WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PAUL MANNING,
Grievant,

v. **Docket No. 2012-0664-KanED**

KANAWHA COUNTY BOARD
OF EDUCATION,
Respondent.

D E C I S I O N

Grievant, Paul Manning, filed this grievance against Kanawha County Board of Education ("KCBE"), Respondent, on December 21, 2011, protesting his dismissal. The Grievance statement provides;

> Respondent terminated Grievant for certain comments made concerning the superintendent. Grievant asserts that his actions resulted from his frustration with the system over a dispute with the payroll department and, though ill advised, did not constitute sexual harassment nor justify termination. Grievant also alleges favoritism/discrimination and disparate treatment. Grievant alleges violations of West Virginia Code §§ 6C-2-2 & 18A-2-8.

The relief requested;

> Grievant seeks reinstatement, compensation for all lost wages and benefits with interest, and expunging of all references to termination from his personnel records with the board of education.

By letter dated November 18, 2011, Grievant was advised allegations had been made that Grievant had made statements concerning the Superintendent of Kanawha County Schools, referring to him as a “homosexual faggot” and stating that his marriage was a sham and other scurrilous remarks. The correspondence further advised Grievant that a hearing would be held in order to receive evidence relating to whether or not disciplinary action should be recommended. On November 30, 2011, Harry Reustle, the

Superintendent's designee, held a pre-disciplinary hearing and collected evidence regarding Grievant's alleged conduct.[1]

The decision issued on December 9, 2011, by the designee Hearing Examiner, recommended that the Superintendent recommend Grievant's termination. Thereafter, Ronald E. Duerring, Ed.D., Superintendent of Schools concurred and adopted the findings and conclusion as his own. Grievant was advised by letter dated December 9, 2011, of suspension without pay, and that the Superintendent intended to recommend to the Kanawha County Board of Education that Grievant's employment be terminated. Superintendent Duerring recommended Grievant be terminated from his employment and the Board of Education voted to approve the Superintendent's recommendation. Grievant was notified of the Board's action by correspondence dated December 16, 2011. Grievant filed this grievance directly to level three.[2] A level three hearing was held before the undersigned Administrative Law Judge on May 9, 2012, at the Grievance Board's Charleston office. Grievant appeared in person and was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association. Respondent KCBE was represented by its General Counsel, James Withrow. This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about June 11, 2012.

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[1]A transcript of the pre-disciplinary hearing was submitted as part of the level three record and testimony from witnesses was offered to supplement the record.

[2] Grievant initiated a grievance to level three on December 21, 2011, authorized by WEST VIRGINIA CODE § 6C-2-4(a)(4).

Synopsis

Grievant was suspended and ultimately terminated by Kanawha County Board of Education, Respondent. Grievant has previously been required to undertake training on sexual harassment issues pursuant to a prior event. Grievant was or should have been aware that his comments were inappropriate. Grievant, by Counsel, contends termination should be overturned in that the established conduct doesn't warrant discharge from employment. Respondent maintains Grievant has demonstrated conduct which constituted violation of applicable standards of employee conduct, i.e., Kanawha County Schools Administrative Regulation; Series G50A (Racial, Sexual, Religious/Ethnic Harassment and Violence Policy).

An employee of a county board of education may be suspended or dismissed for immorality, incompetency, cruelty, insubordination, willful neglect of duty or unsatisfactory performance of duties. Respondent, by a preponderance of the evidence, met its burden of proof and established that Grievant's conduct violated applicable sexual harassment policy. Grievant has not established Respondent's disciplinary action was unlawful, arbitrary and/or capricious. Respondent demonstrated cause for termination of Grievant's employment. This grievance is DENIED.

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

Findings of Fact

1. Grievant, Paul Manning, was employed by the Kanawha County Board of Education as a Bus Operator, but was assigned to work in the warehouse at the Crede

complex. Grievant has been a regular employee since March 2007. At the time of his dismissal Grievant was not permitted to drive a bus, or be in a position in contact with students.

2. In 2009, Kanawha County Schools received a complaint that Grievant had given a student a key ring that was inscribed "Love to the Fullest." After a hearing, it was determined that Grievant was not aware that the individual was a student.[3] The Superintendent of Schools advised Grievant that he should use "good judgment and extreme caution" in dealing with students in the future. Grievant was also required to undertake additional training on sexual harassment issues.

3. Grievant complied with the Superintendent's directive and received additional training on Kanawha County Schools' policy related to sexual harassment.

4. Thereafter, Kanawha County Schools received additional complaints from parents related to Grievant's interactions with their children and themselves. By letter dated August 18, 2010, signed by the Superintendent of Schools, Grievant was informed that it had not been proven Grievant had violated Kanawha County Schools Sexual Harassment Policy.[4] However, it was noted that Grievant had "apparent difficulty in perceiving customary cultural boundaries." Such letter also advised that Grievant would

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[3] Grievant was accused of making inappropriate comments to a student in an effort to establish a romantic relationship. Grievant was not aware that the individual was a student and it was not established that he intended to create a romantic relationship with the individual. After investigation, Grievant was not disciplined on the basis of these allegations.

[4] In March 2010, Grievant was accused of being over friendly with the family of a student who lived in his neighborhood. Most of the "activity" was off duty and not established to be ill motivated. There was an investigation and hearing but Grievant was not disciplined on the basis of these allegations. He was transferred to different duties and given training related to sexual harassment.

not be permitted to drive a bus. This letter also gave many directives to Grievant including to, "be courteous and professional in all your dealings with students, parents, employees and all persons with whom you come in contact in the performance of your duties."

5. The August 18, 2010, letter further advised that if Grievant could not correct his behavior and maintain proper boundaries, "it will be necessary to recommend that your employment be terminated." Respondent Exhibit (R. Ex.) 1, multiple documents.

6. During the 2010-2011 school year, Grievant was off work and was paid for more days than he had accumulated leave. Thereafter, when Grievant returned to work, he was required to reimburse Respondent for the days he was paid without accumulated leave.[5]

7. Grievant disputed the amount of the reimbursement and visited Respondent's Central Office several times in order to resolve the issue.[6]

8. During one visit to the Central Office to have his employee ID badge replaced, Grievant engaged Tammy Faulkner, a substitute clerk, in a conversation about his payroll dispute, his prior sexual harassment complaints and offered to fix or build a computer for her daughter.

9. On October 6, 2011, Grievant was at Respondent's Central Office to speak with the Payroll Department about the long-standing salary dispute. During this visit ,as he had done periodically, Grievant stopped and communicated with Ms. Faulkner, inquiring about the computer.

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[5] Respondent accomplishes the reimbursement by an agreed payroll deduction.

[6] Respondent disputed Grievant's contentions that he over-reimbursed Respondent for his unearned leave, citing WEST VIRGINIA CODE § 18A-4-10.

10. On this third or fourth visit, Grievant made offensive remarks about the Superintendent of Schools to Ms. Faulkner. These comments included: "Did your gaydar go off?" "That man upstairs is gay," "he's a homosexual faggot," "his wife has to get dick somewhere else," "he's married, but that doesn't mean anything," and other similar crude remarks.

11. Some of Grievant's remarks were overheard by Horace Coleman, a security guard who was employed by G-Force Security, under contract with Respondent.

12. Both Ms. Faulkner and Mr. Coleman advised Grievant that he should not continue with such comments. Grievant did not retract his vile and offensive remarks about the Superintendent of Schools.[7]

13. Ms. Faulkner became uncomfortable in Grievant's presence. Ms. Faulkner stated that it was her break time and she was going to leave.

14. Grievant was angry about his payroll dispute. Grievant did not and has not filed a grievance over his alleged payroll dispute.

15. Grievant has admitted that his comments violate the provisions of the Respondent's sexual harassment policy.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Nicholson v. Logan County Bd. of*

[7] Some discrepancies exist between the testimony of Ms. Faulkner and the testimony of Mr. Coleman about what Grievant said and what they said to each other. Minor discrepancies aside, facts are that Grievant made vile comments concerning Dr. Duerring's sexual orientation and marital union.

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). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

The parties actually do not dispute the general description of the specific events which generated this disciplinary action. While Grievant denies making certain specific statements about the Superintendent, he does acknowledge that he referred to the Superintendent as a "homosexual faggot" and that he made comments about the Superintendent's wife and her sexual behavior. There exists some limited ambiguity regarding Grievant's exact wording, however, it is not necessary to determine whether Grievant's version of his comments were accurate or the more graphic renditions espoused by Ms. Faulkner and Mr. Coleman were accurate. Both amount to inappropriate comments. Grievant has acknowledged that his comments violated the provisions of Respondent's sexual harassment policy.

An employee of a county board of education may be suspended or dismissed 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. 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).

The term "immorality" in W. VA. CODE § 18A-2-8 connotes conduct "not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially not in conformity with the acceptable standards of acceptable sexual behavior." *Golden v. Bd. of Education*, 169 W. Va. 63, 285 S.E.2d 665 (1981). Conduct which constitutes prohibited sexual harassment is included within the proscription against immorality in W. VA. CODE § 18A-2-8. *Harry v. Marion County Bd. of Education.*, 506 S.E.2d 319 (W. Va. 1998).

Insubordination involves the "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 Education*, 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 County Bd. of Education*, Docket No. 95-29-151 (Aug. 24, 1995); *Conner v. Barbour County Bd. of Education*, Docket No. 94-01-394 (Jan. 31, 1995).

At the time the actions of Grievant transpired, Kanawha County Board of Education had an Administrative Regulation pertaining to harassment (Series G50A) in effect which provides:

> **50.02 Racial, Sexual, Religious and Ethnic Harassment Prohibited.** Harassment or violence on the basis of race, sex, religion or ethnicity occurring in the work place or the educational environment is strictly prohibited and illegal. All employees are responsible for assuring that the workplace and educational environment is free from racial, sexual, religious/ethnic harassment or violence. Because of the District's strong disapproval of offensive or inappropriate sexual behavior at work and at school, all employees must avoid any action or conduct which could be viewed as sexual harassment.
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> **50.04 Examples of Sexual Harassing Behavior.** Sexually suggestive or obscene letters or notes; sexual rumors or name calling; unwelcome touching, grabbing or punching; inappropriate comments about one's body; dirty jokes or stories; dehumanizing graffiti; display of suggestive pictures, cartoons or objects; threats or demands for sexual favors; assault or attempted assault which is gender based, including any attempt by an employee to develop a romantic relationship with a student; and peer and same sex harassment.

R. Ex. 1, multiple documents.

It was highlighted that Grievant has not previously been counseled specifically about uttering negative comments regarding other employees, because he had not previously been guilty of such conduct. This may be factually accurate, however, it is problematic if Grievant truly needs to be explicitly informed that remarks akin to the ones uttered by Grievant are not appropriate in the workplace.

Respondent avers that the facts of this grievance are substantially similar to those that gave rise to the decision of the West Virginia Supreme Court of Appeals in the case of *Alderman v. Pocahontas County Board of Education*, 223 W.Va. 431, 675 S.E.2d 907 (2009). Alderman was an employee of the Pocahontas County Board of Education. At a hearing on the proposed transfer of Alderman, he began berating certain board members

and the Board's Treasurer. He called them thieves and liars, referred to a board member as an adulterer and stated that the Superintendent of Schools was the dumbest person he had ever met. The West Virginia Supreme Court of Appeals found that this conduct was not protected by the First Amendment, and it constituted sufficient grounds to support Mr. Alderman's dismissal.[8]

Respondent avers the same analysis has a place in the circumstance of the instant case. The undersigned is not convinced the two cases are as similarity situated as Respondent would suggest, but the cited case is influential. Respondent also notes that the Supreme Court concluded that Policy 5300[9] was not applicable to Mr. Alderman's case nor was the punishment too harsh.

Although not made at a public board meeting, Grievant was willful in his verbal assault on the Superintendent of Schools. Even after being advised that he should not be saying those things, he continued his attack to the point that the listener(s) became uncomfortable and distressed.[10] In addition, it does not appear, even at the level three

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[8] The Court noted that Mr. Alderman was acting willfully when he verbally attacked his employers. He made unsubstantiated comments with the sole purpose of demeaning and embarrassing his employer. Significantly, Mr. Alderman was never apologetic for his behavior. He, in fact, maintained his right to be disrespectful. *Alderman, supra*.

[9] Policies, Rules and Regulations of the West Virginia Board of Education provide, in part, that employees are entitled to the opportunity of improving his/her job performance, prior to termination. Generally speaking, the principles of Policy 5300 have been codified. That policy is now referred to as Policy 5310, 126 C.S.R. 142. The legislature codified specific improvement plan language from Policy 5300 in W. VA. CODE § 18A-2-12a(b)(6).

[10] At the time of the relevant event(s), Ms. Faulkner worked in a very small office with only one way in and out. Ms. Faulkner became uncomfortable in Grievant's presence. Grievant was seated in such a manner that he blocked Ms. Faulkner's egress from the room, however, it is not found that Grievant intentionally detained or purported a threat to Ms. Faulkner.

hearing, that Grievant is sorry for his statements. He and one or more of his character witnesses continues to justify his behavior by providing that he was upset.

It is recognized that Grievant was in the mist of a vexing salary dispute. Grievant may have been harboring anger about the outstanding payroll dispute. Nevertheless, the facts do not establish sufficient justification for spewing the vile and hateful statements Grievant uttered. An employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority...". *McKinney v. Wyoming County Bd. of Educ.*, Docket No. 92-55-112 (Aug.3, 1992) (citing *In re Burton Mfg. Co.*, 82 L.A. 1228 (Feb.2, 1984)). While stating that an individual is gay may not, in 2012, be considered disrespectful, calling a superior a "homosexual faggot" and expressing that such superior's spouse must look elsewhere for sexual gratification cannot be viewed as anything other than an attempt to show disrespect and to undermine the individual's status, prestige and authority. "Certainly, an employer is entitled to expect its employees to conform to certain standards of civil behavior." *Redfearn v. Dep't of Labor*, 58 MSPR 307 (1993). All employees are 'expected to treat each other with a modicum of courtesy in their daily contacts.' *See Fonville v. DHHR*, 30 MSPR 351 (1986)(*citing Glover v. DHEW,* 1 MSPR 660 (1980)). Abusive language and abusive, inappropriate, and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. *Hubble v. Dep't of Justice,* 6 MSPR 659, 6 MSPR 553 (1981). *See Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 99-PEDTA-406 (Oct. 31, 2000).

As an employee of Respondent's, Grievant received instructions and staff development training on employee conduct. See R. Ex. 1. Grievant has also been required to undertake additional training on sexual harassment issues. Grievant knew or should have known the statements he was uttering were inappropriate in the workplace. Grievant's conduct violated applicable Kanawha County Board of Education sexual harassment policy. R. Ex. 1, multiple documents.

Grievant alleged in his grievance statement a claim of discrimination/favoritism and disparate treatment. Very little, if any, substantial evidence was presented in support of this allegation.

> For an employee to prevail on a claim of disparate treatment [in discipline], he must establish that there is no rational basis for distinguishing specific penalties for the same or substantially similar misconduct. The misconduct brought into question must be similar or more serious than that with which the grievant is charged. *Clark v. Dept. of Navy,* 6 MSPB 24 (1981). The grievant must also show that the other employee's disciplinary record is similar to his own. *Clancy v. Dept. of Navy*, 6 MSPB 173 (1981). Finally, the grievant must establish that his position is similar to that of the other employee to whom he is compared with respect to the trust and responsibility expected of his position. *Rohn v. Dept. of Army*, 30 MSPR 157 (1986).

Olson v. Kanawha County Bd. of Educ., Docket No. 02-20-380 (May 30, 2003) citing *McVicker v. Kanawha County Bd. of Educ.*, Docket No. 95-20-339 (Feb. 9, 1996).

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). Favoritism is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities

of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). In order to establish a discrimination or favoritism 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);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 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 did not identify a parallel situation or comparative employee that was treated more favorably than him for a similar offence. Nor has it been established that Respondent was unduly persecuted because his statements were directed at the Superintendent versus a lower-ranking school official. The undersigned is not persuaded that Respondent has violated any applicable provisions of WEST VIRGINIA CODE § 6C-2-2 with regard to the disciplinary actions taken against the instant Grievant.

The question remains, were Grievant's comments lawful justification for termination of services. This trier of fact is torn. Reasonable minds may differ as to whether Grievant's comments constitute firing offense, in and of themselves. Normally, such comments would not have reached this level of review; this was not a traditional circumstance. Respondent views this latest conduct of Grievant as yet another example of lack of judgment and boundaries expected of a Kanawha County School employee. Respondent strongly highlights that Grievant has been warned repeatedly to observe good conduct and appropriate interaction with other people. See R. Ex. 1, multiple documents. Grievant has

also been provided extra individualized training on Respondent's sexual harassment policy. Respondent avers that Grievant's continuing behavior should be deemed non-correctable,[11] citing *Alderman v. Pocahontas County Board of Education*, 223 W.Va. 431, 675 S.E.2d 907 (2009). The undersigned is persuaded.

Grievant apparently learned very little from his experiences in 2009 and 2010. Grievant was warned about the consequences of future behavior. As previously discussed, conduct which involves prohibited sexual harassment also constitutes immorality as defined under W. VA. CODE § 18A-2-8. *See Harry, supra*. Such conduct is prohibited by provisions in Kanawha County Board of Education's sexual harassment policy, as well as the previous warning letters provided to Grievant. Grievant's conduct was deliberate and intentional, not inadvertent, accidental, or resulting from a simple misunderstanding. Respondent has demonstrated that the employee's conduct was insubordinate because it involved a deliberate violation of an explicit rule established by Kanawha County Schools to regulate staff conduct.

In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the

[11]It is recognized that when grounds for a school employee's dismissal include charges relating to conduct which is deemed correctable, the county board must establish that it complied with provisions of West Virginia Department of Education Policy 5310 requiring it to inform the employee of his deficiencies and afford him a reasonable period to improve. *Mason County Bd. of Educ. v. State Supt. of Schools*, 165 W. Va. 732, 739, 274 S.E.2d 435, 439 (1980); *See also Maxey v. McDowell County Board of Education*, 575 S.E.2d 278, 2002 W.Va. LEXIS 226 (2002); *McMann v. Jefferson County Bd. of Educ.* Docket No. 2009-1340-JefED (Oct. 21, 2009). In the instant case, Respondent contends that under the facts and circumstances presented, an additional improvement plan is not required nor likely to orchestrate lasting change.

situation in question and any mitigating circumstances, all of which must be determined on a case-by-case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995)(citations omitted). The 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).

Grievant has not demonstrated that the penalty imposed was clearly excessive. "The argument a disciplinary action was 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)." *Meadows v. Logan County Bd. of Educ.,* Docket No. 00-23-202 (Jan. 31, 2001). Given the considerable deference afforded to employers in disciplinary situations, the undersigned does not find sufficient justification to rule that the discipline imposed was excessive. Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute his judgment 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); *Meadows, supra.*

It is not established that Respondent's disciplinary action was motivated by unlawful factors. Nor under the circumstances presented, has it been demonstrated that the disciplinary measure levied was so clearly disproportionate to the employee's offense that it constitutes an abuse of discretion. Respondent established lawful cause for disciplinary action. Respondent has demonstrated that Grievant's conduct was insubordinate because it involved a deliberate violation of an explicit rule established to regulate staff conduct and violated the terms of Grievant's prior warning letters. Respondent proved that the reason for the termination of Grievant's employment by a preponderance of the evidence.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *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. The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in WEST VIRGINIA CODE § 18A-2-8, 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).

3. WEST VIRGINIA CODE § 18A-2-8 provides that "[A] board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty,

insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge." Dismissal of an employee under W. VA. CODE § 18A-2-8 "must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously." Syl. Pt. 3, in part, *Beverlin v. Board of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975); Syl. Pt. 4, in part, *Maxey v. McDowell County Board of Education*, 212 W. Va. 668, 575 S.E.2d 278 (2002); Syl. Pt. 7, in part, *Alderman v. Pocahontas County Bd. of Educ.*, 223 W.Va. 431, 675 S.E.2d 907(2009).

4. Respondent established by a preponderance of the evidence that, in the circumstances of this case, Grievant's misconduct constituted a disciplinary offense. Respondent established in the circumstance of this case that Grievant's conduct was insubordinate.

5. In order to establish a discrimination or favoritism 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., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

6. Grievant failed to produce any evidence that demonstrated that he was treated differently than any comparable employee, who had engaged in similar behavior. Grievant did not prove he was the victim of discrimination or favoritism.

7. The 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). "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).

8. Respondent had discretionary options in the circumstances of this case. Considerable deference is afforded to employers in disciplinary situations. An Administrative Law Judge will not substitute his judgment 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).

9. Grievant did not demonstrate that the penalty imposed was so clearly disproportionate to the offense that it reflects an abuse of discretion.

10. Respondent demonstrated lawful cause for dismissal of Grievant from employment.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: November 14, 2012

Landon R. Brown
Administrative Law Judge