THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JACK HART,
Grievant,

v. **Docket No. 2012-0677-MarED**

MARSHALL COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Jack Hart, filed this grievance against his employer, Marshall County Board of Education, on December 29, 2011, alleging that he "was terminated for failing to reimburse monies to Cameron High School. Said termination was for submitting a false expense voucher. Mr. Hart did not violate any policy of the Marshall County School board. Rather he was following directive of school principal violated no rule or regulation." Grievant seeks back pay and reinstatement to employment.

This matter proceeded directly to level three following the termination of Grievant's employment by Respondent on December 19, 2011. A level three hearing was conducted before the undersigned Administrative Law Judge on June 6, 2012, at the Grievance Board's Westover office location. Grievant appeared in person and by his counsel, David C. White, Neiswonger & White, Attorneys at Law. Respondent appeared by its counsel, Richard S. Boothby, Bowles Rice McDavid Graff & Love LLP. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on July 23, 2012.

Synopsis

Grievant was dismissed from his employment when it was discovered that he had retained $444.00 in reimbursements to him which should have been refunded to Respondent. Grievant's conduct was not in conformity with acceptable standards of behavior, and constituted immorality. Grievant does not dispute these facts, but argues that mitigating circumstances exist in the facts of this grievance, and that termination of his employment was excessive punishment. The record of this grievance does not support mitigation of the imposed punishment.

The following findings of fact are based upon the lower level record and level three record.

Findings of Fact

1. Grievant was hired by Respondent on July 1, 2009, as the Activities Coordinator for Cameron High School in Cameron, West Virginia. Grievant's job responsibilities included handling between $35,000 and $40,000 each school year, much of it in the form of gate receipts. Cameron High School is a small school of less than 300 students.

2. Kathy Hughes is the financial secretary at Cameron High School. Ms. Hughes oversees the record-keeping and check drafting for the school's athletic fund and the West Virginia Secondary School Activities Commission meetings.

3. Ms. Hughes and Grievant have known each other for a long time, and the Grievant would typically visit with Ms. Hughes on a daily basis.

4. Vocational-agriculture teachers at Cameron High School, who work with

students in the vocational-agriculture and Future Farmers of America programs, travel to various agricultural and Future Farmers of America ("FFA") events. Some of these events involve out-of-town overnight stays at hotels.

5. FFA students conduct fund raisers to help pay for the cost of traveling to FFA events. The funds are deposited into the high school's vocational-agriculture/FFA account.

6. A different and separate vocational account is overseen by the Career Tech office at the Board's central office in Moundsville. This account contains funds that may be used to reimburse employees traveling on official business in connection with vocational-agriculture and FFA events.

7. Teachers traveling to vocational-agriculture or FFA events in their official capacity are entitled to reimbursement for their legitimate expenses, such as registration fees, mileage, and meals.

8. In the past, prior to an out-of-town event that required an overnight hotel stay, a check for the hotel would be written from the Cameron High School FFA account. This fund is overseen by the high school's principal, Jack Cain, and the school's financial secretary, Ms. Hughes. A check for hotel expenses was typically taken to the event by a teacher who would tender the check to the hotel upon arriving.

9. Some years ago, an unusual reimbursement procedure was started at Cameron High School with regard to the FFA account. Under this procedure, Cameron High School teachers, whose hotel expenses were prepaid by the Cameron High School FFA account, would nevertheless file a reimbursement request form with the Respondent's central office seeking reimbursement for the same hotel expenses.

10. These reimbursement request forms would also typically cover the teacher's

legitimate out-of-pocket expenses such as meals and mileage. When the teachers were reimbursed by the central office vocational account, they were to keep the money owed to them, and return the money for prepaid expenses to the Cameron High School FFA account by turning it into the financial secretary. The financial secretary, in turn, issued a receipt to the teacher for the returned funds, and then made the proper notation in the computer deposit summary records for the FFA fund.

11. Cameron High School financial secretary, Ms. Hughes, did not see these reimbursement request forms that the teachers sent to the Respondent's central office in Moundsville, West Virginia.

12. In the fall of 2010, Diana Curfman, the secretary to the director of the Career Tech office, noticed something unusual about the travel reimbursement request forms turned in by Cameron High School teachers John Smith and Russell Dotson. Cameron High School was prepaying for hotel expense that had not been incurred. She brought this reimbursement procedure concern to the attention of the director, Scott Varner.

13. Mr. Varner explained that it was odd practice at Cameron High School that once the full reimbursement check was written, the teacher was to return the prepaid hotel expense portion to the FFA account at Cameron High School.

14. In November of 2011, Ms. Curfman contacted Ms. Hughes and asked for verification of repayment of the prepaid hotel expenses to the FFA account by John Smith and Russell Dotson. After checking the records, Ms. Hughes informed Ms. Curfman that neither of the teachers had paid back any of the accounts.

15. After being questioned about his failure to repay the prepaid hotel expenses to the FFA account, John Smith gave a check to Ms. Hughes for all of the prepaid hotel

expenses he had received.

16. Robyn Fitzsimmons, Respondent's personnel director, met with John Smith and Russell Dotson to explain the situation and potential consequences. Both teachers resigned after the meeting.

17. On November 9, 2011, one day after John Smith paid for what money he had improperly retained, the Grievant went into Ms. Hughes's work area where he found her to be visibly upset. Ms. Hughes told Grievant that if he owed any money to Respondent that he needed to take care of it.

18. Thereafter, Grievant presented a check to Ms. Hughes. Grievant indicated that he could not find his records reflecting what he owed, but he paid with a check in the amount equal to the prepaid funds that Grievant had retained over a 18-month period of time.

19. That same day, Ms. Hughes contacted Principal Cain and made him aware that the Grievant had turned in a check for $444.00 for the athletic fund on November 10, 2011. Ms. Hughes explained that the Grievant had not explained to her what the money was for, and that he told her that he could not find his receipts.

20. On November 18, 2011, Principal Cain spoke with Grievant in his office, and asked him if he had not reimbursed the High School's FFA fund for the prepaid amounts he received through the unusual reimbursement procedure. Grievant stated he had not paid these amounts back until November 10, 2011, just eight days earlier.

21. That same day, Grievant phoned Ms. Fitzsimmons and explained that he had been going over some records and realized that he had not given back some funds that he had received as part of the prepaid expenses.

22. Grievant acknowledged on November 18, 2011, in an email to Ms. Fitzsimmons, that he retained $444.00 in reimbursements to him which should have been refunded to Respondent.

DISCUSSION

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying determines the weight of the testimony." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

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

CODE § 18A-2-8 goes on to state, in part, that:

> (a) Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge.

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

Respondent argues that Grievant engaged in immorality when he failed to reimburse Cameron High School's FFA fund for prepaid expenses on four separate occasions over a 18-month period in the amount of $444.00. Grievant does not dispute these facts, but argues that mitigating circumstances exist in the facts of this grievance, and that termination of his employment was excessive punishment.

The term "immorality," as used in West Virginia Code Section 18A-2-8, is defined as conduct which is "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." *Golden v. Bd. of Educ. of Harrison Co.*, 169 W. Va. 63, 285 S.E.2d 665, 668 (1981) (citing *Webster's New Twentieth Century Dictionary*, Unabridged 910 (2d ed. 1979)); *Harry v. Marion Co. Board of Educ.*, 203 W. Va. 64, 506 S.E.2d 319, 321 (1998). Although most frequently used to define sexual

misconduct, immorality may include other forms of conduct not in conformity with accepted principles of right and wrong behavior, such as theft. *Arnold v. Monongalia County Bd. of Educ.*, Docket No. 02-30-195 (Jan 13, 2003); *Cooper v. Kanawha County Bd. of Educ.*, Docket No. 02-20-097 (July 31, 2002). Accepting pay for time worked when no such work was actually performed constitutes theft. *Arnold, supra.*

In the present case Grievant's actions were similar to those in *Arnold*, in that he failed to reimburse the FFA fund for as long as 18 months, as well as his sudden reimbursement of the precise amount owed indicated that he intended to keep the money at issue. Grievant's conduct may be equated with theft. In any event, Grievant's conduct was not in conformity with acceptable standards of behavior, and constituted immorality. Therefore, Respondent has proven that Grievant engaged in immorality.

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 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). "Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall not substitute her [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)." *Meadows*, *supra*.

The record established that Grievant had only worked for the Respondent for roughly two and a half years when Respondent terminated his employment. That means Grievant was engaging in immorality for more than half of his tenure with Respondent. Only after he had reason to suspect that there might be some very serious repercussions for keeping the money did the Grievant return the money. Grievant's request that the undersigned reduce the penalty is denied.

The following conclusions of law support the decision reached.

Conclusions of Law

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

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

3. Dismissal of an employee under W. VA. CODE § 18A-2-8 "must be based

upon the just causes listed therein and must be exercised reasonably, not arbitrarily or 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. The term "immorality," as used in West Virginia Code Section 18A-2-8, is defined as conduct which is "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." *Golden v. Bd. of Educ. of Harrison Co.*, 169 W. Va. 63, 285 S.E.2d 665, 668 (1981) (citing *Webster's New Twentieth Century Dictionary*, Unabridged 910 (2d ed. 1979)); *Harry v. Marion Co. Board of Educ.*, 203 W. Va. 64, 506 S.E.2d 319, 321 (1998). Although most frequently used to define sexual misconduct, immorality may include other forms of conduct not in conformity with accepted principles of right and wrong behavior, such as theft. *Arnold v. Monongalia County Bd. of Educ.*, Docket No. 02-30-195 (Jan 13, 2003); *Cooper v. Kanawha County Bd. of Educ.*, Docket No. 02-20-097 (July 31, 2002). Accepting pay for time worked when no such work was actually performed constitutes theft. *Arnold, supra.*

5. Respondent has proven by a preponderance of the evidence that Grievant engaged in immorality.

6. "[M]itigation 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).

7. Nothing in the record of this grievance established that dismissal was so clearly disproportionate to the offense that it indicates an abuse of discretion.

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: October 15, 2012

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Ronald L. Reece
Administrative Law Judge