

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**DONNA ESTEPP,
Grievant,**

v.

Docket No. 2023-0624-MinED

**MINGO COUNTY BOARD OF EDUCATION,
Respondent.**

DECISION

Donna Estepp, Grievant, filed this grievance against her employer, Mingo County Board of Education ("MCBE"), Respondent, protesting her dismissal. The original grievance was filed on January 16, 2023, and the grievance statement provides:

Grievant's counsel advised Mingo County BOEs counsel that grievant would waive action to level 3. As a result, grievant was terminated by Mingo County BOE on 12/20/2022 and received notice on or about 01/07/2023. The Grievant alleges that the Board's action was not based on credible evidence.

Relief sought:

Reinstatement to position as aide; backpay; and attorney's fees and costs.¹

As authorized by W. VA. CODE § 6C-2-4(a)(4), this grievance was filed directly to level three of the grievance process.² A level three hearing was held before the undersigned Administrative Law Judge on November 16, 2023, at the Grievance Board's Charleston office. Grievant appeared in person and was represented by counsel, Robert

¹ West Virginia Code § 6C-2-6 is entitled, "Allocation of expenses and attorney's fees." It specifically states: "(a) Any expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense." It is well established that the Grievance Board does not have the authority to award attorney fees. This issue will not be addressed further in this decision.

² W. VA. CODE § 6C-2-4(a)(4), provides that "[a]n employee may proceed directly to level three of the grievance process upon agreement of the parties, or when the grievant has been discharged, suspended without pay, demoted or reclassified resulting in a loss of compensation or benefits."

B. Kuenzel, Esquire. Respondent was represented by its superintendent of schools, Dr. Johnny Branch, and by its general counsel, Leslie Tyree. At the conclusion of the level three hearing, the parties were invited to submit written proposed fact/law proposals. Both parties submitted Proposed Findings of Fact and Conclusions of Law, and this matter became mature for decision on or about January 4, 2024, on receipt of the last of these proposals.

Synopsis

Mingo County Board of Education terminated Grievant's employment as an Aide, as a consequence of a pattern of misreporting her time on timesheets, which resulted in overtime pay. Respondent alleges that Grievant's conduct violated Mingo County Board of Education policy numbers 4000 (Service Personnel, Code of Conduct), 6000 (Finances, Overtime), and 8000 (Operations, Anti-Fraud). Grievant protests and contends the facts do not warrant termination and/or Respondent is overreacting.

Violation of applicable rules and regulation is established. Grievant is found to be in violation of applicable school codes, which undermines Respondent's willingness to retain Grievant in its employment. Respondent maintains that Grievant violated certain policies, specifically its Code of Conduct Policy, Overtime Policy, and Anti-Fraud Policy by falsified time sheets that reflected ½ hour overtime each day for a period of several months; resulting in repeated overtime pay. It is not established that Respondent is beyond its discretion finding the established conduct (in the facts of this case) to be a dischargeable offence. 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 Donna Estepp was employed by the Mingo County Board of Education as an Aide assigned to Williamson Pre K-8, a non-exempt position.

2. Grievant was a classroom aide who helped with special needs children. Then, as part of her role, she would also accompany the children on their bus ride to and from school. As part of her daily duties, Grievant completed a bus route each morning and each evening acting as the aide riding along with bus operator Anita Davis.

3. On or around October 6, 2023, Grievant was placed on administrative leave along with other employees in order for an unrelated investigation to be completed by the school district.

4. As a result of Grievant being placed on administrative leave, another employee was utilized to complete Grievant's morning and afternoon bus run duties.

5. The employee replacing Grievant during the October 6, 2023, administrative leave period was questioned about overtime by Secretary Brewster. The employee advised Ms. Brewster that overtime was not an issue on the bus run in question because there wasn't any need for overtime.

6. This revelation (no overtime needed) prompted and resulted in the county investigating the time sheets submitted by Grievant.

7. Charles Kingery is the Director of Investigative Services at Mountain State Educational Cooperative. In October 2022, Dr. Johnny Branch, Superintendent, Mingo

County Schools, tasked Mr. Kingery with investigating allegations of manipulation of time sheets. (R Ex 3). Director Kinger testified at the Level 3 Hearing.

8. An investigation was conducted by Director Kingery. The time frame investigated was a 5-month period.

9. Mingo County bus aides completing bus runs complete "Aides Bus Time Work Record" forms commonly referred to as "time sheets". Upon completion of their time sheets, Aides are required to secure the signature of their supervisor and then fax or deliver the time sheets to the payroll officer handling their payments for processing.

10. Director Kingery reported in his investigation document several bits of interesting facts, information, and supposition. E.g., allegedly Grievant had advised aide Skylar Williamson to complete her overtime reports in pencil and then change them after the supervisor had signed. See *R Ex 3, page 2*. Aide Williamson did not testify at the level three hearing.

11. Anita Davis appeared and testified at the instant L3 hearing. Anita Davis is a bus operator for Mingo County Schools and has worked in that position for 18 years. Bus operator Davis drives the route with Grievant each day and is the supervisor that signs Grievant's time sheets.

12. Bus operator Davis picked up Grievant at approximately 8:00-8:05 a.m. and dropped Grievant off each day by 4:12-4:15 p.m. Each day after dropping off Grievant, driver Davis completed another bus stop and was home herself each day by 4:30-4:35 p.m..

13. Bus operator Anita Davis was steadfast, clear, and convincing:

- a. She had never picked Grievant up as early as 7:45 a.m. and never dropped her off as late as 4:45 p.m.
- b. She never picked up Grievant prior to 8:00-8:05a.m. and dropped Grievant off each day by 4:12-4:15 p.m..
- c. Each day after dropping off Grievant she completed another bus stop and was home herself each day by 4:30-4:35 p.m..

14. Bus operator Davis attested to the fact that when she signed the time sheet documents for Grievant, the times were an accurate reflection of Grievant's time and were **not** recorded at the time of signature with a start time of 7:45 a.m. and/or a stop time of 4:45 p.m.

15. Time sheets numbered 1-7 and collectively marked as Respondent's Exhibit 4 are the time sheets submitted by Grievant and acknowledged by Grievant to be her submission. The timesheets numbered 2-7 indicate that Grievant's start time each day during the 5-month audit period as 7:45 a.m. and her stop time as 4:45 p.m. *R Ex 4.*³

16. Subsequent to his investigation, Director Kingery was of the opinion and concluded that Grievant had in fact violated West Virginia Code § 61-3-24, Obtaining money property and services by false pretenses, as well as Mingo County Board of Education policies; 4210, Employee Code of Conduct; 6700, Overtime; and 8900 Anti-Fraud. *R Ex 3.*

17. Superintendent Branch advised Grievant by letter dated November 18, 2022, that he would be recommending her termination to the Mingo County Board of

³ There exists a conflict between the time sheets submitted and time Grievant is known to have been picked up and dropped off during the time period in review.

Education at the next regularly scheduled meeting on December 20, 2022. *R Ex 2.*

18. Respondent maintains Grievant's conduct constitutes:

a. A violation of the Mingo County Employee Code of Conduct, Policy 4210, section F, requiring employees to demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior; as well as section G, which requires employees to comply with all Federal, West Virginia and Mingo County laws, ordinances, policies, regulations, and procedures. *R Ex 5.*

b. A violation of Mingo County Policy 6000, Overtime, page 2 section 4, which requires every non-exempt employee to complete a time sheet each week reflecting the actual starting and ending times for each day worked. *R Ex 6.*

and

c. A violation of Mingo County Policy 8900, Anti-Fraud which defines fraud as the intentional, false representation or concealment of a material fact in order to personal benefit. Policy 8900 further defines fraud as falsifying, altering without authorization or forging board documents to include claims for reimbursement, which would include submitting false claims for overtime and misappropriating funds. *R Ex 7.*

19. Superintendent Dr Johnny Branch affirmed that he believed termination was the correct penalty for an employee that stole funds from Mingo County students. Superintendent Branch further attested that he did not believe mitigation of this punishment was appropriate and considered the following things in reaching his decision:

- a. Whether or not he found Grievant to be credible.
- b. What Grievant said in her defense, in its totality.
- c. The actual time sheets, the evidence.
- d. The action was intentional, facts of the events.
- e. Severity of the violation

20. Superintendent Branch did not communicate that Grievant's longevity (work-history) with Respondent was a consideration.

Discussion

As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges against the Grievant. In disciplinary matters, the employer bears the burden to prove by a preponderance of the evidence that the disciplinary action taken was justified. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018) “[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 party bearing the burden has not met its burden. *Id.*

Respondent maintains that Grievant violated applicable Mingo County Board of Education policy numbers 4000 (Service Personnel, Code of Conduct), 6000 (Finances, Overtime), and 8000 (Operations, Anti-Fraud), by falsified or altered time sheets that reflected ½ hour overtime each day for a period of several months; resulting in Grievant receiving undue and excess compensation. Grievant protests Respondent’s disciplinary action. Grievant disputes that she altered any time sheets. Grievant did not argue that the disciplinary measure was disproportionate to the offense; however, she alleged it was not based on credible evidence.

This grievance is not complicated. Grievant received overtime payment for activity not supported by correlated facts. There exists a conflict between the time sheets submitted and time Grievant is known to have been picked up and dropped off during the time period in review. The start and stop time on Grievant’s timesheets

submitted by Grievant do not balance with the pickup and drop off schedule reported by the relevant Bus operator. Respondent contends the contradiction is a result of deliberate conduct by Grievant. If driver Davis never picks up Grievant prior to 8:00-8:05 a.m. and is back at her own home each day by 4:30-4:35 p.m. after dropping off Grievant and completing another student bus stop; it is impossible for Grievant's timesheets to be correct. Respondent is empowered to discipline Grievant for systematically defrauding.⁴

W. Va. 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." Immorality may encompass various forms of conduct not in conformity with accepted principles of right and wrong behavior, including theft. *Painter v. Kanawha County Bd. of Educ.*, Docket No. 2008-0724-KanED (June 18, 2008). See *Arnold v. Monongalia County Bd. of Educ.*, Docket No. 02-30-195 (Jan. 13, 2003); *Cooper v. Kanawha County Bd. of*

⁴ Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute his judgment for that of the authoritarian agency. See generally *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

Educ., Docket No. 02-20-097 (July 31, 2002); *Buckley v. Kanawha County Board of Education*, Docket No. 2015-0963-KanED (May 18, 2015).

The credibility of witnesses and the reliability of the information being presented by all parties was under review.⁵ In assessing the trustworthiness of the information provided by Grievant and various administrative personnel, the undersigned was mindful of the potential for bias, and the possibility of agency interest, while considering the consistency of statements and the plausibility of the witnesses' information. The undersigned Administrative Law Judge found it prudent to use the factors cited, see footnote five below, to assess witnesses' testimony and to determine the appropriate weight various testimony warranted to establish or disprove a contested fact. The undersigned had an opportunity to observe the demeanor of the witnesses and to assess their words and actions during their testimony.

Superintendent Johnny Branch, Mingo County Schools, testified at the instant level three hearing. Dr. Branch provided that Grievant was a classroom aide who helped with special needs children. Then, as part of her role, she would also accompany the children on their bus ride to and from school. During Grievant's administrative leave involving an

⁵ An Administrative Law Judge is charged with assessing the credibility of the witnesses. See *Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1994). The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. See *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*. The testimony of all witnesses was provided direct attention and assessed with the identified factors in consideration.

unrelated matter, a teacher was required to ride along with the children on their bus ride to and from school. At this time, the school secretary told the teacher that she was not entitled to overtime as she was paid as a professional, to which the teacher responded, questioning why overtime would be paid as the additional time is nominal, and the duties do not require additional time. In turn, Superintendent Branch ordered that Grievant's time sheets be reviewed. He contacted Mountain State Educational Cooperative and requested that Charles Kingery investigate. Superintendent Branch testimony was clear and direct. The information provided was rational and depicted reasonable conduct of an administrator.

Charles Kingery is the Director of Investigative Services at Mountain State Educational Cooperative. In October 2022, Dr. Johnny Branch, Superintendent, Mingo County Schools, tasked Mr. Kingery with investigating allegations of manipulation of time sheets. Specifically, it was requested that Director Kingery investigate irregularities in timekeeping at Williamson Pre-K through 8 involving Grievant. During the course of his investigation Director Kingery interviewed co-workers of Grievant, including but not necessarily limited to bus operator Anita Davis and aide Skylar Williams. Director Kingery provides via his investigation document procedural practice, facts, and suppositions. R Ex 3 Upon the conclusion of the investigation Director Kingery opined that Grievant manipulated time sheets and that her actions were a violation of board policy. Specifically, Director Kingery hypothesized that it is more likely than not that Grievant filled out her time sheets in pencil so she could manipulate them after they had

been reviewed by supervisors.⁶ Director Charles Kingery testified at the instant level three hearing and his report was entered into the record without objection.

Grievant's counsel's questioning of Director Kingery did not persuade the undersigned that Director Kingery was attempting to mislead or deceive anyone with his testimony or October 19, 2022, report. R Ex 3. Grievant's counsel seems to focus on whether it can categorically be established (proven) that Grievant altered her time sheets, tending to ignore the fact that the timesheets were an inaccurate reflection of Grievant's work hours and resulted in Grievant repeatedly receiving undue compensation. As represented on the first page of the investigation: "*It is alleged that beginning January 2022 through May 2022, [Donna Estep], submitted fraudulent time sheets resulting in \$443.16 in excess overtime pay.*" R Ex 3 The timesheets submitted by Grievant for compensation were systematically inaccurate. Director Kingery had no predisposition or ulterior motive in investigating the accuracy of Grievant's timesheets.

Bus Operator Anita Davis testified that she is a bus operator for Mingo County Schools and has worked in that position for 18 years. Ms. Davis testified that Grievant served as an aide on her bus. Specifically, Grievant would ride along with special needs children to ensure the children got on and off the bus. Grievant was an aide on Ms. Davis's bus from January 2022, through May 2022, serving in that position on both morning and evening runs. Bus Operator Davis testified that she would pick up Grievant at approximately 8:00-8:05 a.m. and dropped Grievant off each day by 4:12-4:15 p.m.

⁶ Relevant to this see R Ex 3, page 2. *Reportedly*, Grievant advised teacher's aide Skylar Williamson to complete her overtime reports in pencil and then change them after the supervisor had signed. Ms. Skylar Williamson did not testify at the level three hearing.

Each day after dropping off Grievant, Ms. Davis completed another bus stop and was home herself each day by 4:30-4:35 p.m.. Bus operator Davis was steadfast, clear, and convincing in the presentation of her testimony. See, finding of fact #11-14. Bus Operator Davis's demeanor, physical mannerisms and speech patterns tended to establish and maintain the attributes of someone wanting to provide accurate facts and information. The undersigned finds Bus Operator Davis's testimony to be reliable. Bus Operator Davis attested to the fact that, when she signed the time sheet documents for Grievant, the times were an accurate reflection of Grievant's time and were **not** recorded at the time of signature with a start time of 7:45 a.m. and/or a stop time of 4:45 p.m..

There exists a conflict between the time sheets submitted and the time Grievant is known to have been picked up and dropped off during the time period in review. The start and stop time on Grievant's timesheets submitted by Grievant do not balance with pickup and drop off schedule reported by the relevant bus operator. If driver Davis never picks up Grievant prior to 8:00-8:05 a.m. and is back at her own home each day by 4:30-4:35 p.m. after dropping off Grievant and completing another student bus stop, it is impossible for Grievant's timesheets to be correct. Respondent established that Grievant submitted time sheets that reflected ½ hour overtime each day for a period of several months; resulting in repetitive overtime pay.

Grievant testified at the level three hearing. She did not explain away or offer sufficient information to counterbalance Respondent's determination that Grievant is in violation of applicable school codes that undermines Respondent's willingness to retain Grievant in its employment. It is noted that Respondent has an obligation to give due

consideration to Grievant's years of service and her employment record. Nevertheless, the undersigned is not empowered to independently establish Grievant's punishment.

While Respondent has the burden of proof, it would have served Grievant well to supply plausible explanations for ambiguous conduct. Grievant submitted and received pay pursuant to the inaccurate times. Grievant's attitude, demeanor and deeds were in review. Grievant has a very real interest in the outcome, and a recognized motive to manipulate the facts. Grievant's explanation for differences in the record is not persuasive.

The rationale for Respondent's disciplinary measure is not difficult to comprehend. Superintendent Branch testified that the identifiable violations, see finding of fact 18, warranted termination and he is of the opinion that his recommendation of Grievant's termination to the Board of Education was appropriate. Grievant is found to be in violation of applicable school codes, which undermines Respondent's willingness to retain Grievant in its employment. Respondent may dismiss an employee for any one of eight causes under the relevant statute, West Virginia Code § 18A-2-8, of which immorality is identified. Immorality may encompass various forms of conduct not in conformity with accepted principles of right and wrong behavior, including theft. *Painter v. Kanawha County Bd. of Educ.*, Docket No. 2008-0724-KanED (June 18, 2008). See *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). *Buckley v. Kanawha County Board of Education*, Docket No. 2015-0963-KanED (May 18, 2015).

“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. Respondents had discretionary options in the circumstances of this case; ultimately choosing to terminate Grievant’s employment. Respondent has substantial discretion to determine a penalty in these types of situations, and an administrative law judge should not substitute his or her 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); *Buckley v. Kanawha County Board of Education*, Docket No. 2015-0963-KanED (May 18, 2015).

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). “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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

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, as

amended, and must be exercised reasonably, not arbitrarily or capriciously. See *Maxey v. McDowell County Bd. of Educ.*, 212 W. Va. 668, 575 S.E.2d 278 (2002); *Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975); *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991); *Buckley v. Kanawha County Board of Education*, Docket No. 2015-0963-KanED (May 18, 2015).

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.” Immorality may encompass various forms of conduct not in conformity with accepted principles of right and wrong behavior, including theft. *Painter v. Kanawha County Bd. of Educ.*, Docket No. 2008-0724-KanED (June 18, 2008). See *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). *Buckley v. Kanawha County Bd of Educ.*, Docket No. 2015-0963-KanED (May 18, 2015).

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

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

5. The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence of nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. See *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD216 (Dec. 28, 1999); *Perdue, supra*.

6. Respondent established by a preponderance of the evidence that, in the circumstances of this case, Grievant's pattern of conduct constituted a disciplinary offense.

7. Respondent had discretionary options in the circumstances of this case. Respondent has substantial discretion to determine a penalty in these types of situations, and an administrative law judge should not substitute his or her 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); *Buckley v. Kanawha County Bd. of Educ.*, Docket No. 2015-0963-KanED (May 18, 2015).

8. "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).

9. Respondent demonstrated its disciplinary actions in the circumstances of this case were not arbitrary or capricious. Respondent met its burden of proof by a preponderance of the evidence and established just cause for disciplinary actions against Grievant.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals.⁷ Any such appeal must be filed within thirty (30) days of receipt of this decision. 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 named as a party

⁷ On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over "[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to 29A-5-4 or any other provision of this code[.]" W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.

to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

Date: February 16, 2024

Landon R. Brown
Administrative Law Judge

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DONNA ESTEPP,
Grievant,

v.

Docket No. 2023-0624-MinED

MINGO COUNTY BOARD OF EDUCATION,
Respondent.

CERTIFICATE OF SERVICE

THE UNDERSIGNED certifies the attached **DECISION** has been sent to the following persons by email and/or addresses by United States Mail, postage prepaid:

Donna Estopp
2942 Beech Creek Road
Matewan, WV 25678
estepddonna@yahoo.com

Robert B. Kuenzel, Esquire
Kuenzel & Associates, PLLC
PO Box 607
36 Adam Street
Chapmanville, WV 25508
rob@kuenzellaw.com

Dr. Johnny Branch, Superintendent
Mingo County Board of Education
110 Cinderella Road
Williamson, WV 25661
jbranch@k12.wv.us

Leslie K. Tyree, Esquire
3564 Teays Valley Road
Hurricane, WV 25526
tyreelesliekt@aol.com

Certified sent this 16th day of February, 2024.

Candace Spade
Candace Spade
Paralegal