WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RONALD SANBOWER, Sr.
Grievant,

v. **Docket No. 2021-2490-RalED**

RALEIGH COUNTY BOARD OF EDUCATION,
Respondent.

D E C I S I O N

Ronald Sanbower, Sr., Grievant, filed this grievance against his employer, Raleigh County Board of Education, Respondent, protesting disciplinary action taken against him resulting in an unpaid suspension and the termination of his contract of employment as a custodian for Respondent. The grievance was filed on June 4, 2021, and the grievance statement provides:

> Grievant was regularly employed by Respondent as a custodian. Respondent has unlawfully suspended without pay and will be terminating the Grievant in violation of W.Va. Code 18A-2-8. Grievant grieves unlawful suspension and termination.

For relief sought:

> Grievant seeks extraordinary relief through a more proportional form of discipline due to mitigating circumstances, reinstatement, back pay with interest, and the restoration of seniority and any and all benefits lost as a result of the suspension and termination.

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 conducted by the undersigned Administrative Law Judge via Zoom, on October 19, 2021, at the Grievance

[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.

Board's Charleston office. Grievant appeared and was represented by Gordon Simmons, West Virginia School Service Personnel Association. Respondent appeared by its Superintendent, C. David Price, and by its attorney George "Trey" B. Morrone III, Bowles Rice LLP. At the conclusion of the level three hearing, the parties were invited to submit written Proposed Findings of Fact and Conclusions of Law. Both parties submitted fact/law proposals and this matter became mature for decision on receipt of the last of these proposals, on or about November 29, 2021.

Synopsis

Grievant was employed by Respondent as a custodian at Liberty High School. Grievant was suspended without pay and then terminated from employment following the investigation of a complaint. Respondent maintains that Grievant engaged in conduct that violated both its employee code of conduct and sexual harassment policies and that such violations of each constitutes insubordination, immorality, impacting the learning environment of students, and jeopardizing the health, safety, and welfare of students. Respondent bears the burden to prove by a preponderance of the evidence that the disciplinary action taken was justified.

Respondent highlights that it is within its authority to punish Grievant for his conduct, up to and including termination. Grievant seeks mitigation of the punishment imposed by Respondent, maintaining that the punishment was disproportionate to the offense. An allegation that a particular disciplinary measure is disproportionate to the offense proven is an affirmative defense. Grievant bears the burden of demonstrating that

the penalty was clearly excessive, reflects an abuse of the employer's discretion or an inherent disproportion between the offense and the personnel action. Mitigation was seriously considered, but Grievant failed to meet his burden of proof that the punishment should be mitigated. Respondent established Grievant engaged in conduct impacting the learning environment and jeopardizing the health, safety, and welfare of students. Grievant violated applicable school employee code of conduct and policies. Accordingly, 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. Ronald Sanbower Sr., Grievant, has been employed by the Raleigh County Board of Education, Respondent, as a custodian for approximately nine years. He entered into a continuing contract of employment for the 2015-2016 school year and was assigned to Marsh Fork Elementary School. Grievant was subsequently assigned to Trap Hill Middle School and eventually to Liberty High School, where he was assigned for the 2020-2021 school year.

2. Grievant was employed by Respondent as a custodian at Liberty High School in Glen Daniels, WV at the time of the events relevant to the instant discussion, his suspension and termination.

3. For the 2020-2021 school year, D.T., C.W. and Z.W.[2] were freshman at Liberty High School. D.T. had met Grievant the year before, while she was a student at Trap Hill Middle School. R Ex 25C (DT interview)

4. An allegation was made that Grievant touched D.T., a student, on November 18, 2020, and that he made comments to that same student about a "whistle," "a dude's pecker," and "a boy's pecker" on November 19, 2020. Both incidents were alleged to have occurred during the second lunch breaks in the cafeteria of the school.

5. On November 18, 2020, Grievant approached the table in the lunchroom at Liberty High School where D.T., C.W. and Z.W. were seated for lunch.[3] After leaning over and talking to the students for a short time, Grievant reached out and made physical contact with D.T. The school video surveillance footage shows Grievant reaching toward D.T. and D.T. pulling away quickly. L3 Testimony: R Ex 25A (video), R Ex 3, R Ex 4, R Ex 8, R Ex 25C (audio), R Ex 25B (audio), and R Ex 25G (audio).

6. The physical contact with D.T. has been variously referenced and/or described as a "touch," "poke," "tickling," and/or a "pinch." *See* record in its entirety.

7. On or about November 19, 2020, Grievant found a bag with whistles in the shape of penises in a cabinet discarded near the school dumpster. R Ex 25E (Grievant's interview with Title IX Investigator Ronald Cantley)

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[2] Consistent with the Grievance Board's practice, all minors referenced will be referred to by initials in this decision. The undersigned will follow the past practice of the West Virginia Supreme Court in cases involving underage individuals and will refer to the initials only of the involved minors. S*ee Jonathan P.,* 182 W.Va. 302, 303 n. 1, 387 S.E. 2d 537, 538 n. 1 (1989).

[3] Students were seated around a table with a seat between them, as per COVID-19 guidelines in place at the time.

8. At the level three hearing, during various testimony there was a tendency on the part of witnesses to confuse relevant dates. E.g., November 18 and 19, 2020, as Thursday and Friday, although the two dates fell on a Wednesday and Thursday.

9. On November 19, 2020, near the end of the lunch period, Grievant approached the table in the lunchroom where D.T., C.W. and Z.W. were seated. Grievant stopped at the table and leaned over in the direction of D.T. and stated that he had something for her "in the back." D.T. asked Grievant what he was talking about and Grievant said a "whistle." Confused, D.T. and C.W. asked Grievant what he meant. Grievant pulled down his mask and said, "a dude's pecker." D.T. testified that she was shocked, and she said, "what??" Grievant repeated it was a "boy's pecker." According to D.T., C.W. and Z.W., Grievant smiled/laughed and walked off towards the teacher's lunch table.[4] L3 Testimony; R Ex 3 (Grievant's written Nov 19, 2020 statement), R Ex 4 (C.W. written Nov 19, statement), R Ex 25C (audio), R Ex 25B (audio), and R Ex 25G (audio)

10. On November 19, 2020, James Newman, a teacher at Liberty High School, was seated at the teacher's table that Grievant approached after speaking to D.T., C.W. and Z.W. James Newman has been a teacher at Liberty High School for eight years.

11. Newman was sitting at the table of teachers in the LHS lunchroom during the second lunch period on November 19, 2020, along with wrestling coach Nick Hylton. Grievant approached the teacher's table near the end of the lunch period and engaged in

[4] Z.W. testified that she could not hear what Grievant said when he leaned over between D.T. and C.W. Noticing the looks on her classmates faces, Z.W. asked D.T. and C.W. what Grievant had said to them. According to Z.W., D.T. and C.W. told her that Grievant said he had a whistle shaped like a dude's pecker. L3 Testimony. R Ex 3, 4, 8, 25C (audio), 25B (audio), and 25G (audio). C.W. stated that she heard Grievant's statements to D.T.

a conversation with the former wrestling coach, Nick Hylton.[5] Grievant conversed with Coach Hilton about having found whistles in a discarded locker located in a fenced in area behind Liberty High School. After Grievant left, Mr. Newman asked Coach Hilton what Grievant was referring. Newman L3 testimony

12. Almost immediately following the lunch period and as they were walking to their next class, D.T., C.W. and Z.W. communicated with teacher Newman.

13. Mr. Newman was shocked when he realized that the students were aware of the penis whistles and that Grievant had also told the female students about the whistles. Mr. Newman escorted the students to their next class with female teacher Sarah Milam.

14. Mr. Newman and Ms. Milam agreed the matter needed to be reported to the administration, and due to the sensitive nature of the matter, they agreed that it would be more appropriate for Ms. Milam to further discuss the matter with the students. Mr. Newman proceeded to teach his next class. L3 Testimony; R Ex 5, 7, 25D and 25F

15. After speaking with D.T., C.W. and Z.W., Ms. Milam reported the matter to the administration at Liberty High School Principal John McElwain and Assistant Principal Greg Betkijian.

16. Assistant Principal Greg Betkijian initiated a school-level investigation on November 19, 2020, and proceeded to take written statements from D.T., C.W., Z.W., Mr. Newman and Ms. Milam. *See* R Ex. 3, 4, 5, 7 and 8.

[5] Coach Hilton left the employment with Raleigh County Schools during the 2020-2021 school year.

17. The November 19, 2020, written statement of D. T. provides:

> I was eating lunch when the Janitor came up to me and it was just a normal friend conversation and after he said "I have something in the back for you." I was confused and said "what is that." He said a whistle. I said what do you mean. He pulled down his mask and said "A dudes pecker." I said "um what." And I was very nervous and he repeated it and said "a boys pecker" and that's all that happened but the day before that he touched me on my side basically on my bra line. R Ex 3

18. The following day, November 20, 2020, Grievant provided Assistant Principal Betkijian with the following written statement: "I said something about the whistle to a gril [sic] I kown [sic] but did not said [sic] anything to any body [sic] else[.] I found a whistle that look like a dick and she said where did I found [sic] it[.] I said in a [sic] the green fecien [sic] out dack [sic]." R Ex 6

19. Pursuant to Respondent's Policy C.1.3A ("Sexual Harassment and Discrimination Grievance Process")[6] (hereinafter "Policy C.1.3A"), D.T.'s mother, C.T.,[7] initiated a *Potential Complaint of Sexual Harassment Form* dated November 19, 2020. Eric Dillon, Director of Pupil Service and Title IX Coordinator, noted on the form that the complaint had been initially received by [Teacher] James Newman and [Principal] John McElwain.

20. Title IX Coordinator Dillon conducted a telephone interview of C.T. on Monday, November 30, 2020,[8] and noted the following description of events being

[6] Respondent's Sexual Harassment and Discrimination Policy is Raleigh County Schools Policy C.1.3A (personnel), which is also identified as Raleigh County Schools Policy D.3.19 (students).

[7] Although it is not necessary to use initials for adults, naming a parent of a student would be equivalent to naming the student. Hence, the undersigned will use initials for all parents of students.

[8] The delay between the incident occurring and initially being reported on Thursday,

reported as having occurred on November 18, 2020 and November 19, 2020, respectively:

> 11/18/2020 – Custodian (Ronald Sanbower) pinched D. T. in her armpit area.
> 11/19/2020 – Ronald Sanbower said to D. T., "Hey D., I have something for you in the back room. A whistle, [A] boy's pecker." He then took off his mask, got close to D. and repeated, "A boy's pecker." He laughed and walked off.

A *Formal Complaint of Sexual Harassment* was thereafter filed pursuant to Respondent's Policy C.1.3A and Mr. Dillon offered the following supportive measures to D.T. to relieve any ongoing issues: "No contact between D. T. and Ronald Sanbower." Upon the filing of the Formal Complaint, the matter proceeded to a formal investigation. L3 Testimony; R Ex. 9, 10, 11 and 20

21. On November 30, 2020, Title IX Coordinator Dillon sent a letter to Grievant notifying him that a *Formal Complaint of Sexual Harassment* had been filed and provided him with details of what had been reported and his rights under Respondent's Policy C.1.3A. R Ex 11

22. On December 4, 2020, Superintendent of Raleigh County School C. Dave Price sent a letter to Grievant placing him on paid administrative leave pending the outcome of an investigation of his alleged misconduct and a meeting with Superintendent Price. R Ex 12, see also, R Ex 20, §8.1, p. 111

23. The Title IX Investigation conducted pursuant to Respondent's Policy C.1.3A was assigned to Investigator Ronald Cantley II. During the investigation, Mr.

November 19, 2020, and the complaint being processed and Mr. Dillon conducting the interview on Monday, November 30, 2020, was that schools were closed during that period for the Thanksgiving holiday break.

Cantley interviewed D.T., C.W., Z.W., Mr. Newman, Ms. Milam, Grievant and K.R. and Assistant Principal Betkijian. Investigator Cantley provided both the complainant and Grievant with opportunity to present witnesses and inculpatory or exculpatory evidence. All interviews conducted were recorded and copies of the interviews and all evidence gathered during the investigation were provided to both the complainant and Grievant. L3 Testimony; R Ex 13,14 and 15. Also see R Ex 25B, 25C, 25D, 25F, 25G and 25I

24. The statements taken by Investigator Cantley of D.T., C.W., Z.W., Mr. Newman and Ms. Milam were consistent with the written statements they provided to Assistant Principal. Betkijian on November 19, 2020. R Ex 25B, 25C, 25D, 25F, 25G and 25I

25. Grievant, in the presence of his counsel was interviewed by Title IX investigator Ronald Cantley on December 18, 2020. This interview was recorded. R Ex 25E Grievant provided Investigator Cantley, information regarding events. Grievant admitted having found the penis-shaped whistle on November 19, 2020. Grievant denied telling D.T. about the penis whistle. Grievant admitted that he told another female Liberty High School student about the whistle, but stated that he could not remember her name. Grievant suggested that he could pick the student out of a yearbook, and he thereby identified the student he told as being K.R.[9] R Ex 25E

26. Grievant continued to deny touching D.T. on November 18, 2020. R Ex 25E

[9] Grievant had a subpoena issued for a witness with the initials of K.R. -- the last name matching the last name of the student Grievant identified in the yearbook but the first name starting with a K but being a different name. However, the witness who actually appeared at the hearing was a student with the initials C.R., and neither her first name nor her last name matched the name of the student Grievant identified in the yearbook or the student listed on the subpoena.

27. Title IX Investigator Ronald Cantley II gathered information and interviewed numerous individuals pertaining to the complaint and alleged harassment by Grievant toward a minor aged student. Investigator Cantley prepared a draft investigative report dated January 10, 2021. R Ex 13 Later Investigator Cantley submitted a final investigative report dated February 6, 2020. R Ex 15

28. In his investigative report dated February 6, 2021,[10] Investigator Cantley concluded that a preponderance of the evidence supported D.T.'s version of the events described in the sexual harassment complaint, specifically with regards to the events described to have occurred on November 18, 2020 (inappropriate touching) and November 19, 2020 (inappropriate communication). The Title IX Investigator submitted his investigative report to the Title IX decision-maker, Assistant Superintendent Dr. Serena Starcher. R Ex 15

29. Pursuant to Policy C.1.3A, Title IX decision-maker Dr. Starcher gave the Complainant and Grievant an opportunity to submit written and relevant questions to each other or any other witnesses involved in the allegations. R Ex16, p. 26-28

30. In response to written questions submitted, Grievant admitted that the video camera footage of November 18, 2020, is the best evidence to determine the factual conclusion of whether or not he touched D.T.; Grievant admitted having a conversation

[10] Investigator Cantley's draft report was issued on December 29, 2020 and provided to Grievant and his counsel to review and/or comment up on before it became final. Likewise, copies of all six statements taken at Liberty High School, the video of November 18, 2020, and copies of the interviews conducted during the Title IX investigation were all provided to Grievant and his counsel prior to the issuance of the final report. The final report was issued on February 6, 2021. R Ex 13, 14 & 15

with Mr. Hilton in the presence of Mr. Newman regarding finding the whistles in a locker Grievant had cleaned out; Grievant admitted to telling Liberty High School student K.R. about the whistles that looked like a penis; Grievant admitted it is inappropriate to speak about men's genitalia to underage girls. R Ex 16, p. 39-40

31. On May 20, 2021, a Title IX Decision was issued by Assistant Superintendent Dr. Serena Starcher, concluding that Grievant had violated the provisions set forth in Respondent's Policy C.1.3A, prohibiting sexual harassment, by inappropriately touching D.T. on November 18, 2020, and inappropriately communicating to D.T. that he had something in his room in the back to show her -- a whistle shaped like a boy's pecker -- on November 19, 2020. The decision detailed the investigation; included factual findings that the inappropriate touching described by D.T., C.W. and Z.W., did occur and that it was supported by their statements and by the video recording of November 18, 2020; included factual findings that the events described by D.T., C.W. and Z.W., that Grievant had inappropriately communication with D.T. on November 19, 2020, about the penis whistle, also supported by the statements provided by Mr. Newsom and Ms. Milam. The decision included factual findings that Grievant admitted he did tell K.R., a female student at Liberty High School, about the penis whistles; and that Grievant admitted that he had completed Title IX and Mandatory Reporter Training; and included factual findings that Grievant admitting that it is inappropriate to speak to underage girls about men's genitalia. Dr. Starcher recommended that Grievant be referred to Superintendent Price for appropriate disciplinary action and a meeting. R Ex 17.

32. Grievant admitted during the Title IX Investigation that he had received training on Respondent's sexual harassment policy.[11] R Ex 17, p. 94, and records were introduced at the level three hearing. Grievant had received annual in-service training on Respondent's employee code of conduct[12] and sexual harassment policies for the 2018-2019, 2019-2020 and 2020-2021 school years. R Ex 2 Also see L3 Testimony

33. Grievant did not exercise his right to appeal the May 20, 2021 Decision issued by the Title IX decision-maker Dr. Starcher, as permitted under Policy C.1.3A.

34. On June 2, 2021, Superintendent Price met with Grievant and his representative, M. Alex Urban, West Virginia School Service Personnel Association, to discuss the allegations of misconduct made against him. Superintendent Price thereafter sent a letter to Grievant, dated June 2, 2021, informing Grievant that, as a result of the completed investigation, the conference, and a finding that he had violated Policy C.1.3A by a preponderance of the evidence, he was suspended without pay and that a recommendation would be made to Respondent County Board that Grievant's suspension be ratified and that his contract of employment be terminated. Grievant was notified of his right to request a hearing before the Respondent County Board. *See* R EXs 18, 19, 20, 21 and 22

35. Grievant did not request a hearing before the Respondent County Board regarding the recommendations by Superintendent Price and, on July 13, 2021,

[11] Respondent's Sexual Harassment and Discrimination Policy is Raleigh County Schools Policy C.1.3A (personnel), which is also identified as Raleigh County Schools Policy D.3.19 (students).

[12] Respondent's Employee Code of Conduct policy is West Virginia Board of Education Policy 5902. R Ex 19

Respondent ratified Superintendent Price's suspension of Grievant and approved his recommendation to terminate Grievant's contract of employment. R Ex 23

36. On July 13, 2021, Respondent's Board discharged Grievant from employment upon Price's recommendation. By letter dated July 14, 2021, Superintendent Price notified Grievant that the Respondent had ratified his unpaid suspension and approved his termination at the July 13, 2021, Board Meeting. R Ex 24

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). This grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence.

> . . . *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, the party bearing the burden has not met its burden. *Id.*

W. VA. 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." Respondent presented evidence pertaining to the conduct of Grievant during the lunch periods at Liberty High School on November 18, and 19, 2020. Respondent contends that Grievant violated its sexual harassment and discrimination policy on November 18 and 19, 2020, resulting in its decision to suspend Grievant and ultimately terminate his employment. 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. Va. 1067, 216 S.E.2d 554 (1975). Respondent bears the burden of demonstrating that the disciplinary action taken was justified.

Grievant was suspended and then terminated for violating Respondent's employee code of conduct and sexual harassment policies. More specifically, Grievant was charged with violating the following provisions of the employee code of conduct policy set out in R Ex 19, W. Va. Department of Education's Policy 5902 § 4.2.1, 4.2.3, and 4.2.6:

> 4.2 All West Virginia school employees shall:
>
> 4.2.1. exhibit professional behavior by showing positive examples of preparedness, communication, fairness, punctuality, attendance, language, and appearance. . . .
>
> 4.2.3. maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination. . . .
>
> 4.2.6. demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior.

At the level three hearing, the testimony of the witnesses, Title IX Investigator, Title IX decision-maker and Superintendent Price supported the conclusion Grievant's conduct was unwelcomed, as defined in Section 2.15 of Respondent's Sexual Harassment and Discrimination Policy C.1.3A (R Ex 20):

> 2.19 **Sexual harassment**. Conduct on the basis of sex that satisfies one or more of the following . . . . (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person to equal access to an education program or activity as determined under a reasonable person standard; . . .

Respondent presented evidence of Grievant's conduct during the lunch periods at Liberty High School on November 18, 2020, and November 19, 2020. The allegation that Grievant inappropriately touched D.T., then a freshman at Liberty High School, on November 18, 2020, is supported by the direct testimony of D.T., C.W. and Z.W., as well as the video footage of the school lunchroom. R Ex 25 The video footage shows Grievant reaching towards D.T. and D.T. pulling away. The physical contact with D.T. has been variously referenced and/or described as a "touch," "poke," "tickling," and/or a "pinch." *See* record in its entirety. D.T. described the physical contact as being her side

at her bra line. Both C.W. and Z.W. also testified that the touching incident occurred, and they both described D.T.'s response as indicating that she was uncomfortable with Grievant touching her. While Grievant did not testify at the level three hearing, he agreed during the Title IX investigation that the video would be the best evidence of the events that occurred on November 18, 2020. Grievant in response to written investigation questions provided that he *did not recall* touching D.T.

According to D.T., the contact Grievant made with her side seemed as if Grievant was pinching her at her bra line. D.T. testified that she pulled away from Grievant in response to his actions. Both C.W. and Z.W. testified that they observed D.T.'s response. D.T. indicated that Grievant's actions made her feel uncomfortable. The school video surveillance footage shows Grievant reaching toward D.T. and D.T. pulling away quickly. L3 Testimony; R Ex 25A (video), 3, 4, 8, 25C (audio), 25B (audio), and 25G (audio). While Grievant denies, or has simply forgotten, that he touched D.T. on November 18, 2020, the preponderance of the evidence leads to the conclusion that he did.

While Grievant denies that he told D.T. or any of the students at her lunch table about the penis whistles he admittedly found and talked with another female student at Liberty High School about the penis whistles. Moreover, Grievant also admitted during the Title IX investigation that it was inappropriate for him to discuss men's genitalia with a female student. It could be interpreted by Grievant's own admissions, he engaged in inappropriate conduct, NEVERTHELESS, this review of information and facts will focus on the charges for which Grievant was formally disciplined.

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 Resources,* Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res*., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ*., Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp*., Docket No. 93-HHR-050 (Feb. 4, 1994). The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge 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. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*. The testimony of all witnesses was provided direct attention and assessed with the identified factors in consideration. [13] The record of this matter contains direct testimony, written statements, oral recordings, video and various other documents of evidence. Well within his right, Grievant choose not to testify at the L3 hearing proceeding.[14]

[13] The specific testimony of T. G. (alleging minor) will be addressed directly, the testimony of other witnesses or co-workers will be discussed in context of the statements as provided at level three hearing and during the investigation stage of issues in litigation.

[14] Grievant did provide written and verbal responses during the investigative stage of this matter, which are of record. *See* R Ex. 6 and 27.

An administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. *Weik v. Div. of Natural Resources*, Docket No. 2011-1270-DOC (Dec 2011); *Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (Mar. 11, 2010); *Warner v. Dep't of Health and Human Resources*, Docket No. 07-HHR-409 (Nov. 18, 2008); *Miller v. W. Va. Dep't of Health and Human Resources*, Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996).[15]

During the 2020-2021 school year, D.T. was freshman at Liberty High School. D.T. had met Grievant the year before, while she was a student at Trap Hill Middle School. This minor testified at the October 19, 2021 level three hearing regarding November 18, 19, and other related events that transpired in 2020. D.T's demeanor during her testimony reflected proper attitude toward the seriousness of the proceedings and the issues in discussion. D.T. provided personal insight and reflection to video evidence and conversation between her and Grievant. D.T's L3 testimony was consistent with prior information provided by her written statement and investigation interview. R Ex 3, 10,

[15] The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with firsthand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (1997); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-8-115 (June 8, 1990)

and 25C The testimony of minor, D.T. was plausible and presented in a non-bias manner. D.T. did not present as dishonest or fabricating facts.

D.T.'s allegation that Grievant communicated to her that he had something in the back to show her – a whistle shaped like a dude's pecker – on November 19, 2020, is supported by the direct testimony of both D.T. and C.W. Further, Z.W. testified that she observed the conversation and, while she could not hear precisely what was said at the time, she immediately asked after Grievant laughed and walked away from the table. Both D.T. and C.W. directly told her that Grievant had said he had a whistle shaped like a boy's pecker that he wanted to show to D.T. The testimony by teachers Newman and Milam that D.T., C.W. and Z.W. reported these events to them within minutes of the occurrence lend support to the accuracy of the statements.

The written statements given by D.T., C.W., Z.W., Mr. Newman and Ms. Milam to the school administrator on November 19, 2020, their recorded statements given to the Title IX Investigator on various dates in December 2020, and their testimony during the level three hearing were consistent with respect to all material facts supporting the conduct of Grievant. During each and every statement, these witnesses consistently recalled the same events initially reported on November 19, 2020, regarding the penis whistles. Likewise, D.T., C.W. and Z.W., consistently recalled the touching incident on November 18, 2020. The testimony presented in this case is not significantly conflicting, as the testimony of all of Respondent's witnesses was consistent and plausible.

While Grievant denies, or has simply forgotten, that he touched D.T. on November 18, 2020, the preponderance of the evidence leads to the conclusion that he did.

Further, While Grievant denies that he told D.T. or any of the students at her lunch table about the penis whistles he admittedly found and talked about on November 19, 2020, Grievant oddly admits that he told another minor female student at Liberty High School about the penis whistles. Moreover, Grievant also admitted during the Title IX investigation that it was inappropriate for him to discuss men's genitalia with a female student.

Insubordination "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." *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).

An employee of a board of education who has received proper training on the employee code of conduct, and subsequently engages in unprofessional behavior violative of the same with and around students may be subject to dismissal for insubordination and/or willful neglect of duty. *See Lancaster v. Ritchie County Board of Education,* No. 15-0554 (W. Va. Sup. Ct., May 23, 2016) (memorandum decision). The evidence presented at the level three hearing demonstrates that Grievant has received annual training on the employee code of conduct and the sexual harassment policy.

Moreover, Grievant's own statement during the Title IX investigation reveals that he knew discussing men's genitalia with an underage female student was inappropriate.[16] The evidence supports a conclusion that Grievant violated both the employee code of conduct and sexual harassment policies, either of which support a finding of insubordination, when he knowingly approached and communicated with an underage female student at Liberty High School that he had found a whistle shaped like a boy's dick or pecker. While it was D.T. and not K.R. who voiced a complaint about Grievant's conduct, the conduct of Grievant remains the same and violates both the employee code of conduct and the sexual harassment policies of Respondent. Grievant's conduct constitutes "insubordination" under W. VA. CODE § 18A-2-8.

Respondent established by a preponderance of the evidence grounds to justifying Grievant's suspension. Grievant's conduct in this case has put into question the welfare of students interacting with Grievant, and whether his presences impact's the learning environment of Liberty High School. It is understandable that Respondent wanted to address these concerns.

Mitigation

The question proposed in several forms is whether the instant superintendent of schools is justified in seeking Grievant's dismissal from employment. Grievant asserts

[16] Respondent argues Grievant's conduct constitutes immorality under W. VA. CODE § 18A-2-8. "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). The subject matter in this case pointedly raises the question of whether Grievant's conduct is in conformity with the acceptable standards of sexual behavior.

that Respondent's decision to terminate his employment was excessive or disproportionate to the offense. The instant ALJ is perplexed. This quandary is not readily answered. Grievant's intent is the true litmus test. Intent is generally indicated by words and deeds. Grievant, has been employed by Respondent, as a custodian for approximately nine years. Grievant, by representative, dispute the fact-finding of this matter and highlights that the record does not establish prior discipline concerns prior to the allegations leading to his suspension and termination. Simply stated, Grievant challenges the severity of the punishment. Grievant asserts that Respondent's decision to terminate his employment was excessive or disproportionate to the offense.

"[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). "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). 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).

Grievant presented little to no persuasive evidence to support an affirmative defense of mitigation. Grievant presented one exhibit and Grievant called one witness. Grievant's sole exhibit was a finding by the DHHR that child abuse did not occur. While no evidence whatsoever was presented as to what the DHHR investigator considered to reach such a conclusion, the standard for finding child abuse, or lack thereof, has no bearing on whether Grievant's conduct violated Respondent's employee code of conduct or sexual harassment policies. There is no allegation that Grievant brought the penis whistles onto school property, nor that he showed any of them to even a single student.

Grievant's only witness, C.R., had little knowledge regarding the events of November 19, 2020. After showing C.R. the video of November 18, 2020 introduced into evidence, C.R. admitted that she had no knowledge of the touching event shown on the November 18, 2020 video, and she had limited to no knowledge of relevant events

occurring on November 19, 2020. In other words, C.R.'s testimony had limited to no impact on whether Grievant had touched D.T. on November 18, 2020, or whether Grievant had inappropriately communicated with D.T. on November 19, 2020. The testimony of D.T. and C.W., supports the conclusion that Grievant's conduct impacted the educational program for them and that they would not feel safe if Grievant would be returned to his position of employment.

"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). Grievant asserts that Respondent's decision to terminate his employment was excessive or disproportionate to the offense, was truly considered but Grievant failed adequately meet the necessary burden. 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. Grievant failed to meet his burden of proof.

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. 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 party bearing the burden has not met its burden. *Id.*

2. W. Va. 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." 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. Va. 1067, 216 S.E.2d 554 (1975).

3. "It is not the label a county board of education attaches to the conduct of the employee . . . that is determinative. The crucial 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).

4. An employee of a board of education who has received proper training on the employee code of conduct, and subsequently engages in unprofessional behavior violative of the same with and around students may be subject to dismissal for insubordination and/or willful neglect of duty. *See Lancaster v. Ritchie County Board of Education*, No. 15-0554 (W. Va. Sup. Ct., May 23, 2016) (memorandum decision).

5. Respondent established by a preponderance of the evidence that Grievant conduct constitutes an actionable cause for disciplinary action under W. VA. CODE § 18A-2-8.

6. "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). Grievant's conduct constitutes immorality under W. VA. CODE § 18A-2-8.

7. Respondent proved by a preponderance of the evidence that Grievant violated applicable employee code of conduct policy. *See* W. Va. Department of Education's Policy 5902 § 4.2.1, 4.2.3, and 4.2.6 Also see Section 2.15 of Respondent's Sexual Harassment and Discrimination Policy C.1.3A. Respondent established by a preponderance of the evidence grounds to justifying Grievant's suspension.

8. “[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).

9. "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).

10. Grievant failed to prove by a preponderance of the evidence that his suspension and subsequent dismissal was clearly excessive, or reflected an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action.

11. Respondent proved by a preponderance of the evidence that Grievant conduct violated its policy prohibiting sexual harassment thereby justifying disciplinary action, which can include suspension and/or dismissal.

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 31, 2022

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Landon R. Brown
Administrative Law Judge