DEBRA SANTER,

Grievant,

v v.

Docket No. 03-20-092

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Debra Santer, filed this grievance directly to Level IV on March 25, 2002, against her employer the Kanawha County Board of Education ("KCBOE"). Her Statement of Grievance reads:

> Appeal of disciplinary decision of 3-19-03 W. Va. Code § 18A-2-8; policy 5300[.] Ms. Santer was improperly disciplined and suspended without due process of law.
>
> Relief sought: Reversal of suspension and all disciplinary action, attorney fees and costs and such other relief as may be made available.

The parties agreed to submit this grievance on the record developed at the pre- disciplinary hearing, without a grievance hearing, and this case became mature for decision on May 8, 2003, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

History

In a letter dated September 13, 2002, Respondent suspended Grievant, with pay, for inappropriate behavior, insubordination, and making false, misleading, and accusatory statements to her supervisor, Assistant Superintendent Leonard Allen, Superintendent Ron Duerring, and the board of education. (See footnote 2) The main reason for the investigation and disciplinary action was Grievant's behavior on September 10, 2002, which KCBOE identified as insubordination. On March 19, 2003, after a lengthy, three day pre- disciplinary hearing and attempts at mediation, KCBOE

adopted the findings and recommendations of the Hearing Examiner and suspended Grievant for ten days without pay, and upon her return to work, directed her to provide input into an Improvement Plan to be developed with an administrator that was not her supervisor. A written reprimand was also placed in Grievant's personnel file to serve as a warning that future incidents could result in additional disciplinary action.

Issues and Arguments

KCBOE asserts it has met its burden of proof and demonstrated Grievant's behavior was insubordinate and a ten-day suspension, written reprimand, and Improvement Plan were the correct actions. Grievant makes several arguments. First, Grievant maintains she did not do anything wrong, and her behavior was the result of the treatment she received from KCBOE in generally, and Dr. Duerring and Assistant Superintendent Allen, in particular. Second, she asserts she did not receive due process. Third, Grievant argues her suspension was retaliatory, (See footnote 3) and fourth, Grievant asserts the punishment is too harsh and violated due process. (See footnote 4)

After a detailed review of three day, pre-disciplinary hearing record, the undersigned Administrative Law Judge makes the following Findings of Fact. (See footnote 5) It is noted that several KCBOE regulations were cited in Grievant's submissions, and these were not placed into the record or addressed in the pre-disciplinary hearing. The undersigned Administrative Law Judge took administrative notice of these rules and accessed them through KCBOE's Web site. Additionally, Grievant's attorney spoke in some detail about portions of Grievant's Improvement Plan which was written after the pre-disciplinary hearing, andGrievant took exception to several areas. Since there is no evidence about this Improvement Plan in the record, it cannot be addressed in this Decision as to its content, and Grievant's attorney's allegations cannot be accepted as facts, as these assertions are not sworn statements. Additionally, this issue was not discussed during the pre-disciplinary hearing.

Findings of Fact

1. Grievant is employed by KCBOE as an Assistant Principal at Flinn Elementary.

2. By letter dated September 13, 2002, Grievant was notified of a paid suspension until a determination was made about what appropriate action should be taken given Grievant's recent actions. Grievant was also directed to KCBOE's Employee Assistance Program.

3. Grievant has many professional qualifications, and is working on her doctorate.

4. Grievant yearns to be selected as a principal, but has so far been unsuccessful.

5. During the 2000-2001 school year, Grievant was acting principal at Roxalana Elementary ("RE"), a school scheduled for closure.

6. While there, Grievant developed some problems with the teachers and staff, to the point of the faculty and staff requesting a meeting with her supervisor, Assistant Superintendent Allen. Additionally, there were complaints from parents about Grievant's decisions. Grievant also had difficulty accepting the directions she received from Assistant Superintendent Allen, and there were some harsh words exchanged between them. 7. Superintendent Duerring and Assistant Superintendent Allen met with Grievant after the RE meeting with the staff and faculty. Superintendent Duerring and Assistant Superintendent Allen had initially decided to transfer Grievant, but at her request they allowed her to remain at RE. Grievant returned to RE, threatened the staff with some type of legal action, and Grievant was immediately transferred to Piedmont Elementary to assist that principal. (See footnote 6)

8. During the time Grievant was at RE, she received two verbal warnings about her inappropriate behavior. These warnings related to her aggressive and rude interpersonal communication style.

9. Grievant continued to apply for principal positions. When she was not selected for a position at Robins Elementary, on or about August 12, 2001, she started writing lengthy letters to Superintendent Duerring, other administrators, and KCBOE members.

10. In her August 12, 2001 letter, Grievant rehashed all the wrongs she felt had been done to her for many years, indicated she believed KCBOE engaged in discrimination and unfair hiring practices, and asserted Assistant Superintendent Allen had unduly influenced the selection at Robins and other schools to have friends placed in administrative positions. Grievant went on at some length about her emotional distress, damage to her professional reputation, and the demoralizing and condescending treatmentshe had received. Grievant requested a hearing before an impartial administrator, but did not file a grievance.

11. Grievant continued to write these types of letters to Superintendent Duerring, other administrators, and KCBOE members, and the tone of these letters became more strident and accusatory. Grievant continued to rehash past events. For example, in her August 24, 2001 letter,

she complained about how she was treated during the RE controversy, and stated she was shocked by Superintendent Duerring's behavior, and she could not believe he would act in such a "condescending," "humiliating," and "repulsive" manner. (See footnote 7) Grievant stated there was "a total lack of ethics on the part of selected central office administrators." Grievant demanded Superintendent Duerring call the staff of RE together so she could face and question her "accusers," as she believed the cassette recording of that meeting "disproportionately documented [her] negatives." Grievant maintained she had done nothing wrong, and she hoped Superintendent Duerring would do the right thing. Resp. No. 14.

12. Sometime in late August or early September 2001, Grievant filed a grievance over her non-selection academic year Robins. She believed the matrix was wrongly calculated.

13. After Grievant filed her grievance, Superintendent Duerring informed Grievant he could no longer talk to her about the issue and did not want any more letters on the subject. 14. The GPA's in the Robins' selection matrix were incorrectly calculated, and this error was revealed at a Level IV hearing on this issue just recently. Grievant asserted these errors were intentionally created to keep her from getting "her position." The selection issue is not before the undersigned Administrative Law Judge, but Grievant has maintained KCBOE's intentional acts, in essence, caused her to act the way she did. 15. These mistakes in the matrix were not intentional.

16. Superintendent Duerring responded to Grievant's letter on August 29, 2001, and stated he had selected the best qualified person for the position at issue, Grievant had the right to disagree, and she had filed a grievance that would review the Robins decision. He also declined to schedule a meeting with the former staff of a closed school. Resp. No. 17.

17. Grievant was unable to let the matter drop with Superintendent Duerring even though she had filed a grievance, and it was in process. She responded to Superintendent Duerring's letter with a six page single spaced letter in which she repeated many prior statements, again defended her actions at RE, again compared her qualifications to the successful applicant at Robins, and made many allegation against Assistant Superintendent Allen, and Superintendent Duerring. She stated Assistant Superintendent was unethical, and abusing his power. She questioned Superintendent Duerring's "strength of character," indicated he was unprofessional, and stated he had comprised his integrity by his decision at RE. Again, Grievant indicated her behavior was completely correct, and any problems were entirely the fault of others. Resp. No. 15.

18. Superintendent Duerring responded to this epistle with a short, curt note on September 6, 2001. He noted he took exception to several of Grievant's assertions, hewas not going to litigate Grievant's complaints through the mail, and the grievance process would uphold his decisions.

19. Grievant's letter writing campaign did not cease, and on September 7, 2002, Grievant wrote a five and one half page, single spaced letter to Superintendent Duerring, Assistant Superintendent Allen, Bill Courtney, and Attorney Jim Withrow. In this letter Grievant: 1) complained about being questioned during the grievance process, and called Mr. Withrow a bully; 2) complained Anne Charnock and Carole Bloom had masqueraded as Hearing Examiners; 3) again repeated her qualifications; 4) indicated a former witness had "regret and remorse" over her testimony; and 5) repeated her lack of respect for each of the addressees and noted their lack of judgment, poor leadership, dearth of scruples, arrogance, and absence of ethics. This letter was very aggressive and strident, full of accusations and allegations, and stated Grievant's belief there was a "power struggle and personal vendetta against her strong will. . . ." Resp. No. 6.

20. Grievant made misleading statements about the testimony of a witness in her September 7, 2001 letter to KCBOE. See Finding of Fact 19. Contrary to her assertions, she had no basis in fact to believe these statements were correct. These assertions were completely rebutted by the sworn testimony of Principal Charlotte Richardson, the person alleged to have made the remarks. Test. Richardson.

21. Contrary to Grievant's accusations in her September 7, 2002 letter, KCBOE did not intentionally refuse to give her the Assistant Principal of the Year Award. First, there is no Assistant Principal of the Year Award, only a Principal of the Year Award for which Assistant Principals can be nominated, and second, Grievant did not win this award. 22. Grievant continued to write letters along the same vein. Resp. Nos. 7, 8, 9, 10. She also wrote a letter to KCBOE members a few days after her Level II hearing, before a decision had been rendered. She also wrote a letter to the newspaper that she later requested not be published, but she sent copies of this letter to several central office administrators. Resp. No. 12. These letters accused Superintendent Duerring and/or KCBOE of slander, intentional manipulation of data prior to selections, falsification of documents, and not giving her due process. At the same time, Grievant reiterated her hard work and dedication, the "oppression" she had suffered at the hands of Superintendent Duerring and Assistant Superintendent Allen, and her failure to contribute in any way to the events that had befallen her.

23. During this time period, Grievant also repeatedly visited Superintendent Duerring's office and verbally complained about how she had been treated.

24. After several of these hour long meetings, Superintendent Duerring decided not to meet with Grievant alone as the remarks he later heard about these meetings did not comport with what he believed had occurred.

25. Sometime during this time period, Superintendent Duerring asked Assistant Superintendent Joe Godish to be present during one of these meetings. At this meeting Grievant took out her hearing aides and tossed them on the table, one of them landing close to Superintendent Duerring. Assistant Superintendent Godish viewed Grievant's demeanor as loud and angry, and he believed Grievant's behavior was an inappropriate way to address a supervisor. Contrary to Grievant's assertions, Assistant Superintendent Godish did not find Grievant's loud voice related to a hearing loss, as her volume increased with the anger. 26. Grievant received another verbal warning from Superintendent Duerring about her rude and inappropriate behavior sometime during 2002. (See footnote 8)

27. Grievant applied for another principal position at Lakeview Elementary, and arrived late for the interview. Grievant has a history of being late. Because another applicant had arrived late and had been refused an interview, the committee also refused to interview Grievant. She then threw a fit and demanded an interview, and argued she had been intentionally been given the wrong interview time so she could not be considered for the position.

28. Superintendent Duerring became involved in the situation, and Grievant was granted an interview.

29. On September 9, 2002, when Grievant learned she would not be recommended for the Lakeview position, she addressed KCBOE before it made its final selection, informed the board members she was the most qualified applicant, and threatened to file another grievance if she was not selected. KCBOE accepted Superintendent Duerring's recommendation and another applicant was selected.

30. On September 10, 2002, Grievant was to attend an in-service meeting on an important new reading project for the elementary schools. She had attended a similar in- service previously, but her supervisor, Principal Sara Sutler had not. After Grievant arrived late at the meeting, (See footnote 9) she decided to obtain a grievance form and fill it out during themeeting. Once she had completed her

section, she also completed the section that was to be filled out by her supervisor, Principal Sutler. Even though the meeting was still going on, Grievant then went to Principal Sutler and asked her to sign where Grievant had placed an X. Principal Sutler did not want to sign a document without checking its content, and she asked Grievant to go out in the hall. Once in the hall, Principal Sutler discovered Grievant had filled in her portion, and she refused to sign it. Grievant became upset and insisted over and over again that Principal Sutler immediately sign the form exactly as Grievant had filled it out. When Principal Sutler still refused to sign the form, Grievant became even more agitated, and she told Principal Sutler she would go to the newspaper, and report what Grievant perceived as Principal Sutler's failure to perform her duties in a satisfactory manner. Principal Sutler then became very upset.

31. At some point, Central Office Administrator Melanie Vickers heard Grievant's raised voice in the hall and had the parties step into her office. Additionally, someone reported to Mr. Allen that Grievant had upset Principal Sutler, and she was crying.

32. Mr. Allen went in search of Grievant, who by this time was in the personnel office filling out a new set of grievance forms. Assistant Superintendent Allen told Grievant her behavior of filling out the forms during a staff development meeting and trying to force Principal Sutler to sign the forms was inappropriate. Grievant responded that Assistant Superintendent did not want to get in another dogfight with her, and Assistant Superintendent Allen stated if she wanted another dogfight she could have one, and he, as her supervisor, was informing her behavior was inappropriate. Grievant did not agree that Assistant Superintendent Allen was superior to her. 33. Grievant returned to the meeting room. Shortly thereafter, while the meeting was on break, Assistant Superintendent Allen told Grievant she was to gather her things and leave immediately. Grievant refused initially. Mr. Allen asked her if she was refusing a direct order, and Grievant said, "You would just love to get me on something like that." Shortly thereafter, Grievant agreed to leave the meeting.

34. Assistant Superintendent Allen agreed Grievant could wait for a short time to leave, so her departure would not seem so noticeable. Grievant returned to Flinn Elementary, went to the office of the school secretary, Ms. Carol Elliot, and sat on the floor (there was no chair) and cried. Grievant was very upset and told Ms. Elliot something like she had "lost it," or made "a mistake," or had "pushed it too far."

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. ofEduc., 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 and hearsay

Because the testimony of the parties is in conflict, there is a need to assess the credibility of these individuals. 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 fact that this testimony is offered in written form does not alter this responsibility." Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996).

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 ofbias, 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 footnote 10) See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

Some of the comments attributed to others are obviously hearsay, for example the comments attributed to Principal Richardson, but relevant hearsay is admissible in administrative hearings. Gunnells v. Logan County Bd. of Educ., Docket No. 97-23-055 (Dec. 9, 1997). The key question is whether these statements are credible, and what weight, if any, to give these statements.

The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first hand 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 theirstatements. (See footnote 11) Id.; Sinsel v. Harrision County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996); Perdue, supra; Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't, Docket No. 90-8-115 (June 8, 1990).

In assessing the testimony presented, the undersigned Administrative Law Judge cannot accept Grievant's version of the facts. Her perceptions and interpretations of events were vastly different from the majority of the other witnesses. In many of these incidences, the interpretation, and thus, the credibility of Grievant, must be called into question. "[A] [f]actor to be considered in making and explaining credibility determinations is [the] possibility that [the] witness is biased and may consciously or unconsciously shade his or her testimony for or against one of the other witnesses or parties." Chin v. Dep't of Treasury, 44 M.S.P.R. 201 (1990). See Loundman-Clay v. Higher Educ. Policy Comm'n, Docket No. 02-HEPC-013 (Aug. 29, 2002). Additionally, Grievant's attitude, language, and behaviors were "over the top" and not appropriate to the situation. Additionally, Grievant's perception and interpretation of events, and her assessments and interpretations were not

born out by other witnesses.

The undersigned Administrative Law Judge will review several incidents where the interpretations differed and perceptions were incorrect in order to demonstrate. Grievant reported to KCBOE that Principal Charlotte Richardson had expressed regret and remorse about her testimony in another hearing. This belief was completely contradicted by Principal Richardson's testimony in this case. Grievant explained she saw PrincipalRichardson after that hearing, and because she had smiled at her, she believed she was sorry for her actions even though such words were never said or even indicated.

An example of Grievant's inability to perceive or realize how her behavior affected others was demonstrated by the interaction between Grievant and Principal Sutler. She appeared to see nothing wrong with saying the following to Principal Sutler after Principal Sutler had refused to sign the grievance form: "Sharon, just sign this. Just sign it. This is a technicality and this is just ridiculous. Just sign this." Test. Grievant at 56, Vol II. Grievant also stated, "I didn't understand why she was making such a big deal of it", about Principal Sutler's refusal to sign something she had not written nor read. Test. Grievant at 56, Vol II.

While it is true Grievant has not been selected for a principal's position, and the factual determinations of that issue are not before the undersigned Administrative Law Judge, what is clear and what is not perceived by Grievant, is that Grievant had difficulties at RE, some of which were of her own making. Grievant's own behavior led to her removal from this position, but this failure was not seen as a huge black mark against Grievant, until she threatened the RE staff with legal action. Superintendent Duerring indicated that sometimes the personality of the school and the assigned principal just don't mesh. Even with these problems, Assistant Superintendent Allen rated Grievant as satisfactory or above on her evaluation for that year. This does not sound like the act of the megalomaniac as portrayed by Grievant.

Accordingly, the undersigned Administrative Law Judge finds Grievant's testimony to be distorted and influenced by her own bias; thus, her credibility and her interpretation of events must be called into question. Loundman-Clay, supra. **II. Merits of the case**

W. Va. Code §18A-2-8 identifies the types of conduct 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. Respondent labeled Grievant's behavior as insubordination. The undersigned Administrative Law Judge finds the behavior of Grievant can be viewed under the following charges of W. Va. Code § 18A-2-8: insubordination and/or possibility intemperance. (See footnote 12)

Grievant is 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., 569 S.E.2d 456 (W. Va. 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, supra; Webb, supra.

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 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).

An employee's belief that management's decisions are incorrect or the result of incompetence, absent a threat to the employee's health and safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. Vickers v. Bd. of Directors/W. Va. State College, Docket No. 97-BOD-122B (Aug. 7, 1998). See Parker v. W. Va. Dep't of Health and Human Resources, Docket No. 97-HHR-042B (Sept. 30, 1997). Additionally, an employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . .". McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992) (citing In re Burton Mfg. Co., 82 L.A. 1228 (Feb. 2, 1984)).

In this case, not all of Grievant's behavior fits easily into a definition of insubordination that

encompasses the refusal to obey a directive, but it does fit Grievant'saction when she continued to badger Principal Sutler to sign the grievance form after Principal Sutler said she would not do so. Grievant was also insubordinate when she initially refused to leave as Assistant Superintendent Allen requested.

Much of Grievant's behavior falls into the definition of insubordination that includes the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority. . .". McKinney, supra. Grievant's stream of letters and verbal interactions as outlined in Findings of Fact 10, 11, 17,18 - 22, 23, 25, and 27 demonstrate Grievant's lack of respect for her supervisors and her attempts to disparage her supervisors' status and authority. Her behaviors resulted in at least three verbal warnings. Additionally, Grievant's inability to discern the effect her behavior and rude, negative, and demeaning comments have on others shows almost a complete lack of understanding of the process of interpersonal communication.

III. Retaliation

Grievant has alleged her suspension was in retaliation for filing prior grievances. Grievant has the burden of proof on this allegation. Reprisal is defined in W. Va. Code § 18-29-2(p) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;

2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's protected activity within such a period of

time that retaliatory motivation can be inferred.

See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Gruen v. Bd. of Directors/Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997).

If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

Grievant has made a prima facie case of retaliation, as her suspension followed the filing of two grievances (one was dropped), and the threat of filing another. However Respondent has rebutted this prima facie case with the evidence presented above. Even though Grievant had invoked the grievance process, this does not entitle her to free rein. Grievant's letters and verbal comments to central office administrators, board of education members, Superintendent Duerring, and Assistant Superintendent Allen demonstrate a striking lack of restraint. While Grievant does have the right to free speech, the Grievance Board in Harold v. Department of Environmental Protection, Docket No. 02-DEP-142 (Dec.20, 2002) noted, "[i]t is astonishing how many employees feel they are entitled to respond to their superiors 'in-kind' when they are admonished or criticized about their job performance." In Harold, the administrative law judge found the tone of Grievant's e-mail was insubordinate. The same reasoning would apply here to Grievant's numerous letters and communications that were filled with negative remarks.

Grievant received three verbal warnings for this type of behavior, but no other action was taken, until Grievant's conduct of September 10, 2003, as described in Findings of Fact 30 - 34. On this day, Grievant's behavior was clearly out of control, and Grievant, even while down playing the seriousness of her conduct, admits she did not use good judgment. Grievant's action on this day alone could have resulted in discipline as she berated her supervisor, refused to accepted her response about not signing the grievance form, and threatened to report behavior of her supervisor to the newspaper. Additionally, she filled out grievance forms when she was expected to be paying attention in an important meeting, initially refused a direct order, and then basically threatened Assistant Superintendent Allen. (See footnote 13)

Given the facts set put previously, the undersigned Administrative Law Judge finds there was no retaliation in the assessment of Grievant's discipline.

IV. Harassment

Although not clearly pled, it also appears Grievant is asserting she is the victim of harassment. W. Va. Code § 18-29-2(n) defines harassment as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to thedemeanor expected by law, policy and profession." "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. See Moreland v. Bd. of Trustees, Docket No. 96- BOT-462 (Aug. 29, 1997)." Pauley v. Lincoln County Bd. of Educ., Docket No. 98-22-495 (Jan. 29, 1999). A single incident does not constitute harassment. Id; Metz v. Wood County Bd. of Educ., Docket No. 97-54-463 (July 6, 1998). Grievant has not demonstrated "repeated or continual disturbance, irritation or annoyance . . . contrary to the demeanor expected by law, policy and profession."

Grievant has not demonstrated she has been subjected to harassment. While it is true she received three verbal warnings and a suspension; these facts alone do not demonstrate harassment. Employers are expected to inform employees about their problems in the work area, and employees are entitled to receive fair and honest feedback and evaluations. This feedback may not always be positive. Just because Grievant did not like the information she received, does not mean it was inappropriate or constituted harassment. Rider v. Bd. of Trustees/Marshall Univ., Docket No. 99-BOT-348 (Apr. 7, 2000). Grievant's response to constructive criticism and direction was anger, blame avoidance, and refusal to listen. The information and corrections Grievant received were proper and warranted, and Grievant has not demonstrated she was subjected to harassment.

V. Due process

Grievant asserts she has been denied due process for many reasons, and these arguments appear to overlap. In sorting out this argument it appears the issue is twofold. One, her initial suspension with pay was too long and did not meet KCBOE's requirements, and two, the requirements of Policy 5300 and the directions in Maxey v. McDowell County Board of Education, No. 30440, (W. Va. December 3, 2003), were not followed.

A. Failure of KCBOE to follow its due process regulations

Pursuant to KCBOE Policy G25A, an employee is to be suspended **with pay** during an investigation. Grievant was suspended with pay while she responded to the charges in the suspension letter, and then continued to remain on suspension **with pay** while a lengthy hearing was conducted. This paid suspension is not to exceed 30 days without KCBOE's approval. (See footnote 14) Grievant asserted for the first time in her brief that this regulation was not followed. As this issue was not addressed a the pre-disciplinary hearing, KCBOE had no opportunity to answer this issue and it will not be addressed further. Grievant's argument about Respondent's failure to provide required due process during this time is also without merit. The West Virginia Supreme Court of Appeals in Board of Education of the County of Mercer v. Wirt, 453 S.E.2d 402 (W. Va. 1994), determined what due process is required to **terminate** a continuing contract of employment. A tenured employee is entitled to a **pre-termination** hearing, not a full adversarial hearing. An employee is also entitled to written notice of the charges and an explanation of the evidence. Id. at Syl. Pt. 3; W. Va. Code §18A-2-8. Additionally, Wirt found an employee is entitled to an opportunity to respond to the charges. Grievant was given all these due process protections by KCBOE, even though the disciplinary action was a ten-day suspension, nota termination. She had a pre-disciplinary hearing, written notice of the charges, explanation of the evidence, and an opportunity to respond. Apparently Grievant believed the pre-disciplinary hearing was a full adversarial hearing, as she elected to have this Decision on her suspension be based on the record developed in that venue. Grievant was given more due process than was required.

KCBOE's own Policy for a possible suspension **without pay** for greater than thirty days has the following due process requirements: notice of a hearing, statement of the charges and a statement about how the hearing will be conducted. Clearly KCBOE's requirements were met. After Grievant responded to the charges, three days of hearing with lengthy testimony were held. The Superintendent's designee then wrote a recommended Decision, and this Decision was adopted by the Board. There was no failure of KCBOE to meet the due process requirements outlined in Wirt or listed in KCBOE's own policy.

B. Due process violations caused by Respondent's failure to follow Policy 5300 and the Maxey Decision

Grievant's main due process argument focused on KCBOE's failure to place Grievant on an Improvement Plan prior to any disciplinary action. KCBOE asserted that because the proven charges

did not relate to job performance, there was no need for Grievant to be placed on an Improvement Plan prior to the suspension without pay. (See footnote 15) Grievant strongly disagrees with that holding and asserts an Improvement Plan was required before any disciplinary action could be taken.

First, it must be noted that while Policy 5300 speaks to transfers, promotions, termination, and demotions, it does not speak to suspensions, written reprimands, or verbal warnings. Since the Policy is very clear to list all these actions and did not list other disciplinary action, suspensions are not covered by the Policy. The decision not to include suspensions, etc., makes sense as the actions identified in the Policy are end point or final actions, resulting in long term affects. The undersigned Administrative Law Judge is hesitant to read a requirement into the Policy where it is not clearly listed.

However, in Mason County Board of Education v. State Superintendent of Schools, 165 W. Va. 732, 274 S.E.2d 435 (1980), the West Virginia Supreme Court of Appeals stated a board of education was to follow the procedures in 5300 "if the circumstances forming the basis for the **suspension** or discharge [were] 'correctable.'" (Emphasis added). Additionally, Trimboli v. Board of Education, 163 W. Va. 1, 254 S.E.2d 561 (1979), stated the procedures in 5300 should be applied if the misconduct or incompetency "ha[d] not been called to the attention of the employee through evaluation and [was] correctable." Accordingly, this issue will be addressed.

First, the issue of whether these issues were called to the attention of Grievant. It is clear Grievant was told her misconduct was unacceptable through three verbal warnings. Although this notification was not through the evaluation process, the undersigned Administrative Law Judge finds the verbal warnings should also be considered as sufficient warning. The next issue relates to the issues raised by Grievant and the requirements of the Maxey case. Maxey discusses the need for an Improvement Plan when the underlying complaint relates to the performance as a teacher. Grievant's suspension did not arise from her behavior in her school assignment and did not relate to her performance at Flinn Elementary. It is also noted that there are several other differences between the grievant's situation in Maxey, and Ms. Santer. For example, here Grievant's behavior was discussed with her, she was told her behavior was inappropriate, and the behavior was continuous and repetitive for a lengthy period of time. Accordingly, an Improvement Plan was not required before Respondent took the action if did. (See footnote 16)

VI. Mitigation/Severity of Penalty

The argument that 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. ofEduc., 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 work performance. 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).

In assessing the above-cited factors, the undersigned Administrative Law Judge is unable to conclude Respondent abused its substantial discretion in designating the ten- day suspension and the Improvement Plan. However, given that Grievant received the disciplinary action of suspension,

there is no need for the additional written reprimand, andthe undersigned Administrative Law Judge **ORDERS** this written reprimand be removed from Grievant's file.

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 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). 2. A county board of education possesses the authority to suspend 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 is 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. 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. 569 S.E.2d 456 (W. Va. 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).

5. “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).

6. "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 Inc., 13 M.S.P.R. 77 (1983).

7. An employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . .". McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992) (citing In re Burton Mfg. Co., 82 L.A. 1228 (Feb. 2, 1984)).

8. KCBOE properly determined Grievant's conduct constituted insubordination under W. Va. Code § 18A-2-8. Butts, supra; McKinney, supra.

9. Grievant's behavior towards her supervisors was ungoverned, unrestrained, and excessive.

10. Reprisal is defined in W. Va. Code § 18-29-2(p) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it."

11. To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;

2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Gruen v. Bd. of Directors/Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997).

12. If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

13. Although Grievant made a prima facie case of retaliation, as her suspension followed the filing of two grievances (one was dropped) and the threat of filing another, Respondent rebutted this prima facie case by presenting legitimate, non-retaliatory reasons for its actions.

14. Grievant did not demonstrate her had been subjected ti retaliation.

15. W. Va. Code § 18-29-2(n) defines harassment as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession."

16. "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. See Moreland v. Bd. of Trustees, Docket No. 96-BOT-462 (Aug. 29, 1997)." Pauley v. Lincoln County Bd. of Educ., Docket No. 98-22-495 (Jan. 29, 1999). A single incident does notconstitute harassment. Id; Metz v. Wood County Bd. of Educ., Docket No. 97-54-463 (July 6, 1998).

17. Grievant has not demonstrated "repeated or continual disturbance, irritation or annoyance . . . contrary to the demeanor expected by law, policy and profession," and she has not demonstrated she has been subjected to harassment.

18. Employers are expected to inform employees about their problems in the work area, and employees are entitled to receive fair and honest feedback and evaluations. This feedback may not

always be positive. Just because an employee does not like the information she received, does not mean it was inappropriate or constituted harassment. Rider v. Bd. of Trustees/Marshall Univ., Docket No. 99-BOT-348 (Apr. 7, 2000).

19. Grievant has not proven a violation of KCBOE Policy G25A.

20. The West Virginia Supreme Court of Appeals in, determined what due process is required Prior to termination a continuing contract of employment, a tenured employee is entitled to a pre-termination hearing, not a full adversarial hearing, a written notice of the charges, an explanation of the evidence, and an opportunity to respond to the charges. Bd. of Educ. of the County of Mercer v. Wirt, 453 S.E.2d 402 (W. Va. 1994) at Syl. Pt. 3; W. Va. Code § 18A-2-8.

21. Grievant received the due process protection required by Wirt, even though the action was a suspension.

22. Since Policy 5300 speaks to transfers, promotions, termination, and demotions, and it does not speak to suspensions, written reprimands, or verbal warnings, an Improvement Plan is not required prior to these unlisted disciplinary actions. 23. Grievant was not entitled to an Improvement Plan prior to her suspension because her behavior was no related to her performance as an educator, the behavior had been pointed out to her through three verbal reprimands, and her behavior was continuous, See Maxey v. McDowell County Board of Education, No. 30440, (W. Va. December 3, 2003).

24. 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).

25. "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).

26. "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 theemployee'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).

27. 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).

28. Given the charges proven against Grievant, the penalty of a ten-day suspension and an Improvement Plan 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).

29. The additional disciplinary action of a written reprimand, given the other action, does appear excessive and should be removed from Grievant's personnel file.

Accordingly, this grievance is **GRANTED, in part, and DENIED, in part**. The disciplinary action of a ten-day suspension is upheld, the Improvement Plan remains intact, but the written reprimand is to be removed from Grievant's personnel file.

Any party may appeal this decision to the Circuit Court of Kanawha. 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 theBoard 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: June 30, 2003

Footnote: 1

Grievant was represented by Attorney Jennifer Taylor, and the Board was represented by Attorney James Withrow.

Footnote: 2

Respondent labeled these behaviors as insubordination.

Footnote: 3

Grievant has filed a total of three grievances, but she elected to drop the grievance relating to an alleged criticism by Assistant Superintendent Allen. Accordingly, any allegations made by Grievant about this incident will not be considered as this grievance was abandoned.

Footnote: 4

Grievant also asserts the time between her initial suspension with pay, and subsequent suspension without pay was too long. It appears from the pre-disciplinary hearing record, any delays were caused by Grievant's counsel's requests for continuances. See Recommended Decision of the Hearing Examiner. Further, the undersigned Administrative Law Judge ascertained from the record that the parties engaged in settlement negotiations which also delayed the pre-disciplinary hearing and subsequent disciplinary action. Accordingly, Grievant has not proved this allegation, and this issue will not be discussed further.

Footnote: 5

In this record many issues and events were discussed which have no bearing on the charges against Grievant and this Decision. These events will not be discussed in any detail. Grievant has filed two other grievances on her non-selection for principal positions. They are within the grievance process and should not and will not be addressed here in any detail. Further, events that happened several years ago that were not grieved will also not be addressed in any depth, because if Grievant had wished to address these issues in the grievance process she could have done so earlier, and Grievant is barred now from raising these issues. Since Grievant chose not to filed grievances over these events, the undersigned Administrative Law Judge will not examine whether any wrongdoing occurred in those events, and it will be assumed there were no violations of any statutes, rules, or regulations when these events occurred. To do otherwise would be to allow Grievant to circumvent the statute of limitations and timelines in the filing of grievances.

Footnote: 6

The exact threat was unclear in the testimony, but this course of events was not clearly rebutted by Grievant. Grievant has continually asserted that the complaints at this meeting should have been under oath, and she should have had the opportunity to "cross- examine" these employees.

Footnote: 7

Apparently during one of the meetings with Grievant over RE, Superintendent Duerring mirrored Grievant's non-verbal behavior to demonstrate how her actions could be seen as not promoting successful interpersonal communication.

Footnote: 8

The parties were unclear when this verbal warning occurred, but both sides agreed it happened.

Footnote: 9

As Grievant was dealing with a problem at the direction of her supervisor, Grievant's arrival time was not an issue in the discipline or this grievance.

Footnote: 10

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as 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).

Footnote: 11

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing hearsay. See Borninkhof v. Dep't of Justice, 5 MSBP 150 (1981).

Footnote: 12

Much of Grievant's behavior could also be seen as intemperate. Intemperance is frequently defined as an immoderate indulgence in a form of conduct, and it is usually associated with drinking or drug abuse. However, it appears to be the best word to describe some of Grievant's behavior. While it is recognized Grievant has the right to express her opinions, her behavior was excessive and ungoverned. Grievant's letters show this lack of restraint, as does her tendency to label all those who do not agree with her as adversaries. Additionally, her behavior of interrupting her supervisor during a meeting and insisting she sign papers that could be done later, and her tossing her hearing aide[s] on the table toward Superintendent Duerring is unacceptable.

As stated by Assistant Superintendent Joe Godish, who Superintendent Duerring asked to sit in on one of the meeting with Grievant, "Had I been in the Superintendent's shoes, the meeting would have ended much sooner," because of Grievant's hostile and negative behavior. He was shocked that Grievant would talk to Superintendent Duerring in such a manner, and he believed Grievant's behavior would not be the way he "would approach someone who was in a supervisory role to accomplish my goal." Test. Godish, at 101 & 105.

Footnote: 13

This is not to say that Assistant Superintendent Allen could have handled the situation in a better manner, but it appears by that time he was also feeling frustrated.

Footnote: 14

Grievant notes that if a suspension is to go beyond thirty days it must be approved by the board of education, and then infers this was not done. This issue was not raised during the pre-disciplinary hearing; thus, KCBOE was not aware this was an issue and did not have an opportunity to respond.

Footnote: 15

Grievant also complained about the content of her subsequent Improvement Plan. As Grievant appealed after suspension, chose to rely on the pre-disciplinary hearing record, and elected to submit this case for decision based on that record, there is of course no information in the record about the Improvement Plan, as it had not been formulated at that time. Accordingly, the content of the Improvement Plan cannot be addressed.

Footnote: 16

A question also arises as to whether Grievant's behavior was correctable, and what type of Improvement Plan could be written to resolve these issues.