nine photographs were offered into evidence for the purpose of supporting Superintendent Jones's recommendation that Grievant should be dismissed on the ground of immorality. The Supreme Court of Appeals of West Virginia has attempted to define "immorality" within the meaning of W. VA. CODE § 18A-2-8. The Court stated: "Immorality is an imprecise word which means different things to different people, but in essence it also connotes conduct 'not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the

acceptable standards of proper sexual behavior.' [Citations omitted.]" *Golden v. Bd. of Educ. of Harrison Co.*, 169 W. Va. 63, 285 S.E.2d 665, 668 (1981); *Harry v. Marion Co. Board of Educ.*, 203 W. Va. 64, 506 S.E.2d 319, 321 (1998).

Grievant was accused of being responsible for obscene images on his classroom computer as well as engaging in inappropriate conversations on internet dating sites. Grievant countered by offering the testimony of two student witnesses who took full responsibility for the materials found on Grievant's classroom computer. Again, the students' testimony lacked credibility because their story and account of what happened was not plausible. Mr. Daniels, State Department of Education computer expert, provided explanation about the "Created Date" date and time stamps for the images retrieved from Grievant's classroom computer hard drive. Mr. Daniels explained that after being deleted, as the student indicated he had done to the specific images, there would no date/time stamp. The student's account is not plausible because the images identified by the student have date/time stamps.

Grievant suggested that he never accessed the dating web sites from the computer in the science classroom, but that he was aware of the site, and that he did occasionally go on the site from his mother's computer during times that he may be visiting her. One of Grievant's students testified at level three to having impersonated Grievant on two dating web sites. Once again, this testimony has no credibility. The sheer volume of the entries making reference to the Grievant found on the hard drive on his classroom computer make this student's confession of impersonating Grievant implausible. See Respondent's Exhibit 1, Level Three. Forensic computer analysis revealed hundreds of visits to these web sites in May 2009 alone. Grievant denied ever visiting these web sites even a single time on his

classroom computer. It is not plausible that the student spent entire portions of many school days sitting in front of the classroom computer, more likely it was Grievant.[2]

The other student's accounts concerning the images found on Grievant's classroom computer were flawed with inconsistencies. This student acknowledged responsibility for images 9 through 17 as found in Respondent's Exhibit No. 1 at level three. This student identified a girl in one of the photos wearing a Hundred High School football jersey, which he stated he purchased in the high school office for $20. Head Football Coach Rex Rush testified that since becoming head coach in August 2005, the same year the student began enrollment, that he has never authorized the sale of any white football jerseys.

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[2]The following received messages are offered by way of example:
"Hi Tom,
Science, and especially biology, were my favorite subjects. I started out as a biology major in college . . ." Respondent's Exhibit 1, Level Three, tab G, page 7.

"Hi Tom, sounds beautiful, no other houses close. My uncle used to have a farm in Mannington, I loved to go there, I have always wanted a work horse, don't ask me why? I think we have a lot in common. . ." Respondent's Exhibit 1, Level Three, tab G page 9.

"Hi Tom,
Thanks for the picture. Someone came in my cube as I was opening it up and the response was -'he's cute as a button'. I have to agree :) Oh - and that someone was female! Now stop blushing! (lol)

I noticed it said basketball somewhere in the message. Since Hundred is a small school do you coach as well as act as the ad?" Respondent's Exhibit 1, Level Three, tab G, page 33.

The undersigned need not go into detail about the images, most are inappropriate and not work related, to say the least, and some are particularly obscene.[3] In addition, it is uncontested that Grievant's classroom computer was password-protected and behind a locking door. The record established that Grievant, not his students, spent an inordinate amount of time in front of his computer.[4]

The unavoidable conclusion in light of the overwhelming evidence and due, in part, to what was obviously contrived testimony of the students, is that Respondent has established by a preponderance of the evidence that Grievant was responsible for the images and dating web site chatter found embedded on the computer. This is unacceptable activity from the Grievant while he is supposed to be working, especially at a school, and especially when his activity raises the probability that a child may access the same material. Grievant's use of class time to access pornographic material and soliciting sexual relationships through dating web sites is not in conformity with community standards

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[3]The Grievance has previously held that use of a school computer to access pornographic and/or sexual materials constitutes sufficient basis for dismissal. *Kennard v. Tucker County Bd. of Educ.*, Docket No. 01-47-591/628 (Mar. 12, 2002).

[4]The following sent messages are offered by way of example:

"YOU sent on 5/7/2009 6:58:48 AM - gonna give me some sexy pictures, huh ??? you are a very beautiful lady" Respondent's Exhibit 1, Level Three, tab G, page 115.

"YOU sent on 4/24/2009 10:09:37 AM - no woman or man? have you been with a woman or something?" Respondent's Exhibit 1, Level Three, tab G, page 131.

"YOU sent on 4/27/2009 9:06:27 AM - I worked at miracle run last night and was dirty . . .would you do me if I just got out of the mines??" Respondent's Exhibit 1, Level Three, tab G, page 133.

and accepted principles of right and wrong behavior. Respondent has met its burden of proof as it relates to a charge of immorality.

Grievant's behavior related to the images and dating service web sites on the classroom computer can also be viewed as insubordination. Grievant knew what type of behavior was and was not expected of him in regard to the West Virginia State Board Policy on acceptable use of the classroom computer.[5] Therefore, Respondent has also demonstrated that Grievant's conduct was insubordinate because it involved a deliberate and knowing violation of policy against misuse of his classroom computer.

The following conclusions of law support the decision reached.

Conclusions of Law

1. As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *Nicholson V. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989).

2. An employee of a county board of education may be suspended or dismissed only for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a nolo contendere to a felony charge. W. VA. CODE § 18A-2-8.

3. Dismissal of an employee under W. VA. CODE § 18A-2-8 "must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or

[5]State Board of Education Policy 2460 establishes criteria for the safe and acceptable use of the Internet by students, educators, school personnel, and the West Virginia Department of Education employees.

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).

4. 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." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002) (*per curiam*).

5. To prove a willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. *Williams v. Cabell County Bd. of Educ.*, Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ.*, Docket No. 95029-151 (Aug. 24, 1995).

6. "Immorality is an imprecise word which means different things to different people, but in essence it also connotes conduct 'not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior.' [Citations omitted.]" *Golden v. Bd. of Educ. of Harrison Co.*, 169 W. Va. 63, 285 S.E.2d 665, 668 (1981); *Harry v. Marion Co. Board of Educ.*, 203 W. Va. 64, 506 S.E.2d 319, 321 (1998).

7. Respondent has proven by a preponderance of the evidence that Grievant violated the Superintendent's order that he not communicate with any staff or students

regarding allegations that he violated WESTEST 2 protocols; that Grievant falsified grades for several alternative education students; and that material found on the computer in Grievant's classroom is such as to warrant discharge from employment.

8. Respondent has established that Grievant's conduct constituted insubordination, willful neglect of duty, and immorality.

Accordingly, this grievance is **DENIED**.

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: August 18, 2010

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Ronald L. Reece
Administrative Law Judge