THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

KELLY REED,
Grievant,

v. **Docket No. 2017-2507-CONS**

BERKELEY COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Kelly Reed, was employed as a teacher at Rosemont Elementary School in Berkeley County, West Virginia. She filed this grievance at Level One on January 30, 2017, against Respondent, Berkeley County Board of Education. Grievant requested an interactive process to assess a reasonable accommodation of her disability, situational anxiety. Grievant also requested reassignment to a position within Berkeley County Schools other than at Rosemont Elementary School. This grievance was denied at Level One. Subsequently, Respondent held a Pre-Termination hearing on September 26, 2017. Grievant was notified of her termination from employment with Respondent at this hearing and by letter dated September 27, 2017. Grievant then filed a grievance directly to Level Three challenging her termination of employment on October 3, 2017. The grievances were consolidated and a Level Three hearing was held before the undersigned at the offices of counsel for Grievant on February 20, 2018, in Shepherdstown, West Virginia. Grievant appeared in person and by her counsel, T. Nicole Saunders-Meske. Respondent appeared by its counsel, Kimberly S. Croyle, Bowels Rice LLP. This matter became

mature for consideration upon the receipt of the last of the parties' fact/law proposals on April 11, 2018.

Synopsis

Grievant was a second-grade teacher at Rosemont Elementary School in Berkeley County, West Virginia. The ultimate issue in this case is whether Respondent acted within its discretion in terminating Grievant's employment after she refused to return to work following the exhaustion of her leave. Grievant's failure to return to work is undisputed. The fact that Grievant does not suffer from an impairment that interferes with her ability to teach, thus requiring an accommodation, is also undisputed. For these reasons and others, as more fully set forth below, this grievance is denied.

The following Findings of Fact are based upon the record of this case.

Findings of Fact

1. Grievant was employed by Berkeley County Schools as a second-grade teacher at Rosemont Elementary School, where she has worked for several years.

2. The Principal of Rosemont Elementary School is Erica Propst. Ms. Propst has served in that capacity for five years and has supervised Grievant during that time.

3. In June of 2016, Grievant was offered an opportunity by Principal Propst to move her classroom. Grievant was not required to change her classroom, and she was not required to move any furniture or do any heavy lifting.

4. Throughout the course of the summer, Grievant and Principal Propst had communications regarding Grievant's progress in moving to her new classroom. Despite committing to several different dates, Grievant failed to complete the move to her new

classroom before the beginning of the 2016/2017 school year. Grievant never advised Principal Propst that her failure to get her classroom ready was related to any type of medical condition.

5. In August of 2016, as preparations were underway to begin the new school year, Principal Propst advised Grievant that her new classroom needed to be ready for Orientation on Friday, August 19, 2016. Grievant was afforded significant opportunities to get her class ready on August 17, August 18, August 19, and even prior to these dates.

6. Principal Propst checked on Grievant's status on August 17, August 18, and August 19. Principal Propst advised Grievant of her concerns that she would be unable to get her classroom organized in time for Orientation.

7. Orientation is important because it represents the first opportunity that parents usually have to meet the teacher and observe the classroom environment. Both parties acknowledged the importance of making a good first impression. Principal Propst indicated that she expects all classrooms to be ready for Orientation, and the record reflects that all classrooms at Rosemont Elementary School were ready for Orientation, except for Grievant's.

8. As of Friday morning, August 19, 2016, Grievant's classroom was not ready for Orientation. Principal Propst secured permission from the central office to have Grievant excused from mandatory training on the morning of Friday, August 19, 2016, so that Grievant could focus her efforts. Two individuals from the central office offered to assist Grievant with getting her classroom ready on Friday, August 19, 2016. Grievant declined these offers of assistance.

9. During Grievant's interactions with central office staff, she became belligerent and confrontation. Because of her demeanor, Assistant Superintendent Laura Sutton directed Grievant to leave the premises, and to return later that day. Grievant refused Ms. Sutton's directive and continued to engage in disruptive behavior. Ms. Sutton then directed Grievant to leave the premises and not to return until she received further instruction from the central office.

10. In order to get Grievant's classroom ready for Orientation, Principal Propst organized an effort to clean and organize Grievant's classroom. The record demonstrated Grievant's classroom was in poor shape for Orientation. Misplaced materials were strewn about the students' desks. Information materials were not ready. The record reflected substantial effort was made to make Grievant's classroom presentable for Orientation that evening.

11. Grievant claims that Principal Propst's concerns and attention regarding her classroom readiness constituted a form of harassment, and that she was set up to fail. The record demonstrated that Greivant readily acknowledged that she received advanced notice of Principal Propst's expectations, that Principal Propst's expectations were reasonable, and that those expectations were made of all classroom teachers. Grievant also acknowledged that Principal Propst never mistreated her.

12. Grievant returned to Rosemont Elementary School on September 26, 2016. She was advised by Principal Propst that she wanted to meet with her before she resumed her duties as a Second Grade Teacher. Principal Propst had a plan to integrate Grievant back into the classroom, but she never got a chance to share that plan with Grievant. As soon as Principal Propst advised her of the meeting, Grievant advised Principal Propst that

she wanted her lawyer to be present for this meeting. Grievant's counsel arrived at Rosemont Elementary School, and Principal Propst was advised for the first time that Grievant would be unable to resume her duties as she was needed to care for her mother. Grievant left that day and has never returned to Rosemont Elementary School.

13. From September 26, 2016, through her termination, Grievant refused to return to work. She has been on various forms of leave from or about August 19, 2016. Her FMLA leave expired in December of 2016. At her request, Grievant was provided with an additional leave of absence.

14. While on leave, Grievant advised Respondent that she wanted to pursue other employment opportunities within the school system. She was invited to apply for any vacancies. Eventually, Grievant advised Respondent that she had been diagnosed with Situational Anxiety Disorder, and she sought an accommodation that would allow her to return to work for Respondent as long as she did not have to return to Rosemont Elementary School. Nevertheless, the correspondence from Grievant's health provider indicates that she can clearly work as a teacher. Grievant Exh. 11.

15. By letter dated December 27, 2016, Respondent advised Grievant that it could not accommodate her request to be reassigned away from Rosemont Elementary School. As an alternative, Grievant was given the opportunity to return to Rosemont Elementary School under a positive Focused Support Plan.

16. By email dated January 6, 2017, counsel for Grievant advised Respondent that Grievant would like an opportunity to meet with representatives in order to participate in an interactive process to determine the availability of any reasonable accommodations.

17. A meeting was held on January 30, 2017, with Grievant, her counsel, and representatives of the Respondent. During the meeting, Grievant indicated that she suffers from Situational Anxiety Disorder; her impairment prohibits her from working at Rosemont Elementary School under the supervision of Principal Propst; and she required an accommodation that would allow her to return to work for Respondent, so long doing did not involve returning to Rosemont Elementary School.

18. By letter dated February 6, 2017, Grievant was advised that her request for accommodation to return to work at a school other than Rosemont Elementary had been denied. Respondent advised Grievant that her impairment did not qualify as a disability under the Americans with Disabilities Act, nor did it qualify as a disability under the West Virginia Human Rights Act. Respondent also advised Grievant that her request for accommodation was not reasonable because it required Respondent to disregard its nondiscriminatory personnel rules.

19. Grievant was directed to return to Rosemont Elementary School on February 13, 2017.

20. Grievant failed to return to work on February 13, 2017.

21. Respondent scheduled a Pre-Termination hearing in this matter on September 26, 2017, at the conclusion of this hearing, Grievant was informed that her employment would be terminated. On September 27, 2017, Manny Arvon, Superintendent of Berkeley County Schools, wrote to Grievant stating that the Berkeley County Board of Education voted to terminate her employment. Superintendent Arvon stating that the reasons for the Board's action were namely misconduct in not returning to work at Rosemont in February constituting wilful neglect of duty and insubordination.

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).

Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002) (*per curiam*). *See Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts, supra*.

The undersigned finds that Respondent has proven by a preponderance of the evidence the charge of insubordination against Grievant. The record established that Grievant was advised to return to Rosemont Elementary School in February of 2017. By letter dated February 6, 2017, Grievant was advised that her request for accommodation to return to work at a school other than Rosemont Elementary had been denied. Respondent advised Grievant that her impairment did not qualify as a disability under the

Americans with Disabilities Act, nor did it qualify as a disability under the West Virginia Human Rights Act. Respondent also advised Grievant that her request for accommodation was not reasonable because it required Respondent to disregard its nondiscriminatory personnel rules. Grievant was directed to return to Rosemont Elementary School on February 13, 2017. Grievant failed to return to work on February 13, 2017.

As to the remaining issues in this grievance, the allegations do not involve discipline, and as a result, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). 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).

Grievant argues in her proposals that the punishment of termination was excessive, and should be mitigated by the undersigned. 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).

Nevertheless, a lesser disciplinary action may be imposed when mitigating circumstances exist. *See Conner v. Barbour County Bd. of Educ*., Docket No. 95-01-031 (Sept. 29, 1995). 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. *See Pingley v. Div. of Corr*., Docket No. 95-CORR-252 (July 23, 1996). When 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). Nothing in the record of the instant case supports, or can be viewed as addressing, the argument that termination of Grievant's employment was too severe. Notwithstanding Grievant's long tenure with Respondent, the record does not support mitigation of the punishment imposed. If the undersigned were to substitute his judgment for that of Respondent, which is not appropriate based upon the facts of this case, it would be an abuse of discretion.

Respondent argued at Level Three that Grievant has not proven that she is a qualified person with a disability. This Grievance Board has determined that it does not have authority to determine liability for claims that arise under the West Virginia Human

Rights Act ("WVHRA" W. VA. CODE §§ 5-11-1, *et seq*.), including a claim of handicap discrimination, or the federal Americans with Disabilities Act ("ADA" 42 U.S.C. §§ 12111, *et seq*.). *Bowman v. W. Va. Educational Broadcasting Auth.*, Docket No. 96-EBA-464 (July 3, 1997); *Rodak v. W. Va. Dep't of Tax and Revenue*, Docket No. 96-T&R-536 (June 23, 1997).

> Nevertheless, the Grievance Board's authority to provide relief to employees for "discrimination," "favoritism," and "harassment," as those terms are defined in W. VA. CODE § 29-6A-2, includes jurisdiction to remedy discrimination that would also violate the Human Rights Act. In other words, the Grievance Board does have subject matter jurisdiction over handicap-based discrimination claims. *Smith v. W. Va. Bureau of Employment Programs*, Docket No. 94-BEP-099 (Dec. 18, 1996). *See Vest v. Bd. of Educ.*, 193 W. Va. 222, 455 S.E.2d 781 (1995).

Bowman, supra.

Accordingly, the fact that a grievance may also state a claim under the West Virginia Human Rights Act (in this case, for disability-based discrimination) does not deprive the Grievance Board of jurisdiction. For the Grievance Board to possess jurisdiction, however, the grievance must state a claim under the grievance statutes, in this case W. VA. CODE § 6C-2-2(d).

The record established that Grievant's impairment only prohibits her from working at Rosemont Elementary School under the supervision of Principal Propst. Grievant's impairment doe does not interfere with her ability to perform the essential functions of a Second Grade Teacher, nor does her impairment interfere with her ability to teach generally. In addition, the record established that Grievant failed to identify a reasonable accommodation that would allow her to perform the essential functions of a Second Grade Teacher at Rosemont Elementary School.

Finally, WEST VIRGINIA CODE § 6C-2-2(l) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." What constitutes harassment varies based upon the factual situation in each individual grievance. *Sellers v. Wetzel County Bd. of Educ*., Docket No. 97-52-183 (Sept. 30, 1997). "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96-BOT-462 (Aug. 29, 1997)." *Pauley v. Lincoln County Bd. of Educ*., Docket No. 98-22-495 (Jan. 29, 1999).

The record of the case is clear that Grievant did not like the scrutiny that she received from Principal Propst in August of 2016; however, the incidents described by Grievant do not rise to the type of conduct that typically qualifies as harassment. Grievant admitted that Principal Propst's expectations were reasonable, and Grievant admitted that her room was not ready on the day of Orientation. In this context, the concerns and actions of Principal Propst relative to Grievant's classroom do not constitute harassment, however unpleasant Grievant may have perceived them to be.

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. 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).

3. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002) (*per curiam*). *See Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts, supra*.

4. Respondent met its burden of proof by a preponderance of the evidence and demonstrated that Grievant's conduct was such that she may be disciplined, up to and including termination.

5. As to the remaining issues in this grievance, the allegations do not involve discipline, and as a result, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). 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).

6. 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).

7. Grievant has failed to demonstrate that mitigation is appropriate in this case.

8. This Grievance Board has determined that it does not have authority to determine liability for claims that arise under the West Virginia Human Rights Act

("WVHRA" W. VA. CODE §§ 5-11-1, *et seq*.), including a claim of handicap discrimination, or the federal Americans with Disabilities Act ("ADA" 42 U.S.C. §§ 12111, *et seq*.). *Bowman v. W. Va. Educational Broadcasting Auth.*, Docket No. 96-EBA-464 (July 3, 1997); *Rodak v. W. Va. Dep't of Tax and Revenue*, Docket No. 96-T&R-536 (June 23, 1997).

> Nevertheless, the Grievance Board's authority to provide relief to employees for "discrimination," "favoritism," and "harassment," as those terms are defined in W. VA. CODE § 29-6A-2, includes jurisdiction to remedy discrimination that would also violate the Human Rights Act. In other words, the Grievance Board does have subject matter jurisdiction over handicap-based discrimination claims. *Smith v. W. Va. Bureau of Employment Programs*, Docket No. 94-BEP-099 (Dec. 18, 1996). *See Vest v. Bd. of Educ.*, 193 W. Va. 222, 455 S.E.2d 781 (1995).

Bowman, supra.

Accordingly, the fact that a grievance may also state a claim under the West Virginia Human Rights Act (in this case, for disability-based discrimination) does not deprive the Grievance Board of jurisdiction. For the Grievance Board to possess jurisdiction, however, the grievance must state a claim under the grievance statutes, in this case W. VA. CODE § 6C-2-2(d).

9. Grievant's impairment does not interfere with her ability to perform the essential functions of a Second Grade Teacher, nor does her impairment interfere with her ability to teach generally. The record established that Grievant failed to identify a reasonable accommodation that would allow her to perform the essential functions of a Second Grade Teacher at Rosemont Elementary School.

10. WEST VIRGINIA CODE § 6C-2-2(l) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." What constitutes harassment varies

based upon the factual situation in each individual grievance. *Sellers v. Wetzel County Bd. of Educ*., Docket No. 97-52-183 (Sept. 30, 1997). "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96-BOT-462 (Aug. 29, 1997)." *Pauley v. Lincoln County Bd. of Educ*., Docket No. 98-22-495 (Jan. 29, 1999).

11. Grievant failed to establish that she was the victim of harassment.

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: May 15, 2018

Ronald L. Reece
Administrative Law Judge