WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BRADLEE JORDAN,

Grievant,

v. **Docket No. 2022-0059-LinED**

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Bradlee Jordan, Grievant, filed this grievance against the Lincoln County Board of Education, Respondent, challenging disciplinary actions taken against him. Grievant was suspended, and ultimately dismissed, from his employment as a special education teacher. The original grievance form was dated July 6, 2021. The grievance statement provides, in part:[1]

> On Monday April 5th, 2021 Mr. Jordan met with the Assistant Superintendent of Lincoln County Schools. At that meeting Mr. Jordan admitted to bringing moonshine onto Lincoln County School property, that another employee was given moonshine, that the moonshine was "sampled" on the school property, and that Mr. Jordon has previously witnessed other employees consume alcohol on Lincoln County School property. Mr. Jordon did NOT admit to consuming alcohol in front of students or during work hours. Mr. Jordon then apologized for his conduct.
>
> ** ** **

Relief Sought:

> Reinstatement of Employment with back pay or in the alternative, Lincoln County School Board accept the resignation of Mr. Jordan.

Grievant was suspend with pay effective April 5, 2021. By correspondence dated April 29, 2021, Grievant was informed that the Superintendent would recommend the termination of his contract of employment. Grievant's status was altered to suspended

[1] While not reproduced here, the entirety of the grievance statement is of record and is incorporated as part of the instant decision.

without pay pending the May 18, 2021, board meeting. On June 16, 2021, Respondent voted to ratify Grievant's suspension without pay and retroactively terminate his employment effective June 4, 2021. Grievant appealed. This grievance was waived to level three on October 1, 2021. A level three hearing was held before the undersigned Administrative Law Judge on April 19, 2022, at the Grievance Board's Charleston office. Grievant appeared in person and by his counsel Alan L. Pritt, Pritt & Spano, PLLC, who appeared via Zoom. Respondent appeared by its legal counsel, Leslie Tyree, Esquire. At the conclusion of the level three hearing, the parties were invited to submit written Proposed Findings of Fact and Conclusions of Law which were submitted by both parties. This matter became mature for decision on May 18, 2022, on receipt of the last of the submitted fact/law proposals

Synopsis

Grievant was employed by Lincoln County Board of Education, Respondent, as a teacher. Respondent disciplined Grievant for self-acknowledged conduct of bringing moonshine on to school property, consuming alcohol on school property, and giving another employee moonshine on school property. Respondent terminated Grievant's position for violations of the employee code of conduct and WEST VIRGINIA CODE §18a-2-8. Grievance DENIED.

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

Findings of Fact

1. Bradlee Jordan, Grievant, was employed by Lincoln County Board of Education, Respondent, as a special education teacher and assigned to Lincoln County High School.

2. On April 5, 2021, Grievant appeared at the central office of Respondent to meet with Assistant Superintendent, Josh Brumfield. There was an ongoing investigation of another employee.

3. Grievant was to review a statement he had previously given during the investigation. Grievant was a witness to an extreme outburst by another employee. The outburst was so extreme that it led to a question as to whether or not the other employee was under the influence of alcohol at the time of his outburst.

4. During the meeting with Assistant Superintendent Brumfield, Grievant was asked whether he thought the employee was under the influence of alcohol during the outburst.

5. Grievant was asked by Assistant Superintendent Brumfield if he ever witnessed the employee in question drink alcohol at work to which the Grievant admitted that he had in fact witnessed the employee in question drink alcohol while at school. *See* Respondent Exhibit 2. *See also* Brumfield L3 testimony.

6. Grievant further indicated the following to Assist. Superintendent Brumfield:

a. Grievant had brought moonshine to school.
b. Grievant had provided moonshine to another employee while at school.
c. Grievant and another employee sampled the moonshine in the school.
d. Grievant drank alcohol while at school on more than one occasion.

See R Ex 2 and Brumfield, L3 Testimony.

7. Assistant Superintendent Brumfield advised Superintendent Jeffrey Kelley that Grievant had disclosed bringing to and consuming alcohol on school property. R. Ex. 2.

8. Grievant was placed on paid administrative leave pending investigation. R. Ex. 1.

9. Subsequently, four mason jars were located in Grievant's cubicle, some of which still smelled of alcohol. *See* Brumfield and Kelley, L3 Testimony.

10. Specifically, the following mason jars were discovered:

a. Mason jar labelled "Ole Smokey Tennessee Moonshine Blackberry"
b. Mason jar labelled "Ole Smokey Tennessee Moonshine White Lightening."
c. Mason jar with no label but a small amount of liquid which smelled like Moonshine.
d. Mason jar labelled Kroger's Cherries which was half full of a substance smelling like moonshine.

11. Superintendent Kelley made multiple attempts to meet with Grievant after the discovery of the four mason jars in Grievant's cubicle.

12. Grievant refused to meet with Superintendent Kelley or offer any explanation as to why mason jars labelled as "Ole Tennessee Moonshine" as well as mason jars containing substances which smelled of moonshine were in his cubicle inside a school building.

13. Grievant did not appear for a scheduled April 13, 2021, meeting with Superintendent Kelley. Grievant was informed by email that he was to meet with the Superintendent on April 13, 2021, Grievant was again reminded on April 13th 2021 of the meeting.

14. On April 13, 2021, Grievant tendered a letter of resignation to Counsel for Lincoln County Schools.

15. Assistant Superintendent Brumfield contacted Grievant by phone on April 14, 2021. The tone and inference of the conversation is disputed.

16. Grievant was informed that Superintendent Kelley was going to recommend termination of Grievant's employment and not accept his resignation.

17. Grievant was again contacted by Superintendent Kelley on April 16, 2021, asking for a date that Grievant would be available to meet to discuss the discovery of the mason jars. Grievant failed to provide a date he was available to meet or respond to the Superintendents email in any way.

18. Grievant received an April 20, 2021, letter from Lincoln County Schools providing notice of a "Due Process Meeting" that would be held on April 23rd, 2021.

19. Grievant was directed by Superintendent Kelley to be present in his office for a conference on April 23, 2021. This meeting was to provide Grievant an opportunity to respond to his disclosures regarding bringing alcohol to school and offer any explanation as to the discovery of the four mason jars in his cubicle. R. Ex. 3.

20. Grievant, through counsel, advised the Superintendent that Grievant would not be attending the meeting and asked the Superintendent to reconsider accepting Grievant's resignation.

21. Grievant was advised by letter dated April 29, 2021 that Superintendent Kelley would recommend to the Lincoln County Board of Education that Grievant's contract be terminated. R. Ex. 4.

22. On or about April 29, 2021, Grievant was suspended without pay pending a May 18, 2022, meeting of the Lincoln County Board of Education. *See* R. Ex. 4.

23. Grievant's contract for employment was scheduled to expired on or about June 10th, 2022.

24. For reasons not explained, Respondent's Board meeting previously scheduled for May 18, 2022, was changed to a different date.

25. The Lincoln County Board of Education, held a Board meeting on June 15, 2021. The Board voted to ratify Grievant's suspension without pay and retroactively terminate his employment effective June 4, 2021. R. Ex. 5.

26. On June 16, 2021, Superintendent Kelley sent a letter to Grievant stating that Respondent had voted to ratify Grievant's suspension without pay and retroactively terminate his employment.

Discussion.

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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Leichliter v. W. Va. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

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). 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 contendre* to a felony charge.”

Applicable provisions of the Lincoln County Board of Education Employee Code of Conduct, Policy 3210, (R Ex 6) maintains and requires Grievant to “demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral and ethical behavior.” Respondent alleges Grievant did not maintain such high standard

of conduct, self control, or moral and ethical behavior when he chose to bring and consume moonshine on school property. Not to mention leaving moonshine in a mason jar on school property.

Grievant was terminated for bringing moonshine on school property, consuming alcohol on school property, and giving another employee moonshine on school property. Respondent formerly terminated Grievant's position for violations of the employee code of conduct and WEST VIRGINIA CODE §18a-2-8. Grievant argues that Respondent failed to provide adequate evidence or justification for terminating Grievant's employment in light of Grievant's performance evaluations and lack of disciplinary actions taken against him while employed by the Lincoln County Board of Education. Further, Grievant highlights that he was already out of contract for employment with the Lincoln County Board of Education at the time he received the letter retroactively terminating his employment.[2]

Respondent highlights that Grievant not only admitted his conduct at the April 5, 2021 meeting with Assistant Superintendent Jordan, but also further reaffirmed his conduct and acknowledgement in his July 6, 2021, Statement of Grievance. The entire statement is of record. A relevant, highlighted portion provides Grievant "admitted to bringing moonshine onto Lincoln County School property, that another employee was given moonshine, that the moonshine was "sampled" on the school property, and that

[2] This point was not disregarded, it was given consideration, but given the facts and timeline of relevant events, the contention was not persuasive. Grievant was made aware of Respondent's intent to terminate his employment by an April 29, 2021, Correspondence. R. Ex 4. Grievant with the assistance of legal counsel failed to meet with Respondent agents repeatedly. Grievant was suspended without pay pending a scheduled May 18, 2022, meeting of the Lincoln County Board of Education. The rationale for the alteration of the hearing date is not of record but the change did not nullify Respondent's ability to sanction Grievant for improper conduct. This issue will not be addressed further in this decision.

[Grievant] has previously witnessed other employees consume alcohol on Lincoln County School property." Grievant further provides that he apologized for his conduct. *Id*

Nevertheless, relevant documents and witness testimony was presented at the level three hearing. Respondent presented the testimony of Assistant Superintendent Josh Brumfield and Superintendent Jeff Kelley to testify regarding events and rationale for Respondent's disciplinary actions. Grievant was terminated for bringing moonshine on school property, consuming alcohol on school property, and giving another employee moonshine on school property, all of which the Grievant acknowledged. Grievant, by counsel's request that it be noted, Grievant admitted to having alcohol on school grounds; however, he never admitted to consuming alcohol in front of students or during work hours. So, noted.

Respondent argues that its burden is met. This trier of fact agrees. A more decerning question seems to be whether Respondent's sanction is reasonable, not whether Respondent established undisputed facts. However, the existance of more than one employee repeatedly participating in this forbidden behavior (drinking) on school grounds tends to emphasize the need for Respondent to act demonstratively. Lest not forget, initially there was an ongoing investigation of another employee. Grievant was a witness to an extreme outburst. The outburst was so extreme that it led to a question as to whether or not the other employee was under the influence of alcohol. Grievant admitted that he had in fact witnessed the employee in question drink alcohol while at school. Brumfield, L3 testimony; *see also* R. Ex. 2. Grievant further indicated he himself had brought moonshine to school, had provided moonshine to another employee

while at school and had in fact drank alcohol while at school on more than one occasion. *Id* While Respondent had discretion regarding the severity of discipline action taken, it is recognized that Respondent had a duty to address this inappropriate conduct.

It is well-settled that county boards of education have discretion with regard to disciplinary actions, but those actions must be reasonable and not arbitrary and capricious. *McDaniel v. Div. of Highways*, Docket No. 2017-1404-CONS (June 30, 2017). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (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), aff'd, Mercer Cnty. Cir. Ct. Docket 16 No. 97-CV-374-K (Oct. 16, 1998).

Respondent had less severe means to punish Grievant but elected to terminate his employment. Superintendent Kelley testified that bringing alcohol and consuming alcohol on school property is an extremely serious offense. Grievant contends his unwillingness to provide more or additional damning statements regarding the conduct of other school employees cost him his job. There was room for discretion and Grievant

elected not to cooperate with Respondent at more than one stage of relevant events. This could have had an effect on Respondent's analysis of appropriate punishment. However potential factor(s), whether fact or fiction, does not negate Respondent's discretion. Inappropriate behavior on school grounds was established. Such behavior is proper justification for the disciplinary action taken. It is not determined that Respondent acted without proper cause.

"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 & Human Res./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). Grievant's performance evaluations were not entered into the record.

It is not determined that Respondent abused its discretion in the circumstances of this grievance. Respondent's decision to pursue discipline was not arbitrary and capricious or a violation of any statute, policy, rule or regulation. Respondent has met it burden of proving by a preponderance of the evidence that Grievant violated the Lincoln County Board of Education Employee Code of Conduct, Policy 3210. R. Ex. 6. The undersigned does not conclude that dismissal is clearly excessive, an abuse of agency

discretion, or that there exists an inherent disproportion between the offense and the personnel action. Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute his judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997). *Meadows, supra.*

The following conclusions of law are appropriate in this matter:

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. *See* Procedural Rules of 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 party bearing the burden has not met its burden. *Id*.

2. W. Va. Code § 18A-2-8 authorizes a board of education to suspend or dismiss any person in its employment at any time for a number of reasons, including willful neglect of duty, immorality, and insubordination, but that authority cannot be exercised in an arbitrary and capricious manner. W. Va. Code § 18A-2-8; see *Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995) Dismissal or suspension of an employee under WEST VIRGINIA CODE section 18A-2-8 “must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or

capriciously." Syl. Pt. 3, in part, *Beverlin v. Bd. of Educ*., 158 W. Va. 1067, 216 S.E.2d 554 (1975). Syl. Pt. 4, in part, *Maxey v. McDowell County Board of Education*, 212 W. Va. 668, 575 S.E.2d 278 (2002); Syl. Pt. 7, in part*, Alderman v. Pocahontas County Bd*. of Educ., 223 W. Va. 431, 675 S.E.2d 907 (2009).

3. It is well-settled that "[c]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. pt. 3, *Dillon v. Wyoming County Bd. of Educ*., 177 W. Va. 145, 351 S.E. 2d 58 (1986).

4. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

5. The Lincoln County Board of Education Employee Code of Conduct, Policy 3210, requires employees to "demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral and ethical behavior."

6. "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 & Human Res./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).

7. "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 17 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). Mitigation of a penalty is considered on a case by case basis. *Conner v. Barbour County Bd. of Educ.,* Docket No. 95-01-031 (Sept. 29, 1995); *McVay v. Wood County Bd. of Educ.,* Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when 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 work performance. *Pingley v. Div. of Corrections*, Docket No. 95-CORR-252 (July 23, 1996).

8. An 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 the employer's discretion, or an inherent disproportion between the

offense and the personnel action. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995).

9. Respondent established by a preponderance of the evidence justification for disciplinary action.

10. It is not determined that Respondent abused its discretion in the circumstances of this grievance. Mitigation of the levied discipline is not deemed warranted.

11. Respondent established Grievant violated applicable provisions of the employee code of conduct and WEST VIRGINIA CODE §18a-2-8.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals.[3] Any such appeal must be filed within thirty (30) days of receipt of this decision. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal

[3] On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over "[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]" W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.

petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

Date: July 6, 2022

_____

Landon R. Brown
Administrative Law Judge