THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ANNE MARIE MICHELLE WOART,

Grievant,

v. **Docket No. 2021-2181-MerED**

MERCER COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Anne Marie Michelle Woart, filed this expedited level three grievance against her employer, Mercer County Board of Education, dated February 8, 2021, stating as follows: "[o]n February 2, 2021, the Mercer County Board of Education voted to terminate my employment after nearly 20 years. This termination is excessive punishment given the facts of the situation. Other employees of the Board have been treated more favorably than the grievant despite evidence of wrongdoing." As relief sought, Grievant seeks, "[r]einstatement to her position as a classroom teacher, back pay and benefits from the date of suspension and removal of this action from her official record." Grievant attached to her statement of grievance form a copy of a letter dated February 4, 2021, she received from Respondent informing her that it voted to terminate her contract of employment on February 2, 2021.

A level three hearing was conducted on July 7, 2021, via Zoom video conferencing, before the undersigned administrative law judge appearing at the Grievance Board's Charleston, West Virginia, office. Grievant and her counsel, Katherine L. Dooley, Esquire, appeared together via video conferencing from Ms. Dooley's office. Respondent, Mercer

County Board of Education, appeared by counsel, Malorie N. Morgan, Esquire,[1] and Kermit J. Moore, Esquire, Brewster Morhous, PLLC, via video conferencing from the Mercer County Board of Education office. Appearing with Ms. Morgan and Mr. Moore was Dr. Deborah Akers, former Superintendent of Mercer County Schools. This matter became mature for consideration on August 10, 2021, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a Spanish teacher. Respondent suspended Grievant, then subsequently terminated her contract of employment, citing charges of insubordination and immorality, as well as a violation of the Mercer County Schools Policy G-24. Grievant denies all of Respondent's allegations and asserts that mitigation of her dismissal is warranted. Respondent met its burden of proving that Grievant's actions constitute insubordination and that such justifies its decision to suspend, and subsequently terminate, Grievant's employment contract. Grievant failed to present sufficient evidence to demonstrate that mitigation is warranted. Respondent failed to prove its claims of immorality and that Grievant violated Policy G-24. 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, including the record of the lower school-level disciplinary hearing:

[1]This ALJ now realizes that she mistakenly referred to Ms. Morgan, counsel for Respondent, as "Ms. Mallory" throughout the level three hearing. My apologies for this error. This notation shall serve to correct the record of the level three hearing where applicable.

Findings of Fact

1. At the times relevant herein, Grievant was employed by Respondent as a Spanish teacher at Bluefield High School. Grievant had been employed by Respondent for approximately twenty years. Before becoming a regularly employed classroom teacher, Grievant worked as a substitute teacher for Mercer County Schools.

2. Grievant's first language is Spanish. Grievant is also fluent in English, French, Creole, and an African dialect. In addition to her duties as a classroom teacher, over the years, Grievant has assisted school administration by serving as a translator for new students who were not fluent in English.

3. Mike Collins is the Principal of Bluefield High School.

4. At the times relevant herein, Deborah S. Akers, Ed.D., was the Superintendent of Mercer County Schools. Dr. Akers retired sometime prior to the level three hearing. Nonetheless, Dr. Akers appeared and testified at the same.

5. At the times relevant herein, Charles "Abe" Lilly was employed by Mercer County Schools as a Librarian/Technology Integration Specialist ("TIS").[2]

6. Brent Murphy is employed by Respondent as the Director of Technology at Mercer County Schools and has been so since 2015.

7. At the times relevant herein, teachers at Bluefield High School were assigned two laptop computers for their use in their classrooms, one being a Lenovo computer and one larger, HP 640. Additionally, each teacher's classroom was assigned twenty-five laptop computers for students to use during their classes. These twenty-five laptops were kept in each teacher's classroom and stored on carts that contained twenty-

[2]*See*, Transcript, February 2, 2021, school-level disciplinary hearing.

five slots, one slot for each laptop. The students were not permitted to leave the classrooms with these laptops. The way the carts were configured, the laptops could be seen when they were stored in their respective slots. They were not somehow concealed from view. Therefore, it was easy to tell when a laptop was in use because its slot was empty.[3]

8. The Mercer County Schools Technology Department places property tags on each of the county's computers to uniquely identify them. These tags are used to keep track of the computers for inventory purposes. The Technology Department then assigns the tagged computers to the various classrooms and maintains records of the same. As such, the Technology Department knows where each computer is assigned.[4]

9. Teachers are required to inventory their classrooms at the end of each year. This inventory process includes accounting for computers assigned to them and their classrooms, as well as everything else in the classrooms such as desks, furniture, and textbooks.[5]

10. Neither party presented any policy pertaining to the inventory process at level three. Further, neither party presented any policy regarding computers.

11. In March 2020, Mercer County Schools were closed, as were all other schools in West Virginia, as a result of the onset of the COVID-19 pandemic. It is unclear from the record whether the students of Mercer County began remote learning at that time.

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[3]*See*, testimony of Michael Collins at Level Three; testimony of Brent Murphy at Level Three.

[4]*See*, testimony of Brent Murphy at Level Three.

[5]*See*, testimony of Michael Collins at Level Three; testimony of Michael Collins, transcript, February 2, 2021, school-level disciplinary hearing.

12. At the end of the 2019-2020 school year, despite the pandemic, teachers came back to their schools to inventory their classrooms as usual. The inventory process at Bluefield High School requires teachers to complete an inventory list which is taped to the outside of their classroom doors, and to complete a "checklist" form which is to be given to a member of school administration. The checklist addresses actions the teachers are supposed to take at the end of the year, including the return of technology to Mr. Lilly.[6]

13. There has been no allegation that Grievant failed to complete any of her required inventory duties for any school year. Neither party presented copies of any inventory sheets for Grievant's classroom. However, Respondent presented two of Grievant's "End of Year Checklists" during the level three hearing.[7]

14. Given the state of the pandemic in or about August 2020, schools were not allowed to resume in-person learning. Therefore, Mercer County Schools transitioned to virtual learning. During this time, Bluefield High School's classroom student laptop computers, those that had been previously assigned to classrooms, were reconfigured and issued to the students to use at their homes for virtual learning.[8]

15. In October 2020, Mercer County Assistant Superintendent Browning,[9] received a telephone call from police in Morgantown, West Virginia, informing him that they had in their possession a laptop computer that had a tag on it identifying it as the property of Mercer County Schools.

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[6]*See*, testimony of Michael Collins, Level Three.
[7]*See*, Respondent's Exhibit 1 and Exhibit 2, End of Year Checklists.
[8]*See*, Testimony of Michael Collins, Transcript, February 2, 2021, school-level disciplinary hearing.
[9] Assistant Superintendent Browning's first name is unknown, and he was not called to testify at the Level Three hearing.

16. That same day, Assistant Superintendent Browning called Principal Collins and informed him about the computer being found in Morgantown by the police. Assistant Superintendent Browning then told Principal Collins that the police had seized the computer during a search in a criminal matter involving Grievant's son. He also told Principal Collins that computer had been used in an illegal scheme to sell credit card numbers on the "dark web."[10]

17. It is unclear from the record exactly when the laptop was returned to Mercer County Schools by the Morgantown Police, but it was sometime after the October 2020 telephone call and before January 21, 2021. Nonetheless, when it was received, the laptop was sent to Mercer County Schools' Technology Department to be examined.

18. Upon its review of the laptop, the Technology Department determined that the computer was a student laptop assigned to Grievant's classroom, Room 103. The Technology Department also discovered that on July 1, 2019, a TOR browser was installed on the laptop. This type of browser allows one to browse the internet anonymously. Meaning, the computer's IP address could not be seen or traced. The security settings on the laptop were bypassed to install the TOR browser, and the browser history on the device had been cleared. Also, a shortcut to a "dark web" app used for selling information for identity theft purposes was visible on the laptop.[11]

19. There has been no evidence to suggest that Grievant logged onto the laptop and downloaded the TOR browser.[12]

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[10]The criminal matter is irrelevant to this grievance decision. Therefore, it will not be discussed or examined in this Decision, and no additional information regarding the same will be noted herein.

[11]*See*, testimony of Brent Murphy, Director of Technology for Mercer County Schools.

[12]*See*, testimony of Brent Murphy, Director of Technology for Mercer County Schools.

20. In January 2021, about three months after the call from the Morgantown Police Department, after the computer had been returned to Mercer County Schools and examined by the Technology Department, Principal Collins and the Vice Principal, whose name is unknown, spoke to Grievant regarding the computer.

21. When Principal Collins and the Vice Principal talked to Grievant in January 2021, she stated that she did not know anything about the laptop and asked them about her son. They told her that they did not know anything about her son or the police matter. Grievant's son had not told her anything about the police matter.

22. Later, Grievant went back to Principal Collins and told him that she remembered that she had taken the student laptop home with her in 2019, which would have been during the second semester of the 2018-2019 school year, to use because her classroom (teacher) computer was not working, and that Mr. Lilly had said she could do so. She also stated that she had allowed her son to use it for his classes.

23. Later, Grievant told Principal Collins that after she took the laptop home with her in 2019, she accidentally left it in the backseat of her car and her son drove that car back to Morgantown to school. She explained that her son had told her about the laptop when he arrived in Morgantown. She did not trust her son to mail it back safely, so he was going to bring it home the next time he came home. However, the car her son had driven broke down and he could not drive home, and subsequently, she forgot about the laptop all together.

24. Grievant admits that she took the laptop, that was eventually found in Morgantown, home with her in 2019, during the 2018-2019 school year, that it left her possession from soon thereafter, and that she never returned it to the school. Grievant

further admits that upon learning that the computer was in Morgantown, she did not inform Mercer County Schools of the same.

25. The laptop at issue in this grievance was out of the possession of Mercer County Schools from sometime in the second semester of the 2018-2019 school year until it was returned by the Morgantown police sometime between October 2020 and January 2021.

26. On January 26, 2021, Grievant was suspended from employment pending the Respondent Board's decision on Superintendent Akers recommendation to terminate Grievant's contract of employment.

27. Grievant requested a school-level disciplinary hearing before the Respondent Board and the same was conducted on February 2, 2021.

28. By letter dated February 4, 2021, Grievant was informed of the following:

> [a]t its meeting on February 2, 2021, the Mercer County Board of Education confirmed your suspension, without pay, from your teaching position at Bluefield High School, and terminated your employment contract with Mercer County Schools. The reason for this action is theft of a computer, which is an act of insubordination in that you willfully refused to obey regulations and policies of the Board, and immorality in that your behavior connotes conduct not in conformity with acceptable principles of right and wrong behavior. Your actions are a violation of Mercer County Policy G-24, Employee Code of Conduct[,] and WV Code § 18A-2-8.
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> Your suspension dates were from January 26, 2021, to the date the Board suspension confirmation and employment contract termination on February 2, 2021. . . .[13]

[13]*See*, February 4, 2021, letter attached to the statement of grievance dated February 8, 2021.

29. Neither party called Mr. Lilly to testify at the level three hearing. However, he testified at the school-level disciplinary hearing, and the transcript of that hearing is part of the record of this grievance.[14]

30. Neither party presented copies of Mercer County Policy G-24, or any other policy at the level three hearing. It is unknown what Mercer County Policy G-24, as referenced in the February 4, 2021, dismissal letter, says, or to what it pertains.

31. While witnesses mentioned a police report regarding the laptop, one was not presented at level three.

32. The school level disciplinary hearing transcript provided by Respondent has no exhibits attached to it, and on page one of the same, it states that no exhibits were presented during the proceeding.[15]

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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Respondent asserts that its decision to suspend Grievant, and subsequently terminate her employment contract, was proper because Grievant took a student laptop

[14]*See*, Transcript, February 2, 2021, school-level disciplinary hearing.
[15]*See*, Transcript, February 2, 2021, school-level disciplinary hearing.

that was assigned to her classroom home, allowed her son to use it, as well as, take it back to college with him, where the laptop somehow, apparently, wound up being used in the commission of a crime, and she never reported the laptop's whereabouts to Mercer County Schools. Respondent argues that Grievant's conduct constitutes insubordination, immorality, and violation of Policy G-24.

Grievant denies any wrongdoing. Grievant argues that she took the student laptop home to do her work because the two computers assigned to her as a teacher were not working properly, Mr. Lilly was trying to fix them, and that Mr. Lilly said she could take the laptop home to use. Grievant claims that the laptop was mistakenly taken to Morgantown by her son because she had left it in the car he eventually drove back to college. Thereafter, she totally forgot all about the laptop. Grievant now admits that she should have told someone at Mercer County Schools when the student laptop was taken to Morgantown, and that was poor judgment on her part.

WEST VIRGINIA CODE §18A-2-8 states, 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. . . .

W. VA. CODE § 18A-2-8(a). "The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. VA. CODE § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ.,* Docket No. 91-20-005 (Apr. 16, 1991). *See Beverlin v. Bd. of Educ.,* 158 W. Ca. 1067, 216 S.E.2d 554 (1975)." *Graham v. Putnam County Bd. of Educ.,* Docket No. 99-40-206 (Sep. 30, 1999). However, "[i]t is not the label a county

board of education attaches to the conduct of the employee . . . that is determinative. The critical inquiry is whether the board's evidence is sufficient to substantiate that the employee actually engaged in the conduct." *Allen v. Monroe County Bd. of Educ.*, Docket No. 90-31-021 (July 11, 1990); *Duruttya v. Mingo County Bd. of Educ.*, Docket No. 29-88-104 (Feb. 28, 1990).

Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *See State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Id.* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997).

Further, the "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *See Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative

law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

Insubordination "at least includes, and perhaps requires, a willful 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 willful; 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 "willful," 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). *See also Kennard v. Tucker County Bd. of Educ.*, Docket No. 01-47-591/628 (Mar. 12, 2002); *Snodgrass v. Wetzel County Bd. of Educ.,* Docket No. 97-52-384 (Dec. 15, 1997); *Harry v. Marion County Bd. of Educ.*, 203 W. Va. 64, 506 S.E.2d 319 (1998). "'Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires at least an inference of conscious intent.' *See Hayes v. Kanawha County Bd. of Educ.*, Docket No. 94-20-1143 (June 28, 1995), *citing Youngman v. Doerhoff*, 890 S.W.2d 330 (Mo. 1994)." *Kennard v. Tucker County Bd. of Educ.*, Docket No. 01-47-591/628 (Mar. 12, 2002); *Wahl v. Mineral County Bd. of Educ.*, Docket No. 98-28-175 (Sep. 14, 1998).

The sole issue to be decided in this grievance is whether Respondent has proved by a preponderance of the evidence that Grievant's conduct constituted insubordination, immorality, and/or violated Mercer County Schools Policy G-24, and if so, whether Respondent's decision to suspend and, subsequently, dismiss Grievant was justified.

At the outset, this ALJ must first address an evidentiary issue that arose during the level three hearing. The Grievance Board's Hearing Procedures Order entered by Chief Administrative Law Judge Billie Thacker Catlett on February 22, 2021, which was necessitated by the COVID-19 pandemic, established the procedures for hearings conducted by video conferencing, such as this grievance. The Grievance Board sent a copy of this Order to counsel for the parties by email dated February 22, 2021, along with the Zoom video conferencing information required for the July 7, 2021, level three hearing. The Hearing Procedures Order states, in part, as follows:

> All exhibits shall be provided to the Grievance Board and the opposing party no later than three business days prior to the hearing. Exhibits shall be provided by email unless the party does not have the ability to send the document by email.

> Employers shall permit grievants to use the employer's scanning equipment if such equipment is available. Each party shall provide a descriptive list of exhibits and must identify each individual exhibit by number. The parties are encouraged to confer prior to the hearing and submit as joint exhibits any documents that are in common. . . .

However, neither party submitted exhibits to the opposing party or the Grievance Board before the level three hearing. Early in the level three hearing, counsel for Respondent attempted to introduce two documents as exhibits, two "End of Year Checklists" during the testimony of its first witness, Principal Collins. Counsel for Grievant objected stating that the proposed exhibit had not been disclosed to her prior to the hearing pursuant to the Grievance Board's Hearing Procedures Order.

At that time, this ALJ informed the parties that she had not received any exhibits from either party, but asked the parties whether they had attempted to send any such exhibits the Grievance Board pursuant to the Hearing Procedures Order. Grievant's counsel stated that she had not submitted any exhibits. However, counsel for Respondent did not know whether they had submitted any. This ALJ directed counsel for Respondent to make inquiry as to whether they had attempted to submit exhibits and adjourned the hearing for a ten-minute break. Upon the return from the break, counsel for Respondent informed this ALJ that they had not submitted any exhibits to the Grievance Board or to counsel for Grievant in advance of the level three hearing despite the Hearing Procedures Order. Upon hearing the arguments of both counsel, this ALJ sustained counsel for Grievant's objection as Respondent had violated the provisions of the procedural order. Whereupon, Mr. Moore, counsel for Respondent, moved to vouch the record with respect to these documents and this ALJ granted the same.

Many of the material facts of this grievance are in dispute. 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).

While several witnesses testified at the level three hearing and at the school-level disciplinary hearing about the allegations and the investigation, the testimony of Grievant is the most relevant, and dispositive. However, this ALJ considered the testimony of all witnesses in making her decision.

As Grievant is seeking reinstatement to her former position, she has an interest in this matter which could be a motive to be untruthful. During questioning by her attorney, Grievant appeared calm and her demeanor was appropriate. She testified that her two teacher computers were not working in 2019 and that Mr. Lilly took them to work on, and

he told her she could take one of the student laptops home to do her work, which she did. She explained that soon thereafter, she accidentally left the laptop in the backseat of her car and her son drove that car back to college in Morgantown. She testified that her son called and informed her about the laptop being in the car when he got back to Morgantown. Grievant testified that she did not think her son could mail it back to her safely, so he was going to bring it back with him when he returned home. However, the car broke down and she did not see her son until the next year. Grievant testified that she forgot all about the laptop because of the stressors in her life, such as a difficult and lengthy divorce and the pandemic.

In response to questions from her counsel, Grievant testified that she reported on the 2019 inventory list that two computers were missing and that one computer was missing on the 2020 inventory list. Grievant did not present these inventory lists as evidence at level three, asserting that the school did not retain these records; therefore, she did not have them. Grievant explained that when Principal Collins first talked to her about the laptop received from the Morgantown police, she did not remember anything about it, but once she had time to think about it, she remembered what had happened. That is why she returned to Principal Collins and told him what she had remembered. Grievant denies being untruthful, asserting she just needed some time to think calmly about it, and she was able to remember. Grievant was adamant that she did not intend to keep the laptop or allow her son to take it to Morgantown, and that it was all a mistake. Grievant acknowledged that she should have told Principal Collins when she first learned her son had taken the laptop to Morgantown, and that such was her mistake in judgment.

When Grievant was questioned by counsel for Respondent, she was mostly calm and professional. When asked about her participation in the end of the year inventory, Grievant testified that she realized a computer was missing and stated that she reported it, and she did not remember that the computer was with her son. Grievant acknowledged that she had allowed her son to use the computer, and that Mr. Lilly did not give her son permission to use it. Respondent's counsel asked Grievant about the inventory procedure and the checklists done each year. Thereafter, Grievant testified that she noted on the checklists in 2019 and 2020 that two computers were missing. At which time, counsel for Respondent introduced the previously excluded "End of the Year Checklists" for impeachment purposes, and counsel for Grievant objected. Given that the exhibits were being offered for impeachment, this ALJ overruled the objection and allowed counsel for Respondent to continue questioning Grievant regarding the documents. During this line of questioning, Grievant began to speak more rapidly and became somewhat evasive.

The two checklists are from the 2018-2019 and 2019-2020 school years.[16] The 2018-2019 checklist notes one computer in the tech office and that all of the "media center materials and technology materials" were returned to Mr. Lilly. The 2019-2020 checklist indicates that "all media center materials and technology materials" were returned to Mr. Lilly. There are no missing computers noted on either checklist. These checklists have Grievant's name hand-printed at the bottom of each sheet, along with a phone number. The phone number is the same on both sheets. They both bear the signature of an administrator, but the signatures are indecipherable. When presented with these

[16] *See*, Respondent's Exhibit 1 and Exhibit 2, Checklists.

documents for review, Grievant testified that these documents did not bear her signature or her own handwriting, implying that someone else completed the documents and wrote her name thereon.

Grievant was very forth coming about her personal history and information during questioning by her counsel. She answered the questions asked of her and she was not evasive. However, when opposing counsel introduced the two checklists and began asking her questions about the same, Grievant's demeanor changed. Her speech became more rapid, and it appeared that she did not want to answer the questions being asked. Some of the change in demeanor can be attributed to nervousness, but not all. While both inventory sheets and checklists were discussed during witness testimony, the two checklists presented at level three appear to contradict Grievant's testimony that she reported the missing computer. Given that, the changes in Grievant's demeanor when she was being asked about the checklists likely indicate of some level of untruthfulness.

Given the evidence presented, and evaluating Grievant's testimony based on the credibility assessment factors, this ALJ cannot find that she was entirely credible. With respect to Grievant changing her answers to Principal Collins' initial questions about the laptop, Grievant's claim that once she had time to collect her thoughts and calmly think about it, she remembered taking the laptop home and her son taking it to Morgantown, is plausible. Grievant had just been told that the police had searched her son's residence and seized a laptop in a criminal matter months before, and that was the first she was hearing about it. It would be reasonable for her to be upset and worried about her son, which could certainly affect her ability to think clearly. Therefore, the simple fact that she went back to Principal Collins and told him about taking the laptop home with her, etc.,

after she had had time to think about it does not, in and of itself, negatively impact her credibility.

However, even if Mr. Lilly told Grievant that she could take the laptop home to use until her computers were repaired, Grievant's claim that she forgot entirely about the school laptop after its trip to Morgantown is not plausible. Grievant testified that she took it home with permission in 2019 before that school year ended, and the evidence demonstrated the laptop did not surface again until October 2020. It is true that Grievant was under stress in her personal life, and the general upheaval everyone has experienced with the pandemic is an additional stressor, but this is just not the kind of thing one is likely to forget about entirely. If this computer were just being used until her two teacher computers were fixed, the return of her fixed computers should have jogged her memory. Also, when her son called her and told her he had the laptop, Grievant had the opportunity then to tell someone at the school and she did not. It is more likely that Grievant decided not to inform the school about the laptop being taken to Morgantown, but it is unknown why. Nonetheless, the evidence presented does not suggest that Grievant intended to steal the laptop. Rather, it appears more likely that things went wrong, and Grievant chose not to act to fix the problem.

In addition to theft, Respondent has alleged that Grievant violated Mercer County Schools Policy G-24; however, Respondent did not present that policy as evidence. As such, it is unknown what Policy G-24 says, or even what it is about. Given this, there is no way to determine whether Grievant violated Policy G-24. As Respondent has the burden of proving the charges against Grievant, Respondent has failed to meet its burden of proving theft or violation of Policy G-24.

Respondent has further charged Grievant with immorality and insubordination. As the evidence does not suggest that Grievant acted with conscious intent to steal the laptop, Respondent has failed to prove that Grievant engaged in immoral conduct. Respondent has proved that Grievant's conduct constitutes insubordination. 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). Grievant's failure to inform Mercer County Schools or administration that the laptop, she had supposedly taken home with the permission of Mr. Lilly, was accidentally taken to Morgantown by her son demonstrates a willful disregard for implied directions of Mercer County Schools. While she may have thought she had permission to take the laptop home with her, Grievant had to understand that, if nothing else, there were implied directions to not allow her son, or anyone else, have the computer in their exclusive possession indefinitely, which is what she did. Therefore, when Grievant failed, or refused, to inform Mercer County Schools or administration that her son took the computer to Morgantown with him, she was willfully disregarding the implied directions of Mercer County Schools. Accordingly, Respondent has proved by a preponderance of the evidence that Grievant's actions as described herein constitute insubordination. Given that Grievant's insubordination ultimately resulted in the computer likely being used in the commission of a crime, this ALJ cannot conclude that Respondent's decision to suspend, and subsequently, dismiss Grievant from employment was unreasonable, or arbitrary and capricious.

Grievant argues that dismissal was an excessive punishment for her actions. "[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was 'clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n,* Docket No. 89-SFC-145 (Aug. 8, 1989)." *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996). "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).

Grievant had been an employee for twenty years, and there was no evidence that she had any other serious disciplinary history or issues with honesty. However, dismissal is not disproportionate to Grievant's offense. Grievant's insubordination led to the laptop going missing for over a year without the knowledge or permission of Respondent and it likely being used to commit a crime. While Respondent was not required to dismiss Grievant for her misconduct, it was certainly within its rights to do so, and such was not unreasonable. Further, this ALJ cannot substitute her judgment for that of Respondent. Grievant has failed to present sufficient evidence to prove that mitigation of her punishment is warranted. Lastly, Grievant alleged that others have engaged in similar conduct and received more favorable outcomes; however, Grievant presented no evidence to support this claim.

For the reasons set forth herein, Respondent proved by a preponderance of the evidence that Grievant's actions as described herein constitute insubordination and that Respondent's decision to terminate Grievant's employment contract is justified. This grievance is DENIED.

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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. WEST VIRGINIA CODE §18A-2-8 sets out the reasons for which a public school employee may be dismissed or suspended and states, in part as follows:

> (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. . . .

3. "The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. VA. CODE § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ.,* Docket No. 91-20-005 (Apr. 16, 1991). *See Beverlin v. Bd. of Educ.,* 158 W. Ca. 1067, 216 S.E.2d 554 (1975)." *Graham v. Putnam County Bd. of Educ.,* Docket No. 99-40-206 (Sep. 30, 1999).

4. Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *See State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Id.* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*,

769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997).

5. 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).

6. Insubordination "at least includes, and perhaps requires, a willful 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 willful; 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 "willful," 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.

7. 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).

8. "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). *See also Kennard v. Tucker County Bd. of Educ.*, Docket No. 01-47-591/628 (Mar. 12, 2002); *Snodgrass v. Wetzel County Bd. of Educ.,* Docket No. 97-52-384 (Dec. 15, 1997); *Harry v. Marion County Bd. of Educ.*, 203 W. Va. 64, 506 S.E.2d 319 (1998). "'Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires at least an inference of conscious intent.' *See Hayes v. Kanawha County Bd. of Educ.*, Docket No. 94-20-1143 (June 28, 1995), *citing Youngman v. Doerhoff*, 890 S.W.2d 330 (Mo. 1994)." *Kennard v. Tucker County Bd. of Educ.*, Docket

No. 01-47-591/628 (Mar. 12, 2002); *Wahl v. Mineral County Bd. of Educ.*, Docket No. 98-28-175 (Sep. 14, 1998).

9. Respondent failed to prove by a preponderance of the evidence that Grievant engaged in acts of immorality.

10. Respondent proved by a preponderance of the evidence that Grievant committed acts of insubordination, and that its decision to suspend, and subsequently terminate Grievant's employment, was justified.

11. Respondent failed to prove by a preponderance of the evidence that Grievant violated Mercer County Schools Policy G-24.

12. Grievant failed to prove by a preponderance of the evidence that mitigation of her dismissal 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* 156 C.S.R. 1 § 6.20 (eff. July 7, 2018).

DATE: September 22, 2021.

Carrie H. LeFevre
Administrative Law Judge