THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LENNIE DALE ADKINS,
Grievant,

v. **DOCKET NO. 2013-1028-CabED**

CABELL COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

On January 24, 2013, Lennie Dale Adkins ("Grievant") filed this grievance directly at Level Three of the grievance procedure, as authorized by W. Va. Code § 6C-2-4(a)(4), challenging the termination of his employment by the Cabell County Board of Education ("Respondent" or "CCBE"). Following a series of continuances, each of which was granted for good cause shown, a Level Three hearing on this grievance was held on September 4 and 24, 2013, in this Grievance Board's offices in Charleston, West Virginia. Grievant was represented at the hearing by Dennis E. Kelly, Esquire, and Donald Jarrell, Esquire, with Kelly Law Office, while Respondent was represented by Richard S. Boothby, Esquire, with Bowles Rice, LLP. Following the hearing, the undersigned Administrative Law Judge issued a ruling on the admission of certain exhibits into the record of the Level Three hearing, and established a schedule for the parties to submit findings of fact and conclusions of law. This matter became mature for decision on November 27, 2013, upon receipt of the Respondent's post-hearing fact

and law proposals.[1] No post-hearing argument was received from Grievant.

Synopsis

Grievant's employment as a Librarian with CCBE was terminated[2] on January 9, 2013, on charges of insubordination and immorality. A preponderance of the credible evidence of record established that in November 2010, while Grievant was the Librarian at Geneva Kent Elementary School, he engaged in instant messaging conversations outside normal school hours with three Cabell Midland High School students in which he asked the students if they were gay and what porn they liked to watch, and referred them to a gay porn web site. In addition, during the 2008-2009 school year, when Grievant was a math teacher at Cabell Midland High School, he sent sexually oriented text messages to one of his male students, who was 17 years old at the time, soliciting and receiving via the Internet explicit photos of the student exposing his erect genitals. Grievant likewise exchanged electronic messages with a second Cabell Midland High School student sometime around the same time frame, obtaining similar photographs of that 16 year old male exposing his erect genitals. These photographs were located on Grievant's electronic communication devices which were forensically examined by a State Police expert after they were seized from his residence pursuant to a search warrant issued by the Circuit Court of Cabell County. This warrant was subsequently quashed by the Circuit Court and the criminal charges against Grievant dismissed.

[1] Respondent attached a document to its post-hearing argument without requesting permission to reopen the record and admit additional documentary evidence. This evidence is excluded and was not considered in rendering this decision. *See L. A. v. Marshall Univ*., Docket No. 2013-1720-MU (Nov. 21, 2013); *Redd v. McDowell County Bd. of Educ*., Docket No. 2012-1419-McDED (July 16, 2012).

[2] Grievant was previously suspended indefinitely without pay following his arrest by the West Virginia State Police in July 2011. This suspension was the subject of a separate grievance presently on appeal to the Circuit Court of Kanawha County, and is not part of this grievance. *See Adkins v. Cabell County Bd. of Educ*., Docket No. 2012-0085-CabED (Apr. 26, 2012) (*appeal pending*).

Nonetheless, this evidence was found to be admissible in an administrative grievance proceeding based upon a determination that the exclusionary rule derived from the Fourth Amendment is not applicable to such proceedings. Based upon the established facts, Grievant's conduct constituted immorality prohibited by W. Va. Code § 18A-2-8(a), as well as insubordination for disregarding the behavior standards in the State Board of Education's Employee Code of Conduct. Therefore, this grievance must be denied.

The following Findings of Fact are made based upon the record developed through the Level Three hearing.

Findings of Fact

1. Grievant was employed as a Librarian by Respondent Cabell County Board of Education ("CCBE") at Geneva Kent and Guyandotte Elementary Schools during the 2010-2011 school year.

2. Grievant was previously employed by CCBE as a math teacher at Cabell Midland High School during the 2007-2008 through 2009-2010 school years. Grievant was the Librarian at South West Middle School during the 2006-2007 school year. During the 2003-2004 through 2005-2006 school years, Grievant was a math teacher at Cabell Midland High School. *See* R Ex 4.

3. Randall Black is currently employed by CCBE as a Technology Integration Specialist. Mr. Black was previously employed by CCBE as a Social Studies Teacher at Cabell Midland High School.

4. Joedy Cunningham is currently employed by CCBE as the Assistant Principal at Huntington High School. In November 2010, Mr. Cunningham was the Assistant Principal at Cabell Midland High School.

5. Todd Alexander is employed by CCBE as its Assistant Superintendent for Leadership Development and Administrative Studies.

6. Corporal Marlene Moore is a member of the West Virginia State Police assigned to the Crimes Against Children Unit in Huntington, West Virginia. She has been assigned to that unit since November 2010.

7. Corporal Robert Boggs is a member of the West Virginia State Police assigned to the Digital Forensics Unit which is located at the Marshall University Forensics Science Center in Huntington, West Virginia. *See* R Ex 14. The parties orally stipulated at the Level Three hearing that Corporal Boggs is an expert in the area of forensic computer examination.

8. While teaching a class on November 29, 2010, Mr. Black observed C. D.[3] speaking to another unidentified student regarding some messages sent over Facebook by Grievant while C.D. was staying with some friends the previous weekend.

9. After class ended, Mr. Black spoke with C. D. and asked him to provide a statement regarding the Facebook messages. C. D. prepared a hand-written statement which he gave to Mr. Black.

[3] Each of the students involved in the activities for which Grievant was disciplined will be identified only by their initials, consistent with this Grievance Board's practice of respecting the privacy of individuals in such circumstances. *See Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995); *Edwards v. McDowell County Bd. of Educ.*, Docket No. 93-33-118 (July 13, 1994); *Bailey v. Logan County Bd. of Educ.*, Docket No. 93-23-383 (June 23, 1994).

10. C. D.'s undated statement (with the first and last names of the students involved subsequently redacted) provided the following narrative:

> Saturday night I was staying the night at my friend's house with my other friend, J. A., and Dale Adkins (former teacher) instant messaged J. on Facebook. J. claims Dale talks to him all the time. But he also IMed (*sic*.) M. P. M. told Dale that J. and I were staying with him that night. Dale made a joke about it. But later on Dale was talking about what porn he was watching at that time, and he kept making gay jokes about us, so we stopped talking to him, but he kept reading IMs to M. and J. Then I added him as a friend on Facebook and I got an IM from him saying "You boys having fun yet?" He kept asking M. and J. that also.

R Ex 1.

11. Mr. Black took C. D.'s statement to Mr. Cunningham, advising Mr. Cunningham what he had heard in his classroom.

12. Shortly thereafter, Mr. Cunningham interviewed C. D. to confirm the information contained in his hand-written statement.

13. After interviewing C.D., Mr. Cunningham separately interviewed each of the other two students who C. D. indicated were present while Grievant was sending and responding to text messages, J. A. and M. P. Each of these students prepared hand-written statements describing their recollection of the events, and provided their statements to Mr. Cunningham.

14. J. A.'s statement, dated November 29, 2010, states as follows:

> As we were at each others (*sic*.) house we were on Facebook and Mr. Dale Adkins started a conversation with us over IM. We thought it was harmless until he started acting weird and typing homosexual suggestions. He also referred to pornography in some of his messages. In an act of creepiness we all got off the computer and discussed what had happened and continued to discuss it at school the following Monday and a teacher over heard (*sic*.) us and asked us about it and we told him what actually happened.

R Ex 2.

15. M. P.'s undated statement, with the students' first names redacted to initials only, states as follows:

> Previous to the night that Mr. Adkins talked to me, C., and J. He had a discussion with me about my orientation. He asked me if I was gay. I said no and he kept going on like he might be able to convince me that I was. Then he suggested a porn site to me and asked if I watched gay porn, and what kind of porn I liked. I replied that I didn't watch porn and it was kind of weird he was asking, then I got off-line and just put it in the Back of my mind, I really didn't care. I figured he was just joking around.
>
> Then the day I had J. over he "IM"d (*sic*.) me first and I don't really remember what he said. J. took the computer and started talking to him. From that point I don't really know what was said. I just know that he talked about the same subject and sent us the link to a porn site. We didn't look at it cause (*sic*.) it was weird. Then when C. came he joined the discussion and added Mr. Adkins as a friend (on Facebook). Then he sent him a message saying "this is . . . C.'s Father," "We need to have a serious talk" He didn't reply and he deleted C. as a Friend. I personally thought that was really weird. I thought he could have at least replied and talked to "C.'s Father" [a]bout the problem and tried to resolve it, but he just fled. He hasn't talked to me since.
>
> I honestly don't care. I just think the whole situation was really weird and <u>suspicious.</u>

R Ex 3 (emphasis in original).

16. After obtaining the additional student statements, Mr. Cunningham contacted CCBE Assistant Superintendent Alexander by telephone, advised him of the allegations made by these students, and thereafter sent the statements to Mr. Alexander by telephone facsimile.

17. After reviewing the statements written by the three students, Mr. Alexander contacted Child Protective Services, West Virginia Department of Education

Investigator John Morrison, and Corporal Moore with the West Virginia State Police Crimes Against Children Unit.

18. On December 3, 2010, Corporal Moore met with Mr. Alexander and reviewed copies of the statements.

19. The computer on which the students' instant messaging activity was alleged to have transpired was a "work computer" belonging to M. P.'s mother. Neither Mr. Alexander nor Corporal Moore was able to obtain permission from M. P.'s parents to secure the computer for a forensic examination. *See* R Ex 8.

20. On January 4, 2011, Corporal Moore spoke with an Assistant Prosecuting Attorney for Cabell County who advised her that she had sufficient information to obtain a search warrant for Grievant's residence.

21. On January 6, 2011, Corporal Moore obtained a search warrant from Judge Hustead of the Circuit Court of Cabell County, West Virginia. Later that same day, Corporal Moore and four other State Police officers went to Grievant's place of employment with the search warrant where they met Grievant. Grievant then accompanied the State Police to his residence where the search warrant was executed.

22. Pursuant to the search warrant, Corporal Moore seized 14 computers and computer-related items, such as digital media storage devices, and delivered those items to Corporal Boggs at the Digital Forensics Unit for a forensic examination. At the time she transferred custody of these items to Corporal Boggs, Corporal Moore completed a form logging those items into the laboratory. *See* R Ex 8.

23. Corporal Boggs performed a forensic examination of the computer material seized from Grievant's residence and prepared a report which he provided to Corporal Moore.

24. In the course of Corporal Boggs' forensic examination, the names of two males, J. L. and J. H., were found in electronic mail on Grievant's computer. Corporal Moore matched those names with the names of two students at Cabell Midland High School. *See* R Exs 6, 7 & 9.

25. J. L. was born on August 27, 1992. *See* R Ex 9. J. H. was born on September 5, 1992. *See* R Ex. 5.

26. J. H. attended Cabell Midland High School from 2007 through 2011. *See* R Ex 6. Grievant was one of J. H.'s classroom teachers during the first semester of his Junior year and during the first and second semesters of his Sophomore year. *See* R Ex 7.

27. During the 2008-2009 school year, when J. H. was a Sophomore at Cabell Midland High School, he sent explicit nude photos of himself to someone on Facebook purporting to be a 16-year-old Sophomore male student at Hurricane High School named "Ben." Ben also sent similar photos to J. H. which appeared to be photos of different individuals, rather than a single person.

28. J. H. also communicated via electronic mail to Ben at the e-mail address "CountryBoy304." J. H. tried to meet Ben in person but Ben made various excuses why they could not get together, and J. H. stopped trying to set up a meeting.

29. During the time J. H. exchanged photos and other communications with the individual known to him as “Ben” at the CountryBoy304 e-mail address, J. H. was over 16 years of age but not yet 18 years of age. At no time during this exchange of communications and photos was J. H. aware that Grievant was the person with whom he was communicating.

30. At an unspecified subsequent time, J. H. received a Facebook communication from Grievant in his normal persona as Dale Adkins which J. H. considered to be “flirtatious.” J. H. asked Grievant not to contact him any further. Thereafter, J. H. received no additional communications from Grievant.

31. One of the computer devices seized from Grievant contained explicit nude and semi-nude photos labeled using the names of Cabell Midland High School students J. H. and J. L., with the photos for each individual numbered sequentially in normal computer jargon used to identify such digital data. *See* R Ex 15.

32. These seized photos which displayed the exposed erect genitals of J. H. and J. L. were associated with an e-mail account on the computer seized from Grievant bearing the user name of “CountryBoy304.” *See* R Ex 15.

33. On May 27, 2011, eleven felony criminal complaints were filed against Grievant in the Magistrate Court of Cabell County, West Virginia. Grievant was arrested and released on bail that same day. *See Adkins v. Cabell County Bd. of Educ*., Docket No. 2012-0085-CabED (Apr. 26, 2012) (appeal pending in the Circuit Court of Kanawha County) (“*Adkins I*”). Also on May 27, 2012, Grievant was placed on paid administrative leave until further notice. *Id*.

34. As a further result of the pending criminal complaints, CCBE Superintendent William A. Smith indefinitely suspended Grievant without pay on July 8, 2012. This suspension, pending resolution of the criminal charges, was the subject of a grievance adjudicated by this Grievance Board in *Adkins I*, and constitutes a separate matter from the present grievance, in accordance with an oral stipulation of the parties.

35. In September 2012 the criminal charges against Grievant were dropped after a Circuit Court suppressed the evidence obtained as a result of the search warrant obtained by Corporal Moore.

36. Following a meeting with Grievant and his attorneys on November 20, 2012, Superintendent Smith issued the following notice to Grievant, stating in pertinent part:

> . . . I have decided to continue to suspend your employment, without pay, until a meeting of the Cabell County Board of Education to be held within 30 contract days of this letter. At the meeting I will ask the Board to ratify the suspension and terminate your contract of employment. At present I intend to make those recommendations at the Board's regular meeting on January 8, 2013, which is within 30 contract days of today's date.
>
> I am taking these actions because I have been informed that in November or December 2010, when you were the librarian at Geneva Kent Elementary School, you had instant message conversations on Facebook with three Cabell Midland High School male students, J. A., M. P., and C. D., and that in the conversations you asked the students if they were gay, ask (*sic*.) them what porn they watch and like, referred them to a gay porn site and sent them a link to the site. Statements by each of the students were taken by Cabell Midland Assistant Principal Cunningham. The students were also interviewed by the State Police.
>
> You were assigned as a math teacher at Cabell Midland High School during school years 2003-04 through 2005-06, and again for school years 2007-08 through 2009-10. For school year 2006-07, you were assigned as a librarian at West Middle School (now Huntington Middle School)[.]

Additionally, I have been informed that (1) you sent sexually oriented text messages to a then-17-year-old male Cabell Midland High School student, J. H. (Whom you taught at Cabell Midland High School in school years 2008-09 and 2009-10) and convinced him to send to you over the internet pictures of himself naked with erect genitals; and (2) you sent sexually oriented text messages to a then-16-year-old Cabell Midland student and convinced him to send you over the internet pictures of himself nude and his erect genitals.

If you or your legal counsel do not know the names of the individuals whose initials appear in the foregoing paragraphs, your legal counsel should contact our legal counsel, who can supply the names.

Any one of the facts described above would warrant the suspension and termination of a school employee's contract under West Virginia Code §18A-2-8 and violate West Virginia Board of Education and Cabell County Board of Education policies, including the Employee Code of Conduct.

At our November 20 meeting, your legal counsel contended that the school district cannot discipline you on the basis of evidence that the Circuit Court suppressed in the criminal cases. While I appreciate counsel's position, as Superintendent of Schools I have a duty to protect our students and see to it that unfit individuals are not employed in our schools.

I cannot ignore the information and evidence that have come to my attention. Any error that was committed in the criminal justice system by the issuance of the invalidated search warrant was not committed or instigated by the school district. Nor is the school district bound in employee disciplinary proceedings by the formal rules of evidence or burden of proof that apply in a criminal case in Circuit Court.

You have a right to be heard by the school board before it acts upon my recommendations. If you wish to exercise that right, you must deliver written notice to me no later than noon on December 17, 2012, in which case you will be informed of the date, time and place of the hearing. If the Board accepts any of my recommendations, you will be notified in writing and, as provided by law, have the opportunity to appeal the Board's action to the West Virginia Public Employees Grievance Board.

* * *

J Ex 1.

37. On January 8, 2013, the Board of Education met and approved Superintendent Smith's recommendation to continue Grievant's suspension without pay and to terminate his employment, effective January 9, 2013. *See* J Ex 2 & R Ex 16.

38. On September 17, 2013, Grievant voluntarily surrendered his teaching license. The State Superintendent of Schools revoked Grievant's license to teach in West Virginia on September 19, 2013.[4] *See* R Exs 12 & 13.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008). *Nicholson v. Logan County Bd. of Educ*., Docket No. 95-23-129 (Oct. 18, 1995); *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." *Petry v. Kanawha County Bd. of Educ*., Docket No. 96-20-380 (Mar. 18, 1997). "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 Resources*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

[4] This date was established as the cut-off date for any back pay entitlement which Grievant might be awarded. However, because Grievant's termination was consistent with applicable law, it will not be necessary to address this issue.

Circumstantial evidence alone may be sufficient to meet an employer's burden to prove the charges against a disciplined employee by a preponderance of the evidence. *Galloway v. W. Va. Bd. of Trustees*, Docket No. 90-BOT-388 (Nov. 22, 1991). *See Bailey v. Logan County Bd. of Educ*., Docket No. 93-23-383 (June 23, 1994); *Kirk v. Mingo County Bd. of Educ*., Docket No. 89-29-99 (Sept. 12, 1999).

Some of the evidence on which Respondent relies to support the charges against Grievant consists of hearsay statements. An administrative law judge must determine what weight, if any, is to be given to hearsay evidence in a disciplinary proceeding. *Hamilton v. W. Va. Dep't of Health & Human Res*., Docket No. 2011-1785-DHHR (Sept. 6, 2012); *Miller v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ*., Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996). 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 their statements. *Simpson v. W. Va. Univ*., Docket No. 2011-1326-WVU (May 3, 2012); *Cale v. W. Va. Univ*., Docket No. 2011-1711-WVU (Mar. 22, 2012);

Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996). *See Vojas v. Office of Personnel Management*, 115 M.S.P.R. 502 (2011); *Borningkhof v. Dep't of Justice*, 5 M.S.P.R. 77 (1971).

Standing alone, the hand-written, unsworn statements of C. D., J. A., and M. P. would not be sufficient to establish any part of the charges against Grievant. However, these statements are corroborated to some degree by the testimony of Mr. Black who personally observed and overheard C.D. talking to another student in his classroom. This observed interaction did not occur during an investigatory or custodial interrogation, but in the normal course of students being students. Further, there was no evidence to suggest that the students who provided statements were themselves suspected of some offense, or that they sought to inculpate Grievant in order to exculpate themselves. *Cf*. *Comfort v. Regional Jail & Corr. Facility Auth*., Docket No. 2013-1459-CONS (Apr. 18, 2013) (statements by co-workers, who were themselves suspects in an internal investigation for participating in prohibited behavior, or failing to report prohibited behavior which they observed, and who provided inconsistent statements in the course of that investigation, in an apparent effort to shift blame to the grievant and others, were accorded no evidentiary weight). Indeed, there was no apparent motive for any of these students to fabricate the information they provided to the school administration.

These hearsay statements may also be corroborated by evidence obtained in a search of Grievant's residence. Grievant objects to evidence obtained from a search of his computers, cell phone, flash drives and similar digital devices on the basis that this

evidence was obtained in violation of his right to freedom from unreasonable search and seizure under the Fourth Amendment to the Constitution of the United States, inasmuch as the warrant authorizing the State Police to seize this equipment was quashed as improper. *See generally*, *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914). Further, Grievant contends that certain evidence that was obtained subsequent to the search, including the testimony of certain witnesses identified through examination of stored photos and data taken from various devices confiscated during the search, should likewise be excluded from consideration because that evidence constitutes "fruit of the poisonous tree" derived from the original unlawful search. *See generally*, *Wong Sun v. United States*, 371 U.S. 41 (1963); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

This Grievance Board has previously acknowledged that individuals do not lose their Fourth Amendment rights merely because they work for the government instead of a private employer. *Knight v. Dep't of Health & Human Res.*, Docket No. 2012-1517-CONS (Sept. 20, 2013). *See O'Connor v. Ortega*, 480 U.S. 709, 717 (1987). Further, the Fourth Amendment applies when the government is acting in its capacity as an employer. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989). However, no CCBE personnel were involved in the search of Grievant's property by law enforcement personnel which took place at Grievant's residence. In fact, the only involvement by CCBE personnel was to report a possible crime which triggered a police investigation. The State Police then proceeded to independently obtain a warrant, seize Grievant's property, and conduct a thorough forensic examination of the contents.

The evidence derived from this search was subsequently excluded from a criminal proceeding based upon a defect[5] in the search warrant. Because CCBE was not involved in the illegal search, it is not barred from using evidence derived either directly or indirectly from this search, unless the exclusionary rule and its progeny extend to such proceedings.

Initially, the testimony of J. H. may be considered because the United States Supreme Court has previously determined that the live testimony of a witness is not necessarily barred by the exclusionary rule, even if that witness was identified from evidence obtained in an illegal search, at least where, as here, the witness is appearing in response to a civil subpoena, and there is no evidence of coercion. *See United States v. Ceccolini*, 435 U.S. 268 (1978). Further, as will hereinafter be discussed, the exclusionary rule does not apply to proceedings of this nature in any event.

The exclusionary rule is a judicially created means of deterring illegal searches and seizures. *United States v. Calandra*, 414 U.S. 338, 348 (1974). *See also Stone v. Powell*, 428 U.S. 465, 482 (1976). "Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons." *Calandra*, *supra*. CCBE relies upon *United States v. Janis*, 428 U.S. 433 (1976), to support the proposition that the exclusionary rule precluding introduction of evidence in criminal proceedings does not apply to evidence obtained in violation of the Fourth Amendment which is being offered

[5] The record is less than crystal clear concerning the particular deficiency in the search, although it appears that the criminal statute upon which the State Police relied to request the warrant was not applicable to the facts alleged. Therefore, it is not apparent whether this represents the sort of "police misconduct" which the exclusionary rule was established to address. In any event, because the search warrant was ultimately quashed, this decision will assume that the exclusionary rule would bar the evidence seized from being introduced in a criminal proceeding against Grievant.

in a civil proceeding. *Janis* allowed the use of evidence obtained by state law enforcement officers pursuant to an invalid state court warrant in a federal civil tax proceeding where there was no evidence of federal involvement in the illegal search. *Id*. However, where there is federal involvement in an illegal search (or involvement of the "same sovereign"), the federal courts will nonetheless apply the exclusionary rule to a civil proceeding, when the object of the proceedings is to penalize a person for the commission of an offense against the law, such as a forfeiture proceeding, or an action that allows the imposition of monetary civil penalties. *See One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965); *Boyd v. United States*, 116 U.S. 616 (1886); *United States v. Modes, Inc*., 787 F.Supp. 1466 (U.S. Ct. of Int'l Trade 1992).

Based upon involvement of federal law enforcement personnel in searches that did not meet Fourth Amendment standards, at least two federal courts have excluded improperly obtained evidence from disciplinary proceedings involving federal employees. *See Saylor v. United States*, 374 F.2d 894 (Ct. Cl. 1967); *Powell v. Zuckert*, 366 F.2d 634, 640 (D.C. Cir. 1966). However, the United States Merit Systems Protection Board ("MSPB), a federal agency with jurisdiction to adjudicate adverse personnel actions involving classified federal civil service employees analogous to this Grievance Board, has adopted the position that the exclusionary rule does not apply to its proceedings. *Delk v. Dep't of the Interior*, 57 M.S.P.R. 528 (1993). *Accord*, *Culley v. Defense Logistics Agency*, 60 M.S.P.R. 204 (1993). The MSPB was established as part of the Civil Service Reform Act of 1979, subsequent to the decisions rendered in *Saylor* and *Powell*. *Delk* relied on *Janis*, as well as *INS v. Lopez-Mendoza*, 486 U.S. 1032

(1984), a deportation proceeding which was decided after *Janis*, and subsequent to *Saylor* and *Powell*. The Merit Systems Protection Board continues to follow *Delk* in adjudicating adverse personnel actions. *See Fahrenbacher v. Dep't of Veterans Affairs*, 89 M.S.P.R. 260 (2001).

West Virginia has followed the exclusionary rule in criminal proceedings for many years. *State v. Townsend*, 186 W. Va. 283, 412 S.E.2d 477 (1991); *State v. Davis*, 170 W. Va. 376, 294 S.E.2d 179 (1982). However, West Virginia has declined to apply the exclusionary rule in administrative proceedings involving a driver's license revocation matter. *See Miller v. Toler*, 229 W. Va. 302, 729 S.E.2d 137 (2012). *Accord*, *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d 800 (2012). This is consistent with the approach taken in other jurisdictions. *See Martin v. Kansas Dep't of Revenue*, 285 Kan. 625, 176 P.3d 938 (2008); *Tornabene v. Bonine ex rel. Ariz. Highway Dep't*, 203 Ariz. 326, 54 P.3d 355 (2002); *Motor Vehicle Admin. v. Richards*, 356 Md. 356, 739 A.2d 58 (1999); *Riche v. Director of Revenue*, 987 S.W.2d 331 (Mo. 1999); *Westendorf v. Iowa Dep't of Transp*., 400 N.W.2d 553 (Iowa 1987). *But see State v. Lussier*, 171 Vt. 19, 757 A.2d 1017 (2000) (representing the minority view).

Although the majority of jurisdictions addressing the question have declined to extend the exclusionary rule to driver's license revocation proceedings, it should be noted that the "informed consent" language in each state's legislation may be a controlling factor in reaching this finding. That language appears to have been a significant consideration in the *Toler* decision, although the Court noted that "the exclusionary rule is not usually extended to civil cases." *Toler*, *supra*, at 305, 141, n.

11, *quoting State ex rel. State Farm Fire & Casualty Co. v. Madden*, 192 W. Va. 155, 451 S.E.2d 721 (1994). West Virginia has also refused to extend the exclusionary rule to probation revocation proceedings. *See* Syl. Pt. 3, *Hughes v. Gwinn*, 170 W. Va. 87, 290 S.E.2d 5 (1982).

West Virginia has not previously addressed the specific issue raised here, application of the *Mapp v. Ohio* exclusionary rule to a disciplinary proceeding concerning a public employee. Therefore, it is appropriate to consider the approach taken by other states as to whether the exclusionary rule applies to public employee disciplinary proceedings. Consistent with *Janis*, other jurisdictions have generally declined to extend the exclusionary rule to administrative proceedings relating to the discharge of public employees. *See Ahart v. Dep't of Corrections*, 943 P.2d 7 (Colo. 1996); *Grames v. Illinois State Police*, 254 Ill. App.3d 191, 625 N.E.2d 945 (1993); *Sheetz v. Mayor & City Council of Baltimore*, 315 Md. 208, 553 A.2d 1281 (1989). *But see Turner v. City of Lawton*, 733 P.2d 375 (Okla. 1986) (decided, at least in part, on state constitutional grounds). Those jurisdictions which have declined to apply the exclusionary rule often apply a balancing test before determining that there is no significant deterrent effect against police misconduct to be achieved by excluding evidence obtained in violation of the Fourth Amendment from such administrative proceedings.

Previously, in a case which relied upon both *Janis* and *Delk*, this Grievance Board declined to adopt a general exclusionary rule "precluding admission of evidence obtained in violation of Fourth Amendment rights." *R.H.S. v. Reg'l Educ. Serv. Agency*

IV, Docket No. 96-RESA-348 (Mar. 31, 1997) ("*RESA IV*"). The Grievance Board generally attempts to follow the doctrine of *stare decisis* in adjudicating grievances that come before it. *Adams v. Cabell County Bd. of Educ*., Docket No. 94-06-520 (May 15, 1995); *Chafin v. W. Va. Dep't of Health & Human Res*., Docket No. 92-HHR-132 (Jul. 24, 1992), *citing Dailey v. Bechtel Corp*., 157 W. Va. 1023, 207 S.E.2d 169 (1974). "*Stare decisis*" literally means "to stand by things decided." This is the doctrine of precedent under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation. Black's Law Dictionary 1414 (7th Ed. 1999). This approach is premised upon the belief that the parties whose employment relationships are regulated by the Grievance Board are best guided in their actions by a system that provides for predictability, while retaining the discretion necessary to effectuate the purposes of the statutes being applied. Thus, prior decisions of the Grievance Board are followed unless a reasoned determination is made that the principle previously adopted was clearly in error. *See Adams*, *supra*.

In regard to application of the exclusionary rule to public employee grievances, the Supreme Court of the United States has not overruled *Janis,* nor has the U.S. Merit Systems Protection Board overruled *Delk*. Thus, the two precedents on which this Grievance Board relied at the time of the *RESA IV* decision remain extant. Moreover, since *RESA IV* the West Virginia Supreme Court of Appeals has declined to apply the exclusionary rule to a driver's license revocation proceeding in *Toler*, placing this state with the majority of state jurisdictions which have declined to expand the exclusionary rule to such proceedings. Finally, the majority of state jurisdictions which have

addressed this question have followed *Janis* and refused to expand the court-created exclusionary rule to administrative proceedings involving public employee discipline. Grievant has presented no persuasive argument to show that the West Virginia State Police would be deterred from executing a warrant which they obtained in good faith from a Circuit Court Judge simply because the evidence obtained in that search was not allowed in a hearing to determine whether CCBE acted properly in dismissing a teacher for insubordinate conduct and immorality. Therefore, the evidence previously offered and admitted at the Level Three hearing, which was obtained from the execution of a search warrant that was subsequently quashed, will be considered in determining whether CCBE established the charges against Grievant by a preponderance of the evidence.

Considering evidence that was obtained either directly or indirectly from the search of Grievant's residence and seized personal property, the sworn testimony of J. H. corroborates the hearsay statements of C. D., J. A. and M. P., in that the conduct in which J. H. participated, which is tied to Grievant through the photographs found on one of Grievant's computer devices, labeled with J. H.'s name, represents activity in a similar vein to the suggestive comments concerning "gay porn" attributed to Grievant by these three students. In addition, the nature of the aberrant conversations described by these three students is generally consistent with the sworn testimony of J. H., who communicated with someone, apparently Grievant employing an Internet user name found on one of his computers, and posing as a male high school student.

In regard to the live testimony of J. H., he was a completely candid and credible witness with no apparent motive to provide false or misleading information. Although J. H. gave no appearance of having been lured into explicit posing for another male, he did appear peeved that he had been "scammed" by an adult posing as one of his high school peers. That this adult turned out to be one of his high school teachers did not mitigate the situation. Although the second student neither appeared nor provided a sworn statement, the documentary evidence from the forensic search matches well enough with the student records of J. L. to establish that Grievant also obtained explicit photos from this student over the Internet. See *Shannon v. WorkForce W. Va*., Docket No. 2012-0959-DOC (Jan. 29, 2013).

The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily and capriciously. *Bell v. Kanawha County Bd. of Educ*., Docket No. 91-20-005 (Apr. 16, 1991); *DeVito v. Bd. of Educ*., 169 W. Va. 53, 285 S.E.2d 411 (1981); *Beverlin v. Bd. of Educ*., 158 W. Va. 1067, 216 S.E.2d 554 (1975). W. Va. Code § 18A-2-8(a) provides:

> 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.

Immorality is one of the specific causes listed in W. Va. Code § 18A-2-8 for which an education employee may be disciplined. *See Harry v. Marion County Bd. of Educ*., 203 W. Va. 64, 506 S.E.2d 319 (1998). The West Virginia Supreme Court of Appeals

has observed that immorality connotes conduct which is "not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked, especially, not in conformance with the acceptable standards of proper sexual behavior," as defined in Webster's Dictionary. *Golden v. Bd. of Educ*., 169 W. Va. 63, 67, 285 S.E.2d 665, 668 (1981).

Just exactly what constitutes immoral conduct may be perceived differently by different people. *See Hurley v. Logan County Bd. of Educ*., Docket No. 97-23-394 (Dec. 11, 1997). However, CCBE properly determined that Grievant's conduct in soliciting sexually explicit nude photos from at least one male CCBE student and encouraging one or more other students to discuss their sexual preferences and look at a homosexual website involved immorality prohibited by W. Va. Code § 18A-2-8(a). *See Golden*, *supra*; *Snodgrass v. Wetzel County Bd. of Educ*., Docket No. 2009-1691-WetED (Aug. 18, 2010); *Hurley*, *supra*; *Rosenburg v. Nicholas County Bd. of Educ*., Docket No. 34-86-125-1 (Aug. 4, 1986).

West Virginia State Board of Education Policy 5902, Employee Code of Conduct, establishes "standards of conduct for all West Virginia school personnel." 162 C.S.R. 162 § 3.1 (2002). This Employee Code of Conduct states as follows:

> 4.2 All West Virginia school employees shall:
>
> 4.2.1. exhibit professional behavior by showing positive examples of preparedness, communication, fairness, punctuality, attendance, language, and appearance.
>
> 4.2.2. contribute, cooperate, and participate in creating an environment in which all employees/students are accepted and are provided the opportunity to achieve at the highest levels in all areas of development.

> 4.2.3. maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination.
>
> 4.2.4. create a culture of caring through understanding and support.
>
> 4.2.5. immediately intervene in any code of conduct violation, that has a negative impact on students, in a manner that preserves confidentiality and the dignity of each person.
>
> 4.2.6. demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior.
>
> 4.2.7. comply with all Federal and West Virginia laws, policies, regulations and procedures.

126 C.S.R. 162 (2002).

The forgoing Employee Code of Conduct promulgated by the West Virginia Board of Education in Policy 5902 requires all school employees, *inter alia*, to "demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior." 126 C.S.R. 162 § 4 (2002). Although these standards of conduct are rather broad, anyone in Grievant's position as a tenured teacher ought to have been aware that the particular conduct in which he knowingly and intentionally participated by soliciting and obtaining explicit photos from male students in his school came within the prohibitions in this Code. Respondent maintains that such failure to comply with the established standards of conduct constitutes 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." *Lehman v. Marshall County Bd. of Educ*., Docket No. 2011-1046-MarED (Aug. 9, 2011) *quoting Santer v. Kanawha County Bd. of Educ*., Docket

No. 03-20-092 (June 30, 2003). *See Butts v. Higher Educ. Interim Governing Bd*., 212 W. Va. 209, 569 S.E.2d 456 (2002) (*per curiam*). "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts*, *supra*.

The undersigned Administrative Law Judge finds that CCBE has proven the charge of insubordination against Grievant by a preponderance of the credible evidence of record. As previously noted, Grievant's conduct must necessarily be characterized as wilful and deliberate rather than inadvertent or arising from a misunderstanding or erroneous assumption. Further, Grievant's activity unquestionably contravened the admonition in the Code of Conduct standards that school employees exhibit a high standard of moral and ethical behavior. Finally, these standards represent reasonable expectations for school employees entrusted with the education of students in the public schools of this state.

In addition to establishing a violation of W. Va. Code § 18A-2-8, because these offenses occurred outside school premises at times and places separate from Grievant's employment, CCBE is required to establish a "rational nexus" between the employee's off-duty misconduct and the duties the employee performs. *Rogliano v. Fayette County Bd. of Educ*., 176 W. Va. 700, 347 S.E.2d 220 (1986); *Golden v. Bd. of Educ*., 169 W. Va. 63, 285 S.E.2d 665 (1981). See *Woo v. Putnam County Bd. of Educ*., 202 W. Va. 409, 504 S.E.2d 644 (1998) (*per curiam*). A rational nexus for suspension of a teacher exists:

> (1) if the conduct directly affects the performance of the occupational responsibilities of the teacher; or (2) if, without contribution on the part of the school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the particular teacher to discharge the responsibilities of the teaching position. (citations omitted)

Rogliano, *supra*, at 703-04, 224.

In the instant matter, Grievant's misconduct involved interactions with five individuals who were then students in the same school system where Grievant was employed, including one student who was then in a math class being taught by Grievant. In these circumstances, CCBE established conduct that comes within the first prong of the *Rogliano* test, conduct directly affecting the occupational responsibilities of the teacher. *See Golden*, *supra*; *Hurley*, *supra*.

Having determined that Grievant engaged in immorality and insubordinate conduct contrary to W. Va. Code § 18A-2-8(a), CCBE's determination that Grievant's termination was warranted represents a matter within the Board's discretion, and there was no viable suggestion that this penalty was disproportionate to the offenses charged or constituted an arbitrary and capricious exercise of the Board's substantial discretion.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. Because this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Nicholson v. Logan County Bd. of Educ*., Docket No. 95-23-129

(Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ*., Docket No. 89-41-232 (Dec. 14, 1989).

2. 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, as amended, and must be exercised reasonably, not arbitrarily or capriciously. *See Maxey v. McDowell County Bd. of Educ*., 212 W. Va. 668, 575 S.E.2d 278 (2002); *Beverlin v. Bd. of Educ*., 158 W. Va. 1067, 216 S.E.2d 554 (1975); *Bell v. Kanawha County Bd. of Educ*., Docket No. 91-20-005 (Apr. 16, 1991).

3. Immorality is one of the causes listed in W. Va. Code § 18A-2-8 for which an education employee may be disciplined. *See Harry v. Marion County Bd. of Educ*., 203 W. Va. 64, 506 S.E.2d 319 (1998); *Woo v. Putnam County Bd. of Educ*., Docket No. 93-40-420 (June 2, 1994), *aff'd per curiam* 202 W. Va. 409, 504 S.E.2d 644 (1998).

4. Immorality connotes conduct which is "not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked, especially, not in conformance with the acceptable standards of proper sexual behavior," as defined in Webster's Dictionary. *Golden v. Bd. of Educ*., 169 W. Va. 63, 67, 285 S.E.2d 665, 668 (1981); *Bradley v. Cabell County Bd. of Educ*., Docket No. 99-06-150 (Sept. 9, 1999).

5. 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." *Lehman v. Marshall County Bd. of Educ*., Docket No. 2011-1046-MarED (Aug. 9, 2011) *quoting Santer v. Kanawha County Bd. of Educ*., Docket

No. 03-20-092 (June 30, 2003). *See Butts v. Higher Educ. Interim Governing Bd*., 212 W. Va. 209, 569 S.E.2d 456 (2002) (*per curiam*).

6. An administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. *Hamilton v. W. Va. Dep't of Health & Human Res*., Docket No. 2011-1785-DHHR (Sept. 6, 2012); *Furr v. Dep't of Health & Human Res*., Docket No. 2011-0988-CONS (Dec. 7, 2011); *Kennedy v. Dep't of Health & Human Res*., Docket No. 2009-1443-DHHR (Mar. 11, 2010). *See Warner v. Dep't of Health & Human Res*., Docket No. 07-HHR-409 (Nov. 18, 2008).

7. 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 their statements. *Simpson v. W. Va. Univ*., Docket No. 2011-1326-WVU (May 3, 2012); *Cale v. W. Va. Univ*., Docket No. 2011-1711-WVU (Mar. 22, 2012); *Sinsel v. Harrison County Bd. of Educ*., Docket No. 96-17-219 (Dec. 31, 1996).

8. Hearsay evidence is admissible in the grievance procedure for public employees, but there is no requirement, statutory or otherwise, that it be afforded any

particular weight. *See Simpson*, *supra*; *Cook v. W. Va. Div. of Corrections*, Docket No. 96-CORR-037 (Oct. 31, 1997).

9. Circumstantial evidence alone may be sufficient to meet an employer's burden to prove the charges against a disciplined employee by a preponderance of the evidence. *Shannon v. WorkForce W. Va*., Docket No. 2012-0959-DOC (Jan. 29, 2013); *Galloway v. W. Va. Bd. of Trustees*, Docket No. 90-BOT-388 (Nov. 22, 1991). *See Bailey v. Logan County Bd. of Educ*., Docket No. 93-23-383 (June 23, 1994); *Kirk v. Mingo County Bd. of Educ*., Docket No. 89-29-99 (Sept. 12, 1999).

10. CCBE established by a preponderance of the evidence that Grievant engaged in acts of immorality by soliciting sexually explicit nude photos from at least one male high school student over the Internet, and by encouraging one or more other students to discuss their sexual preferences and to look at a website containing "gay porn" in the course of Internet communications. CCBE further established that Grievant's actions were sufficiently knowing and intentional as to represent a defiance of the established standards of expected conduct in the Code of Conduct for school personnel, thereby constituting insubordination as well. *See Lehman v. Marshall County Bd. of Educ*., Docket No. 2011-1046-MarED (Aug. 9, 2011); *Snodgrass v. Wetzel County Bd. of Educ*., Docket No. 2009-1691-WetED (Aug. 18, 2010); *Santer*, *supra*.

11. In order to discipline a school employee for acts performed at a time and place separate from his employment, a board must demonstrate a "rational nexus" between the conduct performed outside the job and the duties the employee is to

perform. Conduct outside the workplace ceases to be private and a rational nexus exists in at least two circumstances: (1) the conduct directly affects the performance of the occupational responsibilities of the employee; or, (2) if, without contribution on the part of the school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the particular employee to discharge the responsibilities of the teaching position. *Rogliano v. Fayette County Bd. of Educ*., 176 W. Va. 700, 703-04, 347 S.E.2d 220, 224 (1986); *Golden*, *supra*. *See Woo*, *supra.*

12. Respondent established a rational nexus between Grievant's misconduct and his duties as a teacher in that his prohibited activities related to five individuals who were then students in the schools of Cabell County, including one student who was then in a math class taught by Grievant. *See Hurley*, *supra*.

Accordingly, this grievance is **DENIED.**

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

DATE: December 20, 2013

_____

LEWIS G. BREWER
Administrative Law Judge