WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MICAH GERALD SHORT,
Grievant,

v. **Docket No. 2011-1420-WyoED**

WYOMING COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Micah Gerald Short ("Grievant"), filed this expedited Level Three grievance on April 1, 2011, against his employer, Respondent Wyoming County Board of Education ("BOE"), following its March 15, 2011, ratification of the county Superintendent's recommendation to suspend Grievant without pay and approval of the Superintendent's recommendation to terminate Grievant from his employment. Grievant's Statement of Grievance states as follows: "[w]rongful termination. See attached WV Code 18A-2-8 [sic]. Suspension and dismissal of school personnel by board; appeal." As relief, Mr. Short seeks "[d]ismissal of charges, reinstatement with pay, reversal of suspension without pay, reversal of termination decision."

Prior to the Level Three hearing, Respondent filed a Motion to Dismiss asserting this grievance was untimely filed pursuant to WEST VIRGINIA CODE § 18A-2-8 and Grievant filed a Response to the same. This motion was heard at the commencement of the Level Three hearing. The undersigned held the motion in abeyance and noted that the same would be addressed in this Decision.

The Level Three grievance hearing was held on July 6, 2011, at the Raleigh County Commission on Aging in Beckley, West Virginia, before the undersigned administrative law judge. Grievant appeared in person and by counsel, Charles B. Mullens, II, Esquire.

Respondent appeared by counsel, Gregory W. Bailey, Esquire, of Bowles Rice McDavid Graff & Love, PLLC. Frank Blackwell, Superintendent, appeared in person as the representative of the Wyoming County Board of Education.

At the conclusion of the hearing, the parties agreed to submit proposed Findings of Fact and Conclusions of Law by August 26, 2011. Both parties submitted proposed Findings of Fact and Conclusions of Law, the last of which was received on September 16, 2011. Therefore, this matter became mature for consideration on that date.

Synopsis

Grievant was terminated from his teaching position at Westside High School for stealing money from a cash drawer located in the school's office. Grievant's actions were witnessed by one student, and were also captured on video surveillance. Grievant has admitted to stealing money; however, the parties dispute the amount stolen. Grievant argues his actions resulted from extreme emotional stress/strain he was experiencing due to his child being ill and the child needing a medical procedure for which a large up-front payment was required before the procedure would be performed. Grievant asks that his actions be excused for these reasons and that his suspension and subsequent termination be reversed. Respondent has met its burden in proving the charges against Grievant. For the reasons set forth in the discussion below, this grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant, Micah Short, was employed by the Wyoming County Board of

Education as a teacher at Westside High School in Wyoming County, West Virginia. Grievant has been employed by Respondent, at various locations, for approximately twelve years.

2. In February 2011, school officials discovered that the cash drawer in the Westside High School office was short of funds on a number of occasions.

3. On February 7, 2011, Principal Deborah Marsh began investigating the shortages, and began taking actions to reduce the potential for future shortages. One such action was that she spoke to the students who worked in the office about their responsibilities and duties. In doing so, Marsh did not mention missing money to the students, or accuse any of them of taking money from the drawer.

4. After she met with the students, one student came forward and told Marsh that she had seen Grievant take money from the cash drawer on two separate days just prior to Marsh's meeting with the students.[1]

5. In an attempt to confirm who, if anyone, was taking money from the drawer, Marsh arranged for hidden video surveillance to be installed above the cash drawer. The only day video surveillance was successfully conducted was February 17, 2011.

6. On February 17, 2011, video surveillance captured Grievant taking money from the cash drawer two times.

7. Principal Marsh confronted Grievant about stealing money from the cash drawer. Initially, Grievant denied taking the money. However, Grievant admitted to stealing money from the drawer only after he was informed that there was a witness to the

[1] The identity of the student was never revealed during the Level Three hearing.

theft, and that there was a video recording of him taking the money from the drawer.

8. After capturing Grievant taking money from the drawer on video, Marsh pursued criminal charges against Grievant. On February 28, 2011, the Magistrate Court of Wyoming County, West Virginia issued a warrant for Grievant's arrest.[2]

9. By letter dated February 18, 2011, Superintendent Frank L. Blackwell, informed Grievant that he was suspended without pay from his teaching position for stealing money from the school office, and that Blackwell would be recommending to the BOE that Grievant be terminated for this misconduct.[3]

10. On March 15, 2011, Respondent conducted a hearing on Superintendent Blackwell's recommendation to terminate Grievant. Following this hearing, Respondent accepted Blackwell's recommendation, ratified Grievant's suspension without pay, and approved Grievant's termination.

11. By letter dated March 16, 2011, Grievant was informed of the Board's decision to ratify his suspension without pay and to approve his termination.[4]

Discussion

Prior to the hearing in this matter, Respondent filed a Motion to Dismiss alleging that Grievant untimely filed this Grievance at Level Three. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the

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[2] See Joint Exhibit 1.

[3] See Respondent's Exhibit 1.

[4] See Grievant's Exhibit 1.

employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *See, Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17,1996). *See, Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

WEST VIRGINIA CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-3(a)(1). WEST VIRGINIA CODE § 6C-2-4(a)(1) identifies the time lines for filing a grievance and states as follows:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or
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> within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. . . .

W. VA. CODE § 6C-2-4(a)(1). However, WEST VIRGINIA CODE §18A-2-8 entitled "Suspension and dismissal of school personnel by board; appeal" states, in pertinent part, that "[t]he affected employee shall be given an opportunity, within five days of receiving the written notice, to request, in writing, a level three hearing and appeals pursuant to the provisions of article two, chapter six-c of this code . . . ."

Respondent asserts this grievance is untimely because it did not follow the time requirements of WEST VIRGINIA CODE §18A-2-8. Grievant asserts that his filing was timely

and that he relied upon the grievance procedure informational sheet, which was provided to him by the Respondent, in filing his grievance. It is noted that this informational sheet is provided by the West Virginia Public Employees Grievance Board, and it refers to various statutory provisions under WEST VIRGINIA CODE § 6C-2-4 *et seq.*

In *Ewing v. The Board of Education of the County of Summers*, 202 W. Va. 228, 503 S.E.2d 541 (1998), the appellee challenged a hiring decision of the Summers County Board of Education made pursuant to WEST VIRGINIA CODE §18A-4-7a. The appellee filed a grievance, but then sought a continuance so as to file a petition for a writ of mandamus as is permissible under WEST VIRGINIA CODE §18A-4-7a. The West Virginia Supreme Court held:

> When an individual is adversely affected by an educational employment decision rendered pursuant to W. VA. CODE §18A-4-7a (1993) (Repl. Vol. 1997), he/she may obtain relief from the adverse decision in one of two ways. First, he/she may request relief by mandamus as permitted by W. VA. CODE §18A-4-7a. In the alternative, he/she may seek redress through the educational employees' grievance procedure described in W. VA. CODE §§18-29-1 to 18-29-11 (1992) (Repl. Vol. 1994).[5] Once an employee chooses one of these courses of relief, though, he/she is constrained to follow that course to its finality.

When ascertaining legislative intent,

> [a] statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed

[5] In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. VA. CODE §§ 18-29-1 to 18-29-11 and W . VA. CODE §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W . VA. CODE §§ 6C-2-1 to 6C-2-7 and W. VA. CODE §§ 6C-3-1 to 6C-3-6 (2007).

> that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith. Syllabus Point 5, *State v. Snyder*, 64 W. Va. 659, 63 S.E. 385 (1908). Syl. Pt. 1, *State ex rel. Simpkins v. Harvey*, [172] W. Va. [312], 305 S.E.2d 268 (1983). Syl. Pt. 3, *Shell v. Bechtold*, 175 W. Va. 792, 338 S.E.2d 393 (1985) [202 W. Va. 242] [(per curiam)].

Id. at 554.

The legislative intent of the two statutes at issue was to provide an expedited process for school employees who were terminated or suspended by creating the time frame set forth in WEST VIRGINIA CODE §18A-2-8. This was in no way meant to preclude filing under WEST VIRGINIA CODE § 6C-2-1 et seq. Further, "[t]he grievance process is intended to be a fair, expeditious, and simple procedure, and not a 'procedural quagmire.'" *Harmon v. Fayette County Bd. of Educ.*, Docket No. 98-10-111 (July 9, 1998), *citing Spahr v. Preston County Bd. of Educ.,* 182 W. Va. 726, 393 S.E.2d 739 (1990), and *Duruttya v. Bd. of Educ.,* 181 W. Va. 203, 382 S.E.2d 40 (1989). *See, Watts v. Lincoln County Bd. of Educ.,* Docket No. 98-22-375 (Jan. 22, 1999). In the absence of bad faith, substantial compliance is deemed acceptable. *Duruttya, supra; Morrison v. Div. of Labor*, Docket No. 99-LABOR-146D (June 18, 1999). *See also, Deel v. Bureau of Employment Programs*, Docket No. 00-BEP-256D (Nov. 17, 2000). *Toothman v. Marion County Bd. of Educ.*, Docket No. 05-24-036D (Apr. 15, 2005).

Respondent approved the termination of Grievant on March 15, 2011. Grievant was given notice of his termination on March 19, 2011. Grievant filed his Statement of Grievance with the Board on April 1, 2011. Grievant filed his grievance within fifteen days

as defined by West Virginia Code § 6C-2-2(c). *See*, W. VA. CODE § 6C-2-2(c). Accordingly, the Respondent's Motion to Dismiss is DENIED.

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." *Petry v. Kanawha County Bd. of Educ.* Docket No. 96-20-380 (Mar. 18, 1997). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

WEST VIRGINIA CODE § 18A-2-7 provides that "[t]he superintendent, subject only to approval of the board, shall have the 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-2-7. Further, 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. . . .

W. VA. CODE § 18A-2-8(a). Dismissal of an employee under WEST VIRGINIA CODE § 18A-2-8 "must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously." Syl. Pt. 3, in part, *Beverlin v. Bd. 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.,* 223 W. Va. 431, 675 S.E.2d 907 (2009). An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995). *See, Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

By letter dated February 18, 2011, Grievant was suspended without pay from his employment with Respondent for stealing money from the office of Westside High School. By this same letter, Grievant was informed that Superintendent Frank L. Blackwell intended to recommend his termination to the Respondent.[6] Soon thereafter, Grievant was charged with misdemeanor embezzlement and a warrant was issued for his arrest.[7] On March 15, 2011, Superintendent Blackwell recommended to Respondent that Grievant be terminated from his position at Westside High School. At its March 15, 2011 meeting, after a hearing on Superintendent Blackwell's recommendation to terminate Grievant, Respondent

[6] See Letter dated February 18, 2011, included in Respondent's Exhibit 1.

[7] See Joint Exhibit 1.

accepted Blackwell's recommendation, thereby ratifying Grievant's suspension and approving his termination. It is noted Grievant attended the March 15, 2011 meeting.

It is undisputed that Grievant stole money from the Westside High School office; only the amount of money stolen is disputed. Respondent asserts that Grievant stole $365.00 from February 14, 2011 through February 17, 2011. Grievant admits to stealing $265.00.[8] The undersigned finds the amount of money stolen to be irrelevant. Therefore, such will not be addressed any further herein. Grievant argues that he took the money as a result of being under emotional strain/stress arising from his son's medical condition. Further, Grievant argues that he took the money because his son needed an operation and the medical facility required a cash payment of $2,700.00 - $3,900.00 before the operation would be performed.[9]

By letter dated March 16, 2011, from Superintendent Frank Blackwell, Grievant was informed of his termination. This letter did not state the grounds for Grievant's termination. At the Level Three hearing in this matter, Mr. Blackwell testified that Grievant "broke the public trust as a school employee" and was terminated "mainly for just gross misconduct." Blackwell further testified that Grievant's actions were gross misconduct on the part of an

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[8] At this Level Three proceeding, Grievant testified to stealing $265.00. However, at the hearing before the Wyoming County Board of Education on March 15, 2011, Grievant testified that the amount was $275.00. Principal Deborah Marsh testified at the Level 3 hearing that she believed Grievant had stolen much more than $365.00, but offered no evidence to support the same. The criminal complaint alleges Grievant stole $365.00.

[9] Grievant had insurance through his employment with the Wyoming County Board of Education. The reasons for the Hospital's demand for payment in advance of the procedure have not been identified, and the letter from the hospital was not offered into evidence.

employee, violation *Employee Code of Conduct*, and a violation of the oath Grievant took as a teacher, "call it immorality or insubordination or neglect of duty, or whatever you want to call it."[10] No specific grounds, as listed in WEST VIRGINIA CODE § 18A-2-8, for Grievant's suspension and/or termination are identified in either the letter dated February 18, 2011, or that dated March 16, 2011.

"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.' [Citation omitted.]" *Kennard v. Tucker County Bd. of Educ.*, Docket No. 01-47-591/628 (Mar. 12, 2002); *Golden v. Board of Education of County of Harrison*, 169 W. Va. 63, 67, 285 S.E.2d 665, 668 (1981); *Snodgrass v. Wetzel County Bd. of Educ.,* Docket No. 97-52-384 (Dec. 15, 1997); *Harry v. Marion County Bd. of Educ.*, 203 W. Va. 64, 506 S.E.2d 319 (1998). "'Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires at least an inference of conscious intent.' *See Hayes v. Kanawha County Bd. of Educ.*, Docket No. 94-20-1143 (June 28, 1995), *citing Youngman v. Doerhoff*, 890 S.W.2d 330 (Mo. 1994)." *Kennard supra; Wahl v. Mineral County Bd. of Educ.*, Docket No. 98-28-175 (Sep. 14, 1998).

This Grievance Board has previously recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ.*,

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[10] See testimony of Superintendent Frank Blackwell.

Docket No. BOR2-88-029-4 (May 25, 1988) (*citing Weber v. Buncombe County Bd. of Educ.*, 266 S.E.2d 42 (N.C. 1980)). In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ.,* Docket No. 94-01-394 (Jan. 31, 1995). Insubordination can be shown through an employee's "blatant disregard for the authority" of his second-level supervisor. *Sexton, supra* at 10; *Graham v. Putnam County Bd. of Educ.*, Docket No. 99-40-206 (Sep. 30, 1999).

"Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. *Adkins v. Cabell County Bd. of Educ.*, Docket No. 89-06-656 (May 23, 1990). This is a fairly heavy burden, given that Respondent must not only provide that the acts it alleges did occur, but also that the reason for Grievant's neglect of duty was more than simple negligence." *Tolliver v. Monroe County Bd. of Educ.*, Docket No. 01-31-493 (Dec. 26, 2001). Willful neglect of duty "is conduct constituting 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. 95-29-151 (Aug. 24, 1995); *Hoover v. Lewis County Bd. of Educ.*, Docket No. 93-21-427 (Feb. 24, 1994). Willful neglect of duty encompasses something more serious than incompetence. *Bd. of Educ. v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120, 122 (1990); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996)." *Geho v. Marshall County Bd. of Educ.*, Docket No. 2008-1395-MarED

(Oct. 30, 2008).

However, "[i]t is not the label a county board of education attaches to the conduct of the employee . . . 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).

In late January 2011, Principal Deborah Marsh began to notice that the cash drawer in the Westside High School office regularly began coming up short. At that time, there was no formal accounting procedure for the money placed in the cash drawer when it was put out in the mornings and returned at the end of the day. No substantial records were generated daily accounting for cash out and cash in. The only accounting system in place at the school office until February 2011, was that the two secretaries in the office counted the cash drawer before it was put out in the mornings, counted the cash drawer at the end of the day, and then noted the same in the financial secretary's log. In addition to this, Principal Deborah Marsh testified that she personally performed "spot checks" on the drawer just before and just after the school's morning breaks.

According to Marsh, until at least February 7, 2011, anyone who came into the office, including staff, teachers, and students, had access to the cash drawer.[11] On or about February 7, 2011, Marsh began restricting access to the cash drawer in an effort to

[11] After the incidents discussed in this grievance, Marsh instituted an accounting system that requires counts of the drawer each morning and evening, and requires the person counting the drawer to sign accounting sheets at those times. Further, Marsh installed a drawer on which an audible bell rings when the drawer is opened. See testimony of Principal Deborah Marsh.

determine the cause of the shortages. At that time, she restricted access to only the two secretaries in the office. She also held a meeting with the office staff, including students who were working in the office, to remind them of their responsibilities and duties in the office. Marsh did not mention the issue of money missing from the drawer during this meeting. After this meeting a student, who had been working in the office, reported to Marsh that she had seen Grievant take money from the cash drawer on two separate days.

Thereafter, Marsh began trying to catch Grievant in the act of taking money from the drawer. Marsh arranged for a hidden video camera to be installed in the office over the cash drawer to try to identify who was taking money from the drawer.[12] Video surveillance was initiated on February 17, 2011. On that date, video surveillance recorded Grievant taking money from the cash drawer.[13] When Grievant was initially confronted about the theft, he denied taking the money. Only after Grievant was informed that there was a witness and that there was a video recording of the theft did Grievant admit to taking the money. The next day, Superintendent Blackwell sent Grievant the suspension letter.

Stealing is generally recognized as conduct not in conformity with accepted principles of right and wrong behavior, or as being contrary to the moral code of the community. While Grievant admits to stealing money from the cash drawer, he argues that the stress and emotional strain he was experiencing as a result of his son's medical condition, his lack of sleep, and his needing the money up front for his son's surgery

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[12] Marsh testified that she initiated the video surveillance because she was not sure whether to believe the student and because accusing a teacher of theft was very serious.

[13] Video surveillance was successfully used on only one date, February 17, 2011. However, Grievant has since admitted taking money from the cash drawer on that day, as well as on other days in February 2011.

caused him to have “tunnel vison” and to take the money. Grievant is claiming that the emotional stress he was experiencing caused him to do something that he would not normally do. However, Grievant also attempted to conceal the theft when initially asked about it. However, Grievant has presented no evidence to suggest he lacked the capacity to know right from wrong at the time he took the money from the cash drawer. Grievant has also presented no evidence that he was under any disability or impairment at the time he took the money. Everyone experiences stress or strain at some point; however, not everyone steals.

Grievant’s act of stealing money from his employer falls within the definition of immoral behavior, as previously defined by this Board. Grievant admits stealing from the Respondent. Grievant also admits having the intent to steal. Grievant testified that he needed money; he did not know where he was going to get the money he needed; and, he then came upon the opportunity to obtain the money he needed by taking it from the cash drawer in the school office while at work. Before his suspension and subsequent termination, Grievant did not tell others about his son being ill or about needing to pay a large sum before his son could get the needed treatment. Grievant did not ask anyone for help in getting the money he needed. Grievant did not seek treatment for himself for emotional or mental stress or strain prior to his suspension and termination.

The fact that Grievant initially denied the theft, has since offered to pay back the $265.00 he admits stealing, and has testified that when he first began taking the money, he intended to pay it back to the school somehow demonstrates that Grievant understood that his actions were wrong, or contrary to the principles of right and wrong. Because it has been established that Grievant’s actions in stealing money from the school constitute

immorality, there is no need to address the charges of willful neglect of duty and insubordination.

While the undersigned is sympathetic to the circumstances Grievant faced in February 2011, Grievant did not have to steal the money he needed. Grievant could have done any number of things to get the money he needed instead of stealing. Grievant could have obtained secondary employment, sold possessions, or asked family, friends, neighbors, co-workers, or local charitable organizations for help. Grievant did not do so. He chose to steal the money. Such behavior cannot and should not be condoned by the Respondent.

Grievant asserts that if his actions had been caused by drug or alcohol abuse or addiction or emotional problems, he would not have been terminated. Instead, Grievant argues that Respondent would have offered him "some form of assistance to presumably [sic] remediate his personal constitution" and allowed to keep his job. By this argument, Grievant is alleging Respondent violated "the principles of equal protection." Grievant also seeks mitigation. Superintendent Blackwell testified that Respondent offers certain programs to assist employees suffering from emotional problems, as well as drug and alcohol additions. Blackwell agreed that if Grievant's actions resulted from drug or alcohol addictions, Respondent would have offered programs to assist Grievant.

Grievant's argument regarding equal protection is without merit. Grievant is attempting to compare the "emotional strain" and/or "emotional stress" he claims to have experienced to alcohol/drug addiction and to psychological problems. Grievant's comparison is flawed. As opposed to drug and alcohol addiction, as well as any number of psychological problems, "emotional strain" and "emotional stress" are not recognized as

mental impairments by the DSM-IV-TR[14]. Moreover, Grievant has offered no evidence, other than his own testimony, to support his allegations that he was impaired, or otherwise suffering from emotional or psychological problems, and that such caused him to steal the money from the cash drawer. Grievant has offered no evidence to demonstrate he was lacking capacity, or otherwise impaired, when he stole the money. Grievant never sought treatment for any such condition. Grievant never alleged that he was experiencing emotional stress, strain, or problems before the decision was made to suspend or terminate him.

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 Resources/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 cannot substitute her judgment for that of the employer. *Jordan v. Mason County Bd. of Educ.*, Docket No. 99-26-080 (July 6, 1999); *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).

"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.*

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[14] The Diagnostic and Statistical Manual, Fourth Edition, Text Revision published by the American Psychiatric Association.

of Educ., Docket No. 93-45-105 (Mar. 31, 1994). *See, Austin v. Kanawha County Bd. of Educ.*, Docket No. 97-20-089 (May 22, 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 Corrections*, Docket No. 95-CORR-252 (July 23, 1996).

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

Grievant knowingly and intentionally stole money from the school office cash drawer during the course of his employment as a teacher, and a student witnessed the same. Grievant initially denied the theft until he was informed of there being a witness and video footage of him taking money from the cash drawer. Since then, he has fully admitted stealing money from the cash drawer. No evidence has been presented to demonstrate that Respondent has treated Grievant differently from others who have engaged in the same type of misconduct. WEST VIRGINIA CODE § 18A-2-8 allows Respondent to suspend

and/or terminate the Grievant for stealing. The discipline imposed on Grievant is not disproportionate to his offenses. There has been no evidence presented to suggest that Grievant was impaired or lacked capacity at the time of the February 17, 2011 incident, or on any other day he admittedly stole money. The only thing the Grievant disputes is the amount of money stolen.

The simple fact is that Grievant admits that he stole money from his employer. To make it worse, a student witnessed Grievant stealing the money from the cash drawer. The undersigned can only imagine what that student thought when she saw Grievant taking money from the drawer, and how difficult and/or frightening it was for her to tell Principal Marsh about what she saw. It is a sad day when a student is placed in such a terrible position. Fortunately, the student came forward and reported what she saw to Ms. Marsh. The student could have instead followed Grievant's example.

The undersigned finds that Grievant's conduct is not in conformity with accepted principles of right and wrong behavior. Further, the undersigned concludes that Respondent's decision to suspend and subsequently terminate Grievant for his actions was not arbitrary or capricious, or an abuse of its discretion. The discipline imposed on Grievant is not disproportionate to his offenses. Mitigation of the discipline imposed is not warranted. Respondent has met its burden of proving the charges against Grievant by a preponderance of the evidence.

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. *See*, W. VA. CODE § 18A-2-8.

3. "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).

4. An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995). *See, Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

5. "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.' [Citation omitted.]" *Kennard v. Tucker County Bd. of Educ.*, Docket No. 01-47-591/628 (Mar. 12, 2002); *Golden v. Board of Education of County of Harrison*, 169 W. Va. 63, 67, 285 S.E.2d 665, 668 (1981); *Snodgrass v. Wetzel County Bd. of Educ.,* Docket No. 97-52-384 (Dec. 15, 1997); *Harry v. Marion County Bd. of Educ.*, 203 W. Va. 64, 506 S.E.2d 319 (1998). "'Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires at least an inference of conscious intent.' *See, Hayes v. Kanawha County Bd. of Educ.*, Docket No. 94-20-1143 (June 28, 1995), *citing Youngman v. Doerhoff*, 890 S.W.2d 330 (Mo. 1994)." *Kennard supra; Wahl v. Mineral County Bd. of Educ.*, Docket No. 98-28-175 (Sep. 14, 1998).

6. "It is not the label a county board of education attaches to the conduct of the employee . . . 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).

7. 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 Resources/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 cannot substitute her judgment for that of the employer. *Jordan v. Mason County Bd. of Educ.*, Docket No. 99-

26-080 (July 6, 1999); *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).

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 22, 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 Resources/Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

10. Respondent has proved the charge of immorality by a preponderance of the evidence.

11. Grievant has failed to meet his burden of demonstrating that the discipline he received was clearly disproportionate to his offense, or that Respondent abused its discretion in suspending and subsequently terminating him.

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 (eff. July 7, 2008).

DATE: October 27, 2011.

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CARRIE H. LEFEVRE
ADMINISTRATIVE LAW JUDGE