THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ROBERT ALEXANDER HOGSETT, JR.,
Grievant,

v. **Docket No. 2020-0856-CONS**

CABELL COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Robert Alexander Hogsett, Jr., was employed by Respondent, Cabell County Board of Education. On October 11, 2019, Grievant filed a grievance against Respondent protesting his suspension without pay. On January 13, 2020, Grievant filed a second grievance protesting the termination of his employment. The grievances were consolidated into the instant action by order entered February 4, 2020. For relief, Grievant seeks reinstatement, back pay with interest, and "compensation for expenses related to grievance."

The grievances were properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). Telephone conferences were held on January 23, 2020, February 14, 2020, and October 2, 2020, to address various motions and procedural issues. An order was entered on October 30, 2020, memorializing all three conferences as no order had been entered from the prior conferences due to their proximity to then-scheduled hearing dates. The order is incorporated by reference. A level three hearing was held over four days on February 28, 2020, March 2, 2021, March 3, 2021, and March 4, 2021, before the undersigned at the Grievance Board's Charleston, West Virginia office. The later three days of hearing were conducted remotely via video conference due to the ongoing

pandemic. Grievant appeared *pro se*[1] and by his representative, Leigh Hogsett. Respondent appeared by Superintendent Ryan Saxe and General Counsel Sherrone Hornbuckle and was represented by counsel, George "Trey" B. Marrone, Bowles Rice LLP. This matter became mature for decision on May 19, 2021, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law ("PFFCL").[2]

Synopsis

Grievant was employed as a teacher by Respondent at Huntington Middle School. Grievant was suspended without pay and then terminated from his employment after confessing under oath in a grievance proceeding that he had entered the principal's office to search for employee information, had searched through the principal's desk draws and filing cabinet, had taken pictures of documents, and had shared those documents with law enforcement. Respondent proved Grievant violated its policy and that his misconduct constituted insubordination, willful neglect of duty, and immorality. Grievant failed to prove that the termination was invalid due to process failures, that the termination was discriminatory or retaliatory, that he was entitled to an improvement period, or that the discipline should be mitigated. Accordingly, the grievance is denied.

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

---

[1] For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

[2] PFFCL were originally due to be submitted by April 5, 2021, but the timeframe was extended several times at the request and agreement of the parties. Grievant also submitted two different versions of his PFFCL. Grievant mailed an eight-page PFFCL that was received on May 19, 2021, and also emailed a forty-eight-page version on May 17, 2021. It appears the longer version may have been a draft in that the first eight pages are substantially similar, and the remaining pages appear to be more in the form of notes. However, both PFFCL have been considered although arguments that are not fully developed have not been addressed in this decision.

Findings of Fact

1. Grievant was employed by Respondent as a physical education teacher at Huntington Middle School ("HMS").

2. Grievant had been employed as a classroom teacher since 2006.

3. Grievant was supervised by Principal James Paxton.

4. Mathew Gonzales and Joe Thacker served as Assistant Principals.

5. Prior to the events leading to Grievant's termination, Grievant had a contentious relationship with Principal Paxton, Mr. Gonzales and Mr. Thacker. Grievant made allegations of misconduct against them and they made allegations of misconduct against Grievant.

6. Since prior to 2007, there had been rumors about Mr. Gonzales having inappropriate contact with students and Child Protective Services had been involved. Mr. Gonzales was considered to have a strange demeanor by some coworkers. In 2016, rumors began to circulate again, and some teachers, including Grievant, were concerned that Mr. Gonzales was meeting with students with his door locked and lights turned off.

7. On January 14, 2016, Assistant Principal Thacker filed a complaint of harassment against Grievant for an incident in which Grievant, in response to Assistant Principal Thacker eating only the toppings off a piece of pizza, said "Do you want to eat the crust off my balls?" Around the same time, a basketball game official also made a complaint about Grievant's behavior as a parent during a game. Both instances were investigated and Grievant did not deny the allegations but denied he intended harm. Grievant was not discipled for either situation.

8. Also in early 2016, Grievant came into conflict with Mr. Gonzales because Grievant did not believe Mr. Gonzales was handling student discipline appropriately and was also concerned about comments Mr. Gonzales had made to Grievant. Grievant complained that it was difficult to locate Mr. Gonzales at times. Conflict continued until Mr. Gonzales's eventual termination from employment in 2017.

9. In September 2016, Grievant filed a Child Protective Services complaint against Mr. Gonzales.

10. In October 2016, in his capacity as a member of the school's discipline committee Grievant distributed a survey that Principal Paxton believed was inappropriate and unfairly targeting Mr. Gonzales. Principal Paxton asserted that Grievant's actions were in violation of policy. Principal Paxton and Grievant had a heated exchange regarding the survey in front of the other committee members. Grievant was not disciplined.

11. On March 17, 2017, Principal Paxton issued a letter to Grievant expressing concern for a developing pattern of aggressive behavior that had culminated in two instances with students in which Grievant destroyed a student's toy by stomping on it and dumped a sleeping student out of a chair. Although Principal Paxton believed that Grievant had no intent to harm the students, the behavior was unacceptable.

12. On April 6, 2017, Superintendent William Smith held a conference with Grievant regarding the two student instances. As with the inappropriate comment to Mr. Thacker, Grievant attempted to excuse his actions as joking.

13. By letter dated April 10, 2017, Superintendent Smith notified Grievant that he intended to recommend to the school board that Grievant serve a one-day suspension for his actions with the two students.

14. In July 2017, Ryan Saxe was appointed as Superintendent. Although Superintendent Saxe was originally from Cabell County, he had not previously served in a leadership role there but had instead been employed by the West Virginia Department of Education, another county in West Virginia, and the State of Florida. As such, Superintendent Saxe was an outsider and unfamiliar with the history of the conflicts at Huntington Middle School.

15. On August 22, 2017, Grievant, by his union representative, requested accommodations due to his disabilities of "Unspecified Anxiety Disorder and Attention Deficit/Hyperactivity Disorder Combined Presentation."

16. In late August 2017, Grievant, distrustful of the school's administration and fearful that additional disciplinary action was going to be taken against him, entered Principal Paxton's office after school hours with the intent to search for information about himself. Grievant searched Principal Paxton's office, opening file cabinets and desk drawers. While searching, Grievant inspected multiple employee files located in the closed filing cabinet and took pictures of information in the employee files. Grievant also discovered two Airsoft pistols in Principal Paxton's desk drawers and also took pictures of the pistols.

17. Grievant returned on a separate day and used a key to unlock Principal Paxton's door to take additional pictures.

18. One of the files Grievant searched was that of Mr. Gonzales. The file contained several complaints regarding Mr. Gonzales' interactions with students that were addressed by a former principal, and a prior Child Protective Services investigation. Grievant was disturbed by the nature of the complaints and was concerned that the complaints had not been taken seriously. Grievant was also disturbed that the only information in the file from Principal Paxton was of the 2017 Child Protective Services investigation Grievant had initiated.

19. Grievant discussed what he found with a friend who was a law enforcement officer who encouraged him to officially report what he found to law enforcement. Grievant also discussed the information with his sisters.

20. Grievant later shared the photographs with law enforcement.

21. On August 27, 2017, Grievant made a detailed written report to the CyberTipline of the National Center for Missing & Exploited Children alleging his suspicions that Mr. Gonzales had molested students and possessed child pornography and that Principal Paxton had covered it up. In his report, Grievant referenced information from a Child Protective Services report and made references to the "file" of both Mr. Gonzales and Assistant Principal Thacker and documents that were or were not in the "file." Grievant did not state that he had seen or had possession of a copy of the file.

22. Superintendent Saxe received the CyberTipline Report from the West Virginia Department of Education on August 28, 2017, and immediately reported the same to the West Virginia State Police and ordered the school district to conduct an investigation of the allegations.

23. Superintendent Saxe had been hired as the Superintendent only the month before and had no knowledge of the history of conflicts at Huntington Middle School or the prior allegations against Mr. Gonzales. Superintendent Saxe immediately ordered Assistant Superintendent David Tackett to begin investigating and reached out to a law enforcement contact.

24. Although it appeared to Mr. Tackett that the allegations were based, in part, on information from the principal's file on Mr. Gonzales to which Grievant should not have had access, Superintendent Saxe told Mr. Tackett not to investigate where the information had originated. Superintendent Saxe's only focus was on the allegations against Mr. Gonzales, due to the serious nature of the allegations. Superintendent Saxe believed that investigating who had obtained the information on Gonzales would be a distraction and could also result in allegations of further cover up or retaliation.

25. Superintendent Saxe was advised by his law enforcement contact to file a criminal complaint regarding Mr. Gonzales based on the information in the CyberTipline report, which he did on September 15, 2017.

26. During the criminal investigation, Grievant, several other teachers, and the named children were all interviewed. The investigation was closed as unfounded as there was no evidence of inappropriate touching or behavior.

27. On September 22, 2017, Principal Paxton sent an email to Grievant's union representative acknowledging the receipt of the request for accommodation and stating that he required additional information to evaluate the request for accommodation. Principal Paxton attached a letter and questionnaire to be completed by Grievant's physician.

28. Grievant failed to provide the requested additional information and no further action was taken on Grievant's request for accommodation.

29. Also, sometime in September 2017, Grievant told another teacher, when complaining about the behavior of a particular student that the student was the only one he would like to "punch in the face." The teacher did not believe Grievant did anything wrong because he did not want to actually harm the student but was only complaining about the student's behavior. Not seeing anything wrong with the statement, the teacher mentioned the same in passing to Assistant Principal Thacker, who did not view the statement as harmless and instructed the teacher to make a written report regarding the statement, which the teacher did under duress. The teacher was later suspended for making a joke relating to homosexuality and viewed his own discipline as retaliation for resisting reporting Grievant's behavior. Grievant was not disciplined for this incident.

30. Sometime in early 2018, Mr. Gonzales filed a complaint alleging Grievant was harassing him. Respondent hired private investigator Charles Kingrey to investigate the allegation.

31. On March 16, 2018, Superintendent Saxe and Assistant Superintendent Timothy Hardesty and their counsel met with Grievant and his counsel regarding allegations by Mr. Gonzales that Grievant was harassing Mr. Gonzales. Between November 2017 and February 2018, Grievant followed Mr. Gonzales, made a recording of Mr. Gonzales talking on his cell phone in a closet, recorded Mr. Gonzales' empty parking space, and questioned Mr. Gonzales' whereabouts with staff. Grievant shared his concerns about Mr. Gonzales' behavior.

32. On March 29, 2018, Superintendent Saxe issued a *Memorandum of Conference* to Grievant memorializing the conference. Although Superintendent Saxe did not find that Grievant had harassed Mr. Gonzales, he notified Grievant that his behavior could be perceived as such and was not acceptable. Superintendent Saxe explained that it was not Grievant's role to investigate concerns with Mr. Gonzales and that the appropriate action would be to report any concerns to administration.

33. On May 22, 2018, Mr. Gonzales was suspended and demoted. Mr. Gonzales filed a grievance, *Gonzales v. Cabell County Board of Education*, Docket No. 2018-1255-CabED.

34. Grievant was called to testify in the Gonzales grievance on December 11, 2018. Under questioning from Mr. Gonzales' counsel, Grievant stated that, because he was not on his medicine, he had impulsively entered Principal Paxton's office for the purpose of looking at Mr. Gonzales' personnel file, that he viewed Mr. Gonzales' personnel file, and made copies of the file that he gave to the police. Grievant believed he was justified because he believed Mr. Gonzales was a danger to students and Principal Paxton had been protecting Mr. Gonzales. Grievant stated that, although he discussed with them some things he had learned from the file, he did not tell Superintendent Saxe or Assistant Superintendet Hardesty that he had seen the file or had a copy and that he was not going to tell them how he had obtained the information.

35. Superintendent Saxe was present during Grievant's testimony in the Gonzales hearing and was shocked that Grievant had admitted he had obtained the information from Principal Paxton's office.

36. After consideration and consolation with counsel, Superintendent Saxe determined he had no choice but to take action regarding Grievant's admitted misconduct.

37. On January 14, 2019, Superintendent Saxe notified Grievant that he was being placed on paid administrative leave pending the outcome of an investigation of possible misconduct. Superintendent Saxe cited the transcript of Grievant's testimony from on December 11, 2018, stating that Grievant "admitted to entering the principal's office at your school, accessing your assistant principal's personnel file, locating the file and reviewing its contents, photocopying documents from the file, and later sharing them with others."

38. On the same date, and at the direction of Superintendent Saxe, Assistant Superintendent Hardesty made a criminal complaint alleging Grievant had illegally entered Principal Paxton's office and stolen a personnel file.

39. On January 18, 2019, Assistant Superintendent Hardesty notified Grievant that a conference had been scheduled for January 29, 2019 to allow Grievant to respond to "requests for information concerning the testimony."

40. On February 19, 2019, Respondent ratified the Superintendent's action and extended the paid administrative leave until an investigation could be complete.

41. Grievant remained on paid administrative leave through the remainder of the 2018-2019 school year.

42. On June 6, 2019, Grievant was indicted by the Cabell County Grand Jury on a felony charge of "Entry of a Building Other Than a Dwelling" and a misdemeanor charge of "Petit Larceny."

43. After several attempts to schedule a meeting with Grievant and his counsel, Superintendent Saxe held a meeting on August 23, 2019. At the meeting, Grievant invoked his 5th Amendment right against self-incrimination due to the pending indictment.

44. By letter dated August 27, 2019, Superintendent Saxe suspended Grievant, without pay, due to the criminal charges filed against Grievant.

45. Respondent conducted a hearing on the recommendation of suspension on September 17, 2019. Grievant, by counsel, contested the suspension on legal grounds. Neither party presented testimony. At the conclusion of the hearing, Respondent ratified Grievant's unpaid suspension pending resolution of the criminal charges.

46. On December 2, 2019, a *Nolle Prosequi Order*[3] was entered by the Circuit Court of Cabell County, dismissing the criminal charges against Grievant, without prejudice.

47. By letter dated December 6, 2019, the Superintendent Saxe notified Grievant that he was continuing Grievant's suspension without pay and would be recommending his termination. Superintendent Saxe acknowledged the dismissal of the criminal charges and explained the same did not negate Grievant's conduct; that by his own admission he entered the principal's office afterhours to inspect and copy an employee's personnel file with his personal mobile device; and that his conduct violated the Employee Code of Conduct and invaded the privacy of other employees; and that his conduct was grounds for termination.

[3] "The voluntary withdrawal by the prosecuting attorney of present proceedings on a criminal charge." BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

48. Respondent conducted a hearing on the recommended termination on December 17, 2019. Grievant appeared and represented himself. Respondent was represented by Rebecca Tinder, Bowles Rice LLP. Each party was allotted thirty minutes to present evidence. Respondent presented the testimony of Assistant Superintendent Hardesty to explain the charges and evidence against Grievant. Grievant chose to call Superintendent Saxe rather than testify on his own behalf. Grievant had limited opportunity to present his evidence as, despite not representing Respondent during the hearing, Respondent permitted its General Counsel, Sharrone Hornbuckle, to make numerous objections.

49. Following the hearing, Respondent voted to ratify the unpaid suspension and to approve the Superintendent's recommendation to terminate the contract of Grievant.

50. On December 18, 2019, Superintendent Saxe notified Grievant that his employment had been terminated in accordance with West Virginia Code § 18A-2-8.

51. Respondent's Employee Code of Conduct, Policy 3210, requires all school employees to "demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior."

52. Respondent's Personnel Files policy, Policy 8320, states, in pertinent part, "A single central file shall be maintained, and subsidiary records shall be maintained for ease in data gathering only."

53. Throughout his employment Grievant had received annual training on Respondent's policies, the latest of which Grievant acknowledged by his signatures on August 7, 2017, and August 8, 2017.

Discussion

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. W.VA. CODE ST. R. § 156-1-3 (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 employer has not met its burden. *Id.*

The authority of a county board of education to terminate an employee must be based on one or more of the causes listed in West Virginia Code § 18A-2-8 and must be exercised reasonably, not arbitrarily or capriciously. Syl. Pt. 2, *Parham v. Raleigh County Bd. of Educ.*, 192 W. Va. 540, 453 S.E.2d 374 (1994); Syl. Pt. 3, *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). The causes are:

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

W. VA. CODE § 18A-2-8(a).

Respondent terminated Grievant's employment for violating Respondent's code of conduct by entering Principal Paxton's office without permission, searching Principal Paxton's drawers and cabinets for confidential information, taking pictures of the confidential information, and sharing the same with others. Respondent argues that Grievant's conduct constituted insubordination, willful neglect of duty, and immorality.

Grievant mostly admits to the conduct of which he was accused but argues that his actions were justified, that termination of his employment was not proper or warranted, and this reason was merely a pretext to retaliate and discriminate against him.

Although Grievant admitted to most of the conduct there are some facts in dispute and Grievant also asserts that Superintendent Saxe was dishonest in his testimony.[4] In situations where "the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required." *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ 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. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Grievant's demeanor is difficult to assess. Grievant presented as a very personable and likable individual. He was respectful of the process but had difficulty

[4] Numerous witnesses were called during the four-day hearing, but credibility determinations were not necessary for any other witness.

organizing his thoughts and presenting information in a coherent manner. Grievant's testimony was frequently rambling. Grievant would sometimes hedge his answers regarding what he remembered about events, although that certainly could be due to his undeniable deficiencies in focus and attention rather than attempts to be dishonest. Regardless of his motivation, those issues do make his testimony less reliable. Grievant often appears exceedingly forthright, especially in those instances in which he made admissions against his own best interests; however, Grievant also made inconsistent statements that cannot be ignored. Grievant's key defense is that a toxic work environment coupled with his disability and problems with his medication led him to make an unintentional, impulsive decision to enter Principal Paxton's office. Yet, at the end of the level three hearing, Grievant admitted that he had actually returned to the office on another day to take more pictures and on that day Principal Paxton's office was locked and he used a key to get in. In addition, Grievant initially presented his reason for going into the office on impulse to be motivated by his desire to protect students from Mr. Gonzales, yet later testified that he was concerned for himself and actions he believed Principal Paxton may be taking against Grievant and only looked for other employees' files as an afterthought. Therefore, Grievant is not completely credible.

Superintendent Saxe's demeanor was professional and calm. Superintendent Saxe was mostly direct and forthcoming in his answers to questions. Although some of his answers were not responsive, it appears mostly likely those instances were due to genuine confusion or lack of memory. Grievant specifically asserts that Superintendent Saxe's testimony about when he became aware Grievant had taken information from Principal Paxton's office was untruthful. Regarding this testimony specifically,

Superintendent Saxe's testimony appeared genuine, especially when testifying regarding his shock that Grievant had confessed during the Gonzales hearing. Grievant insists Superintendent Saxe is lying because Superintendent Saxe "knew" Grievant had been in Principal Paxton's office. There is no basis for that conclusion. Yes, Superintendent Saxe believed Grievant had seen documents that were in Principal Paxton's file based on what Grievant had said in the CyberTipline report but he had no information how Grievant would have obtained those documents. There was no direct evidence Grievant had actually stolen the information from Principal Paxton's office. Further, Superintendent Saxe's explaining why he did not take any action to investigate Grievant at that time is plausible. His understandable focus was on the allegations of child molestation and child pornography that he did not taint with accusations of retaliation against a whistleblower. Further, there is no evidence of inconsistent statements and the documentary evidence does not contradict his testimony. Although Grievant asserts Superintendent Saxe is somehow biased against him, there is no evidence to support that claim. Superintendent Saxe is credible.

Therefore, what the testimony and evidence show is that Grievant, distrustful of the school's administration and fearful that additional disciplinary action was going to be taken against him, entered Principal Paxton's office after school hours with the intent to search for information about himself. Grievant searched Principal Paxton's office, opening file cabinets and desk drawers. While searching, Grievant inspected multiple employee files located in the closed filing cabinet and took pictures of information in the employee files. Grievant also discovered two Airsoft pistols in Principal Paxton's desk drawers and also took pictures of the pistols. Grievant went back on another day and

used a key to get into the locked office to take additional pictures. Grievant discussed and gave copies of that information to a friend, who was a law enforcement officer, and to his sisters. Although Superintendent Saxe knew Grievant had learned confidential information at the time of the CyberTipline report, he did not know and had no proof that Grievant had obtained the information by searching Principal Paxton's office until Grievant confessed the same during the Gonzales grievance hearing.

As stated above, Respondent may dismiss an employee only for one of the causes listed in W. VA. CODE § 18A-2-8(a). Respondent asserts Grievant's conduct violated Respondent's code of conduct and, as such, constituted insubordination and willful neglect of duty. Respondent also asserts that Grievant's conduct was immoral.

Respondent's Employee Code of Conduct, Policy 3210, contains the same language of the code of conduct for West Virginia school employees as contained in the legislative rules of the State Board of Education, which states that employees shall:

> 4.2.1. exhibit professional behavior by showing positive examples of preparedness, communication, fairness, punctuality, attendance, language, and appearance.
>
> 4.2.2. contribute, cooperate, and participate in creating an environment in which all employees/students are accepted and are provided the opportunity to achieve at the highest levels in all areas of development.
>
> 4.2.3. maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination.
>
> 4.2.4. create a culture of caring through understanding and support.
>
> 4.2.5. immediately intervene in any code of conduct violation, that has a negative impact on students, in a manner that preserves confidentiality and the dignity of each person.

> 4.2.6. demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior.
>
> 4.2.7. comply with all Federal and West Virginia laws, policies, regulations and procedures.

W.VA. CODE ST. R. § 126-162-4.2 (2002).

Insubordination "at least includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued by the school board or by an administrative superior. . .This, in effect, indicates that for 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 v. Higher Educ. Interim Governing Bd./Shepherd Coll.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). [F]or a refusal to obey to be "wilful," the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." *Id.*, 212 W. Va. at 213, 569 S.E.2d at 460. This Grievance Board has previously recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988), *aff'd*, *Sexton v. Marshall University*, 182 W. Va. 294, 387 S.E.2d 529 (1989).

"Immorality is an imprecise word which means different things to different people, but in essence it also connotes conduct 'not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior.' Webster's New

Twentieth Century Dictionary Unabridged 910 (2d ed. 1979)." *Golden v. Bd. of Educ.*, 169 W. Va. 63, 67, 285 S.E.2d 665, 668 (1981).

One of Grievant's key defenses is that he was out of control due to his disability, medication, and the circumstances so he admits he was not exhibiting self-control under the code of conduct. Grievant's conduct was also a willful violation of both the specific direction by Superintendent Saxe to stop investigating Mr. Gonzales and the implied direction to respect the authority and privacy of Principal Paxton. Grievant intentionally went into Principal Paxton's office in search of information to which he was not entitled. He did not inadvertently access information but purposefully and thoroughly searched through desk drawers and filing cabinets and took pictures of all that he found and then he distributed that information to others.

Grievant's arguments that his behavior did not violate the code of conduct or the statute, such as that Principal Paxton's office was not private, that the files were not actual "personnel" files, and that the files were not secured are technical arguments that are meaningless. What is at issue is simple right and wrong. An employee should not go into a superior's office and rifle through files regardless of what those files are called. A person should not take things that do not belong to them, whether those things are tangible or intangible or are locked up or not. Therefore, Respondent clearly proved Grievant violated the code of conduct and that his conduct constituted insubordination, willful neglect of duty, and immorality.

Grievant's main arguments concern whether termination of Grievant's employment was justified under the circumstances. Grievant provides several arguments why his termination was not valid or why his behavior should be excused. Grievant argues that

there were process failures that invalidated the termination, that the termination was a mere pretext for retaliation and discrimination, and that he was entitled to an improvement period because his conduct was correctable. Grievant alternatively argues that even if termination was otherwise justified, mitigating factors compel a lesser penalty.

Grievant argues there were multiple process failures that he asserts render the termination decision invalid. Grievant's arguments mostly relate to an allegation that he was not provided due process. Permanent civil service employees have "a property interest arising out of the statutory entitlement to continued uninterrupted employment." Syl. Pt. 4, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 156, 241 S.E.2d 164, 166 (1977). That property interest "warrant[s] the application of due process procedural safeguards to protect against the arbitrary discharge of such employee under Article 3, Section 10 of our constitution." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 283, 332 S.E.2d 579, 583 (1985) (*per curiam*) (citing *Waite*).

"[O]utside of the area of criminal law, due process is a flexible concept, and . . . the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case. *Clarke v. West Virginia Board of Regents,* [166 W. Va. 702, 710], 279 S.E.2d 169, 175 (1981); *Bone v. West Virginia Department of Corrections,* 163 W. Va. 253, 255 S.E.2d 919 (1979); *North v. West Virginia Board of Regents,* 160 W. Va. 248, 233 S.E.2d 411 (1977)." *Buskirk,* 175 W. Va. at 283, 332 S.E.2d at 583. "The extent of due process protection affordable for a property interest requires consideration of three distinct factors: first, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of a property interest through the procedures used, and the

probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Waite* at Syl. Pt. 5.

Under this test, the WVSCA "'has traditionally shown great sensitivity toward the due process interests of the government employee by requiring substantial due process protections,' including, generally, predischarge notice and a hearing. *Major v. DeFrench,* [169 W. Va. 241, 255], 286 S.E.2d 688, 697 (1982)." *Buskirk*, 175 W. Va. At 283, 332 S.E.2d at 583. In determining the due process that is required for public employees the WVSCA has determined "[t]he constitutional guarantee of procedural due process requires '"some kind of hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment.' *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 [84 L. Ed. 2d 494, 105 S. Ct. 1487] (1985)." Syl. Pt. 3, *Fraley v. Civil Serv. Comm'n*, 177 W. Va. 729, 730, 356 S.E.2d 483, 484 (1987). "The essential due process requirements, notice and an opportunity to respond, are met if the tenured civil service employee is given 'oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story' prior to termination." *Fraley*, 177 W. Va. at 732, 356 S.E.2d at 486 (citing *Loudermill* at 546).

Grievant disputes that the notice he received was adequate on two grounds: that Superintendent Saxe did not identify the employee code of conduct by policy number in the December 6, 2019 letter and that Superintendent Saxe did not state that the grounds for Grievant's termination were based on West Virginia Code § 18A-2-8 until the

termination letter. Neither of these arguments invalidate the notice Grievant was given. Grievant was well aware of the charges against him: that he entered the principal's office, accessed and copied employee files, and shared that information all without permission. Grievant was also well aware of the evidence against him because that evidence was his own sworn testimony. This is certainly sufficient to provide Grievant the notice he was due.

Grievant also asserts that he was not provided adequate opportunity to be heard because his time to present his case before the school board was limited, he was constantly interrupted with objections, and he was not permitted to present evidence of his disability. It is certainly true that Grievant's opportunity to tell his side of the story was limited. Grievant is correct that Ms. Hornbuckle should not have been permitted to make objections during the hearing as she was not acting as Respondent's counsel during the hearing. Her actions were improper and unnecessarily disruptive. However, Grievant did still have his opportunity to tell his side of the story. It was Grievant's choice to call Superintendent Saxe rather than to testify on his own behalf. Grievant's time was limited to thirty minutes but Respondent was not required to give him a particular amount of time to present his case and Respondent's counsel was similarly limited. Respondent is not required to have a formal hearing at all, only to give Grievant an opportunity to tell his story. Although Grievant's opportunity was limited, the limitations did not negate his opportunity to be heard.

Grievant next argues that the stated reason for his termination was a mere pretext to retaliate and discriminate against him. Grievant asserts Respondent was motivated to terminate his employment, not because of his conduct, but to retaliate against him for his

participation in the discipline committee, his report to the CyberTipline, his testimony in the Gonzales grievance, and for requesting accommodation for his disability. Grievant asserts that Respondent knew a year prior to his termination what he had done, and that Respondent did not take action at the time shows that the termination was a pretense.

"No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination." W.VA. CODE § 6C-2-3(h). Reprisal is defined as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." W.VA. CODE § 6C-2-2(o).

"In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation must establish a *prima facie* case." *Freeman v. Fayette Cty. Bd. of Educ.*, 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004). In syllabus point six of *Freeman*, the West Virginia Supreme Court of Appeals specifically applied the same elements required to prove a *prima facie* case under the West Virginia Human Rights Act to a claim arising from a public employee grievance stating,

> [T]he burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

Id., Syl. Pt. 6, 215 W. Va. at 275, 599 S.E.2d at 698 (citing Syl. Pt. 4, *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); Syl. Pt. 1, *Brammer v. Human Rights Comm'n*, 183 W. Va. 108, 394 S.E.2d 340 (1990); Syl. Pt. 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)).

"An employer may rebut the presumption of retaliatory action by offering 'credible evidence of legitimate nondiscriminatory reasons for its actions . . . .' *Mace v. Pizza Hut, Inc.*, 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); *see also Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983). Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. *Mace*, 377 S.E.2d 461 at 464." *W. Va. Dep't of Nat. Res. v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994); *Conner v. Barbour Cty. Bd. of Educ.*, 200 W. Va. 405, 409, 489 S.E.2d 787 (1997).

Grievant has made a *prima facie* case of retaliation on one ground in that his termination was, in fact, precipitated by his testimony in a grievance hearing. Grievant failed to make a *prima facie* case of retaliation for his participation in the discipline committee, his report to the CyberTipline, or for requesting accommodation for his disability. The initial negative employment action was when Grievant was placed on administrative leave in January 2019. Grievant's conflict with Principal Paxton regarding the discipline committee occurred in 2016 and his request for accommodation and report to the CyberTipline occurred in 2017, which were too remote in time to infer a retaliatory motive. There is also no direct evidence of a retaliatory intent based on those

circumstances. Superintendent Saxe is the person who made the initial disciplinary decisions and he had nothing to do with the discipline committee situation or the request for accommodation and the CyberTipline report had no allegation of wrongdoing against Superintendent Saxe.

Regarding Grievant's testimony in the Gonzales hearing, although Grievant has made a *prima facie* case of retaliation on that ground, as already discussed above, Respondent has provided legitimate nondiscriminatory reasons for the termination. Grievant was terminated because he admitted his misconduct under oath in that grievance hearing and not because he participated in the hearing or somehow harmed Respondent's interests with his testimony.

Grievant asserts he has proven his termination was a pretext because Superintendent Saxe lied about not knowing Grievant had been in the principal's office to get the information. Grievant willfully misinterprets Superintendent Saxe's testimony. Yes, it did appear to Superintendent Saxe at the time of the CyberTipline report that Grievant had seen some of the documents in Gonzales' file based on the language Grievant used in the report. However, there was nothing in the report regarding how Grievant knew about the documents. While there was suspicion that Grievant may have accessed the file in Principal Paxton's office, there are certainly other ways that Grievant could have come into possession of that information and no proof that Grievant had taken the information from the Principal Paxton's office.

While Superintendent Saxe certainly would have had justification at the time of the CyberTipline report to investigate Grievant, he gave a reasonable explanation why he chose not to do so. Superintendent Saxe's understandable and correct focus was on the

serious allegations of child molestation and a coverup of the same by administration. He did not want to taint that investigation by investigating the reporter of the same and opening Respondent to allegations of retaliation against a whistleblower. This was certainly not an unreasonable concern considering Grievant now accuses Respondent of exactly that. Grievant's assertion that Respondent's lack of action at the time proves the motive was retaliatory is non-sensical. Respondent purposely refused to take action against Grievant until Grievant essentially gave Respondent no choice when he admitted to his misconduct under oath. If Superintendent Saxe had a retaliatory motive, he had ample opportunity to take action against Grievant in 2017 and early 2018 regarding Grievant's statement that he wanted to punch the student in the face and regarding Grievant's alleged harassment of Gonzales. Yet, Superintendent Saxe took no action against Grievant until he confessed under oath to the misconduct at issue here. Respondent did not discriminate against Grievant.

Grievant asserts his termination was discriminatory because he was treated differently than other employees. For purposes of the grievance process, "'[d]iscrimination' means 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). Grievant asserts he was treated differently, for various reasons, than several other employees: one who seven years prior took an item from a rummage sale without paying first and then paid and was not disciplined; one was accused of stealing food and other unspecified items who was terminated from employment and whose termination was reversed by the Grievance Board; one who was accused of being too rough with a student during a game

who was placed on administrative leave and then transferred; and one who had been placed on administrative leave due to alleged improper contact with a student that was later found unsubstantiated by Child Protective Services. Grievant also asserts he was treated differently than Principal Paxton as Principal Paxton received no discipline for failure to keep the files in his office secure.

Grievant is not similarly situated to the compared employees in that none of the above employees but Mr. Paxton admitted to the conduct of which they were accused and none of the conduct except the one terminated for theft was actually similar to Grievant's conduct. As to the other accused of theft, that person was treated the same in that termination was also the penalty. Grievant claims he was discriminated against in that instance because Respondent made a criminal complaint against Grievant but not the other employee. The other employee had denied the theft and was accused of stealing only unspecified food items. Mr. Paxton was not similarly situated in that his misconduct was only that he failed to secure confidential information in a locked cabinet, which is very different than searching a private office to access and confidential information and then share the same.

Grievant also asserts he was entitled to an improvement period because his conduct was correctable. The provisions of W. VA. CODE § 18A-2-12a(b)(6), which codified State Board Policy 5300, states the following:

> All school personnel are entitled to know how well they are fulfilling their responsibilities and should be offered the opportunity of open and honest evaluations of their performance on a regular basis and in accordance with the provisions of section twelve of this article. All school personnel are entitled to opportunities to improve their job performance prior to the termination or transfer of their services. Decisions concerning the promotion, demotion, transfer or termination of

> employment of school personnel, other than those for lack of need or governed by specific statutory provisions unrelated to performance, should be based upon the evaluations, and not upon factors extraneous thereto. . . .

The West Virginia Supreme Court of Appeals has made it clear that it is not the label given to the conduct that controls the application of W. VA. CODE § 18A-2-12a(b)(6), but whether the conduct was related to Grievant's performance and is correctable. Accordingly, even when Respondent labels Grievant's conduct as "insubordination," where the underlying complaints regarding an employee's conduct relate to his employment "the effect of West Virginia Board of Education Policy is to require an initial inquiry into whether that conduct is correctable." *Maxey v. McDowell County Bd. of Educ., 212 W. Va. 668, 575 S.E.2d 278* (2002). Concerning what constitutes "correctable" conduct the Court noted that the consideration is "whether the conduct forming the basis of dismissal involves professional incompetency and whether it directly and substantially affects the morals, safety, and health of the system in a permanent, non-correctable manner." Syl. Pt 4, *Mason Cty. Bd. of Educ. v. State Superintendent of Sch.,* 165 W. Va. 732, 733, 274 S.E.2d 435, 436 (1980).

Grievant's conduct was not related to his performance and was not correctable. Grievant had received counseling and discipline regarding his impulsive behavior on multiple occasions and was clearly notified that such behavior was unacceptable. Superintendent Saxe specifically instructed Grievant to stop attempting to investigate the behavior of Mr. Gonzales. Grievant ignored the actions Respondent took to correct his behavior and chose to escalate his behavior because Grievant believed he was justified in that behavior. There is no plan of improvement that could correct such a mindset.

Grievant last argues in the alternative that the punishment of termination should be mitigated under the circumstances. "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); *Olsen v. Kanawha County Bd. of Educ.*, Docket No. 02-20-380 (May 30, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004). "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); *Cooper v. Raleigh County Bd. of Educ.*, Docket No. 2014-0028-RalED (Apr. 30, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

While it is clear Grievant believes his actions were justified, they were not, and Grievant's position creates a problem when it comes to the prospects for rehabilitation. While Grievant has acknowledged his behavior he still does not recognize that behavior as misconduct or accept responsibility for it, instead placing the blame on others. Without acceptance of responsibility there is no prospect for rehabilitation because Grievant

cannot be trusted not to engage in the same behavior in the future if he feels he is in the right. Grievant's impulsivity certainly appears to have contributed to his conduct, which hopefully is being better controlled by his medication as he testified, but the real problem is Grievant's continuing refusal to accept authority. Grievant's work history showed an escalating pattern of refusal to accept authority that does not support mitigation. Termination for Grievant's misconduct is not disproportionate to the severity of the misconduct and was the same as the other employee Respondent had accused of theft.

Grievant argues that his behavior should be excused because of his disability and the stress of a "toxic" work environment. Grievant's mental health diagnoses are not necessarily a disability but, regardless of what they are termed, they cannot absolve Grievant of responsibility for his actions. Freedom from disciplinary action for serious misconduct is not an available accommodation for a disability. While there were certainly tensions at Huntington Middle School, which Grievant considers paramount, it is not necessary to discuss those accusations in detail because none of it would excuse Grievant's behavior. Grievant chose to deal with his anxiety and stress by engaging in inexcusable misconduct rather than acceptable and professional conflict resolution. The consequence of that choice was his termination from employment and Grievant's excuses for his choice do not warrant mitigation of that punishment.

The following Conclusions of Law support the decision reached.

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. W.VA. CODE ST. R. § 156-1-3 (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 employer has not met its burden. *Id.*

2. The authority of a county board of education to terminate an employee must be based on one or more of the causes listed in West Virginia Code § 18A-2-8 and must be exercised reasonably, not arbitrarily or capriciously. Syl. Pt. 2, *Parham v. Raleigh County Bd. of Educ.*, 192 W. Va. 540, 453 S.E.2d 374 (1994); Syl. Pt. 3, *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). The causes are:

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

W. VA. CODE § 18A-2-8(a).

3. The code of conduct for West Virginia school employees as contained in the legislative rules of the State Board of Education, states that employees shall:

> 4.2.1. exhibit professional behavior by showing positive examples of preparedness, communication, fairness, punctuality, attendance, language, and appearance.
>
> 4.2.2. contribute, cooperate, and participate in creating an environment in which all employees/students are accepted and are provided the opportunity to achieve at the highest levels in all areas of development.
>
> 4.2.3. maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination.

> 4.2.4. create a culture of caring through understanding and support.
>
> 4.2.5. immediately intervene in any code of conduct violation, that has a negative impact on students, in a manner that preserves confidentiality and the dignity of each person.
>
> 4.2.6. demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior.
>
> 4.2.7. comply with all Federal and West Virginia laws, policies, regulations and procedures.

W.VA. CODE ST. R. § 126-162-4.2 (2002).

4. Insubordination "at least includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued by the school board or by an administrative superior. . .This, in effect, indicates that for 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 v. Higher Educ. Interim Governing Bd./Shepherd Coll.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). [F]or a refusal to obey to be "wilful," the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." *Id.*, 212 W. Va. at 213, 569 S.E.2d at 460. This Grievance Board has previously recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988), *aff'd*, *Sexton v. Marshall University*, 182 W. Va. 294, 387 S.E.2d 529 (1989).

5. "Immorality is an imprecise word which means different things to different people, but in essence it also connotes conduct 'not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior.' Webster's New Twentieth Century Dictionary Unabridged 910 (2d ed. 1979)." *Golden v. Bd. of Educ.*, 169 W. Va. 63, 67, 285 S.E.2d 665, 668 (1981).

6. Respondent proved Grievant violated its policy and that his misconduct constituted insubordination, willful neglect of duty, and immorality.

7. Permanent civil service employees have "a property interest arising out of the statutory entitlement to continued uninterrupted employment." Syl. Pt. 4, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 156, 241 S.E.2d 164, 166 (1977). That property interest "warrant[s] the application of due process procedural safeguards to protect against the arbitrary discharge of such employee under Article 3, Section 10 of our constitution." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 283, 332 S.E.2d 579, 583 (1985) (*per curiam*) (citing *Waite*).

8. "[O]utside of the area of criminal law, due process is a flexible concept, and . . . the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case. *Clarke v. West Virginia Board of Regents,* [166 W. Va. 702, 710], 279 S.E.2d 169, 175 (1981); *Bone v. West Virginia Department of Corrections,* 163 W. Va. 253, 255 S.E.2d 919 (1979); *North v. West Virginia Board of Regents,* 160 W. Va. 248, 233 S.E.2d 411 (1977)." *Buskirk,* 175 W. Va. at 283, 332 S.E.2d at 583. "The extent of due process protection affordable for a property interest requires consideration of three distinct factors:

first, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of a property interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Waite* at Syl. Pt. 5.

9. Under this test, the WVSCA "'has traditionally shown great sensitivity toward the due process interests of the government employee by requiring substantial due process protections,' including, generally, predischarge notice and a hearing. *Major v. DeFrench,* [169 W. Va. 241, 255], 286 S.E.2d 688, 697 (1982)." *Buskirk*, 175 W. Va. At 283, 332 S.E.2d at 583. In determining the due process that is required for public employees the WVSCA has determined "[t]he constitutional guarantee of procedural due process requires '"some kind of hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment.' *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 [84 L. Ed. 2d 494, 105 S. Ct. 1487] (1985)." Syl. Pt. 3, *Fraley v. Civil Serv. Comm'n*, 177 W. Va. 729, 730, 356 S.E.2d 483, 484 (1987). "The essential due process requirements, notice and an opportunity to respond, are met if the tenured civil service employee is given 'oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story' prior to termination." *Fraley*, 177 W. Va. at 732, 356 S.E.2d at 486 (citing *Loudermill* at 546).

10. Grievant failed to prove Respondent violated his right to due process.

11. "No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination." W.VA. CODE § 6C-2-3(h). Reprisal is defined as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." W.VA. CODE § 6C-2-2(o).

12. "In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation must establish a *prima facie* case." *Freeman v. Fayette Cty. Bd. of Educ.*, 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004). In syllabus point six of *Freeman*, the West Virginia Supreme Court of Appeals specifically applied the same elements required to prove a *prima facie* case under the West Virginia Human Rights Act to a claim arising from a public employee grievance stating,

> [T]he burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

Id., Syl. Pt. 6, 215 W. Va. at 275, 599 S.E.2d at 698 (citing Syl. Pt. 4, *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); Syl. Pt. 1, *Brammer v. Human Rights Comm'n*, 183 W. Va. 108, 394 S.E.2d 340 (1990); Syl. Pt. 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)).

13. "An employer may rebut the presumption of retaliatory action by offering 'credible evidence of legitimate nondiscriminatory reasons for its actions . . . .' *Mace v. Pizza Hut, Inc.*, 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); *see also Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983). Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. *Mace*, 377 S.E.2d 461 at 464." *W. Va. Dep't of Nat. Res. v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994); *Conner v. Barbour Cty. Bd. of Educ.*, 200 W. Va. 405, 409, 489 S.E.2d 787 (1997).

14. Grievant made a *prima facie* case of retaliation on one ground but Respondent provided legitimate reasons for the termination and Grievant failed to prove those reasons were pretextual.

15. For purposes of the grievance process, "'[d]iscrimination' means 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).

16. Grievant failed to prove his termination was discriminatory.

17. The provisions of W. VA. CODE § 18A-2-12a(b)(6), which codified State Board Policy 5300, states the following:

> All school personnel are entitled to know how well they are fulfilling their responsibilities and should be offered the opportunity of open and honest evaluations of their performance on a regular basis and in accordance with the provisions of section twelve of this article. All school personnel are entitled to opportunities to improve their job performance

> prior to the termination or transfer of their services. Decisions concerning the promotion, demotion, transfer or termination of employment of school personnel, other than those for lack of need or governed by specific statutory provisions unrelated to performance, should be based upon the evaluations, and not upon factors extraneous thereto. . . .

18. The West Virginia Supreme Court of Appeals has made it clear that it is not the label given to the conduct that controls the application of W. VA. CODE § 18A-2-12a(b)(6), but whether the conduct was related to Grievant's performance and is correctable. Accordingly, even when Respondent labels Grievant's conduct as "insubordination," where the underlying complaints regarding an employee's conduct relate to his employment "the effect of West Virginia Board of Education Policy is to require an initial inquiry into whether that conduct is correctable." *Maxey v. McDowell County Bd. of Educ., 212 W. Va. 668, 575 S.E.2d 278* (2002). Concerning what constitutes "correctable" conduct the Court noted that the consideration is "whether the conduct forming the basis of dismissal involves professional incompetency and whether it directly and substantially affects the morals, safety, and health of the system in a permanent, non-correctable manner." Syl. Pt 4, *Mason Cty. Bd. of Educ. v. State Superintendent of Sch.,* 165 W. Va. 732, 733, 274 S.E.2d 435, 436 (1980).

19. Grievant failed to prove his conduct was correctable or that he was entitled to an improvement period.

20. "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); *Olsen v. Kanawha County Bd. of Educ.*, Docket No. 02-20-380 (May 30, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004). "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); *Cooper v. Raleigh County Bd. of Educ.*, Docket No. 2014-0028-RalED (Apr. 30, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

21. Grievant failed to prove mitigation of the punishment is warranted.

Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: July 1, 2021

Billie Thacker Catlett
Chief Administrative Law Judge