THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

WILLIAM COURTS,
Grievant,

v. **Docket No. 2019-1892-CONS**

KANAWHA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, William Courts, was employed by Respondent, Kanawha County Board of Education, as an Aide/Autism Mentor. On May 31, 2019, Grievant filed a grievance at level one of the grievance process protesting alleged harassment, unsafe and hostile work environment which resulted in physical injury, and an unsatisfactory performance evaluation. The grievance was assigned docket number 2019-1681-KanED. On September 26, 2019, Grievant filed a second grievance directly to level three protesting his termination from employment, harassment, discrimination, favoritism, reprisal and retaliation. The grievance was assigned docket number 2020-0408-KanED. The grievances were consolidated at the request of the parties by order entered November 15, 2019.

A level three hearing was held over two days on July 28, 2020 and February 19, 2021, before the undersigned at the Grievance Board's Charleston, West Virginia office via video conference.[1] Grievant appeared personally and by counsel, D. Adrian Hoosier, II, Hoosier Law Firm PLLC. Respondent appeared by Donnell Amon Gilliam, Assistant Superintendent, and by counsel, Lindsey D.C. McIntosh, General Counsel. This matter

[1] The grievance had also been scheduled for hearing on December 17, 2019, which was continued at Grievant's request; April 13, 2020, which was continued due to the pandemic; and September 18, 2020, which was continued at Grievant's request.

became mature for decision on April 5, 2021, upon final receipt of Respondent's written Proposed Findings of Fact and Conclusions of Law ("PFFCL"). PFFCL were to be submitted by March 19, 2021, and an extension was granted at the request of Respondent with the agreement of Grievant to April 1, 2021. Grievant failed to file PFFCL by the extended date. Grievance Board staff emailed the parties alerting Grievant's counsel that the Grievance Board had not received Grievant's PFFCL, to which the Grievance Board received no reply.

Synopsis

Grievant was employed by Respondent, Kanawha County Board of Education, as an Aide/Autism Mentor. Grievant's employment was terminated for immorality and insubordination when Grievant vandalized a restroom by inappropriately urinating on the floor. Respondent proved Grievant vandalized the restroom. Respondent was justified in terminating Grievant's employment for this misconduct. Grievant failed to prove that mitigation is warranted. 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:

Findings of Fact

1. Grievant was employed by Respondent, Kanawha County Board of Education, as an Aide/Autism Mentor at Dunbar Middle School.

2. Grievant was supervised by Assistant Principal Matt Rhodes and Assistant Superintendent Gilliam, who was the principal of Dunbar Middle School at all times relevant to the grievance.

3. On April 23, 2019, Grievant was interviewed as part of a Child Protective Services investigation regarding an allegation of abuse against a colleague.

4. Grievant was instructed during the interview that the investigation was confidential and he was not to discuss the matter with anyone.

5. Upon leaving the interview, Grievant immediately sought out several colleagues and informed them of the investigation.

6. On April 24, 2019, Principal Gilliam issued Grievant a written reprimand for breach of confidentiality.

7. On May 8, 2019, Principal Gilliam rated Grievant's work as unsatisfactory in his annual evaluation and met with Grievant to review his evaluation. Principal Gilliam informed Grievant that if he returned to Dunbar Middle School the next year he would be placed on a corrective action plan.

8. On May 13, 2019, Classroom Teacher Shannon Hamilton attempted to use the adult restroom and found what appeared to be purposeful urination on the floor and toilet.

9. The adult restroom is small at approximately five feet by eight feet. A large amount of urine covered part of the floor around the toilet and extended halfway to the sink in multiple puddles. Urine was also present on the seat of the toilet. It was immediately apparent upon entering the restroom and the restroom smelled of urine.

10. Thinking that the vandalism had been caused by a student, Mr. Hamilton first went to discuss the matter with the band teacher as the band room is adjacent to the adult restroom.

11. When the band teacher informed Mr. Hamilton that he had not authorized or observed a student entering the restroom Mr. Hamilton then reported to Assistant Principal Matt Rhodes.

12. Assistant Principal Rhodes reported the incident to Principal Gilliam, who instructed him to review the security camera footage, as was the usual practice when a vandalization is suspected.

13. Before viewing the video footage, Assistant Principal Rhodes viewed the condition of the restroom and also believed the urination appeared to be intentional vandalism.

14. Assistant Principal Rhodes then reviewed the security camera footage and determined that the last person to enter the adult restroom before Mr. Hamilton was Grievant and the last person to enter the restroom before Grievant was Autism Mentor Teresa Boggess.

15. The hallway containing the adult restroom is equipped with a motion-activated security camera. The security camera footage is of high quality and clear. There is no evidence of malfunction of the motion detection. The security camera footage shows Mr. Hamilton entered the restroom at 1:48:33 p.m. and exited 20 seconds later. Prior to Mr. Hamilton's entry, Grievant was in the restroom from 1:38:33 p.m. to 1:40:27 p.m. Prior to Grievant's entry, Ms. Boggess was in the restroom from 1:04:36 p.m. to 1:06:30 p.m.

16. Due to near-continuance movement in the hallway, there are only a few gaps of seconds each between the time Grievant left the restroom and Mr. Hamilton

entered. There were a few larger gaps of minutes between the time Ms. Boggess exited the restroom and Grievant entered.

17. After questioning Ms. Boggess, who stated that the restroom was clean when she was in it, Assistant Principal Rhodes concluded that Grievant had committed the vandalism, and immediately reported his conclusion to Principal Gilliam.

18. Principal Gilliam viewed the video and then questioned Grievant. Grievant initially denied that he had used the restroom. When Principal Gilliam stated that the video footage showed Grievant go into the restroom, Grievant then admitted that he had been in the restroom to fix his hair and questioned whether the mess was water rather than urine. Grievant did not state that there was anything wrong with the restroom. Grievant became belligerent and accused Principal Gilliam of harassing him. When Principal Gilliam informed Grievant that he would be writing Grievant up and directed Grievant to return to his classroom, Grievant continued to argue and refused to leave the office. Principal Gilliam had to instruct Grievant multiple times to leave and Grievant only did so once Principal Gilliam stood up from his chair and pointed to the door while again directing Grievant to leave.

19. Immediately after Grievant exited the office, Principal Gilliam composed an email, which he sent at 2:51 p.m., memorializing the above and issuing Grievant a reprimand for the urination and insubordination.

20. Principal Gilliam was shocked by the behavior both of vandalizing the restroom and Grievant's belligerence and insubordination during the meeting. After further consideration of the situation, Principal Gilliam determined he needed to bring the matter to the attention of the Superintendent of Schools the next day.

21. Principal Gilliam also asked Ms. Boggess to provide a written statement, which she did by email on May 14, 2019.

22. On May 15, 2019, Superintendent Ronald E. Duerring, Ed.D. suspended Grievant with pay pending a hearing scheduled for May 28, 2019, to determine if further disciplinary action would be taken. Superintendent Duerring cited Grievant's reprimand for breach of confidentiality, his unsatisfactory evaluation, unprofessional conduct following the evaluation, and the urination incident.

23. The May 28, 2019 hearing was continued by agreement to August 20, 2019. On that date, Grievant was represented by counsel and was given opportunity to cross examine Respondent's witnesses and present his own evidence.

24. The hearing examiner issued a recommended decision on September 11, 2019, recommending Grievant's employment be terminated for insubordination, immorality, and unsatisfactory performance.

25. By letter dated September 16, 2019, Superintendent Duerring notified Grievant that he was recommending to the Kanawha County School Board that Grievant's employment be terminated for insubordination, immorality, and unsatisfactory performance.

26. By letter dated September 20, 2019, Superintendent Duerring notified Grievant that the Kanawha County School Board had terminated Grievant's employment.

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).

Grievant asserts his termination from employment was wrongful in that he was not provided an opportunity to be heard, was not afforded an opportunity to improve, was subjected to multiple disciplinary actions for the same conduct, and that the discipline was disproportionate.[2] Respondent asserts it has proven Grievant's misconduct and that it was justified in terminating his employment for the same for immorality and insubordination.

[2] Grievant further asserted harassment, discrimination, favoritism, reprisal, retaliation, hostile work environment, improper evaluation, and that the termination was in violation of policy. However, as Grievant presented no evidence regarding these allegations, they will not be further addressed.

Grievant chose not to testify, as is his statutory right[3], but has also failed to submit proposed findings of fact. Therefore, Grievant's position is not clear, although it appears Grievant does deny the charges. 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).

Classroom Teacher Shannon Hamilton was credible. His demeanor was professional and polite, his testimony was clear and detailed, and his memory appeared good. There is no indication of bias. His testimony was consistent with the video and with the testimony of Assistant Principal Rhodes. Mr. Hamilton provided clear detail regarding the condition of the restroom. He testified with certainty that the liquid was

[3] "An employee may not be compelled to testify against himself or herself in a disciplinary grievance hearing." W.VA. CODE § 6C-2-3(g)(2).

urine due to its yellow color and smell. He asserted that the amount of urine was consistent with evacuation of a full bladder and that it was inconsistent with an accident. Mr. Hamilton described the multiple puddles and splatters around the toilet. Mr. Hamilton's opinion that the urination appeared intentional is entitled to weight.

Autism Mentor Teresa Boggess was credible. Her demeanor was appropriate and there is no indication of bias. Her testimony that the restroom was clean when she left it was consistent with her written statement made directly after the incident. Further, Ms. Boggess' testimony is plausible in that, if she had been the one to have vandalized the restroom, Grievant would have seen it, and Grievant made no report of urine in the restroom after he visited the restroom.

Assistant Principal Rhodes was credible. He was forthright and serious, and his memory appears good. There was no indication of bias. His testimony was consistent with the video and with the testimony Mr. Hamilton. Assistant Principal Rhodes testified that the urine was visible upon opening the door, that it was present around the toilet, halfway to the sink, and halfway to the wall. He also testified that he knew the liquid to be urine due to the smell. Assistant Principal Rhodes' opinion that the urination appeared intentional is entitled to weight.

Assistant Superintendent Gilliam was credible. His demeanor was forthright and professional. He did not hesitate in his answers. Although his memory for some details was less acute, his memory of the meeting with Grievant appeared very good.

Grievant appears to argue that the liquid in the restroom was not urine or that it was simply a spattering of urine from someone accidentally missing the toilet. Mr. Hamilton and Assistant Principal Rhodes' credible testimony is sufficient to prove it was

more likely than not that the liquid was clearly urine based on its color and smell and that it was intentional due to the large amount of urine and location of the urine.

The video evidence in this case is significant. The quality of the video recording is very good. The picture is clear and smooth. There was no evidence of malfunction. The camera is motion-activated, so there are some gaps in the recording. Between Ms. Boggess' exit of the restroom and Grievant's entry, there were several gaps in the recording of multiple minutes, however, due to the near-continuous movement in the hallway of band students moving equipment, there are only three times, for only seconds each, when the camera was not recording in between Grievant and Mr. Hamilton's visits to the restroom.

Both Ms. Boggess and Mr. Hamilton credibly denied that they had vandalized the restroom with urine. The recording is sufficient to prove that no person was in the restroom in between Grievant and Mr. Hamilton. The only question is whether someone might have vandalized the restroom before Grievant entered. There are enough gaps in the recording to make it theoretically possible that someone entered the restroom prior to Grievant, but it is unlikely given the quality of the video and lack of evidence of any malfunction of the video. Further, when Grievant was initially questioned about the state of the restroom, Grievant denied that he was in the restroom at all. It was only when Grievant was confronted with the video that he admitted he had been in the restroom and he still did not say that there was any problem with the restroom. As Grievant was questioned within approximately an hour and a half of being in the restroom, it is more likely than not that his denial was purposefully evasive rather than merely forgetting. Given the credible descriptions of the amount and location of the urine, it is unlikely

Grievant would have failed to notice the urine when he went to the restroom if someone else had done it.

The video evidence, the credible testimony, and an analysis of the most plausible explanation is sufficient to prove it is more likely than not that Grievant was the person who inappropriately urinated. Based on credible testimony regarding the placement and amount of urine, it is also more likely than not that the urination was a purposeful act of vandalism. While the situation is bizarre, Respondent has provided the plausible explanation that Grievant perpetrated the vandalization because he was disgruntled due to the reprimand for his alleged breach of confidentiality, in which his co-workers had disclosed the breach to Principal Gilliam, and his unsatisfactory evaluation and confrontation with Principal Gilliam several days before the incident.

An adult vandalizing with urine is concerning and it is clearly serious misconduct. Respondent has asserted that the behavior constituted either immorality or insubordination. "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).

Insubordination "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." *Butts v. Higher Educ. Interim Governing Bd.,* 212 W. Va. 209, 569 S.E.2d 456 (2002) (per curiam). However, 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).

Vandalization with urine is certainly not in conformity with accepted principles of right and wrong behavior and would constitute immorality. Vandalization would also constitute insubordination in that it was a flagrant and willful disregarding of the implied directions of Respondent to maintain a safe and healthy environment and for employees to conduct themselves in a professional and courteous manner.

Grievant asserts he was entitled to an improvement period. 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).

Vandalizing a restroom with urine is not a matter of professional competency. it directly and substantially affects the morals, safety, and health of the school. There is no way to correct such behavior, especially given the escalating nature of Grievant’s belligerence and contempt of authority.

Grievant’s assertion that he was not provided an opportunity to be heard is unsupported by the record. Grievant was interviewed during the investigation. He was suspended with pay pending a full hearing with written notification of the charges. He was then provided a full evidentiary hearing in which Respondent presented its evidence and Grievant had the opportunity to cross-examine witnesses and present his own evidence.

Grievant asserts he was improperly subjected to multiple disciplinary actions for the same conduct. This is incorrect. While it is true Principal Gilliam sent an email to “reprimand” to Grievant immediately following the investigation interview, that “reprimand” was not finalized. Upon review with the Superintendent, the final discipline imposed was the suspension and ultimate termination of employment.

In asserting that the discipline was disproportionate, it appears Grievant makes an argument for mitigation of the punishment. “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). Termination of Grievant’s employment was not disproportionate or an abuse of discretion. Given Grievant’s poor evaluation and history of discipline and disrespect of authority Respondent’s assessment that there was no prospect for rehabilitation was reasonable. Mitigation is not warranted.

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. "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).

4. Insubordination "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." *Butts v. Higher Educ. Interim Governing Bd.,* 212 W. Va. 209, 569 S.E.2d 456 (2002) (per curiam). However, 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. Respondent proved Grievant vandalized a restroom with urine and that such conduct constitutes immorality and insubordination.

6. 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. . . .

7. 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).

8. 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).

9. Grievant was not entitled to an improvement period as his conduct was not correctable.

10. "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).

11. 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: May 13, 2021

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Billie Thacker Catlett
Chief Administrative Law Judge