WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JOSEPH LINDAMOOD,
Grievant,

v. **Docket No. 2020-1531-WooED**

WOOD COUNTY BOARD OF EDUCATION,
Respondent.

D E C I S I O N

Joseph Lindamood, Grievant filed this grievance against his employer, Wood County Board of Education, Respondent, protesting his unpaid suspension. The original grievance was filed on June 23, 2020, alleging:

> Violated WV Code Section 18A-2-7 and 18A-2-8 as well as other rules and regulations and policies of the Wood County Board of Education involving discipline.

For relief, Grievant sought the reversal of the unpaid 100 contract days suspension.

As authorized by W. VA. CODE § 6C-2-4(a)(4), the grievance was filed directly to level three of the grievance process.[1] A level three hearing was held before the undersigned Administrative Law Judge on October 6, 2020, at the Grievance Board's Charleston office. Grievant appeared in person and with legal counsel William O. Merriman, Jr., Esquire, Bill Merriman, PLLC. Respondent appeared by representative Superintendent William Hosaflook and legal counsel, Richard S. Boothby, Esquire, Bowles Rice LLP. At the conclusion of the level three hearing, the parties were invited to submit written proposed fact/law proposals. Both parties submitted Proposed

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

Findings of Fact and Conclusions of Law, and this matter became mature for decision on or about November 30, 2020, on receipt of the last of these proposals.

Synopsis

Grievant is a duly licensed teacher of Wood County Board of Education with identified restrictions regarding his physical interactions with students. Grievant argues the instant disciplinary action was gratuitous and excessive action. Respondent maintains it is within its authority to sanction Grievant for his imprudent physical contact with a female student after being told on previous occasions not to have physical contact with students. Grievant was not sanctioned or found to be guilty of kissing a student. Respondent maintains Grievant's conduct was insubordinate after being given ample opportunity to correct his physical contact with (touching of) students.

Respondent establishes Grievant's action was ill-advised and constitutes a violation of a known and acknowledged directive. Respondent established lawful justification for sanctioning Grievant. As a matter of law, Grievant was insubordinate. The levied sanction (100-day suspension) is harsh but within the purview of the agency. This instant Administrative Law Judge recognizes and grasps Grievant's plight and communicated incense however doesn't feel empowered within the totality of this matter to second guess Respondent's analysis (disciplinary action) and mitigate the sanction reached by the collective insight of the Wood County Board of Education. This grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by Respondent as a physical education teacher.

2. Prior to the instant disciplinary action, Grievant had been the subject of an investigation by the Parkersburg Police Department and the WV Department of Health & Human Resources Investigation Unit regarding allegations of misconduct by Grievant. Grievant was suspended for a time.[2]

3. During the time period of these events, there was a plethora of stories. The personnel matters of Grievant was subjected to the attention of parents, students and defamatory comment.

4. On January 14, 2020, Wood County Board of Education ("Board") undertook a hearing predicated on the Superintendent of Wood County Schools, William Hosaflook recommending termination of Grievant's employment.

5. Grievant was represented by legal counsel at the Wood County Board of Education's January 14, 2020 hearing. A transcription of the January 14, 2020 hearing is not part of the instant record.

6. There was discussion of the Department of Health & Human Resources Investigation Unit pending report and the allegations of misconduct. Ultimately no formal charges were levied pertaining to the allegations then at issue. [3]

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[2] On or about December 19, 2019, Grievant was suspended pending the outcome of a criminal investigation into certain allegations made against him.

[3] The DHHR report concludes:

> The behaviors and actions by [Grievant] with his students appear to be **inappropriate and unprofessional**. [Grievant] has been corrected on his hugging of students and still continued to conduct

7. The Board decided to withdraw the Superintendent's recommendation and did not act upon the recommendation. The Board ordered Grievant back-pay for the time he was suspended.

8. On January 15, 2020, the morning after the Board meeting, Superintendent Hosaflook met with Grievant and proceeded to discuss with him allegations regarding Grievant touching student(s) inappropriately. A distinct allegation that was not purportedly provided to the Board the evening before was of issue.

9. During the January 15, 2020 meeting, Grievant acknowledged that he was previously ordered not to be in physical contact with students unless it was necessary due to extenuating circumstances. The instruction not to be in physical contact with students, was rearticulated and reinforced in the Superintendent's letter of reprimand to Grievant on January 21, 2020. R Ex 3

10. On January 21, 2020 Superintendent Hosaflook issued Grievant a letter of reprimand. The written warning of the Superintendent, in relevant part, provided:

> During the meeting, I explained my concern about the serious nature of the allegation and possible consequences if the allegation was true. In September of 2019, Mr. Merritt and Mr. Cook met with you to discuss an allegation of touching students inappropriately. According to our conversation on January 15, you agreed there was a meeting and a directive given not to be in physical contact with students unless it was an extenuating circumstance. However, after the directive was given, you "cracked" a female student's back by placing your arms around her and

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> these actions. Despite **the behavioral misconduct of [Grievant] with his students**, a finding of maltreatment is not being made.

See Respondent's Exhibits (April 7, 2020 DHHR Investigation Report regarding Grievant's then alleged conduct, prior to December, 2019) (*emphasis added*); attachment to R Ex 1 Transcription of June 16, 2020 Personnel Hearing of Grievant before Wood County Board of Education, Respondent.

> lifting her up in the air. Once again, you did not dispute this allegation in our meeting on January 15, 2020.
>
> Based on the fact this incident is your first offense under WVBE Policy 5902, WV Code 18A-2-8 and Wood County School Policy 4118.1, this communication serves as a Letter of Reprimand . . . .

R Ex 3

11. Grievant did not file a grievance regarding the January 21, 2020, letter of reprimand.

12. Subsequently, on March 9, 2020, as preserved on school surveillance video, Grievant was in the hallway of Van Devender Middle School, there were students and other teachers in the area. *See* R Ex 4 (March 9, 2020 surveillance video from Van Devender Middle School). There was also a Resource Officer from the Parkersburg Police Department nearby.

13. A female student informs Grievant that she believes she has a fever. Grievant places his hand on the student's forehead. *Id.*

14. Afterwards Grievant places a section of his face on the student's forehead.[4] *See* video, R Ex 4 Grievant testified he did this in an attempt to determine if the student felt fevered.

15. Grievant didn't think the student felt fevered. Grievant's testimony

16. Another teacher then proceeds to place her hand on the student's forehead, the student walked away shortly thereafter.

17. A student that was involved in the earlier allegations against Grievant, sees this interaction and reports that "the Grievant kissed the student."

[4] Grievant placed the top of his chin on the student's forehead. *See* video, R Ex 4

18. The principal of Van Devender Middle School, Darlene Parsons, reports to Superintendent Hosaflook that Grievant was seen "kissing" a student.

19. Superintendent Hosaflook goes to Van Devender Middle School, the place of Grievant's employment, where he copies the video from the school security monitor onto his telephone.

20. On March 11, 2020, Superintendent Hosaflook called Grievant to his office and confronted him regarding "kissing" a student.

21. At that meeting, Grievant was given the opportunity to respond to the allegation(s) made. Grievant denied "kissing" a student and attempted to explain his version of what the video shows. Superintendent Hosaflook places Grievant on unpaid leave.

22. The Superintendent suspended Grievant without pay and notified Grievant that he would recommend the termination of Grievant's employment contract to the Wood County School Board, Respondent. Superintendent Hosaflook provided Grievant with a letter regarding the same. R Ex 6 In that letter, the Superintendent explained his reasons for taking these actions:

> On January 15, 2020 we met in my office to discuss allegations of you touching students inappropriately. You admitted "cracking a student's back" after you had been given a verbal directive not to be in physical contact with students. During that meeting you acknowledged that you were previously ordered not to be in physical contact with students unless it was necessary due to extenuating circumstances. That order to you was repeated and reinforced in my letter to you dated January 21, 2020. On January 21, 2020 you received a Letter of Reprimand for your actions. On March 10, 2020 I viewed a video from March 9, 2020 at Van

> Devender Middle School of you touching a female student's forehead and then putting your face/lips on her head.[5]

R Ex 6

23. Grievant requested a hearing before the Wood County Board of Education and that hearing was held on June 16, 2020.

24. On June 16, 2020, Grievant appeared under notice that he was being recommended for termination because he kissed a student. Superintendent withdrew the allegation of kissing. At the beginning of the hearing, Grievant learned through representation to the Board by the Superintendent, that Grievant is recommended for termination because he was insubordinate because he touched a student.

25. Grievant was represented by legal counsel at the Wood County Board of Education's June 16, 2020 hearing.[6]

26. The transcript of the June 16, 2020 personnel hearing of Grievant before Wood County Board of Education, Respondent and its exhibits are part of the instant record. R Ex 1 Respondent's exhibits will be referenced by their assigned number as established at the June 16, 2020 personnel hearing.

27. Respondent did not adhere to Superintendent Hosaflook's recommendation. The Wood County Board of Education, Respondent, declined to

[5] Clarification: It is not established that Grievant's lips were in contact with the student (student denied Grievant kissed her). Citing R Ex 1, June 16, 2020 Hearing Transcript; *see* Superintendent Hosaflook testimony, pg 35. It is reasonably maintained that Grievant placed the top of his chin on the student's forehead. *Also see* video, R Ex 4

[6] Counsel noted at length certain allegations that had been made against Grievant in and around December of 2019. It was highlighted with conviction that the instant matter was not revisiting of the prior allegations. *See* e.g., Transcript at 23 ("It has nothing to do with what we're here for today."). R Ex 1

terminate Grievant's employment, but the Board disciplined Grievant by placing him on unpaid suspension for one hundred (100) contract days.

28. Grievant's conduct on March 9, 2020, as preserved on school surveillance video, is of issue which a reasonable person may differ. Respondent has sanctioned Grievant for behavior it adjudicated and determined a violation of an applicable code of conduct applicable to this employee.[7]

29. Grievant protested the unpaid 100 contract days suspension.

30. State Board of Education Policy 5902, West Virginia Code of State Rules 126-162-1 *et seq*., Employee Code of Conduct states, in relevant part, that:

> The West Virginia Board of Education recognizes that the capabilities and conduct of all school employees greatly affect the quality of education provided to students in the public schools. The West Virginia Board of Education further believes that all school employees should be intrinsically motivated by the importance of the job that they do. **The purpose of the Employee Code of Conduct is to establish appropriate standards of conduct for all West Virginia school personnel.**
>
> These regulations also require that West Virginia public school employees respond immediately and consistently to incidents of bullying, harassment, intimidation, substance abuse, and/or violence or any other code of conduct violation that impacts negatively on students in a manner that effectively addresses incidents, deters future incidents, and affirms respect for individuals.
>
> . . .
>
> "Employee" shall include all school personnel employed by a county board of education whether employed on a regular full-time basis or otherwise, and shall include other personnel such as employees of the West Virginia Schools for the Deaf and the Blind, and all employees of West Virginia Department of Education Institutional Programs.
>
> All West Virginia school employees **shall**:

[7] Coupled with the 100-day suspension, Respondent required Grievant to receive mandatory body safety boundary training prior to reinstatement.

> **Exhibit professional behavior** by showing positive examples of preparedness, communication, fairness, punctuality, attendance, language, and appearance.
>
> 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.
>
> Maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination.
>
> Create a culture of caring through understanding and support.
>
> 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.
>
> **Demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior**.
>
> Comply with all Federal and West Virginia laws, policies, regulations and procedures.

W. Va. Code St. R. §126-162-1 *et seq*. (West Virginia State Bd. of Educ. Policy 5902) (*emphasis added*).

Discussion

As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges against the Grievant. In disciplinary matters, the employer bears the burden to prove by a preponderance of the evidence that the disciplinary action taken was justified. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018).

> . . . *See* [*Watkins v. McDowell County Bd. of Educ.,* 229 W.Va. 500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education,* 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters,

> the employer bears the burden of establishing the charges by a preponderance of the evidence.). *See also Hovermale v. Berkeley Springs Moose Lodge,* 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

W. Va. Dep't of Trans., Div. of Highways v. Litten, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in West Virginia Code § 18A-2-8, 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.

West Virginia Code § 18A-2-8(a).

Whether Grievant loves his job or whether he is a dedicated teacher is not at issue. Issues arose as Grievant was specifically ordered not to have any physical contact with

(female) students unless necessary due to extenuating circumstances. Subsequently, as captured on school surveillance tape Grievant initiated physical contact with a student which includes placing his chin on a female student's forehead. Respondent maintains Grievant's actions is in violation of a known directive, and applicable employee standards of conduct,[8] constituting insubordination. Respondent's written notice of suspension and notice of pending recommendation for termination of employment does not allege Grievant kissed a student.[9]

Respondent highlights that Grievant despite having the assistance of able counsel, never filed a grievance challenging the contents of the January 21, 2020 Letter of Reprimand from the Superintendent. When an employee fails to file a timely grievance challenging an earlier disciplinary action, the merits of that action cannot be challenged in a subsequent grievance proceeding. *Potoczny v. Marion County Board of Education*, Docket No. 99-24-344 (June 12, 2000). When an employee does not grieve prior discipline, the merits of that discipline cannot be challenged in a later, unrelated grievance, and it must be presumed that the substance of the allegations is true. *Stephens v. Wayne County Board of Education*, Docket No. 2012-0339-WayED (August 10, 2012). Personnel actions become final upon the expiration of an employee's time limit for challenging them through the grievance process. Thereafter, they are presumed valid. *Jeney v. United Technical Center*, Docket No. 2019-0301-UTC (January 11, 2019)

[8] The January 21, 2020 Letter of Reprimand references WVBE Policy 5902, WV Code § 18A-2-8 and Wood County Schools Policy 4118.1.

[9] *See* Respondent's Exhibits attachment to R Ex 1 Transcription of June 16, 2020 Personnel Hearing of Grievant before Wood County Board of Education, Respondent. (Ex 6).

at 7, n.1 (citing *Cochran v. Mercer County Board of Education*, Docket No. 05-27-307 (December 21, 2005)). Significantly, that letter states that Grievant had been warned earlier in the same school year not to be in physical contact with students.

The January 21, 2020 reprimand was a renewed directive to Grievant from the county superintendent not to be in physical contact with students and specifically contained a warning that continued violation(s) would result in more stringent discipline up to and including termination of employment. R Ex 3

Rather than dispute the written January 21, 2020 order from the Superintendent or the videotaped actions on March 9, 2020, Grievant questions whether "extenuating circumstances" exist and whether his actions truly demonstrate insubordination. Grievant's query is thought provoking. Grievant denies he was intentionally insubordinate. Grievant was ordered not to have any physical contact with female students unless there were extenuating circumstances. Grievant infers that the circumstances of this matter is such circumstances.[10] Respondent disagrees.

Insubordination includes "willful failure or refusal to obey reasonable orders of superior entitled to give such order." *Riddle v. Bd. of Directors/So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). "Insubordination encompasses more than an explicit order and refusal to carry it out. It may also involve a flagrant or willful disregard

[10] Grievant counsel suggests that under the circumstances of COVID-19, with fever being a symptom, Grievant acted as a reasonably prudent teacher.

for implied directions of an employer." *Sexton v. Marshall Univ*., Docket No. BOR2-88-029-4 (May 20, 1988), aff'd 387 S.E.2d 529 (1989).

In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995). 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." *Cooper v. Raleigh County Bd. of Educ*., Docket No. 2014-0028-RalED (April 30, 2014).

In this case, Grievant's knowing and intentional actions on March 9, 2020 did not exhibit advised action or demonstrate prudent behavior for a school employee with Grievant's history and specific restrictions. Wood County School employees are expected to exhibit professional behavior and demonstrate responsible citizenship by maintaining a high standard of conduct and self-control. *See* W. Va. Code St. R. §126-162-1 *et seq*. (West Virginia State Bd. of Educ. Policy 5902). Knowingly violating repeated and reasonable orders from administrators, particularly for a school employee with Grievant's history, is unprofessional and demonstrates an alarming lack of moderation. Grievant's action of placing his face on the face of a female student is concerning and a violation of a reasonable directive of a superior entitled to give such an order. Responsible citizenship is not an insurmountable standard of conduct, the

amount of self-control, and personal restraints required to maintain body safety boundary training is reasonable behavior. The undersigned is not persuaded that Grievant's action was prudent behavior. Even giving that a fever is a symptom of COVID-19, Grievant's Counsel's contention that Grievant acted as a reasonably prudent teacher is not persuasive. Grievant failed to demonstrate persuasive extenuating circumstance which justify his action.

Grievant's Attorney is an impressive and an efficient advocate, he has introduced factors for consideration by an adjudicating authority, be it the School Board or the instant ALJ; nevertheless, ultimately his client's ill-advised physical contact with a female student after being told on prior occasions (verbally and written format) not to have physical contact with female students is misconduct. As a matter of law, Grievant was insubordinate. Respondent maintains it is well within its purview to discipline Grievant for his restricted physical contact with a female student. Respondent by counsel emphasizes that the school board is charged with determining the seriousness of an employee's misconduct brought to their attention. Respondent must provide a reasonable disciplinary response to proven misconduct. Coupled with the 100-day suspension, Respondent mandated Grievant to receive training prior to reinstatement. Training pertaining to body safety boundary is responsible corrective behavior.

The contention that Grievant was denied due process has little merit in the fact pattern of this case. This matter was not a reevaluation of prior dismissed allegations, Grievant had legal representation, who clearly outlined to the School Board the distinction between allegations and proven misconduct. Respondent identified the conduct for

which Grievant was sanctioned. *See* R Ex 1 and 2 (June 16, 2020 Personnel Hearing of Grievant before Wood County Board of Education, Ex 6) Grievant was not sanctioned or found to be guilty of kissing a student.

There was no pressing need for Grievant to touch the student, let alone place their respective faces together. Grievant acted as he did on March 9, 2020 despite his history of issues with female students and the orders he was given. Respondent has with the collective wisdom of the entire Wood County Board of Education's reflection determined this to be actionable. Respondent has persuasively argued that no reasonable school employee who had previously been investigated for misconduct with female students by law enforcement, the Department of Health and Human Resources, and his own employer should have acted as Grievant did on March 9, 2020. Grievant's actions tend to demonstrate an alarming lack of forethought and self-control.

Whether the term insubordination is over reaching was specially contemplated. The undersigned does not easily concur with Respondent's determination that a 100-day suspension is appropriate discipline. Nevertheless, Grievant bears the burden of proof on the affirmative defense that his punishment ought to be reduced in light of mitigating factors. Grievant has failed to offer sufficient evidence on this point. Respondent's Counsel went to some lengths to highlight the parameters of a Grievance Board ALJ to alter the disciplinary measures reached by an adjudicating school board. Considerable deference is afforded the employer's assessment of the seriousness of an 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). 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. A lesser disciplinary action may be imposed when sufficient mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory performance.[11]

In response to Grievant's, willful conduct in opposition to direct and lawful instructions, Respondent did not necessarily abuse its considerable discretion by suspending Grievant's employment contract for 100 days which is significant but far less than the termination of employment originally requested. Grievant violated body safety boundary training. Grievant's knowing and intentional actions on March 9, 2020 did not exhibit professional behavior or demonstrate responsible citizenship by maintaining a high standard of conduct and self-control. Knowingly violating repeated and reasonable orders from empowered administrators to provide such a directive is unprofessional and as a matter of law is insubordination. Respondent has reasonably determined that said conduct is not acceptable.

The following conclusions of law are appropriate in this matter:

[11] It may or may not be worth noting that the April 7, 2020 DHHR Investigation Report tends to indicate that Grievant does not necessarily have a history of otherwise prudent work performance.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

2. The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in West Virginia Code § 18A-2-8, 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. Va. 1067, 216 S.E.2d 554 (1975).

3. West Virginia Code § 18A-2-8 provides that "[A] board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge."

4. Employees are expected to respect authority and do not have unfettered discretion to disobey or ignore clear instructions. *See Reynolds v. Kanawha-Charleston Health Dep't.*, Docket No. 90-H-128 (Aug. 8, 1990). Moreover, insubordination may involve "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).

5. In order to establish insubordination, a county board must demonstrate a policy or directive applied to the employee, was in existence at the time of the violation and that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Domingues v. Fayette County Bd. of Educ.*, Docket No. 04-10-341 (Jan. 28, 2005).

6. In the circumstances of this matter, Respondent by a preponderance of the evidence established Grievant's conduct to be insubordination.

7. It is not necessary that an employee have a malicious intent to harm another in order for his violation of the Employee Code of Conduct to constitute insubordination within the meaning of W. Va. Code § 18A-2-8. Rather, it is enough that he carried out his actions, which are violative of that important policy, in a knowing and intentional manner. *See Hennen v. Wirt County Bd. of Educ.*, Docket No. 05-53-110 (Sept. 30, 2005).

8. "The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was 'clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. [State] Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

9. In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case-by-case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995)(citations omitted). The Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

10. It is not established that Respondent abused its considerable discretion in not terminating Grievant's employment but elected to suspend Grievant's employment contract for 100 days in response to his ill-advised touching of a female student on March 9, 2020.

11. Sufficient mitigating factors are not found present in the instant matter to mandate overriding the action of Respondent. In the circumstances of this matter Grievant did not demonstrate that the penalty imposed was clearly excessive and/or an abuse of discretion.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2018).

Date: January 13, 2021.

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Landon R. Brown
Administrative Law Judge