WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DOTTIE L. WILEY,
Grievant,

v. **Docket No. 2010-1431-MasED**

MASON COUNTY BOARD OF EDUCATION
Respondent.

D E C I S I O N

Grievant, Dottie L. Wiley, filed a grievance against Mason County Board of Education ("MCBE"), Respondent on May 4, 2010, protesting her suspension and ultimate termination. The Grievance statement provides:

> Termination of grievant's employment by the Mason Co. BOE violates W. Va. Code 18A-2-8 and Mason County Schools Drug-Free Workplace Policy (Policy 829). Grievant also believes that she has been discriminated against within the meaning of W. Va. Code 6C-2-2.

The relief sought:

> Reinstatement to former teaching position and compensation for lost wages and any and all other benefits of employment along with attorneys fees and costs associated with prosecuting this grievance.

A level three hearing was held before the undersigned Administrative Law Judge on October 26, 2010, in the Grievance Board's Charleston office. Grievant was represented by counsel, Jason A. Poling, Esquire, Waters Law Group, PLLC. Respondent was represented by Gregory W. Bailey, Esquire, Bowles, Rice, McDavid, Graff & Love, LLP. This case became mature for decision on November 30, 2010, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals.

Synopsis

After exhibiting behavior at school that created a suspicion that she was under the influence of drugs or alcohol, Grievant did not fully comply with drug testing procedure. Grievant departed the testing facility prior to completing the testing regiment. Subsequently, Grievant was suspended and ultimately dismissed from her employment as a teacher at Pt. Pleasant Elementary School employed by Respondent Mason County Board of Education. Grievant had been employed as a classroom teacher for approximately twenty years. Grievant's drug screening results were negative for alcohol and illegal drugs. Grievant contends the disciplinary actions taken by Respondent were inappropriate, abuse of discretion, and unlawful.

Respondent has a recognized duty to protect and safeguard employees and children within its domain. It is established that on the day in discussion Grievant was impaired. At that time Grievant was unaware of her diminished state. The urine sample provided by Grievant was provided within a "reasonable amount of time" as anticipated by the Mason County Schools Drug Free Workplace Policy. It is not established that Grievant's actions, *en toto*, constitute a dismissible offense as provided by W. VA. CODE § 18A-2-8.

Mitigating circumstances exist in the facts of this grievance. Respondent's decision to terminate the employment of Grievant was excessive, given the facts of this case. This grievance is Granted.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant, Dottie L. Wiley, was employed by Respondent, Mason County Board of Education, as a special education teacher at Pt. Pleasant Elementary School. Grievant had been employed by Respondent as a classroom teacher for approximately twenty (20) years.

2. On the morning of February 18, 2010, Grievant was observed by school personnel exhibiting behavior that created a suspicion that she was under the influence of drugs or alcohol. Specifically, employees Ashley Roush and Karen Wamsley noticed Grievant exhibiting unusual behavior.

3. There was a two hour delay on February 18, 2010, before students arrived for the day at Pt. Pleasant Elementary.

4. Ashley Roush is a Special Education Teacher at Pt. Pleasant primary school. She reported that Grievant looked different than usual. Grievant stumbled as she walked, her eyes were glassy and she dozed off while in Ms. Roush's classroom.

5. Karen Wamsley, student care aide, reported to her supervisor that she believed that Grievant was "out of it."

6. A phone call was made to the county school board office.

7. Rebecca (Becky) Hatfield, elementary curriculum coordinator, was dispatched from the Board office to Pt. Pleasant Elementary School to assess the allegation that Grievant was "out of it."

8. Descriptions of Grievant's behavior included: heavy eyes; leaning on an employee when walking down the hall; slurred speech; staggering when walking down the hall; glassy eyes; stumbling forward; stumbling when attempting to sit; sitting with her head

down; and dozing off.

9. A determination was made to require Grievant to submit to drug and alcohol testing. Grievant was accompanied by Rebecca Hatfield, Elementary Curriculum Coordinator, and Ronnie Spencer, PRO Officer to the Holzer Clinic, for that purpose.

10. Grievant was transported by Officer Spencer to the Pt. Pleasant, West Virginia location of the Holzer Clinic (also herein as "Holzer"). Ms. Hatfield followed Grievant and Officer Spencer in her own car.

11. Upon arrival at Holzer Clinic, Grievant submitted to alcohol testing by breathing into an Intoximeter AlcoSensor IV at 10:41 a.m. *Alcohol Testing Form,* Grievant's Exhibit 1. Grievant submitted to the breath alcohol test without incident.

12. The result indicated that Grievant had a ".000" blood alcohol level. *Alcohol Testing Form (Non-DOT),* Grievant's Exhibit 1.

13. Jessica Russell, a phlebotomist employed by the Holzer Clinic, was responsible for the Grievant's drug screen collection. Ms. Russell met the requirements of the Department of Transportation in connection with the performance of specimen collection. Ms. Russell received relevant training in both Department of Transportation and non-Department of Transportation drug screen collection procedures and is certified to perform specimen collections.

14. Grievant was requested to supply a urine specimen. Grievant entered the restroom, came out and stated she could not.

15. Drug screening specimen collection protocols were observed in the attempt to secure a urine sample from Grievant.

16. Holzer lab technician Jessica Russell began a "Shy Bladder Log" at 11:50 a.m. The shy bladder interval began at 11:50 a.m. and was set to end at 2:50 p.m. in the event the donor remained unable to provide a sample prior to that time.[1] *Shy Bladder Log,* Grievant's Exhibit 10/ Respondent's Exhibit 3.

17. Ms. Russell explained to Grievant that she would be requested to wait in an examination room and would be provided 40 ml of water to drink. It was further explained to Grievant that she would be required to wait for a period of up to 3 hours in an attempt to obtain a urine sample.

18. Grievant requested that she be permitted to drink ice tea that she purchased from a Subway restaurant.[2]

19. Within a very short time frame, Grievant informed technician Russell that she intended to leave.

20. Grievant was informed that if she left Holzer prior to providing the requested urine sample it would constitute a "refusal to test."

21. Ms. Russell explained to Grievant that she was required to stay and complete the drug screen, and that if she elected to leave, it would be regarded as a refusal to

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[1] Lab Technician Russell testified that the time noted on the Shy Bladder Log is the time Grievant initially went into the bathroom, per urine testing protocol. April 19, 2010 Pre-Disciplinary Hearing.

[2] It is ambiguous whether Grievant left the clinic once or twice. Ms. Hatfield testified that Grievant left Holzer on two occasions. The first time Grievant left Holzer was to get an iced tea from Subway. The second time to go to the Board office in an attempt to meet with Superintendent William L. Capehart. *Pre-Disciplinary Hearing Transcript* at pgs. 20-21, and pg. 105. Other evidence of record indicates Grievant purchased the iced tea prior to the initiation of the drug screen procedure. Nevertheless, ultimately Grievant left Holzer Clinic prior to providing a urine sample as requested.

submit to the drug screen. Ms. Russell reiterated several times that Grievant's election to leave would be regarded as a refusal to submit to the drug screen.

22. Ms. Hatfield witnessed Ms. Russell's instructions to Grievant. Also, Ms. Hatfield reiterated to Grievant that leaving would be regarded as a refusal to submit to the procedure. Nevertheless, Grievant left Holzer Clinic.

23. Mason County Board of Education Policy 829, *Mason County Schools Drug Free Workplace Policy*, contains the following provisions:

> 4.5 REASONABLE SUSPICION TESTING
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> Reasonable suspicion for requiring an employee to submit to drug and/or alcohol testing shall be deemed to exist when an employee, while on the job or on school premises, manifests physical or behavioral symptoms or reactions commonly attributed to the use of controlled substances, look-alike drugs, intoxicants, illegal drugs or alcohol. Such employee's conduct must be witnessed by at least one supervisor trained in compliance with this policy. Should a supervisor observe such symptoms or reaction, the employee must submit to testing. An employee who observes suspicious behavior by a supervisor should report this to the superintendent.
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> 4.6 REFUSAL TO TEST
>
> Refusal to submit to the types of drug and alcohol tests employed by the Mason County Board of Education will be grounds to terminate employment of existing employees. A refusal to test would include behavior that is intended to obstruct the proper administration of a test. Unreasonable delay in providing urine or breath specimen could be considered a refusal.

Respondent's Exhibit 4.

24. For a time upon leaving Holzer, Grievant sat in the police car waiting on a neighbor to arrive and provide her transportation. Grievant's neighbor arrived at Holzer and gave her a ride.

25. Grievant was not under arrest.

26. After leaving the testing facility, on the afternoon of February 18, 2010, Grievant went to the Mason County Board of Education office. Grievant wanted to meet with Superintendent Capehart.

27. At the Board office, Grievant was unable to meet with Superintendent Capehart.

28. Grievant met with Assistant Superintendent Kingery. Further, Ms. Hatfield informed Mr. Kingery that when Grievant left Holzer Clinic, it was regarded as a refusal to submit to the drug screen.

29. Assistant Superintendent Kingery telephoned technician Russell and asked if Grievant could provide a urine specimen. Ms. Russell reiterated to Mr. Kingery that the Grievant's election to leave Holzer Clinic was regarded as a refusal to submit to the drug screen.

30. Assistant Superintendent Kingery indicated that he still would like the results of a drug screen, and Grievant was transported to Holzer Clinic by Ms. Hatfield.

31. Upon returning to Holzer, Grievant provided a urine sample at 2:32 p.m. *Shy Bladder Log,* Grievant's Exhibit 10/ Respondent's Exhibit 3.

32. The urine sample provided by Grievant was within the range of acceptable temperatures required to constitute a valid urine sample within the protocol utilized by Holzer. *Urine Screen Paperwork*, Grievant's Exhibit 8.

33. The testing of the urine sample ultimately provided by the Grievant yielded a negative result.

34. At Holzer Clinic, Grievant was presented with and signed a statement attached to the *Shy Bladder Log,* that provided the following:

> When patient went to collect drug screen no specimen was obtained. Patient was going to be placed in a room and begin drinking water. Patient refused to wait. Explained to her it was a refusal to give urine. Patient still left.
>
> School called wanting patient to collect urine any way. Its 2:25pm patient has been away from collection site since 11:50. Collecting urine cause school is still wanting it.
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> Finally collected urine at 2:32pm
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> collector - Jessica Russell
> patient - Dottie Wiley

Grievant's Exhibit 10/ Respondent's Exhibit 3.

35. Grievant was suspended with pay effective February 18, 2010.

36. Grievant was provided with an opportunity to offer her version of events that occurred on February 18, 2010, during a detailed interview conducted by Linda Rollins, Administrative Assistant to the Superintendent, on February 22, 2010. *Interview Notes* (15 pgs), Grievant's Exhibit 5.

37. Grievant cooperated with the investigator for Respondent, Linda Rollins, and gave a number of in person and telephonic interviews to Rollins concerning the facts and perceived circumstances surrounding the events of February 18, 2010. Ms. Rollins took notes of the interviews. *Id*, Grievant's Exhibit 5.

38. In Grievant's statement to Ms. Rollins, Grievant vacillated between a version of events to the effect that she did not feel she was acting abnormally or behaving inappropriately, coupled with a desire to demonstrate this to Superintendent Capehart and others and a version of events that included panic attacks, confusion and loss of memory.

39. Grievant requested to return to work and was informed by Ms. Rollins that the Superintendent would first have to know the results of the urine screen before any decision was made with respect to her continued employment with the Board.

40. When the results ultimately came back from the lab, Grievant's urine screen drug test results were negative. *Specimen Result Certificate,* Grievant's Exhibit 2.

41. At the solicitation of Grievant, her family physician Carrie Lockhart Dillard, M.D., provided a letter dated March 5, 2010 addressing Grievant's behavior on February 18, 2010.

42. Dr. Dillard's March 5, 2010 letter provides the opinions that: 1) the events of February 18, 2010 may have been caused by an adverse reaction to an SSRI medication the Grievant had been taking; 2) that if the Grievant had consumed excessive fluid on the day of her urine screen it would not have resulted a false negative result; and 3) based upon her examination of February 25, 2010 that Grievant was "able to perform her job requirements."[3] Grievant's Exhibit 4/Respondent's Exhibit 5.

43. Dr. Dillard's letter was supplied to Respondent by Grievant. The letter recited the symptoms reported to her by the Grievant that consisted of "racing thoughts, elevated energy levels, and rapid speech." Dr. Dillard reported that the symptoms described to her by the Grievant were consistent with a manic episode.

44. In a letter dated March 15, 2010, Superintendent Capehart informed Grievant that she was being suspended without pay effective March 17, 2010 and that termination

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[3]Superintendent Capehart testified that to him it was significant that Dr. Dillard's March 5, 2010 letter listed symptoms indicative of an adverse side effect from Citalopram that were different from the one's exhibited by Grievant on February 18, 2010. Pre-Disciplinary Hearing at pgs. 60-61.

of Grievant's employment was being recommended for violation of the Mason County Schools Drug Free Workplace Policy, Section 4.6 refusal to test. Grievant's Exhibit 7/Respondent's Exhibit 1.

45. Superintendent Capehart, in arriving at his decision to recommend the termination of Grievant's employment, considered Dr. Dillard's March 5, 2010 letter. Superintendent Capehart found it significant that Dr. Dillard had not opined or suggested that the Grievant was mentally incompetent or that her decision-making was impaired on February 18, 2010. Further, Superintendent Capehart also found it significant that the symptoms reported to Dr. Dillard by Grievant were not consistent with the symptoms observed by school personnel.

46. The Mason County Board of Education held a pre-determination hearing on April 19, 2010, regarding Superintendent Capehart's recommendation that Grievant's employment be terminated. The transcript of this hearing is part of the evidence of record.

47. Following the April 19, 2010 hearing, a majority of the members of the Mason County Board of Education voted to terminate Grievant's employment.

48. In a letter dated April 20, 2010, Superintendent Capehart informed Grievant of the decision of the Mason County Board of Education to terminate Grievant's employment. Respondent's Exhibit 6.

49. In an attempt to "clarify" Dr. Dillard's March 5, 2010 letter, Grievant telephoned Dr. Dillard and asked her to compose another letter.

50. Dr. Dillard authored a letter dated October 22, 2010 attempting to provide insight into her letter of March 5, 2010. Grievant's Exhibit 12. Dr. Dilliard provided that:

> a) The intent of her prior letter was to confirm that as of the day she actually examined Grievant, February 25, 2010, the Grievant had no evidence of mental impairment and was able to return to work.
>
> b) With respect to side effects of Citalopram, her prior letter was not meant to be an exhaustive list of possible side effects of the drug.
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> c) Further, with respect to Grievant's behavior on February 18, 2010, the symptoms set forth in her prior letter were those reported by Grievant based upon the Grievant's perception and that the "reported symptoms may or may not have correlated to her observed behavior on that day."

See October 22, 2010 Letter of Carrie Dillard, M.D., Grievant's Exhibit 12.

51. Dr. Dillard provided that because she did not examine the Grievant on February 18, 2010, she could not further characterize Grievant's behavior or mood on that day. Grievant's Exhibit 12.

52. At the Level III hearing Grievant presented testimony of Rodney G. Richmond, RPh, MS, CGP, FASCP, to testify concerning the side effects of Citalopram, drug metabolism, and the ability of someone such as Grievant to turn a positive urine drug screen into a negative result.

53. Richmond offered the opinion that based upon the time that Grievant's impairment was noted by Wamsley, Roush and Hatfield, any drug that the Board requested Holzer to test Grievant for would have still been present in her urine when she provided the urine sample at 2:32 p.m.

54. Richmond offered the opinion that the behavior exhibited by Grievant at school as described by Hatfield, Roush and Wamsley on February 18, 2010 is consistent with the known adverse side effects of an adverse reaction to Citalopram.

55. Richmond offered the opinion that no magic substance exists that Grievant could have consumed that would have afforded her the ability to change an otherwise

"positive" result to the urine drug screen she was administered to the "negative" result of the actual urine screen performed in this case.

56. Grievant was prescribed the medication Citalopram, which is also known by the brand name Celexa, to treat problems with depression by Robert Turner M.D. on or about November 16, 2009. Grievant's Exhibit 9. Citalopram has a number of known adverse side effects. Drug Manufacturer Information Sheet, Grievant's Exhibit 3.

57. Grievant now acknowledges that on February 18, 2010 she was impaired, but contends that, on that day, she did not perceive that she was impaired.

58. Grievant had been employed as a special ed teacher, primarily responsible for students with special needs, mostly mentally impaired and some behavior challenged students (eg., MICD, AU or autistic).

59. Employees of Mason County Schools are required to sign statements indicating the employees are aware of the Mason County Schools Drug Free Workplace Policy and shall abide by the policy as a "condition of employment with the Mason County Board of Education." *Mason County Schools Drug Free Workplace Policy (Policy 829)* § 5; Grievant's Exhibit 6/ Respondent's Exhibit 4.

60. Grievant signed a training verification form that contains the following statement: "This is to certify that I have received training on the Drug Free Workplace Policy." Date: 8-25-08. Respondent's Exhibit 5/Grievant's Exhibit 13.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. This grievance does involve disciplinary action, Respondent has the burden of proving its case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

On February 18, 2010, Grievant did not perceive that she was impaired. However, Grievant now acknowledges that she was impaired, but maintains that her impairment resulted from an adverse reaction to the prescription medication Citalopram/Celexa which she had been prescribed and was taking at the direction of a licensed physician.[4] See Finding of Fact 59-60, *supra*. Grievant argues the disciplinary actions taken by Respondent were inappropriate, abuse of discretion, and unlawful. Grievant by Counsel,

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[4] Grievant provided that she was prescribed the medication Citalopram, which is also known by the brand name Celexa, to treat problems with depression by Robert Turner M.D., Grievant's Exhibit 9. It is vigorously highlighted that Citalopram has a number of known adverse side effects. Drug Manufacturer Information Sheet, Grievant's Exhibit 3. Grievant testifies that on February 18, 2010 she believes that she took her physician prescribed Citalopram at approximately 7:15 a.m.

oppugns:

> 1) Whether Grievant's actions as influenced by lawfully prescribed medication constitute refusal;[5]
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> 2) Whether the disciplinary actions of Respondent were properly administered;[6] and
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> 3) Whether termination of employment of such a long-standing employee, in the circumstances of this case, is appropriate.

Grievant was specifically informed that;

> . . . on February 18, 2010. Based upon observations of your behavior, it was determined that you may have been under the influence of alcohol or drugs. As a result, you were directed to submit to reasonable suspicion drug/alcohol testing. While you did submit to alcohol testing, you (sic) conduct amounted to a refusal to submit to a drug test. Specifically, you left the premises of the testing facility prior to providing a urine sample and being advised that your departure would be regarded as a refusal to submit to the testing by Jessica Russell.

Grievant's Exhibit 7/Respondent's Exhibit 1. Ultimately, Respondent terminated Grievant's employment. Grievant seeks to have the disciplinary action taken modified. Among other relief,[7] Grievant requests reinstatement to her former teaching position and compensation for lost wages.

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[5] A refusal to test would include behavior that is intended to obstruct the proper administration of a test. *Mason County Schools Drug Free Workplace Policy*, § 4.5. Grievant's Exhibit 6/ Respondent's Exhibit 4.

[6] Counsel highlights that pursuant to *Mason County Schools Drug Free Workplace Policy* an "Employee's conduct must be witnessed by at least one supervisor trained in compliance. *Id* at § 4.6.

[7] "It is well established that the Grievance Board does not have the authority to award attorney fees. *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996). WEST VIRGINIA CODE § 6C-2-6 is entitled, 'Allocation of expenses and attorney's fees.' It specifically states: '(a) Any expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense.'" *Cosner v. Dep't of Transp.*, Docket No. 2008-0633-DOT (Dec. 23, 2008).

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

The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. VA. CODE § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991). *See Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975)." *Graham v. Putnam County Bd. of Educ.*, Docket No. 99-40-206 (Sep. 30, 1999). Accordingly, the standard of review for this county board of education's decision is whether it was arbitrary and capricious or an abuse of discretion.

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

Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

A. REQUEST FOR DRUG SCREENING

The Mason County Schools Drug Free Workplace Policy (Policy 829) states that reasonable suspicion drug and alcohol testing can be initiated under certain, limited, circumstances. The policy provides that the employee's behavior which gives rise to the reasonable suspicion "must be witnessed by at least one supervisor trained in compliance" with the drug policy. *Mason County Schools Drug Free Workplace Policy (Policy 829)* § 4.5; Grievant's Exhibit 6/ Respondent's Exhibit 4. Grievant highlights that Ms. Hatfield has the same level of training in the drug policy of the Mason County Schools as all other regular school employees. She has received no special training as a supervisor in compliance. *Citing* April 19, 2010, Pre-determination Hearing testimony. The point is noted but it doesn't persuade this trier of fact that Respondent's request was improper, *see* finding of fact (FOF) 8 and 59.

Ms. Hatfield was specifically dispatched from the Board office to assess, to some degree, the situation. She is administrative personnel and does receive in-service drug training every year. Grievant's behavior included heavy eyes; slurred speech; staggering when walking down the hall; glassy eyes; repeated stumbling events; and dozing off. This behavior constitutes reasonably suspicious conduct. Ms. Hatfield specifically witnessed examples of Grievant's unusual behavior. Taking into consideration Respondent's duty to

safeguard and protect students and employees alike, the determination to request Grievant to submit to drug and alcohol testing is reasonable, justified and prudent in the fact pattern of this case.

B. MERITS

Respondent's Counsel asserts that the decision to approve the Superintendent's recommendation to terminate Grievant's employment is a decision properly within Respondent's purview and discretion. Further, it is highlighted that all of the recited information [with the exception of Grievant's Exhibit 12] was available to the Mason County Board of Education in the form of a full and complete evidentiary hearing that was conducted on April 19, 2010. The Board concluded that Grievant knowingly refused to submit to a drug screen in violation of Mason County Board of Education Policy 829. Respondent argues the nature of the evidence offered on behalf of the Grievant during the Level III hearing does not compel a determination that the Respondent's decision to terminate the employment of the Grievant was arbitrary or capricious or an abuse of discretion.

At the level three hearing, Grievant testified that she could remember certain events that occurred on February 18, 2010, but had no memory of others. Grievant asserted that her testimony regarding the occurrences of February 18, 2010, were based in part upon her own memories and in part on what others had told her. This creates a recurring systemic problem, throughout her various versions of events. Grievant could not distinguish between the two sources. Under cross-examination, Grievant asserted that much of her testimony was based upon her own memory. Grievant failed to demonstrate much effort to separate the facts based upon her own memory and the memory of others.

The weight given to Grievant's recollection of controverted facts must be limited.[8] However, it is uncontested that Grievant was impaired on February 18, 2010. FOF 39, 40, and 59. The quagmire is whether Respondent has lawfully sanctioned Grievant.[9]

Review becomes twofold: whether Grievant's actions constitute a disciplinary event in violation of applicable *Policy*,[10] and whether the disciplinary action taken is reasonable or excessive.

Respondent maintains Grievant's conduct, particularly in the face of repeated instructions that her election to leave the premises before completion of the drug screen would be regarded as a refusal to submit to drug testing, violated Mason County Board of Education Policy 829, *Mason County Schools Drug Free Workplace Policy*. Grievant's Counsel concedes Grievant's acknowledged condition, and very artfully questions how can Respondent now not recognize Grievant to be unable to make rational decisions. If Grievant's condition was so obviously impaired, it only follows that she was rendered

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[8] The Grievance Board, traditionally, 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); 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).

[9] Lawful and justly are not synonymous terms.

[10] Refusal to submit to the types of drug and alcohol tests employed by the Mason County Board of Education will be grounds to terminate employment of existing employees. A refusal to test would include behavior that is intended to obstruct the proper administration of a test. Unreasonable delay in providing urine or breath specimen could be considered a refusal. *Mason County Schools Drug Free Workplace Policy*, § 4.6.

unable to appropriately reason, and was not able to comprehend what she was being told. The irony is not lost on this ALJ.

Mason County Schools Drug Free Workplace Policy, § 4.6. states;

> Refusal to submit to the types of drug and alcohol tests employed by the Mason County Board of Education will be grounds to terminate employment of existing employees. A refusal to test would include behavior that is intended to obstruct the proper administration of a test. Unreasonable delay in providing urine or breath specimen could be considered a refusal.

Grievant's actions were not intended to obstruct the proper administration of the test. Her thought process was arguably affected by Citalopram/Celexa, or an adverse reaction to a combination of prescribed medications. Testimony of Rodney G. Richmond; *also see* FOFs 54-59. At the time, among other thoughts, Grievant believed that if she spoke to Superintendent Capehart this matter would be resolved. On the afternoon of February 18, 2010, Grievant knowingly left Holzer and went to the Mason County Board of Education office.[11] Grievant's intent, no doubt, was to bring this matter to resolution. Regrettably, Grievant's attempts to maneuver through this ordeal, her way, have more times than not, generated the converse of her intent, referencing Grievant's solicitation of Dr. Dillard's March 5, 2010 letter. See FOFs 43-46 and 51-53. Grievant's departure did cause delay in the testing process. As reiterated to Grievant several times, on February 18, 2010, Grievant's election to leave Holzer Clinic prior to completion of the drug screen testing process is regarded as a refusal to submit to the drug screen. This offense is

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[11]Ms. Hatfield testified that there were times that Grievant did not appear to be able to make rational decisions, seemed unable to reason, and was not able to comprehend what she was being told. Lab technician Russell testified that Grievant appeared to her to know what she was doing. Grievant's recollection of being informed that leaving Holzer would be considered a refusal to test for which her employment could be terminated, is selective recollection. Grievant was informed repeatedly, before and after her departure.

sanctionable. Yet, Respondent has discretion in the circumstance of this case. While not all drugs are screened for, the results of Grievant's drug screening did not reveal the use of alcohol or illegal narcotics.

Grievant's actions were not prudent; however, it is debatable whether Grievant intended to commit an action which constitutes one or more of the causes for dismissal listed in W. VA. CODE § 18A-2-8, as amended. Insubordination includes "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). In order to establish insubordination, the employer must not only demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, but that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Jones v. Mingo Co. Bd. of Educ.*, Docket No. 95-29-151 (Aug. 24, 1995); *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995). The actions of Grievant justify reasonable discipline but it is specifically found that Grievant's intent was not insubordination, intemperance, or willful neglect of duty.

Grievant vacillated between a version of events to the effect that she did not feel she was acting abnormally or behaving inappropriately, coupled with a desire to demonstrate this to Superintendent Capehart and others and a version of events that included panic attacks, confusion and loss of memory. These differing versions of events

give the undersigned pause.[12] Ultimately, the issue is whether the actions of Grievant truly exemplify a cause for discharge.

Grievant's actions caused some delay but she went back to the hospital and gave a urine sample. The urine sample provided by Grievant was provided within a "reasonable amount of time" as anticipated by the Mason County Schools Drug Free Workplace Policy in that the specimen was provided within the time period required by Holzer as part of the "Shy Bladder" protocol. Grievant cooperated with Respondent's investigator and gave a number of in person and telephonic interviews. Grievant was informed that the Superintendent would first have to know the results of the urine screen before any decision was made with respect to her continued employment with the Board. When the results ultimately came back from the lab, Grievant's urine screen drug test results were negative. *Specimen Result Certificate*, Grievant's Exhibit 2. Without contradiction, or recognized exception, it was presented that, in accordance with the time period that Grievant's impairment was noted by Wamsley, Roush and Hatfield, any drug that the Board requested Holzer to test Grievant for would have still been present in her urine when she provided the urine sample at 2:32 p.m. Level Three Hearing Testimony Rodney G. Richmond, RPh, MS, CGP, FASCP.

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[12] If Grievant is unable to discern her condition during an event, this is more troublesome than fully discussed. The mission of the Respondent must encompass its obligation to serve and protect the children entrusted to their care. Grievant failed to cooperate during one of the primary checks and balance stages. Grievant, at the time, mistakenly believed she was functioning normally. The testing process implemented for reasonable suspicion conduct is in place to protect everyone's concerns. All parties need to do their individual part.

Despite the negative results of the urine screening test Respondent chose to proceed with disciplinary actions. This decision is within the discretionary authority of Respondent. Grievant questions the rationale for the decision. Discrimination is alleged. Discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008). Grievant taught at the elementary school level. Grievant was employed as a special education classroom teacher, who was responsible for the care and instruction of medically fragile students. Grievant's students are found to be uniquely susceptible to harm from an instructor in an impaired compromised state. FOF 60. The decision to discipline Grievant for failing to fully comply with requested drug screening has not been shown to be discriminatory. Highly subjective, but not discrimination as asserted under the grievance statutes.

The maximum suspension for a first time employee in violation of the Mason County Schools Drug Free Workplace Policy is ninety (90) days unless the employee is

determined to be guilty of a violation of the policy and the actions of the employee are determined to have “caused significant property damage, serious injury or death”. *See Mason County Schools Drug Free Workplace Policy (Policy 829)* § 4.4.1-4.4.9; Grievant’s Exhibit 6/ Respondent’s Exhibit 4.

C. MITIGATION

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 can not substitute his 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).

In assessing the above-cited factors, the undersigned Administrative Law Judge finds that mitigating circumstances exist in the facts of this grievance. Grievant's employment record is considered to be one of a caring and dedicated teaching professional. The only negative thing that Respondent offered with respect to Grievant's job performance was a convoluted event a number of years ago when Grievant was not in her room during a period arguably identified as a break period.[13] Further, it was not established that Grievant was disciplined for this incident. Grievant has been a teacher for more than twenty years, and has expressed a desire to teach for twenty more years. Ms.

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[13]It was represented that Respondent is not relying upon this incident to bolster its case to terminate Grievant's employment.

Hatfield testified that Grievant has a great love and cares for her students. Grievant was impaired. Reasonable men will differ regarding the severity of Grievant's conduct (failure to fully comply with the testing procedure); however, Respondent did not establish due rationale for the severity of the penalty levied. Termination of a twenty year employee for such a technical infraction, without exacerbating facts, is arbitrary and capricious.

_____The testing process implemented for reasonable suspicion conduct is in place to protect everyone's concerns. All parties need to do their individual part. Nevertheless, the penalty for failing to comply must be balanced. The undersigned finds that Respondent's disciplinary action is excessive, given the facts of the situation. Respondent's decision to terminate the employment of Grievant, for the rationale stated, without some history of disciplinary issues, is an abuse of discretion.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by establishing the charges against an employee by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008).

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

3. County boards of education have substantial discretion in matters relating hiring, assignment, transfer and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interest of the schools, and in a manner which is not arbitrary and capricious. *State ex rel. Melchiori v. Bd. of Educ.*, 188 W. Va. 575, 425 S.E.2d 251 (1992); *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991). *See Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975).

4. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

5. Insubordination "includes, and perhaps requires, a willful disobedience of, or refusal to obey, a reasonable and valid rule, regulation." *Santer v. Kanawha County Board of Education*, Docket No. 03-20-092 (June 30, 2003); *Butts v. Higher Education Interim Governing Board*, 212 W. Va. 209, 569 S.E.2d 456 (2002) (per curium). *See Riddle v. Board of Directors, Southern W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Board of Education*, Docket No. 26-89-004 (May 1, 1989). Grievant was not insubordinate.

6. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

7. Respondent's disciplinary action against Grievant is not discrimination as defined under applicable grievance statutes. Discrimination has not been established in the facts of this case.

8. "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).

9. "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).

10. Mitigating circumstances exist in the facts of this grievance.

11. Respondent has substantial discretion to determine a penalty in these types of situations, nevertheless the authority must be exercised reasonably. In the circumstances of this grievance Respondent's decision to terminate the employment of Grievant is an abuse of discretion.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant to her prior position with back pay and benefits from the date of her dismissal to the date she is reinstated plus interest at the statutory rate; and to restore all benefits, including seniority.

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: April 8, 2011

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Landon R. Brown
Administrative Law Judge