WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

YVONNE K. FRANCISCO,
Grievant,

v. **Docket No. 2011-0235-PutED**

PUTNAM COUNTY BOARD OF EDUCATION,
Respondent.

D E C I S I O N

Yvonne Francisco, Grievant, filed this grievance against her employer, Putnam County Board of Education ("PCBE" or "Board"), Respondent, on August 27, 2010, protesting Respondent's imposition of a thirty-day suspension without pay from her duties as a teacher's aide, and the imposition of a plan of improvement. Grievant denies the allegations forming the basis of the suspension and contends that the evidence upon which it was based was illegally obtained and the consequences of a suspension and improvement plan were too severe in light of similarly situated employees. As relief, Grievant seeks her, "records purged of the suspension, and the improvement plan rescinded, full back pay, and any other relief available in this matter."

As authorized by W. VA. CODE § 6C-2-4(a)(4), this grievance was filed directly to level three of the grievance process.

Grievant filed a Motion to Compel Discovery on February 28, 2011. Respondent filed a brief in response to the Motion on March 9, 2011. A telephone conference was held on March 1, 2011, regarding the pending Motion. After hearing the arguments of counsel, this Grievance Board issued an Order Granting the Motion to Compel on April 11, 2011. The Order, in part, states:

> All recordings provided by Respondent are to be used **only** by the attorneys involved in the above-styled grievance and are to be used **only** for the purpose of this grievance. These recordings **shall** not be copied and shared with **anyone** other than the parties involved in this grievance and the West Virginia Public Employees Grievance Board. The recordings **shall** be placed under seal to ensure the confidentiality of the material contained therein. This Order is **not** addressing the admissibility of the recordings as evidence at the scheduled Grievance Board level three hearing. It is necessary to place a copy of the entire tape recording under seal to prevent public inspection. (Emphasis in original)

On April 21, 2011, Respondent filed a Petition for Temporary Restraining Order and Writ of Prohibition with this Board and the Kanawha County Circuit Court. Grievant then filed an Opposition to Temporary Restraining Order and Writ of Prohibition. By Circuit Court Order dated March 19, 2012, Circuit Judge, Paul Zakaib, Jr., denied the Restraining Order and Writ of Prohibition. The Circuit Court ruled that limiting full discovery would cause extreme prejudice to Grievant and deny her access to a fair hearing. Respondent was ordered to provide complete (unredacted) recordings to Grievant in order to prepare for the level three hearing.

A Notice of Hearing was sent on April 5, 2012, providing the level three hearing would be held on June 8, 2012, at the Grievance Board's Charleston office.[1]

On May 31, 2012, Grievant filed a Motion in Limine requesting that the recordings of the activity in the classroom be prohibited from being introduced as evidence during the level three hearing. Grievant cites W. Va. Code § 62-10-3 and 18 U.S.C. § 2515, as relevant. On June 5, 2012, Respondent submitted a written objection to Grievant's Motion in Limine, averring that the West Virginia Wiretapping and Electronic Surveillance Act, is inapplicable because there is no legitimate expectation of privacy of

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[1] For administrative reasons, this grievance was reassigned to the undersigned Administrative Law Judge on or about April 5, 2012.

communication in a classroom of students. On June 6, 2012, Grievant filed a Reply to Respondent's Objection providing that a minor cannot give a legally binding consent and the evidence must be excluded under both state and federal law.

A telephone conference was conducted on June 7, 2012, for the purpose of additional oral arguments on the Motion in Limine. An Order Granting in Part and Denying in Part Grievant's Motion in Limine was signed on June 8, 2012. It was acknowledged that the recordings were not going to be offered directly into evidence; however, for the presentation of information at the level three hearing, a distinction of 'in presence' and 'out of presence' was recognized. The Order, in part, states:

> Granted in part in that the 'out of presence' recordings and any information derived therefrom shall not be admissible for any purpose as being obtained by the student and parents in contravention of the wiretapping act; and denied in part, in that the information derived from the 'in presence' recordings shall be admissible. As the Respondent intends to offer no records directly into evidence, no ruling need be made as it relates to the admissibility of the 'in presence' recordings.

A level three hearing was held before the undersigned Administrative Law Judge at the Grievance Board's Charleston office which transpired over the course of several separate dates, those being; June 8, 2012, June 11, 2012, September 18, 2012, and September 19, 2012. Grievant appeared in person and with counsel, Dwight J. Staples, Esq., Henderson, Henderson & Staples, L.C. Respondent was represented through its counsel, Rebecca Tinder, Esq., Bowles Rice, LLP.

This case became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about November 30, 2012, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals.

Synopsis

Grievant, a kindergarten teacher's aide employed by Respondent, challenges her suspension of thirty (30) days and her placement on an improvement plan. Grievant argues that Respondent improperly utilized non-consensual recordings to justify the disciplinary action. Counsel emphatically argues that applicable state and federal code (e.g., W. VA. CODE § 62-1D-1, et seq., and 18 U.S.C. §2515) prohibits the utilization of such material from consideration by any political subdivision or any officer thereof. Grievant contends Respondent's disciplinary actions are illegitimate, excessive and not adequately substantiated by admissible evidence. Respondent contends its disciplinary actions are justified.

While it is recognized that Respondent played no role in the original alleged illegal interception of the classroom communication, and came in possession of such though their administrative responsibilities of administering the Putnam County School system, the recordings are and were the justifying catalyst for the disciplinary action levied. The recordings are not proper evidence in the facts of this grievance matter. Absent any apparent validation gleaned, discerned or perceived provided by the contested recording, Respondent did not establish by a preponderance of the evidence that Grievant violated applicable employee code of conduct to warrant the severe disciplinary action levied. Given what limited actions of Grievant that are established by 'proper' evidence, the disciplinary action levied was excessive. This grievance is **GRANTED** in part.

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

Findings of Fact

1. Grievant is a teacher's aide employed by the Putnam County Board of Education.

2. Grievant works as a teacher's aide in a kindergarten class. During the relevant time period of this grievance, Grievant worked in the classroom of Carolyn Rogers, Kindergarten Teacher. Grievant has been an employee for approximately 20 years and was assigned to the Buffalo Elementary School since approximately the fall of 2000.

3. A classroom teacher's aide works with and under the direction of the classroom teacher. The duties of individual teacher's aides vary from class to class, but generally aides are responsible for the care and daily maintenance of the children entrusted into her care. A teacher's aide provides supervision of students during designated time periods. Gr. Ex. 1.

4. Near the beginning of the 2009-2010 school year, Mrs. Kathryn Crouse, a parent of a student in Grievant's classroom, noticed what she describes as, negative changes in the behavior of her child. The student was five (5) years old at the time of the acts alleged herein.

5. On August 31, September 1, 2, 17, 18, 21 and 22, 2009, Mr. Marc and Mrs. Kathryn Crouse, parents of a student in the classroom, placed a voice-activated audio recorder in their son's backpack.[2] Mrs. Crouse, with full knowledge and concurrence of Mr. Crouse, placed the recording device into their son's backpack.

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[2] Testimony during the course of proceedings varied to some degree regarding the exact number and date of recordings in total. The dates specified are believed

6. The Crouse's son, a five year old student, took his backpack containing the tape recorder to school and, while at school, the tape recorder recorded oral communications of persons, including Grievant. These recordings were generally recognized and referred to as "in presence" recordings at the level three hearing.

7. There were times when the student was not in the presence of the backpack containing the tape recorder and that recordings were made during those times. These recordings were referred to as "out of presence" recordings at the level three hearing.

8. The child was aware that the recording device was placed in his backpack. The child listened to one or more portions of the recordings. Mrs. Crouse replaced the recording device in her son's backpack at the beginning of each day.

9. The recordings by the Crouses were obtained without the knowledge or consent of the Respondent, or any of its employees.

10. The Crouses took the action of attempting to record their son and his environment during the school day as a result of his behavior, and expressed dislike for school. The Crouses were concerned about their son, and were frustrated by their inability to readily get permission to observe their child in the classroom.

11. Mrs. Crouse listened to the recordings and stored the material on her home computer. From the computer files of the recordings, Mrs. Crouse made CDs of the classroom recordings. The CDs were composites of the voice-activated recordings.

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accurate, however, it is recognized that one or more dates may be missing, or less than accurately identified.

12. Mrs. Crouse distributed copies of the recordings, to parents, news media and others. Mrs Crouse distributed CDs to everyone she believed was, would or should be interested in the situation. Mrs. Crouse even posted a significant portion of the recordings on the web.

13. Respondent was provided electronic copies of the recordings of activities in Grievant's classroom.

14. Respondent played no role in the original interception of the communication, and came in possession of such though their administrative responsibilities of administering the Putnam County School system.

15. Subsequent to the distribution of the CDs, less than a month into the 2009-2010 school year, Respondent began to receive complaints concerning Grievant's behavior.

16. On or about September 23, 2009, the West Virginia Department of Health and Human Resources, specifically the Child Protective Services Division, was contacted due to a reported accusation that a child had been physically struck. See R. Ex. 3.

17. The West Virginia Department of Health and Human Resources investigated. *Also see* Finding of Fact (FOF) 37 and 38, *infra*. It was ultimately determined that such action did not transpire. The allegation stems from the classroom recordings and was determined to be factually untrue. [3]

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[3] Mr. and Mrs. Crouse alleged that a student had been hit by the teacher, Ms. Rogers. An initial complaint to CPS was that a child had been struck. That was not substantiated be either CPS or Respondent's investigation. In review of the classroom recording, Personnel Director Brazeau testified Rogers did not say, "I hit a child in the back." She said "I sent a child to the back." R. Ex 11.

18. On September 24, 2009, Mr. and Mrs. Crouse, Mike Stover and Carma, his mother, Mr. and Mrs. Reedy and Fonda Richardson, all parents of students in Grievant's classroom, went to the Board office. Said individuals meet with Karen Nowviskie, the Director of Elementary Education for Putnam County Schools, Barbara Brazeau, Director of Personnel and Robert Hull, former Assistant Superintendent of Curriculum Instruction, concerning Grievant's behavior.

19. Meetings were conducted separately with the families of individual students. Each of the complaining parties had a child in Grievant's classroom.

20. On September 25, 2009, Grievant was suspended with pay pending an investigation into allegations of misconduct by Grievant towards students.

21. Mrs. Stover, who was not in attendance at the September 24, 2009, meeting, met with Barbara Brazeau on October 9, 2009.

22. Reports from those, and other meetings or calls to Respondent, included:

a. Several parents complaining that Grievant would not let students go to the bathroom.

b. Mr. Stover indicating that his child did not want to go to school.

c. Grandmother Stover indicating that her grandchild had an accident because he was scared to ask to go to the bathroom for fear of receiving a color change (a method of disciplining student misconduct in the classroom).

d. Mrs. Stover "allegedly" observing another parent's child getting screamed at in the cafeteria by Grievant after the child spilled his or her milk.

e. Mrs. Crouse reported witnessing Grievant making children cry in the breakfast room.

f. Mr. and Mrs. Richardson complained that their child had an accident in her pants because she was denied the right to go to the hallway bathroom when the in-class bathroom was occupied.

g. In addition, Mrs. Richardson reported that their child would cry every night and not want to go to school after having previously been happy and excited to go to school, both in preschool and when starting kindergarten.

h. Mrs. Kidd, a parent of another student in Grievant's classroom, complained that when she picked her child up from school, the child had to immediately go to the bathroom. When she asked her child why she did not use the bathroom at school, the child reportedly explained she was scared to go to the bathroom and that Grievant would not let her use the bathroom.

i. Many of the parents indicated that their children had attended preschool at the same location, the year before the 2009-2010 school year, and their children had not exhibited the negative behaviors, fear, nor anxiety that they were experiencing in the beginning of this kindergarten year.

23. Karen Nowviskie, the Director of Elementary Education for Putnam County Schools, took notes regarding the complaints of the various parents. Not all of the complaints were direct derivatives of the CD recordings. However, there are limited examples of first-hand observations or reports of events by concerned parents which are not directly related to the classroom recordings.

24. Ms. Nowviskie listened to significant portions of the recordings made by the Crouses.

25. Respondent conducted an investigation. Barbara Brazeau is the Director of Personnel for the Putnam County Schools. She has held that position for eight (8) years. Ms. Brazeau conducted the investigation into the allegations regarding Grievant in this matter.

26. Ms. Brazeau listened to extensive recordings of classroom activities. Ms. Brazeau took notes while listening to the recordings. The investigation was not solely limited to Grievant. Allegations were levied with regard to both Carolyn Rogers, the kindergarten teacher and Grievant, the teacher's aide.

27. Allegations stemming directly from the recordings include:

(1) Inappropriate communication;
(2) Inappropriate conduct with students;

(3) Addressing students in an inappropriate manner creating a hostile learning environment;
(4) Breaching confidentially; and
(5) Physically striking a student.

Testimony of Personnel Director Barbara Brazeau.

28. Among the other allegations of wrong doing, Ms. Brazeau also investigated allegations that Grievant was hateful or shouted too loudly at the students in the cafeteria while on lunch duty.

29. Further, during the course of the investigation into the complaints of parents, Mrs. Crouse inquired as to the status of a Scholastic Book order, for which her check had not been cashed and the books she ordered had not been received.

30. Grievant had been assigned the duty of collecting the funds from students relating to the Scholastic Book order.

31. The proper procedure for collecting book orders and money is for the teacher or aide to collect the money and orders and lock them in a drawer or deliver them to the front office until the order is placed.

32. Grievant was responsible for the student orders and funds, that being cash and/or checks collected, relating to the Scholastic Book orders. Grievant did not at all times secure or store the funds collected on school property.

33. After Mrs. Crouse's inquiry, Michael Mullins, Principal at Buffalo Elementary, proceeded to determine the status and/or location of the outstanding funds.

34. It is not alleged the funds were stolen or pilfered. However, Grievant, on at least one or more occasions, had the funds in her possession when she went home at the end of the school day.

35. Grievant had been suspended with pay pending further investigation of others issues, at the time Principal Mullins and Personnel Director Brazeau were attempting to determine the location of the Scholastic Book order and related funds. The orders and funds were returned to the school by Grievant's daughter.

36. Grievant admits that the funds, while at her daughter's home, remained in an unsecured location. The funds were accessible to others and one check, among the funds collected, was defaced with the word "Bitch" before the funds were eventually returned to the school. R. Ex 2. The defaced check was one from Mrs. Crouse given to Grievant.

37. Respondent received a copy of the outstanding Child Protective Services (CPS) Division investigation report on or about February 23, 2010. The report was dated approved on February 16, 2010, and made the finding that "child abuse has not occurred." R. Ex. 3. The West Virginia Department of Health and Human Resources investigators were provided copies of the Crouse's CDs for their investigation.

38. The CPS report did make note that classroom comments were made that the agency deemed inappropriate considering the age and vulnerability of the kindergarten students. R. Ex. 3.

39. The State Board of Education's *Employee Code of Conduct* at 126 *C.S.R.* 162 (State Board of Education Policy 5902) directs all West Virginia school employees to "exhibit professional behavior," "maintain a safe and healthy environment, free from harassment [and] intimidation," "create a culture of caring through understanding and support," "demonstrate responsible citizenship by maintaining a high standard of conduct,

self-control," and "comply with all Federal and West Virginia laws, policies, regulations and procedures." *See* R. Ex. 6. and Ex. 7

40. West Virginia Board of Education Policy 4350, Procedures for the Collection, Maintenance, and Disclosure of Student Data, requires all personnel to keep student information confidential. R. Ex. 4

41. Upon the conclusion of Ms. Brazeau's investigation, which included among other inquiries, listening to more than 37 hours of recordings, Ms. Brazeau presented her opinion and conclusions to Superintendent Harold Hatfield. Personnel Director Brazeau informed Superintendent Hatfield about information she had retrieved from the recordings.

42. Respondent's investigation determined that Grievant's misconduct, included: addressing students in an inappropriate manner, both by her tone of voice and by negatively labeling of students; disclosing confidential information about students in front of other students; and removing funds, including a check written by a parent from the school. *See* Superintendent Hatfield's June 16, 2010 letter to Grievant, lower level record, Ex. 4.

43. A thirty (30) day suspension and improvement plan was recommended for Grievant by Superintendent Hatfield to the Putnam County Board of Education. Grievant's suspension was based upon information gained by Respondent's employees after listening to the classroom recordings.

44. The Board voted to suspend Grievant without pay for thirty (30) days from August 18, 2010, until October 2, 2010.

45. The suspension letter given to Grievant dated June 6, 2010, states, in paragraph one:

> As you are aware, we have been investigating allegations of inappropriate communications and conduct with students. In particular, it was reported that you addressed the students in an inappropriate manner creating a hostile learning environment, breached confidentiality, handled funds inappropriately and physically struck a student.

Grievant's Employment History

46. Rebecca Meadows, Principal of Buffalo Elementary from 2003-2006, had to address, through conversations and conferences with Grievant, the need to maintain a positive work environment, including her behavior with and around students. These conversations and conferences were conducted on multiple occasions between Ms. Meadows and Grievant between 2003 and 2006.

47. Ashley Lawrence, a full time kindergarten teacher since 1999, worked in the same kindergarten classroom as Grievant at Buffalo Elementary School from approximately the 2000 school year through the 2007 school year.

48. Teacher Lawrence was interviewed by Personnel Director Brazeau in 2009 regarding any issues she may have previously had with Grievant's work performance. Teacher Lawrence indicated her opinion that Grievant:

a. was impatient;
b. shared confidential information concerning students;
c. knows how to behave, but just chose otherwise,

and that Ms. Lawrence had occasion to address each of these issues with Grievant between 2000 and 2007. According to Teacher Lawrence, Grievant's tone was different when she lost patience with a student or students.

49. Connie Graves, retired teacher, taught kindergarten from 1993-2009 at Buffalo Elementary and worked with Grievant in her classroom during the 2007-2008 school year.

50. Former teacher Graves was interviewed by Personnel Director Brazeau in 2009 regarding issues with Grievant. Graves indicated that Grievant had a loud and gruff voice with students, even though she had discussed with Grievant using a tone that was more caring and calm. Further, Teacher Graves indicated she had occasion to discuss preferred and recommended classroom procedure with Grievant acknowledging that the teacher is primarily responsible for the systems used and providing appropriate direction to Grievant.

51. Grievant's personnel file revealed a wide variety of employee conduct including, but not limited to, evaluations, memorandums of negative events, a number of reprimands, Plans of Improvement and suspension. A measure of progressive discipline has been noted, and Grievant was specifically reminded to "[b]e more discreet and exercise greater self-control in dealing with students. Convey the attitude and tone that you would desire to receive…Your role should be of a supporting and helping nature." R. Ex. 9 and 10.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to

be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in WEST VIRGINIA CODE § 18A-2-8, and must be exercised reasonably, not arbitrarily or capriciously.[4] *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991). *See Beverlin v. Bd. of Educ*., 158 W. Va. 1067, 216 S.E.2d 554 (1975). WEST VIRGINIA CODE § 18A-2-8 provides that "[A] board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge."

Grievant contests her suspension of thirty (30) days and her placement on an improvement plan. Grievant argues that Respondent improperly utilized tape recordings to justify the suspension. Further, Grievant by counsel contends that all matters and evidence derived from the non-consensual recording device should have been excluded from consideration in accordance with18 U.S.C. §2511 and 18 U.S.C. §2515. Counsel

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[4] For Public Employees Grievance Board matters, generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv*., 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

emphatically argues that 18 U.S.C. §2515 prohibits the utilization of said evidence by any political subdivision or any "officer" thereof.

Respondent argues there is no expectation of privacy for conversations in front of a classroom full of students and highlights that West Virginia is a one party consent state. Respondent does not dispute that the recordings were used to substantiate a significant amount of the charges levied against Grievant. Respondent maintains its disciplinary actions should be upheld.

Under the statutes and procedural rules relating to grievances, the formal rules of evidence are not totally applicable in grievance proceedings, except for the rules of privilege recognized by law.[5] Generally, the issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings. The instant matter is not a typical grievance matter, wherein an administrative law judge must determine what weight, if any, is to be accorded evidence. W. VA. CODE § 62-1D-6 states that "evidence obtained in violation of the [Wiretap Act] shall not be admissible in any proceeding."[6] Two major issues of this matter are: whether certain material is

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[5] *See generally* W. VA. CODE § 6C-2-4(a)(3).

[6] WEST VIRGINIA CODE § 62-1D-6, in relevant part, states:

> Evidence obtained, directly or indirectly, by the interception of any wire, oral or electronic communication shall be received in evidence only in grand jury proceedings and criminal proceedings in magistrate court and circuit court: **Provided, that evidence obtained in violation of the provisions of this article shall not be admissible in any proceeding.** (Emphasis added.)

evidence, and/or whether the information derived from the controversial recordings is proper for consideration.

The undersigned was initially tempted by Respondent's contention(s); nevertheless, relevant case law does not tend to endorse the position proposed by Respondent. *See West Virginia Dept. of Health and Human Resources ex rel. Wright v. David L.,* 453 S.E.2d 646, 192 W.Va. 663 (1994). The facts of this case establish the existences of recordings which reasonably are of the nature relating to the Wiretapping and Electronic Surveillance Act, W. VA. CODE §§ 62-1D-1, *et seq*., and its federal counterpart in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510, *et seq***.** The distinctions of "in the presence" and "out of the presence" are not necessarily arbitrary and capricious, but the distinction may have little bearing on the perceptions and/or information derived from the controversial classroom recordings.[7]

Syllabus Points one and three of *West Virginia Dept. of Health and Human Resources, ex rel. Wright v. David L.* 453 S.E. 2d 646, 192 W. Va. 663 (1994), indicates that a violation of state and federal statute makes the oral interception inadmissible:

> 1. "One spouse's interception of telephone communications by the other is a violation of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510, *et seq*., which by its terms renders them inadmissible." Syllabus Point 15, *Marano v. Holland*, 179 W. Va. 156, 366 S.E.2d 117 (1988).
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[7] It is understood that the West Virginia Wiretapping and Electronic Surveillance Act has an explicit exception to its prohibition on the interception and disclosure of wire, oral, or electronic communication - consent. W. VA. CODE § 62-1D-3 (2009). Interception and subsequent disclosure is lawful under the act provided one party to the communication has given prior consent to such communication. *Id.* W. VA. CODE § 62-1D-3(e). Referenced generally as a one party consent state.

> 3. Any recordings of conversations made in violation of W. Va. Code, 62-1D-3(a)(1) (1987), and 18 U.S.C. § 2511(1)(a) (1988) are inadmissible under W. Va. Code, 62-1D-6 (1987), and 18 U.S.C. §2515 (1968).

The Federal Wiretap Act provides a broad and sweeping exclusionary rule. 18 U.S.C. §2515 provides:

> **Whenever any wire or oral communication**[8] **has been "intercepted, no part of the contents of such communication and no evidence derived there from may be received in evidence in any trial, hearing, or other proceeding** in or **before any** court, grand jury, department, **officer**, **agency**, regulatory body, legislative committee, or other authority of the United States, **a State, or a political subdivision** thereof if the disclosure of that information would be in violation of this chapter. (Emphasis added.)

In *Gelbard v. United States,* 408 U.S. 41, 50-51 (1972), the Supreme Court described the purpose of this exclusionary rule as follows:

> Section 2515 is...central to the legislative scheme. Its importance as a protection for 'the victim of an unlawful invasion of privacy' could not be more clear. [footnote omitted]. ... Moreover, §2515 serves not only to protect the privacy of communications, [footnote omitted] but also to ensure that the courts do not become partners to illegal conduct: the evidentiary prohibition was enacted also to protect the integrity of court and administrative proceedings. [internal quotation marks and citation omitted]

Thus, evidence derived from illegally obtained oral communication is barred by State and Federal Statute. Further, the undersigned is persuaded, that Section 2515 excludes not merely illegally intercepted communications, but also all derivative

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[8] This provision of the Wiretap Act statute does not include "electronic communications," See, *U.S. v. Reyes*, 922 F. Supp. 818 (S.D.N.Y.1996).

evidence, e.g.,"fruit of the poisonous tree" doctrine.[9] (Position trumpeted by Grievant's counsel throughout the level three proceedings). The question still looming is, whether the recordings orchestrated by the Crouses are illegal?

The recordings were clearly the foundation upon which the charges against Grievant were constructed. *See* testimony of Personnel Director Barbara Brazeau. Respondent played no role in the original alleged illegal interception of the communication and came in possession of such through their administrative responsibilities of administering the Putnam County School system. Nevertheless, the information derived from the recordings is of limited to no value if the information derived from the recordings is poison fruit.

There were allegations made against Grievant (a point repeatedly highlighted by Respondent as justification for its investigation). This point, while factually accurate, is misleading in the totality of the circumstances. The bulk of all the allegations, and the proclaimed proof verifying the alleged misconduct, stem from the actions of the Crouses, in one form or another.[10] The parents who met with Respondent's agents did so after communicating with the Crouses and listening to some form of the recordings provided to them by Mrs. Crouse.

It is specifically found to be factually accurate that the classroom recordings were the foundation upon which the charges against Grievant were constructed. Further, this

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[9] To determine whether evidence has been "derived" from a violation of the Act, courts apply the familiar Fourth Amendment "fruit of the poisonous tree" doctrine. *U.S. v. Smith*, 155 F.3d 1051, 1060 (9th Cir. 1998). *See, Wong Sun v. United States*, 371 US 471 (1963) (coining the phrase and establishing the doctrine).

[10] Limited exceptions exist; *see* FOF 29, 30 and allegations that children were hesitate to seek permission to use the restroom for fear of reprisal.

trier of fact is persuaded that it would be improper for Respondent to utilize the recordings to formulate and substantiate charges against Grievant. It is not established that the instant five year old student has the capacity to establish legal consent. Nor is it readily evident that the child was anything more than a delivery device to make clandestine recordings. Additionally, the reliability of the recordings disseminated is suspect and should be granted limited weight even if found to be lawful. [11]

Credibility and trustworthiness is a commodity that should never be squandered. 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 Res*., Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res*., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ*., Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp*., Docket No. 93-HHR-050 (Feb. 4, 1993). In the circumstances of this case, it is prudent to delve into the credibility of the witnesses Kathryn Crouse, Barbara Brazeau and Grievant.

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of

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[11] Trustworthiness of the recordings is an issue. Mrs. Crouse created the CDs distributed to third parties from classroom recordings. Semantics aside, Mrs. Crouse edited the recordings for distribution and effect. To what degree is not known by either party of this grievance matter.

bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

The testimony of Mrs. Kathryn Crouse is not easily depicted. The following is based upon the first-hand observation of the witness and review of the record, made available to this trier of fact. Mrs. Crouse's demeanor is not readily comprehended via one medium, or snippets of dry transcripts. Mrs. Crouse's presentation of information was a roller-coaster ride of information, opinion and personal agenda. It was readily evident that Kathryn Crouse was perplexed, frustrated and disillusioned with the overall speed and results of the existing methods for investigating, verifying and correcting the issues currently in review.

Mrs. Crouse expressed the opinion that she is fed up with this matter and lack of fruition. It was more than evident that she had little patience for any further participation with the Putnam County School system, the legal system and the questions regarding her conduct. Mrs. K. Crouse, a lay person, was more than willing to express her interpretation of School and West Virginia law. [12] Mrs. Crouse is not an attorney, nor established to have any special training in interpreting legal matters. She is strong-willed

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[12] In recognition that West Virginia is a one party consent state, Mr. & Mrs. Crouse are of the strong opinion they had every right to tape the classroom, without the teacher or teacher's aide knowledge. Despite the Crouses' laymen's opinions, the legality of the ensuing tapes is of issue and much debate. Whether a five year old child constitutes a party capable of establishing legal consent is controversial. Further, West Virginia case law of *West Virginia Dept. of Health and Human Resources ex rel. Wright v. David L.*, 453 S.E.2d 646, 192 W.Va. 663 (1994) with regard to the parental right of a parent to consent on behalf of a minor child is not as readily decisive in the instant situation as the undersigned would prefer.

and can be dogmatic with a chosen task. Mrs. Crouse's reluctance to be more amenable and co-operate with this grievance process, did not serve to bolster her credibility. While K. Crouse does not appear to be blatantly untruthful, she is biased and self-validating. By repeatedly demonstrating a distain for the process, Mrs. Crouse was at times a hostile witness, with very strong opinions and an agenda of her own design.

On or about the fourth day of school, Mrs. Crouse began to tape her child's experience in school. She placed a voice-activated tape recorder in her son's back-pack. Marc and Kathryn Crouse testified that, the reason they began to tape was because they couldn't get the principal, Mike Mullins, to act. Mr. M. Crouse presented as a more balanced witness than his wife, providing that, "We wanted the school to act." The intent was to record the events that were going on around "C" (our son). Mr. M. Crouse did not initially suspect Grievant of any wrong doing or as one of the individuals his son referenced as "the mean people at school." Mr. M. Crouse presented as a credible witness, married to a strong-minded woman bound and determined to correct what she perceived to be an injustice.

Mrs. K. Crouse engineered the recordings heard by others. By her own testimony, she transferred excerpts of the recordings and highlighted sections she determined to be of particular interest. Grievant, among other objections, questions the lack of authentication of the classroom recordings provided to various third parties. Copies of some form of the recordings Mrs. K. Crouse had made were distributed to every parent with whom she came in contact, who had a child in Grievant's class. Mrs. Crouse describes Grievant's voice as loud, repulsive, mean, nasty, and hateful. The tone of Grievant's voice has been a topic of issue previously. *See* Grievant's employment

history. Nevertheless, Mrs. Crouse's testimony must be viewed for what it is, testimony of a biased witness with an admitted agenda. Mrs. K. Crouse highlighted portions of the recordings and made excerpts of portions she determined warranted scrutiny. Mrs. K. Crouse disseminated CD copies of recordings to parents, news media and others to further maximize effect. She even posted a significant portion of the recordings on the web. While Mr. and Mrs. Crouse do not agree on the number of recordings, this is understandable, given that Mrs. Crouse was more actively involved with the recording than Mr. Crouse. Neither Mr. nor Mrs. Crouse are agents of Respondent. No finding is made as to whether a teacher or a teacher's aide has an expectation of privacy while addressing a classroom of children. The original motivating interest of the Crouses is understandable. However, the ultimate actions of Mrs. K. Crouse may be less than commendable. This trier of fact is persuaded that the recordings as acquired and engineered render them "poison fruit."

Barbara Brazeau investigated allegations that Grievant was hateful or shouted too loudly at the students in the cafeteria while on lunch duty. Ms. Lola Jividen, a school employee working in the school cafeteria, told Ms. Brazeau that she did not hear Ms. Francisco be hateful or otherwise talk in a hateful manner to the students in the cafeteria. Ms. Paula Asbury, who also works for Respondent, told Ms. Brazeau that Grievant had to talk loudly because there was a lot of noise in the cafeteria. Ms. Asbury also told Ms. Brazeau that she had never heard Grievant act inappropriately towards students. The cook, Ms. Carolyn Beller, advised Ms. Brazeau that Grievant had a loud voice, but never acted inappropriately towards the children.

Grievant should be more attentive to the tone of her voice when dealing with children of a tender age. *Also see* CPS Report, R. Ex. 3. The issue with the tone and volume of Grievant's voice was not just that she was normally a loud talker. However, isolated incident(s) alleged in the cafeteria during a breakfast or lunch period by parents fired-up by the Crouses is not convincing evidence. Ms. Carolyn Beller, Ms. Lola Jividen and Ms. Paula Asbury are adults employed by Respondent who worked in the school cafeteria, presumably on a regular basis. They individually and collectively seem more attuned to standards of conduct exhibited by Grievant routinely during meal periods. Grievant is aware and has been reminded that children in her care need to be addressed in a more melodic tone. The cafeteria area is a noisy environment filled with enthusiastic school children during prescribed feeding periods. Thus, it is determined that Grievant has a gruff voice, but it is not established that she verbally abused children during meal periods.

The testimony of Personnel Director Barbara Brazeau was affected, to some degree, by the passage of time. The level three hearing was almost three years post the events in discussion. However, explanation of her conduct was rational. Ms. Brazeau's testimony was informative, relevant, and presented in a credible manner. She did not present as biased or inconsistent. Her statements of how she reached certain conclusions were extremely enlightening. She testified to investigating the allegations made, including interviews, reviewing Grievant's employment history and listening to thirty seven (37) hours of recordings in their entirety (four times). She testified to taking extensive notes based upon what she heard on the recordings. Ms. Brazeau discerned and made recommendations to the Superintendent as to what school code violations

should be levied against Grievant. Ms. Brazeau admittedly formulated the charges against Grievant based upon what she heard on the recordings and her interpretation of applicable school code. This is crucial information. With regard to Grievant's overall treatment of students, with limited exceptions, **absent the controversial recordings, there is scant proof that Grievant violated the cited employee codes of conduct**.[13] Allegations yes, reliable evidence no! Ms. Brazeau testimony is perceived to be reliable and factually accurate with regard to her individual actions.

Further, Ms. Brazeau testified and admitted that pursuant to her investigation she found no evidence that there was ever an instance when Grievant told a student they could not go to the restroom. There was one instance when a child, "D", asked to go to the restroom and there was another student in the restroom in the classroom. Grievant told the other child to hurry up and "D" soiled her pants. Grievant was unaware of the urgency of the situation. Other kindergarten teachers testified that their students were not required to ask to go to the restroom, yet from time to time students soiled their pants anyway. Bathroom accidents happen to children of a young age. There is no credible evidence that Grievant unreasonably denied children in her charge access to the restroom.

Lastly, Grievant was assigned the scholastic book order task, which included the collection of money for the project. Mrs. Crouse wrote a check that was given to Grievant to purchase one or more books. On one or more occasions, among Grievant's

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[13] Respondent acknowledges that the allegations of inappropriate communication and conduct with students; addressing students in an inappropriate manner creating a hostile learning environment; and breaching confidentiality; all came directly from the nonconsensual recordings.

material that she took home at the end of the day, were the items in association with the book order. Accordingly, Mrs. Crouse's check was in her possession. At the very least Grievant, a seasoned school employee, was aware of the practice of keeping funds received in a secure location at the school. *See* testimony of Grievant and teacher Graves. Respondent established by a preponderance of the evidence that Grievant's failure to secure the funds at the school was in contravention of the West Virginia Board of Education Policy 8100, *Public School Finance*, which directs that "[a]ll checks and currency received must be deposited as received." *R. Ex. 5.* It is not established that Grievant herself defaced Mrs. Crouse's check, but it is factually correct the check was mutilated during a time period that Grievant was ultimately responsible for the safe keeping of the book order funds. Grievant's failure to secure the scholastic book order funds at the school is factually a violation of an applicable policy. This infraction is substantiated by evidence not a derivative of the classroom tapes recordings. This violation in and of itself is not sufficient to warrant a thirty-day suspension.

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. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

"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). "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 22, 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).

Grievant's work history, as well as her observations and evaluations, reflects numerous admonitions regarding her tone of voice, how she speaks and treats others and the duty to keep student information confidential. As noted in *Stephens v. Wayne County Board of Education*, Docket No. 2012-0339-WayED (August 10, 2012), when an

employee does not grieve prior discipline, the merits of that action cannot be challenged in a later, unrelated grievance, and the substance of the allegations must be presumed to be true. *See Taylor v. Doddridge County Board of Education,* Docket No. 06-09-451 (Mar. 26, 2007)*; Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997); *Jones v. W. Va. Dept. of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Stamper v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-144 (Mar. 20, 1996); *Womack v. Dept. of Admin*., Docket No. 93-ADMN-430 (Mar. 30, 1994); *Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994). Thus, the documentation of prior misconduct and improvement found in the personnel file of Grievant are all presumed to be true and cannot be challenged herein.

Grievant testified at the level three hearing. She was aware of the gravity of the issues being reviewed. She demonstrated an ability to be evasive and non-comitial. Grievant had an opportunity to communicate her perceptions and rendition of information. Her recollection of facts was dubious. The credibility of Grievant was bruised with her refusal to acknowledge known facts. Grievant demonstrated she was not above gamesmanship. Grievant recalls details she deems beneficial but was inclined not to understand, recall or remember information that might be considered less favorable to her legal posturing. Regrettably, it is believed that Grievant has an attitude which could be impatient. Her testimony and demeanor did not generate a sense that she had endured an injustice. The plausibility of her explanations was relatively thin. Much of Grievant's testimony was designed to address legal appeal issues. Her testimony was deliberate and provided consistent information; it did not present in a manner which tended to demonstrate mitigation was mandated. The reliability associated with

Grievant's testimony is tentative. Nevertheless, it cannot be said, with any degree of certainty, that the past actions of Grievant necessarily establish Grievant's culpability in regard to the instant contested issues.

Mitigation must be considered in the circumstances of this matter. Grievant is challenging her unpaid suspension of thirty (30) days and her placement on an improvement plan. Grievant contends the penalty is clearly disproportionate to the offense proven. The suspension letter provided to Grievant dated June 6, 2010, sets forth a number of alleged improper actions, including "inappropriate communications and conduct with students," "creating a hostile learning environment, breached confidentiality, handled funds inappropriately" and "physically striking a student." Only one of the numerous allegations levied against Grievant has been established without the assistance of the controversial classroom recordings. Grievant failed to properly secure the funds in association with a class book ordering project. The admissibility and reliability of the classroom recordings is and will remain much debated. The reliability of the recordings disseminated is suspect, even if the recordings are found to be lawful. It is this trier of fact's determination that said recordings are of limited, to no, value with regard to establishing Respondent's burden of proof in the circumstances of this case. The integrity of an administrative review process is of importance. Without the use of the controversial recordings, Respondent has not established malfeasance by Grievant to substantiate the disciplinary action of a thirty-day unpaid suspension. Given what conduct was established by a preponderance of proper evidence the disciplinary action levied was excessive. Thus, this grievance is GRANTED in part.

Conclusions of Law

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 Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008).

2. WEST VIRGINIA CODE § 18A-2-8 provides that "[A] board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge." "Although reprimands are not specifically addressed in W. VA. CODE § 18A-2-8, the Grievance Board has previously recognized that lesser penalties can be imposed for the offenses listed in this statute. *See Wahl v. Mineral County Bd. of Educ.*, Docket No. 98-28-175 (Sept. 14, 1998); *See also Blankenship v. Mingo County Bd. of Educ.*, Docket No. 97-29-486 (Apr. 17, 1998)." *Showalter v. Marshall County Bd. of Educ.*, Docket No. 07-25-165 (May 28, 2008).

3. The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in WEST VIRGINIA CODE § 18A-2-8, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991). *See Beverlin v. Bd. of Educ*., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

4. An action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it

cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv*., 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

5. Respondent failed to establish by a preponderance of the evidence a substantial amount of the allegations of employee misconduct levied against Grievant.

6. Evidence derived from illegally obtained oral communication is barred by State and Federal Statute. Syllabus point 3, *West Virginia Dept. of Health and Human Resources ex rel. Wright v. David L.*, 453 S.E.2d 646, 192 W.Va. 663 (1994). *See also* WEST VIRGINIA CODE § 62-1D-6 and 18 U.S.C. § 2515.

7. Respondent established by a preponderance of the evidence that Grievant failed to properly maintain and secure funds collected in association with a recognized school project. This action is a violation of applicable school procedure. West Virginia Board of Education Policy 8100, *Public School Finance.*

8. 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 of rehabilitation. *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.,* Docket No. 96-HHR-183 (Oct. 3, 1996).

9. 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. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

10. "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 20, 1997).

11. Grievant established that a disproportion between the proven offense and the personnel action levied exists in this grievance. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity. Mitigating circumstances exist in the circumstances of this matter.

Accordingly, the grievance challenging Grievant's thirty-day suspension is hereby **GRANTED in part**. The thirty-day suspension without pay is **ORDERED** rescinded and Respondent shall restore all employment benefits lost as a result of the thirty-day suspension, including seniority, and back-pay for the days suspended, plus appropriate statutory interest. This grievance is **DENIED** in that Grievant violated recognized school procedure in handling student funds and **Respondent's assessment of a Plan of Improvement for Grievant is reasonable** and shall stand**.** Given the totality of this

matter, it is prudent that Grievant re-familiarize herself with proper procedures, not solely limited to collections and securing of school funds.[14]

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: May 1, 2013

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Landon R. Brown
Administrative Law Judge

[14] Given the expiration of time since the commencement of this action and this Decision it is believed that Grievant has completed her assessed plan of improvement. If not, a Plan of Improvement should be developed to refresh Grievant with the duties and proper executions of the duties of a teacher's aide.