WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

SHERI A. PAINTER

Grievant,

v. Docket No. 2008-0724-KanED

KANAWHA COUNTY BOARD OF EDUCATION ,

Respondent.

D E C I S I O N

Grievant, Sheri A. Painter, filed this grievance against the Kanawha County Board of Education ("KCBE"), Respondent, protesting her dismissal from employment as a result of employee misconduct. (See footnote 1) Grievant contends her termination was unfair and seeks to be reinstated as a school bus operator.

A Board of Education predetermination hearing regarding Grievant's alleged misconduct transpired on August 10, 2007. Grievant was present and represented by legal counsel. The decision issued October 4, 2007, by Hearing Examiner Carole A. Lewis Bloom recommended the employment of Grievant be terminated. Grievant was advised by letter dated October 26, 2007, that the Superintendent of Schools intended to recommend to the Kanawha County Board of Education that Grievant's employment be terminated. Respondent KCBE voted to terminate Grievant's employment at its meeting held on November 5, 2007. Grievant was so notified by letter dated November 6, 2007. Grievant grieves this discharge. Mediation at Level II was unsuccessful. A Level III Hearing was convened in the Public Employees Grievance Board's Charleston office on December 12, 2007. Grievant was represented by Charles R. Hamilton, Attorney at Law, and KCBE was represented by

its General Counsel James Withrow. This case became mature for decision on January 11, 2008, the deadline for the submission of the parties' proposed findings of fact and conclusions of law.

Synopsis

As a result of an investigation into an unlawful scheme where individual(s) did falsify overtime or extra pay records in order to receive or authorize compensation for work which had not been performed (defrauding Respondent), it was determined that Grievant's admitted participation and failure to inform appropriate authority justified her termination. Grievant disagrees. Grievant made restitution and cooperated with Respondent's investigation. Grievant avers her participation was an isolated instance, the result of her supervisor's design, and contends discharge is too severe a punishment for her reluctant involvement. Respondent acknowledges Grievant's cooperation, a favorable employment record, and that Grievant's role in this scheme was not as egregious as that of some others, but maintains that her actions were improper and unlawful. Respondent chose to terminate Grievant.

Considerable deference is afforded an employer's assessment of the seriousness of an employee's conduct. Further, it has not been demonstrated that the disciplinary measure levied was so clearly disproportionate to the employee's offense that it amounts to an abuse of discretion. Grievance DENIED

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

Findings of Fact

1 1. Grievant, Sheri Painter, was employed by Respondent, Kanawha County Schools, as a school bus operator at the Elkview Bus Terminal. Grievant had been employed full time by Respondent for approximately eight years (1999 - 2007). Prior to that, Grievant had worked for Kanawha County Schools for years as a substitute bus driver.

2 2. Grievant was considered a good employee. She consistently received satisfactory and commendable ratings on evaluations and has received numerous certificates for good attendance and for safe driving.

3 3. The Kanawha County Superintendent of Schools initiated an investigation into

certain alleged activity, after he had received information that Nancy Bowen-Kerr, the Elkview Bus Terminal Supervisor, was involved in a scheme by which she would falsify overtime or extra pay records in order to pay certain employees for work which they had not performed, and the employees would then use all or part of that money to purchase Mary Kay products from Ms. Bowen-Kerr and/or her daughter, Amanda.

4 4. The Superintendent requested that George Beckett, Administrative Assistant for Pupil Transportation, and Jeane Ann Herscher, Investigator, conduct an investigation of the allegations. As part of the investigation, Mr. Beckett and Ms. Herscher reviewed documents and interviewed employees.

5 5. Grievant, a school bus operator at the Elkview Bus Terminal, was interviewed during the investigation.

6 6. Grievant made a conscientious and forthright effort to cooperate with Investigators.

7 7. During the interview and at hearing, Grievant admitted limited participation in the fraudulent activity of Nancy Bowen-Kerr.

8 8. Ms. Bowen-Kerr, the Elkview Bus Terminal Supervisor was the ringleader involved in an unlawful scheme in which she would falsify overtime or extra pay records in order to receive or authorize compensation for work which had not been performed. The fraudulent compensation was paid from public funds of the school board.

9 9. No less than eight to ten employees participated in this scheme. These employees were not necessarily working in concert. The investigation revealed that none, or only a select few, knew of others' involvement.

10 10. At all times relevant to this case, Nancy Bowen-Kerr was Grievant's immediate supervisor at the Elkview Bus Terminal. Ms. Bowen-Kerr has since resigned her employment with Kanawha County Schools.

11 11. It is not clear that Grievant was aware of the magnitude of the fraudulent activity of Ms. Bowen-Kerr, and various other employees of the Elkview Bus Terminal.

12 12. Grievant admitted to investigators and at hearing that she had received pay ($250.00) for work she did not perform on or around November 17, 2006.

13 13. Prior to November 17, 2006, unknown to Grievant, Ms. Bowen-Kerr had received various other moneys for overtime hours that Grievant had not worked by authorizing and

intercepting overtime paychecks in Grievant's name.

14 14. On October 26, 2006, Ms. Bowen-Kerr submitted a Standardized Authorization Form to Alter Payroll, or Green Sheet, representing that Grievant worked overtime hours on September 18, 22, and 30, 2006. Grievant did not work those hours. On November 1, 2006, a check was issued to Grievant for $367.00 for those purported overtime hours. Ms. Bowen-Kerr intercepted that check when it came to the terminal for distribution. Grievant was not aware of these transactions at that time.

15 15. On December 27 and 28, 2006, Ms. Bowen-Kerr submitted a Standardized Authorization Form to Alter Payroll, or Green Sheet, representing that Grievant worked overtime hours on November 19 and December 1, 2006. Grievant did not work those hours. On December 29, 2006, a check for was issued to Grievant for $421.54 for those purported overtime hours. Ms. Bowen-Kerr intercepted that check when it came to the terminal for distribution. Grievant was not aware of these transactions at that time.

16 16. At some time between September and November, 2006, Ms. Bowen-Kerr and Grievant had a private conversation during which Ms. Bowen-Kerr asked if Grievant would like to buy Mary Kay products from her. Grievant told Ms. Bowen-Kerr that neither she nor her daughter uses make-up and that she did not want it.

17 17. On or about November 17, 2006, Grievant received on her paycheck $250.00 (net amount) for overtime hours which she did not work. Subsequently, Grievant went to Ms. Bowen-Kerr and informed her that she had been paid too much. Ms. Bowen-Kerr told Grievant to take the check to the bank, cash it, and bring $250.00 cash back to her (Ms. Bowen-Kerr).

18 18. Grievant cashed the check, and took $250.00 to Ms. Bowen-Kerr.

19 19. Shortly thereafter, Ms. Bowen-Kerr and Grievant went to Ms. Bowen-Kerr's car where Grievant received a bag of Mary Kay products.

20 20. Grievant took the bag of Mary Kay cosmetics home. 21 21. Grievant did not tell any of her co-workers about this event. Further, Grievant did not alert any other Kanawha County Schools officials that she had received money for work she had not performed or of Ms. Bowen-Kerr's actions.

22 22. During the subsequent investigation, six months later, Grievant expressed remorse for receiving money for work that she did not perform.

23 23. On July 26, 2007, Grievant gave Mr. Beckett a check payable to Kanawha County Schools for $371.77, as reimbursement. This amount represents the $250.00 which Grievant admits to having received for work not performed, as well as Kanawha County Schools' associated costs for Social Security, Retirement and Worker' Compensation.

24 24. During the investigation of these events Mr. Beckett specifically informed Grievant this was a serious matter but he would “go to bat for [her]” to“possibly, hopefully,” keep Grievant from losing her job. Grievant cooperated with the investigators.

25 25. By letters dated July 18, 2007 and July 30, 2007, Grievant was advised that as a result of the investigation, she was conditionally suspended from employment, without pay, pending the outcome of an August 10, 2007 hearing.

26 26. A predetermination hearing regarding Grievant's alleged misconduct transpired on August 10, 2007. The decision issued October 4, 2007, by Hearing Examiner Carole A. Lewis Bloom, recommended the dismissal of Grievant. On November 5, 2007, the Kanawha County Board of Education voted to terminate Grievant's employment and by letter dated November 6, 2007, Grievant was so notified.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2007); *Holly v. Logan County Bd. of Educ.,* Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.,* Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92- HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Pursuant to West Virginia Code, school personnel may be suspended or dismissed 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 nolo contendere to a felony charge. W. Va. Code § 18A-2-8; *Kanawha County Bd. of Educ. v. Sloan*,

219 W. Va. 213, 632 S.E.2d 899 (2006). It is the contention of Respondent that Grievant is guilty of immorality by engaging in a scheme to misappropriate public funds from the Kanawha County Board of Education. Respondent further maintains this violation of trust is of sufficient nature to warrant discharge. Grievant argues that her level of culpability does not warrant the sanction levied by Respondent.

The term "immorality," as used in West Virginia Code Section 18A-2-8, is defined as 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 conformity with the acceptable standards of proper sexual behavior." ***Golden v. Bd. of Educ. of Harrison Co.*****, 169 W. Va. 63, 285 S.E.2d 665, 668 (1981) (citing** ***Webster's New Twentieth Century Dictionary*****, Unabridged 910 (2d ed. 1979));** ***Harry v. Marion Co. Board of Educ.*****, 203 W. Va. 64, 506 S.E.2d 319, 321 (1998). Although most frequently used to define sexual misconduct, immorality may include other forms of conduct not in conformity with accepted principles of right and wrong behavior, such as theft.** ***Arnold v. Monongalia County Bd. of Educ*****., Docket No. 02-30-195 (Jan 13, 2003);** ***Cooper v. Kanawha County Bd. of Educ*****., Docket No. 02-20-097 (July 31, 2002). Accepting pay for time worked when no such work was actually performed constitutes theft.** ***Arnold, supra.***

Grievant does not deny limited participation in events of a dubious nature, however she contends that she is not fully responsible because she did what her supervisor told her to do and because she did not use the Mary Kay products. This argument has some appeal. Grievant denies intent. Grievant in so many words contends (and the facts confirm) she was a participant in an elaborate scheme, not of her design, but as a result of orchestrated gross malfeasance. While this contention is interesting, it does not fully excuse or dismiss Grievant's admitted activity. Even if Grievant did not really want or subsequently use the products, she knowingly participated in a quid pro quo transaction which defrauded the school system.

The argument that discipline 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 inherentdisproportion 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. *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 Corr*., Docket No. 95-CORR-252 (July 23, 1996). The Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). Grievant cooperated with Respondent during its investigation of relevant events. **(See footnote 2)** **However, this along with Grievant's tenure and de minimis role in the scheme overall was not viewed by Respondent as sufficient justification to spare Grievant from termination. When Grievant received a check in excess of her proper pay in November 2006, she cashed the check, took money to Ms. Bowen-Kerr and received goods in return. Such conduct constitutes theft, and is a violation of West Virginia Code for which she may be suspended or dismissed. W. Va. Code § 18A-2-8; *Arnold, supra.*; *Cooper, supra.***

Respondent had discretion in the circumstance of this case and chose to discharge Grievant. The undersigned recognizes Grievant's tenure with the instant employer and acknowledges that Grievant has a history of otherwise satisfactory work history. However, it

is also true that Grievant knowingly participated in an unlawful activity with her immediate supervisor which defrauded Respondent of moneys in excess of $250.00. This act of theft, coupled with her failure to properly inform more superior agents of Respondent, is reasonably sufficient to warrant discharge.

It has not been demonstrated that the disciplinary measure levied was so clearly disproportionate to the employee's offense that it constitutes an abuse of discretion. Thus, given the considerable deference afforded to employers in disciplinary situations, the undersigned is without sufficient justification to rule that the discipline imposed was excessive. Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute hisjudgement 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). Respondent's decision is not clearly disproportionate to the employee's offense.

The above discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1 1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2007); *Holly v. Logan County Bd. of Educ.,* Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

2 2. A Board of Education 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 nolo contendre to a felony charge. W. Va. Code § 18A-2-8. Suspension or dismissal of a teacher or school employee pursuant to West Virginia Code Section 18A-2-8 must be exercised reasonably, not arbitrarily and capriciously*. Beverlin v. Board of Educ*., 158 W.Va. 1067, 216 S.E.2d 554 (1975); *De Vito v. Board of Education of Marion County,* 285 S.E.2d 411 (W.Va.

1981); *Harry v. Marion County Board of Education,* 203 S.E.2d 319, Syl. Pt. 1 (1998); *Maxey v. McDowell Co. Board of Ed.*, 575 S.E.2d 278 (2002). 3 3. The term "immorality," as used in West Virginia Code Section 18A-2-8, is defined as 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 conformity with the acceptable standards of proper sexual behavior." *Golden v. Bd. of Educ. of Harrison Co.,* 169 W. Va. 63, 285 S.E.2d 665, 668 (1981) (citing *Webster's New Twentieth Century Dictionary*, Unabridged 910 (2d ed. 1979)); *Harry v. Marion Co. Board of Educ.*, 203 W. Va. 64, 506 S.E. 2d 319, 321 (1998). Although most frequently used to define sexual misconduct, immorality may include other forms of conduct not in conformity with accepted principles of right and wrong behavior, such as theft. *Arnold v. Monongalia County Bd. of Educ.*, Docket No. 02-30-195 (Jan 13, 2003); *Cooper v. Kanawha County Bd. of Educ.*, Docket No. 02-20-097 (July 31, 2002).

4 4. Accepting pay for time worked when no such work was actually performed constitutes theft. *Arnold v. Monongalia County Bd. of Educ.,* Docket No. 02-30-195 (Jan. 13, 2003). The theft of a county school's funds by a school employee adversely affects the rights and interest of the public and is grounds for disciplinary action, including dismissal. *Arnold, supra.*

5 5. Respondent has proven by a preponderance of the evidence that Grievant, committed theft, which constitutes immorality, pursuant to West Virginia Code. W. Va. Code § 18A-2-8; *See also Arnold, supra*.; *Golden v. Bd. of Educ. of Harrison Co.*, 169 W. Va. 63, 285 S.E.2d 665, 668 (1981).

6 6. The argument that discipline 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).

7 7. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of

prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994). *See Austin v. Kanawha County Bd. of Educ*., Docket No. 97-20-089 (May 5, 1997).

8 8. The Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

9 9. Respondent has met its burden of proof by a preponderance of the evidence, and proven the charges against Grievant that led to her dismissal.

10 10. Grievant failed to meet her burden of demonstrating the penalty was clearly excessive or reflects an inherent disproportion between the offense and the personnel action.

Accordingly, this grievance is DENIED.

This Decision is final upon the parties and is enforceable in the Circuit Court of Kanawha County. Any party may appeal this decision to the Circuit Court of Kanawha County within thirty days of receipt of the Decision. This Decision is not automatically stayed pending the outcome of the appeal. W. Va. Code § 6C-2-5 (2007). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by the Rules of Practice and Procedure of the West Virginia Public Employees Grievance Board at . 6.19 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 certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County.

Date: June 18, 2008 _____

Landon R. Brown

Administrative Law Judge

Footnote: 1

Grievant filed a grievance form at the Public Employees Grievance Board's Charleston office on November 1, 2007, after Grievant was advised of the Superintendent's intent to recommend termination, and a second grievance form was filed on November 8, 2007, after Respondent KCBE voted to terminate Grievant's employment. There were two filings, November 1, and November 8, 2007; however, there is but one grievance in litigation.

Footnote: 2

It is clear that Grievant was unaware of the magnitude of the fraudulent activity of Ms. Bowen-Kerr, and various other employees of the Elkview Bus Terminal. Further, it also became evident that Ms. Bowen-Kerr received additional funds, without Grievant's knowledge, by authorizing and intercepting overtime paychecks in Grievant's name.