KENNETH COOPER,

Grievant,

v. Docket No. 02-20-097

KANAWHA COUNTY BOARD OF EDUCATION,

RESPONDENT.

DECISION

Grievant, Kenneth Cooper, was employed as a Cook by the Kanawha County Board of Education ("KCBOE") before his termination. His Statement of Grievance, filed April10, 2002, reads:

> **I have not been provided a Drug Free Workplace.**
>
> **I have been wrongly terminated from my job.**
>
> **I have been falsely accused of theft.**
>
> **I have been falsely accused of insubordination**
>
> **I was misinterpreted about sexual harassment**
>
> **Relief Sought: I want my job back with Full backpay[.] I want the board to investigate the Illeagal (sic) Drug Abuse By Mary Elliott at weberwood (sic). That has caused these allegations.**

As this grievance was a termination, it was filed directly to Level IV, and a Level IV hearing was held on May 13, 2002. This grievance became mature for decision on June 12, 2002, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1) **By agreement of the parties, the record from the pre-disciplinary hearing was included as a portion of the evidence to be considered. After a detailed review of the record in its entirety, including the pre-disciplinary hearing record, the undersigned Administrative Law Judge makes the following Findings of Fact.**

Findings of Fact

1. Grievant had worked as a cook at Weberwood Elementary for a number of years. Grievant is married.

2. Grievant's supervisor at Weberwood Elementary during part of this time was Mary Elliot.

3. Ms. Elliott has admitted to an addiction to prescription pain medication, and is currently enrolled in a drug treatment program. She has been participating in this program since at least October 2001. (See footnote 2)

4. Ms. Elliott's drug problems frequently caused her to be sleepy at work, and inhibited her ability to perform her job duties. During the first portion of the treatment, a client in the program may experience increased drowsiness. Ms. Elliott also had numerous health problems including seizures, TMJ, fibromyalgia, and carpal tunnel syndrome.

5. Both Grievant and Ms. Elliott occasionally asked Weberwood Elementary staff members for one of their prescription pain medications. 6. Grievant was aware of Ms. Elliott's drug and health problems, and performed many of her duties for her. He also encouraged the part-time cook, Connie Lambert, to assist with these duties.

7. Grievant spent much time with Ms. Elliott. He took breaks off school grounds with Ms. Elliott, attended school social gatherings with her, lent her money and gave her presents. They went to flea markets and the Goodwill together. When Ms. Elliott could not drive her car, Grievant took her to work, and these trips included stopping at the drug treatment clinic. He occasionally followed her movements away from school, and would "just happen" to run into her when she was out.

8. Grievant called Ms. Elliott's doctors, checked on her at the methadone treatment program, and discussed Ms. Elliott's personal problems and his involvement in them with many people. Ms. Elliott was unaware Grievant told people about her personal problems, or told them that she had occasionally borrowed money from Grievant.

9. Grievant never asked Ms. Elliott to sign any type of IOU for the occasional loans, and there is no written documentation of these loans. Whether Ms. Elliott owed Grievant approximately $275.00 at the time of the incident that resulted in his firing is unclear. Ms.

Elliott did owe Grievant twenty dollars for two rings he had sold her the week before. See Finding of Fact 13, infra.

10. Sometime in January 2002, Grievant informed Principal Charlotte Richardson, that Ms. Elliott had a drug problem, she was receiving treatment, she was getting better, and to please give Ms. Elliott time to straighten out these problems. He alsotold Principal Richardson that he had the situation under control in the kitchen. Additionally, Grievant told Principal Richardson that he had given this information to her in confidence, and to please not tell Ms. Elliott that she now knew.

11. Principal Richardson discussed Ms. Elliott's "sleepy" behavior with her, and Ms. Elliott indicated she was on prescribed medication. Ms. Elliott also indicated the effects of the drugs would decrease after a while. (See footnote 3)

12. Grievant never informed Principal Richardson he believed there was illegal and/or inappropriate drug usage at school or on school grounds by Ms. Elliott.

13. On or about January 29, 2002, Grievant brought some rings to work in an attempt to sell them. Ms. Elliott wished to buy some of these rings, but had no money at this time. Grievant told Ms. Elliott to take the two rings, worth about ten dollars a piece, and she could pay him later.

14. Although there was no sexual involvement, Grievant was obsessed with Ms. Elliott, and he was very aware of her activities and troubles. He constantly tried to help her with any problem that arose.

15. On, or about, February 3, 2002, Grievant saw Ms. Elliott in Ames with Ernie Elliott, a man Ms. Elliott had lived with when she was separated from her husband. (See footnote 4) **Grievant became incensed, and waited to confront Ms. Elliott outside the building. Grievant informed Ms. Elliott he would not be at work on Monday, he was tired of all herlies, he was going to the doctor, and how she should be with her husband instead of Mr. Elliott. Contrary to his assertions, Grievant was angry and upset during this confrontation.**

16. Grievant came to Weberwood Elementary prior to the opening of school on Monday, February 4, 2002, and he left the following note for Ms. Elliott.

Mary

> **I wasn't surprised to see you with Ernie Sat. nite. You can't wait until Doug leaves for work so you can run to your Drug Buddy. And that[']s all it is. Ernie has money & Drugs. and that[']s all you want. He's to (sic) Fucking Ugly for any thing else. I have nothing to offer you like that, so you don't need me. Mary you lie so much about everything. You talk about wanting your marriage to work. But all you do is lie and cheat on Doug. I feel sorry for Doug & your familey (sic). You sure aren't the person I thought you were. I didn't think I would ever say this[,] but you make me sick, and I regret the day I met you. I called you Sat. nite at midnite and you still wasn't (sic) home. You and Ernie must have had a good time. I hope it[']s all worth it. You need Help. I don't know when I'll be back to work and don't really care.**
>
> **P.S. Here's the rags. I never had time to wash them. Maybe Ernie will do it for you.** (See footnote 5)

17. Grievant did not work Monday or Tuesday. Ms. Elliott had gotten a substitute and reported Grievant as sick.

18. Grievant called Principal Richardson on Wednesday, February 6, 2002, around 10:00 - 10:30 a.m., and he told her he had been to see his doctor because of his high stress level caused by problems at work with Ms. Elliott. Grievant told Principal Richardson he was on the verge of a nervous breakdown. Grievant also told Principal Richardson about the incident at Ames, and how upset and angry it had made him. He told Principal Richardson he had told Ms. Elliott that, "I can't even bear to see you." 19. Principal Richardson told Grievant to follow his doctor's orders and to stay at home as long as he needed to be away from work, and that he needed to calm down. She also directed him that upon his return to work he should cease spending time with Ms. Elliott, and he should try to put as much personal space between them as possible. 20. On that same day, approximately one hour later at 11:30 a.m., Grievant came to work while the cooks, including Ms. Elliott, were serving lunch. He did not tell Principal Richardson he was there. He went in the back of the kitchen area and took a brass picture frame he had given Ms. Elliott. He also went into a zippered compartment in Ms. Elliott's purse and took four rings. (See footnote 6) **He took these articles because he believed Ms. Elliott owed him money, and these would serve as partial payment of her debt. Grievant did not have permission to get into Ms. Elliott's purse or take the rings.**

21. Grievant was aware this time of day was busy, but he could offer no explanation as to why he went to school at this time.

22. As he left the area, he told Ms. Elliott, "I got my stuff." Ms. Elliott did not hear what

Grievant said. She asked him to wait until she was through serving lunch. One of the cooks tried to encourage Ms. Elliott to talk to Grievant right then, but she did not want to, and she was busy serving lunch.

23. Grievant believed Ms. Elliott should have stopped serving to talk to him, and was upset that she had not. 24. Approximately forty-five minutes later, Ms. Elliott discovered her rings were missing. She became very upset, especially because her mother had given her one of the rings. Principal Richardson was called to the kitchen to resolve the problem.

25. When Principal Richardson discovered Grievant had taken the rings out of Ms. Elliott's purse, she informed Ms. Elliott the police must be called. Principal Richardson was also worried and concerned about safety issues because Grievant had just discussed his anger at and displeasure with Ms. Elliott.

26. Ms. Elliott stated she believed what Grievant really wanted was to talk to her, and she asked Principal Richardson to wait until she talked to Grievant before the police were involved. Ms. Elliott wanted to see if she could get Grievant to return her mother's ring. Ms. Elliott was afraid Grievant would throw the rings away when confronted by the police.

27. Because this ring was so important to Ms. Elliott, Principal Richardson agreed to delay calling the police until Ms. Elliott tried to get the ring back.

28. Ms. Elliott paged Grievant, and he returned her call immediately. When asked to return the rings, he indicated Ms. Elliott should meet him to talk about it. Grievant also indicated he did not know one of the rings belonged to Ms. Elliott's mother.

29. Grievant met Ms. Elliott a short distance from the school, and he was wearing the rings he had taken, with the exception of the one Ms. Elliott had received from Mr. Ernie Elliott. Grievant indicated he would not let that ring even touch his skin. He returned Ms. Elliott's mother's ring and Ms. Elliott left. 30. Ms. Elliott returned to school, the police were called, and an arrest warrant was completed. **(See footnote 7)**

31. On February 8, 2002, Grievant was called to the police station as probable cause was found to believe he had committed simple larceny.

32. Grievant turned the remaining rings over to the police, and he was released on bail.

33. Grievant said these charges were dropped because Ms. Elliott did not appear at the magistrate hearing. Ms. Elliott was called by the officer who had completed the arrest warrant,

and she was told not to appear for the hearing. The matter was placed on the open docket for one year, and Grievant agreed he was told this information. The warrant would be dismissed if he stayed away from Ms. Elliott and Weberwood Elementary until the board of education resolved the other issues. **(See footnote 8)**

34. By letter dated February 8, 2002, Grievant was informed Superintendent Ronald Duerring that he was suspended with pay pending an investigation into allegations of theft and harassment of co-workers. He was "directed to have no contact, either in person, by telephone or otherwise, with any Weberwood service or teaching personnel." 35. Shortly after Grievant received this notice, he met with Bill Courtney, Director of Employee Relations, and asked to file "drug charges" against Ms. Elliott. Mr. Courtney indicated this issue could be addressed in Grievant's pre-disciplinary hearing.

36. By letter dated February 26, 2002, Grievant was informed that following an investigation of the allegations made against him, it had been determined a pre-disciplinary hearing on the charges should be held. The letter specified the charges as theft from and sexual harassment of Ms. Elliott.

37. Sometime late in February 2002, Ms. Elliott told Principal Richardson of her addiction problem, and the treatment she was undergoing.

38. A pre-disciplinary hearing was held on March 7, 2002. By letter dated April 2, 2002, Grievant was informed the pre-disciplinary Hearing Examiner had found Grievant to be guilty of sexual harassment and insubordination, and she recommended he be suspended for a period of ninety calendar days. Grievant was suspended effective the date of the letter. Grievant would also be required to provide medical verification that he presented no risk to himself or others prior to returning to work. Grievant was also informed the recommendation would be taken to the Kanawha County Board of Education, and he would be advised of his appeal rights.

39. By letter dated April 9, 2002, Grievant was informed the Kanawha County Board of Education, after an independent review of the record from the pre-disciplinary hearing, had voted to terminate his employment. **(See footnote 9)** **40. After receiving this notice, Grievant called many staff and faculty at Weberwood Elementary to enlist support. Ms. Lambert testified Grievant called her approximately sixteen times between April 14 and 29,**

2002, and he became irate when she would not circulate a petition for his re-employment. Eventually, Ms. Lambert got caller ID so she would not have to talk to Grievant anymore. Other faculty indicated Grievant had called them as well, and they felt harassed.

41. Grievant also called parents and informed them of Ms. Elliott's drug problems, and indicated Principal Richardson had been aware of these problems and had failed to act.

42. Several staff members changed their testimony and opinion about whether Grievant had harassed Ms. Elliott, after they found out about or received these numerous phone calls to staff and parents.

Issues and Arguments

Respondent asserted Grievant had been insubordinate, had harassed his supervisor, and had stolen personal possessions from this supervisor. Grievant asserted he did not steal anything; he had permission to take the articles as payment for $275.00 in unpaid loans, he was not aware he had broken any rules, and all the problems were created by his supervisor's drug problem. He did agree he had used a curse word in a letter to his supervisor, but maintained this was not sexual harassment, and should not warrant his dismissal. (See footnote 10)

Discussion

___In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). "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. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. 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 and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.; See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

I. Credibility

The first issue to address is witness credibility, as the testimony of Grievant and Ms. Elliott was frequently diametrically opposed. Additionally, there were other witnesses whodisagreed with either Grievant or Ms. Elliott. 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 Resources, 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 Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

The United States Merit System Protection Board Handbook ("MSPB Handbook") is helpful in setting out factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984). The Grievance Board has applied these factors in many cases, and considers the following in assessing 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 majority of the witnesses appeared to be truthful, but it was clear their testimony was colored by their own personal perceptions or psychological orientations. In evaluating the available evidence, the undersigned finds that the testimony of the Respondent'switnesses

was substantially consistent. Moreover, their demeanor and responses under cross-examination revealed no particular animosity toward Grievant, so as to cause them to fabricate or embellish their statements.

Where Grievant's and Ms. Elliott's testimony differed, the undersigned Administrative Law Judge has found the truth to be somewhere between the two on several matters. However, the credibility of Grievant must be called into question. The undersigned Administrative Law Judge will review several incidents where the testimony of the two differed in order to demonstrate the reasons why Grievant's credibility is called into question.

The first issue is whether Grievant was very upset and angry when he saw Ms. Elliott at Ames with Mr. Elliott, and whether there was a confrontation. Grievant denied he was upset or angry. Ms. Elliott testified Grievant was upset and confrontational, and Grievant scared her. Principal Richardson testified Grievant was still upset and angry when he discussed the incident with her on the following Wednesday, three days after the incident had occurred. This continuing anger was why she directed Grievant to stay away from the school until he felt better. Additionally, Grievant wrote the letter in Finding of Fact 16, which clearly demonstrates he was upset and angry.

Grievant also stated he had never taken anything stronger than an aspirin for any pain, but his testimony indicated he had been on prescribed pain medication for his back. Further, several witnesses who had no reason to lie, testified Grievant had asked them for one of their prescription pain pills.

On the issue of whether Ms. Elliott owed Grievant approximately $275.00 at the time he took her rings, the undersigned Administrative Law Judge does not have sufficientevidence to decide this issue. Grievant and Ms. Elliott strongly disagreed on this point. Other witnesses stated Grievant had told them that he lent Ms. Elliott money, but Ms. Elliott never told others that this happened. Ms. Elliott did agree she had borrowed money from Grievant from time to time, and that he had willingly offered this money without any IOU. Ms. Elliott stated she had paid this money back. Ms. Elliott had taken two rings worth about ten dollars apiece approximately five days before. She was to pay Grievant for these rings when she got the money, so she did owe him at least $20.00.

Grievant and Ms. Elliott strongly disagreed whether Ms. Elliott gave Grievant permission to

go in the side, zipped pocket of her purse when she was not present, to get her rings as payment for loans. Even Grievant noted he did not have permission to take Ms. Elliott's mother's ring. This permission is difficult to believe just on the face on it. It is a fairly recognized societal norm that ladies do not allow people, men in particular, in their purses. This rule usually applies even to spouses. Grievant knew where Ms. Elliott kept her rings because she took them off when she prepared dough. The undersigned Administrative Law Judge finds Ms. Elliott did not give Grievant permission to go in her purse to take her rings. She certainly did not give him permission to take her mother's ring. It is possible Ms. Elliott could have told Grievant that if he wanted the rings, to stop by, and she would give them back, but this is not what Grievant reported as happening.

As noted above, these above-cited differences in the testimony were resolved in favor of Ms. Elliott, and this false testimony calls into question Grievant's credibility.

II. Merits of the case

W. Va. Code §18A-2-8 identifies the types of action that can result in disciplinary action and provides, in pertinent part:

> **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. A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article.**

The next issue to decide is whether the evidence substantiates the charges against Grievant. The undersigned Administrative Law Judge finds the behavior of Grievant can be viewed under the following charges of W. Va. Code § 18A-2-8: immorality and insubordination.

A. Immorality

1. Sexual Harassment

The term "immorality" in W. Va. Code § 18A-2-8 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 acceptable sexual behavior." Golden v. Bd. of Educ., 169 W. Va. 63, 285 S.E.2d 665 (1981). Conduct which

constitutes prohibited sexual harassment is included within the proscription against immorality in W. Va. Code § 18A-2-8. Harry v. Marion County Bd. of Educ., 203 W.Va. 64, 506 S.E.2d 319 (1998). Further, "[m]isconduct by a school employee which can be characterized as sexual harassment can constitute a basis for the termination of the offending employee's employment." Id. at Syl. Pt. 2.

At the time of the alleged incidents, KCBOE had adopted an Administrative Regulation which explicitly prohibited sexual harassment, Policy G50A. (See footnote 11) This Regulationindicated sexual harassment is prohibited, and prohibited behaviors include inappropriate comments and obscene letters or notes. Discipline for sexual harassment may include reprimand, suspension, or termination. Id. Grievant's conduct was deliberate and intentional, not inadvertent, accidental, or resulting from a simple misunderstanding. See Bradley, supra; Burns v. McGregor Elec. Indus., 955 F.2d 559 (8th Cir. 1992); Wilson v. Wayne County, 856 F. Supp. 1254 (M.D. Test. , Level IV Hearing. 1994). Although a close call, the letter referred to in Finding of Fact 16 falls within these parameters. The letter was personally demeaning, included foul language, and was accusatory. Grievant was jealous of Ms. Elliott's relationship with Mr. Ernie Elliott, and these feelings are reflected in the letter.

2. Theft

Grievant is also accused of theft. If proven this charge can be seen under the definition of immorality as stealing is conduct "not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community . . . " Golden, supra. As previously stated, the undersigned Administrative Law Judge does not believe Grievant had permission to go into Ms. Elliott's purse and take the rings, so the taking of these items would be theft.

Even if the testimony is taken in the light most favorable to Grievant, and it is believed Ms. Elliott gave Grievant permission to go in her purse and take the two rings she had not paid him for and the ring she received as a gift from Mr. Ernie Elliott, Grievant still did not have permission to take Ms. Elliott's mother's ring. This taking would then be theft,even though Grievant returned the ring. Respondent has proven Grievant stole from Ms. Elliott.

Additionally, it must be noted Grievant's testimony that the charges were dropped was not proven. The case was placed on an open docket so that charges could be brought against

Grievant later during the year if he continued to cause trouble for Ms. Elliott. His assertions that the charges against him were dropped, as unproven, makes no sense.

B. Insubordination

Grievant is also accused of insubordination. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." Butts v. Higher Educ. Interim Governing Bd. No. 30120 (W. Va. June 17, 2002)(per curiam). See 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 involves the "willful failure or refusal to obey reasonable orders of a 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).

In order to establish insubordination, an employer must demonstrate 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). "Employees are expected to respectauthority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dep't, Docket No. 90-H-128 (Aug. 8, 1990).

The charge of insubordination is a close one. The issue revolves around whether Grievant disobeyed an order of his supervisor or a board of education policy when he came to work while on sick leave. Not surprisingly, KCBOE's sick leave policy does not state an employee cannot come to work when he reports he is too ill to work. Inherent in any sick leave policy is the expectation that if you are too sick to come to work, you are too sick to come to work for any reason. There would seem to be no need to place such a directive in a sick leave policy.

Additionally, Grievant had talked to his supervisor one hour before and informed her he was too sick to work. His doctor had diagnosed Grievant with work-related stress, and he had directed him to stay away from the work place for approximately two weeks. Principal Richardson told him to follow his doctor's directions and not come in until the doctor indicated it was all right. She also told Grievant to keep his distance from Ms. Elliott as much

as possible when he returned to work.

Despite the doctor's order and Principal Richardson's directions, Grievant appeared at the work place one hour after he talked with Principal Richardson. He could not explain why it was necessary for him to do this. It is clear he was angry with Ms. Elliott and his personal feelings interfered with his judgement. He came to work while on sick leave, in an upset state, right after Principal Richardson had told him to follow his doctor's orders and stay home until he felt better. Grievant came when he knew the kitchen would be busy, had no explanation for this intrusion, and was even upset when Ms. Elliott would nottake time from her work to talk to him. Given this set of facts the undersigned Administrative Law Judge finds Grievant was insubordinate.

III. Mitigation/Severity of Penalty

The argument Grievant's termination is 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. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

"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). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997). 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 workperformance. Pingley v. Div. of Corrections, Docket No. 95-CORR-

252 (July 23, 1996). This 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 Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute her 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).

Grievant, even at the time of the Level IV hearing, did not see any of his behavior as inappropriate, except for the use of the word "fucking" in the letter to Ms. Elliott, and the failure to tell Principal Richardson sooner his belief that Ms. Elliott was using drugs on the school's premises. He saw nothing wrong with coming to the school while he was on sick leave, and ignoring the doctor's and Principal Richardson's directions to stay away from the stressful situation at work. Throughout, Grievant maintained his belief that all that had happened to him had been caused by Ms. Elliott and her problems.

In assessing the above-cited factors, I find that while Grievant's evaluations were satisfactory during his tenure with KCBOE, the employer has substantial discretion to determine a penalty, and the undersigned Administrative Law Judge cannot and will not substitute her judgement for that of Respondent. Although reasonable people might differover whether termination was an unduly harsh penalty for the offenses proven, the undersigned Administrative Law Judge is unable to conclude that KCBOE abused its discretion in selecting the penalty in question.

It is noted that both the Hearing Examiner at the pre-disciplinary hearing and Superintendent Duerring believed a lengthy suspension would be sufficient in this case, with the precaution of medical assurances that Grievant was not a danger to himself or others. Additionally, Grievant would have been transferred to another school. Thus, the punishment was not excessive, although lesser punishment could also have been appropriate.

One somewhat unusual circumstance occurred with this disciplinary action. KCBOE, after a review of the pre-disciplinary hearing transcript, decided not to follow the recommendation of the Superintendent. KCBOE decided against a suspension and voted instead to terminate Grievant's employment. It should be noted that the recommendation of a superintendent is just that, a recommendation. The final decision belongs to the board of education, and they may accept or reject the recommendation of a superintendent, after they perform an independent review.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered inopposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. 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 and Human Resources, Docket No. 92-HHR- 486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.; See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

2. A county board of education possesses the authority to terminate an employee, but this 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).

3. Insubordination and immorality are among the causes listed in W. Va. Code §18A-2-8

for which an education employee may be disciplined. See Rovello v. Lewis County Bd. of Educ., 181 W. Va. 122, 381 S.E.2d 237 (1989); Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975); Woo v. Putnam County Bd. of Educ., Docket No. 93-40-420 (June 2, 1994), aff'd 202 W. Va. 409, 504 S.E.2d 644 (1998); Jones v. Mingo County Bd. of Educ., Docket No. 95-29-151 (Aug. 24, 1995). 4. Immorality connotes conduct which is "not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked, especially, not in conformance with the acceptable standards of proper sexual behavior," as defined in Webster's Dictionary. Golden v. Bd. of Educ., 169 W. Va. 63, 285 S.E.2d 665 (1981). Accord, Rosenburg v. Nicholas County Bd. of Educ., Docket No. 34- 86-125-1 (Aug. 4, 1986).

5. A county board of education may properly discipline an employee who violates the board's sexual harassment policy, and sexual harassment "may be considered as a species" of immorality. Harry v. Marion County Bd. of Educ., 203 W. Va. 64, 506 S.E.2d 319 (1998); Willis v. Jefferson County Bd. of Educ., Docket No. 96-19-230 (Oct. 28, 1998).

6. "Misconduct by a school employee which can be characterized as sexual harassment can constitute a basis for the termination of the offending employee's employment." Harry, supra.

7. KCBOE has met its burden of proof by a preponderence of the evidence and demonstrated Grievant is guilty of immorality, theft, and sexual harassment under W. Va. Code § 18A-2-8.

8. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." Butts v. Higher Educ. Interim Governing Bd. No. 30120 (W. Va. June 17, 2002)(per curiam). See Riddle v. Bd. of Directors, So. W. Va. CommunityCollege, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989).

9. "Insubordination encompasses more than an explicit order and refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." Nicholson, supra; Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 20, 1988), aff'd 182 W. Va. 294, 387 S.E.2d 529 (1989).

10. "Employees are expected to respect authority and do not have the unfettered

discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dep't, Docket No. 90-H-128 (Aug. 8, 1990), citing Meads v. Veterans Admin., 36 M.S.P.R. 574 (1988); Daniel v. U.S. Postal Serv., 16 M.S.P.R. 486 (1983); Davis v. Smithsonian Instantaneous., 13 M.S.P.R. 77 (1983).

11. KCBOE properly determined Grievant's conduct constituted insubordination under W. Va. Code § 18A-2-8. Id.

12. 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). See Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

13. When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether thepenalty 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). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997).

14. "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).

15. Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute her 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).

16. Given the charges proven against Grievant, the penalty is not disproportionate or

excessive, nor is the penalty arbitrary and capricious. See Lanehart, supra; Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994); Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991).

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. W. Va. Code § 18-29-7. Neither the West Virginia Education and State 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

_____

JANIS I. REYNOLDS

Administrative Law Judge

Dated: July 31, 2002

Footnote: 1

Grievant was self-represented, with the assistance of Susan Halstead from the United School Personnel of West Virginia. Respondent was represented by its attorney, James Withrow.

Footnote: 2

Kimberly Levy, an attorney from the West Virginia School Service Personnel Association, appeared with Ms. Elliott.

Footnote: 3

Principal Richardson testified Ms. Elliott is more alert now, and she is performing her duties adequately.

Footnote: 4

Mr. Ernie Elliott is Ms. Elliott's husband's cousin.

Footnote: 5

The employees in the lunchroom took turns taking the cleaning rags home to wash them.

Footnote: 6

There were allegations Grievant took a pill and fifty dollars. These allegations were not proven.

Footnote: 7

There are some minor inconsistencies in the details of the arrest warrant, but these disparities did not change the basic facts in the warrant.

Footnote: 8

Ms. Elliott testified she was told not to come to the magistrate hearing, and then received a second phone call telling her the outcome of the magistrate proceedings. Grievant did not believe this information, and he requested a copy of the tape of these phone calls be placed into evidence. A tape of the phone calls was received, after the hearing, and it demonstrated Ms. Elliott had accurately reported them.

Footnote: 9

Grievant attempted to place into the record at the Level IV hearing and in his post- hearing submissions, evidence of later conversations he had with Board member Pete Thaw. Grievant also provided Mr. Thaw's phone number so the undersignedAdministrative Law Judge could call Mr. Thaw. This evidence was not admitted.

Footnote: 10

Although reminded frequently by the undersigned Administrative Law Judge that the purpose of the hearing was for him to defend himself from the charges which resultedin his termination, Grievant persisted in focusing on the wrongs allegedly committed by Ms. Elliott. Grievant appeared to believe that any of his possible wrong doings were caused by Ms. Elliott's drug problems.

Footnote: 11

This Policy was not presented by the parties, but was referred to by the parties and was easily found at the Kanawha County Board of Education web site.