THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MICHAEL E. COOPER,
Grievant,

v. **Docket No. 2014-0028-RalED**

RALEIGH COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Michael E. Cooper, is employed by Respondent, Raleigh County Board of Education. The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4) on July 3, 2013. The grievance states, "The Raleigh County Board of Education illegally terminated the employment contract of the grievant, in violation of West Virginia law, to teach social studies at Woodrow Wilson High School and to coach football at Independence High School during a special meeting of the Raleigh County Board of Education. For relief, Grievant seeks "the reinstatement of his teaching and contracts, along with back pay and the award of fees and costs[1], with the reinstatement of his contracts to be retroactive to the date of his initial suspension."

[1] "[A]n ALJ for the Grievance Board is not authorized by law to grant attorney's fees or costs. W. VA. CODE § 6C-2-6; *Long v. Kanawha County Bd. of Educ.*, Docket No. 00-20-308 (Mar. 29, 2001); *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996); *Cosner v. Dep't of Transp.*, Docket No. 2008-0633-DOT (Dec. 23, 2008). West Virginia Code § 6C-2-6 states in part, '(a) [a]ny expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense.' W. VA. CODE § 6C-2-6." *Stuart v. Div. of Juvenile Serv*. Docket No. 2011-0171-MAPS (Sept. 23, 2011).

A level three hearing was held on November 19, 2013, before Administrative Law Judge Landon R. Brown[2] in Beckley, West Virginia, at the office of the Raleigh County Commission on Aging. Grievant was represented by David S. Hart, Hayden & Hart, PLLC. Respondent was represented by counsel, Howard Seufer, Bowles Rice LLP. This matter became mature for decision on December 19, 2013, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a teacher and coach at Woodrow Wilson High School and as a coach at Independence High School. Respondent dismissed Grievant from all of his positions after discovering Grievant was engaged in an inappropriate relationship with a student. Respondent proved that Grievant's relationship with the student, while not sexual, was immoral, that Grievant's violation of specific policy was both insubordinate and a willful neglect of duty, and that Grievant's defiance of administration orders was insubordinate. Grievant failed to prove that mitigation of his dismissal was warranted. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant had been employed by Respondent since 1996, serving his first year as a substitute teacher, with his remaining service as a full-time regular employee in various teaching and coaching positions at various schools. During his final year of employment, Grievant was a social studies teacher and assistant wrestling coach at

[2] This case was assigned to the undersigned Administrative Law Judge on March 26, 2014, for administrative purposes.

Woodrow Wilson High School, and was the head football coach at Independence High School.

2. During the seven years Grievant's performance was required to be evaluated, his evaluations were favorable. Grievant has never been advised of any deficiencies in his work performance and has never previously been subject to disciplinary action.

3. In the fall of 2012, M.S.[3] became one of Grievant's students in his social studies class. The next semester, Grievant presented an award to M.S. M.S. had developed a crush on Grievant and, following the award presentation, M.S. began to write Grievant notes.

4. After receiving several notes from M.S., Grievant began to respond to the notes. Grievant and M.S. communicated through notes for a week or so. The notes were exchanged by being placed in Grievant's mailbox in the school's office. Grievant was flattered that M.S. was attracted to him.

5. M.S. is female and was sixteen years old. Grievant is male and was thirty eight years old.

6. Grievant and M.S. then began to exchange electronic messages, either by text or instant messaging[4]. Grievant planned to disguise their communication by saving

[3] The undersigned will follow the past practice of the West Virginia Supreme Court in cases involving underage individuals and will refer to the initials only of the involved students. *See In the Matter of Jonathan P.,* 182 W.Va. 302, 303 n. 1, 387 S.E. 2d 537, 538 n. 1 (1989).

[4] Throughout the remainder of the decision, communication by either text or instant messaging with be referred to as electronic messaging as it is not possible to discern whether particular electronic communications were by text messaging or instant messaging, and there is no practical difference between the two in this context.

M.S.'s phone number under that of a football player. Grievant also messaged M.S. from his son's iPod. Grievant and M.S. were communicating regularly by electronic messaging between May 24, 2013 and May 27, 2013. The texts were flirtatious, discussed meeting in person, and also discussed the possibility that their notes might have been discovered. An example exchange:[5]

> Grievant: You've got guys all over school falling all over you lol and you said I have girls on me lol
>
> M.S.: But they're all the wrong guys. I'm not interested at all. & you definitely do have girls falling all over you
>
> Grievant: How many girls do you think are on me?
>
> Grievant: I did have girl in my room today that drives me crazy. Had her on class she used make me uncomfortable lol
>
> M.S.: I know quite a few that like you. I assume there are many more though. I don't make you uncomfortable do I?
>
> Grievant: Not at all
>
> Grievant: If you think so many girls try get my attention y do you think you have gotten my attention
>
> Grievant: I'll be honest I've always ignored girls up til now
>
> . . .
>
> Grievant: I guess I shouldn't but you have different appeal
>
> Grievant: You stand out in a crowd
>
> M.S.: Oh really? Why do you think that is?
>
> Grievant: I can't tell you everything before I embarrass myself lol

[5] Quotations from the electronic communications throughout the decision will be quoted verbatim.

M.S.: There's no reason for you to be embarrassed. I was just curious, but you don't have to tell me if you don't want to.

Grievant: Your smart. Easy to talk to or write to lol. Very pretty . Just different

The next day another exchange:

Grievant: Only thing u observed about me is that I don't look Like a teacher lol

Grievant: What else you observed?

M.S.: I've noticed that you're a really sweet person. At first, I thought you were the type to be all tough & uncaring. But you're not like that at all. You never seemed to be too worried about getting in trouble for talking to me or writing me back & you're just full of question but that's completely fine because you can keep a conversation going which I like.

Grievant: Well I am worried but not bc of my wife, can't lose my job and career lol.

Grievant: No one has ever called me sweet lol

Grievant: I ask too many questions but I do so to avoid assumptions, which have already lead me wrong with you lol

. . .[6]

M.S.: How have assumptions lead you wrong with me?

Grievant: I thought you wanted more than text buddy lol

. . .

Grievant: You realize I thought u liked me more than just teacher and text buddy. Big assumption there.

[6] This and the next break in text are statements that may or may not have been from Grievant and are not included.

7. One of the handwritten notes was intercepted by a student, who was concerned, made a photocopy of the note, and gave the note to the school's Prevention Resource Officer[7]. After reading the note, the officer gave the note to Assistant Principal Eric Dillon, who gave the note to Principal Marsha Smith.

8. The note is handwritten and contains a conversation between M.S. and Grievant, referencing earlier conversations in which Grievant told M.S. about his reasons for marrying, and his difficulties with his marriage. The note is obviously a continuation of prolonged and intimate discussions between Grievant and M.S. based on references to things previously discussed and previous notes. Importantly, in response to M.S.'s statement that she did not want to get Grievant in trouble with his wife, he responds, "At the moment the notes might get me fired LOL."[8] Grievant also provides a telephone number to M.S. to text message him, and states that he will "put you (M.S.) in my phone as a football player. LOL." Grievant states that they would not be able to communicate through Twitter because "I think it best not to follow one another" and expressing concern that the letter was opened, which might mean that "someone is on to that w[ith] us." For M.S.'s part, her communications sound very much like a teenager with a crush. The note also clearly shows that the relationship was escalating as Grievant provided a telephone number and discussed how the two might begin electronic communication that could be hidden.

9. After reviewing the note, Principal Smith, along with Assistant Principal Patricia Zutaut, met with Grievant on May 28, 2013. Grievant admitted that the note

[7] A Beckley Police Department Officer stationed at the high school through grant funding.

[8] A customary abbreviation in texting for "laugh out loud."

was an exchange between him and M.S, one of about twenty such exchanges. Principal Smith believed these communications to be inappropriate and told Grievant, "This has to end." Principal Smith also told Grievant that she would be reporting the incident to Miller Hall, Director of Secondary Education.

10. Immediately after this meeting, Grievant went to the class M.S. was attending and took her out of her classroom. He and M.S. had a brief conversation in the hallway. Grievant told M.S. that Principal Smith had copies of the note and told her to delete their electronic communication. M.S. was very upset that Grievant might be "in trouble."

11. Later the same day, May 28, 2013, Director Hall and Jeffrey McClung, Director of Pupil Services, came to the high school to meet with Grievant regarding the note. Grievant again admitted that the note was an inappropriate exchange between him and M.S. He denied electronic communication with M.S via text or instant messaging. At this time, Grievant was specifically told to have no further contact with M.S.

12. That night, Grievant messaged M.S. using his son's iPod to tell her that he had met with several school administrators and that they had several of their notes. M.S. assured him that she had convinced her parents that Grievant had done nothing wrong, that she and her mother were meeting with school officials the next day, and that her parents had agreed not to get Grievant "in trouble."

13. On May 30, 2014, Superintendent James Brown, Director McClung, and Principal Smith met with Grievant. Grievant again admitted to the correspondence but denied communicating with M.S. by electronic messaging. Superintendent Brown told

Grievant to have no further contact with M.S. Superintendent Brown gave Grievant the option of either resigning or being fired. Grievant resigned in writing; however, he withdrew his resignation about an hour later. Superintendent Brown then suspended Grievant without pay and informed him that he would recommend Grievant's termination to the Board.

14. The correspondence between Grievant and M.S. was also reported to Child Protective Services and the police. Because of a potential conflict with the West Virginia State Police, the Beckley police agreed to investigate.

15. Child Protective Services conducted an investigation, but concluded that no neglect or abuse had occurred.

16. Detective Morgan Bragg conducted the investigation for the Beckley police. As part of the investigation, Detective Bragg received permission from M.S. and her mother to examine M.S.'s cell phone. The Beckley police department has software that can retrieve deleted electronic messages from a cell phone. Detective Bragg was able to retrieve thousands of deleted messages from M.S.'s phone.[9] Included in those messages are many messages between M.S. and Grievant, including the messages referenced above.

17. No criminal charges have been filed by the Beckley police department.

18. Following a lengthy disciplinary hearing before the School Board, the School Board ratified Grievant's suspension and accepted Superintendent Brown's recommendation that Grievant's employment be terminated.

[9] The Beckley police department has a technology that can retrieve deleted electronic messages from a phone, but it does not retrieve the associated telephone number if the contact information from the number has been deleted.

19. The communications between Grievant and M.S. were not sexual in nature, but M.S.'s interest in Grievant was romantic, a fact of which Grievant was aware and encouraged. Grievant's communications with M.S. were flirtatious, manipulative, and wholly inappropriate for a teacher to have with a student.

20. The relationship between Grievant and M.S. was emotionally damaging to M.S. She has blamed herself for the negative consequences Grievant has faced, and is still attempting to contact Grievant to obtain his forgiveness.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. VA. CODE § 18-29-6; *Hoover v. Lewis County Bd. of Educ.,* Docket No. 93-21-427 (Feb. 24, 1994); *Landy v. Raleigh County Bd. of Educ.,* Docket No. 89-41-232 (Dec. 14, 1989). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

The authority of a county board of education to terminate an employee must be based on one or more of the causes listed in West Virginia Code § 18A-2-8 and must be exercised reasonably, not arbitrarily or capriciously. Syl. Pt. 2, *Parham v. Raleigh County Bd. of Educ.*, 192 W. Va. 540, 453 S.E.2d 374 (1994); Syl. Pt. 3, *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). The causes are:

> 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.

W. VA. CODE § 18A-2-8(a).

Grievant challenges much of the evidence Respondent presented in this case. It is important to remember that the presentation of evidence in administrative cases is different from that of criminal cases, and that the burden of proof is only a preponderance of the evidence. The rules of evidence do not strictly apply, and hearsay is admissible. In determining the facts of this case, it is necessary to review the weight to be afforded to the note and the deleted text messages, and to determine the credibility of certain witnesses. Although the videotaped interview of M.S. by Detective Bragg was properly admitted into evidence, the interview was not considered by the undersigned in determining the facts of the case.

The handwritten note is afforded great weight. Grievant has never denied writing the note, so it is an indisputable true example of the communication between Grievant and M.S. The deleted text messages are given weight. Although the ability to attribute statements to Grievant is somewhat limited due to the technology used to retrieve the messages, Grievant has now admitted that he and M.S. exchanged electronic communications. Although it is difficult to determine if some of the conversations were actually with Grievant, there are other conversations that can be identified with a reasonable degree of certainty to Grievant based on the content and context.

Credibility determinations are not necessary for all of the witnesses who testified at the school board hearing and the level three hearing. It is not necessary to assess the credibility of testimony regarding a contemporaneous allegation of sexual

harassment by another teacher in another school. It is not proper to litigate the facts of that case in this grievance. Testimony regarding that case is only relevant as to the basic nature of the conduct and the resulting penalty for purposes of determining whether it might present a mitigating factor for Grievant in this grievance. Credibility determination is made for those witnesses whose testimony directly bears upon the conduct of Grievant alleged to be immoral, insubordinate, or a willful neglect of duty.

In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Grievant is not credible. He has an obvious motive to lie in order to regain his job. He has previously shown his willingness to lie to retain his job when he lied to administrators about having electronic communications with M.S. Also, several of Grievant's statements were contrary to other evidence, not plausible, or changed over time. For example, he testified in the school board disciplinary hearing that he pulled M.S. out of class to tell her not to contact him anymore. However, that very evening, Grievant contacted M.S. through electronic messaging. Considering that he had already lied to Principal Smith about the electronic communication and afterward lied to

Directors Hall and McClung about the electronic communication, it is obvious that Grievant pulled M.S. out of class in order to tell her to delete the electronic communications. In his level three testimony, Grievant basically said that what he did that was wrong in his conduct was the method by which he communicated with M.S., writing notes and sending electronic communication, not the content of the communications. He testified that he did not think sending a text message to a student would get him fired. This testimony is not consistent with his prior admission to school administrators that he was flattered by M.S.'s attention and knew the note was inappropriate, and with his statement in the note and electronic message that the communication could cost him his job.

Director McClung was mostly credible. Director McClung's demeanor in the level three hearing was poor. His answers to questions were often non-responsive or evasive. However, none of the questioning at level three was about the facts of this grievance. All questioning was to very specific facts relating to the conduct and discipline of another employee. Therefore, it is possible that Director McClung's evasiveness was due to lack of preparation to speak in such detail about a situation only tangentially related to this grievance. Director McClung's testimony at the school board's hearing about the actual facts of this grievance do not seem similarly problematic. Director McClung's account of what Grievant and Director McClung discussed in their meeting seems plausible and is consistent with Principal Smith's account of the same meeting. While Director McClung could have a possible motive to lie to defend his actions in the case and save the school board money, it does not

appear that he is lying about the meeting with Grievant, nor does it appear he has any bias against Grievant.

Principal Smith was credible. She does not appear to have any motive to lie or bias against Grievant. Her level three testimony was calm and direct, and was consistent with her testimony at the school board hearing.

Respondent proved the following facts by a preponderance of the evidence: Grievant participated in a written correspondence with M.S., a sixteen year old female student. Grievant encouraged the correspondence even though he knew M.S. had developed a crush on him and her interest was romantic in nature. He was flattered that his sixteen year old student was attracted to him. Grievant escalated the communication by providing a telephone number so that the two could communicate by electronic messaging. Grievant communicated with M.S. through electronic messaging. The nature of the communication was not that of teacher and student, but was flirtatious and more as if Grievant was M.S.'s peer. Grievant was attempting to escalate the relationship by encouraging M.S. to meet with him alone and to make the relationship more than "just text-buddy." Grievant's behavior was not an isolated lapse of judgment, but a continuing, evolving, inappropriate relationship. Grievant knew his communications with M.S. were wrong, worried that he might lose his job if it was discovered, and took steps to conceal the communications. When confronted, Grievant lied about his electronic communications with M.S. Grievant continued to communicate with M.S. through electronic means even after being instructed by Respondent to cease communication with M.S. M.S. has been emotionally harmed by the actions of Grievant.

Based on these facts, Respondent contends that it had good cause to dismiss Grievant for immorality, willful neglect of duty, and insubordination. Grievant contends that Grievant's conduct was not immoral because it was not sexual in nature, that Grievant was not insubordinate, and that the punishment of termination was too harsh for Grievant's proven actions. Each of these will be addressed under heading below.

Immorality

"Immorality is an imprecise word which means different things to different people, but in essence it also connotes conduct 'not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior.'" *Golden v. Board of Education of County of Harrison*, 169 W. Va. 63, 67, 285 S.E.2d 665, 668 (1981) (citation omitted). *See also Harry v. Marion County Bd. of Educ*., 203 W. Va. 64, 506 S.E.2d 319 (1998); *Kennard v. Tucker County Bd. of Educ*., Docket No. 01-47-591/628 (Mar. 12, 2002). "The conduct need not be of a sexual nature." *Kimble v. Kanawha County Bd. of Educ*., Docket No. 2009-1640-KanED (Nov. 30, 2009) ***aff'd***, Kan. Co. Cir. Ct. Civil Action No. 09-AA-205 (July 2, 2013) (citing *James v. West Virginia Bd. of Regents*, 322 F. Supp. 217 (S.D. W. Va. 1971) ***aff'd***, 448 F.2d 785 (4th Cir. 1971); *Bledsoe v. Wyoming County Bd. of Educ.*, 183 W. Va. 190, 394 S.E.2d 885 (1990); *Smith v. Kanawha Co. Bd. of Educ.*, Docket No. 2008-0286-KanEd (July 18, 2008); *Powell v. Hardy Co. Bd. of Educ.*, Docket No. 04-16-412 (April 4, 2005))

Grievant is correct that there has been no proof of sexual conduct, however, immorality is not just about sexual behavior; it is the failure to conform with accepted principles of right and wrong behavior or behavior contrary to the moral code of the

community. It is clearly wrong for a teacher to take advantage of the romantic feelings of his student towards him. Grievant was flattered that M.S. found him attractive. As her teacher, Grievant should have been concerned by M.S.'s continued pursuit of his attention. Instead, he used her to talk about his adult problems and inflate his own ego. He communicated with her as if he were her peer, not as an adult in charge of her welfare. He encouraged her inappropriate attentions for his own benefit with no concern for the consequences to M.S.

Grievant's willful manipulation of M.S. for his own benefit has caused emotional harm to her. Grievant's own testimony shows the harm M.S. has suffered. She was very upset that Grievant was "in trouble" and has continued to blame herself and feel guilty for the consequences Grievant faced for his own adult actions. Tellingly, Grievant does not care about those consequences for M.S., instead using her attempts to contact him to obtain forgiveness as some sort of proof that this situation is M.S.'s fault. He blames her for what happened because she initiated contact with him, as if this sixteen year old girl had some sort of irresistible siren song he was powerless to resist. Grievant's victim-blaming a sixteen year old girl is not in conformity with the moral code of the community. Grievant's conduct was not a momentary lapse in judgment, but was done with conscious intent. Grievant knew his conduct was wrong from the start. He said in the note that notes might get him fired. Also, Grievant lied on multiple occasions about the extent and nature of his contact with M.S and tried to cover up what he had done. Grievant's conduct was immoral.

Willful Neglect of Duty

Respondent alleges Grievant is guilty of willful neglect of duty for his violation of two of Respondent's policies: West Virginia Education Policy 5902, Employee Code of Conduct, and West Virginia Education Policy 2460, Education Purpose and Acceptable Use of Electronic Resources, Technologies and the Internet. In relevant part, West Virginia Education Policy 5902 requires school employees to "exhibit professional behavior by showing positive examples of …communication…" and to "demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior." W. VA. CODE ST. R. § 126-162-4.2. West Virginia Education Policy 2460 states in relevant part:

> School personnel will maintain a professional relationship with all school students, both inside and outside of the classroom and while using any form of social media and other electronic communication. Unethical conduct includes but is not limited to…soliciting, encouraging, or consummating a romantic or inappropriate relationship with a student, regardless of the age of the student…"

W. VA. CODE ST. R. § 126-41-5.8.b.1.

Willful neglect of duty is a knowing and intentional, rather than negligent, act, and is more serious than just incompetence. *Bd. of Educ. v. Chaddock*, 183 W.Va. 638, 640, 398 S.E.2d 120, 122 (1990) (per curiam); *Costello v. Monogalia County Bd. of Educ.* No. 13-0039 (W.Va. Supreme Court, November 8, 2013) (memorandum decision).

Under West Virginia Education Policy 2460, Grievant had a duty to maintain a professional relationship with M.S. and to refrain from soliciting or encouraging a romantic or inappropriate relationship with her. Grievant's relationship with M.S. as

discussed above is an obvious failure of that duty. The development of the relationship was clearly intentional, unfolding over time and being escalated by Grievant. Furthermore, despite Grievant's argument to the contrary, his duty was clear. It should have been clear to him even without a specific policy, but there was a specific policy of which he was, or should have been, aware. Grievant signed the Employee Technology Acceptable use Agreement Form on August 15, 2012, in which he was informed he was required to abide by Policy 2460, and agreed to comply with the policy. Grievant's violation of Policy 2460 constitutes willful neglect of duty. The allegation that Grievant's violation of Policy 5902 also constituted willful neglect of duty was not proven by a preponderance of the evidence as it was not proven that Grievant was aware of the policy.

Insubordination

In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ.,* Docket No. 94-01-394 (Jan. 31, 1995). This Grievance Board has previously recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988) (*citing Weber v. Buncombe County Bd. of Educ*., 266 S.E.2d 42 (N.C. 1980)).

Respondent alleges Grievant was insubordinate in his violation of policy and in defying the orders of administration by pulling M.S. from class to talk and in continuing to communicate with M.S. through electronic messages. As discussed above, Grievant knowingly and intentionally violated Policy 2460. This action, in addition to being a willful neglect of his duty, is also insubordinate. Grievant was also insubordinate in failing to follow the orders of administration. In the morning of May 28, 2013, Principal Smith, after reviewing the note and discussing the situation with Grievant, told him, "This has to end," which was an unnecessarily vague pronouncement. However, later in the day, administration specifically told Grievant to have no further communication with M.S. Between the two meetings, Grievant pulled M.S. out of class to tell her that the note had been discovered and to delete their electronic communication. Later that evening, Grievant had further electronic communications to M.S. The physical meeting viewed in isolation might not have constituted insubordination given the vagueness of the instruction; however, Grievant's later electronic communication shows his intention to violate the orders of administration. It had been made clear to Grievant that the note in isolation was very concerning to school administration and was inappropriate. Since Grievant had lied about the additional electronic communication with M.S., school administration was unaware at the time of the meetings that Grievant had also been communicating electronically with M.S. Taken as a whole, Grievant's conduct in having continuing communication with M.S. was insubordinate.

Mitigation

Grievant also argues in the alternative that Grievant's termination from employement should be mitigated. 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 5, 1997).

Grievant argues that he was a good, long-term employee, that the penalty was disproportionate to the offense, and that Respondent had not clearly prohibited his conduct. Grievant also presented a substantial amount of evidence regarding a contemporaneous incident in which a substitute teacher had been accused of sexual

harassment of a student. In that instance, behavior had been reported to another school's principal, and it appears no real investigation had been done. However, once this incident was brought up in Grievant's disciplinary hearing before the school board, Respondent conducted an investigation and the substitute teacher was subsequently terminated from employment. While it appears that the situation regarding this other teacher may have been handled poorly, it is not appropriate to litigate that issue in this grievance. The actions and subsequent discipline of the other teacher are relevant to this grievance only insofar as it compares to Grievant's action and discipline as a possible mitigating factor. As that teacher was also terminated from employment, it in no way supports Grievant's argument for mitigation

During the seven years Grievant was required to be evaluated, his evaluations were favorable. Grievant has never been advised of any deficiencies in his work performance and has never previously been subject to disciplinary action. These are factors in favor of mitigation. However, there are no other mitigating factors present in this case. The penalty is not disproportionate to the offense. Grievant's conduct was clearly prohibited as it violated both specific policy as well as the basic fiduciary duty owed by a teacher to a student. Mitigation is extraordinary relief, and Grievant has failed to prove it is warranted in this case.

Conclusion

A review of all the evidence shows that Grievant had a continuing disregard of M.S.'s best interests in favor of his own inappropriate interests. Even though he knew it was wrong, he was flattered by M.S.'s attention, encouraged her inappropriate feelings, and cultivated a self-serving relationship with her. His response throughout the

grievance procedure has been to blame M.S, stating that she is the one who contacted him first and continued to pursue him. He points out that she continues to attempt to contact him, as if that absolves him of responsibility rather than proving the continuing damage to M.S. that Grievant has caused. When confronted with his behavior, his continuing response has been to attempt to cover it up, lie, and encourage M.S. to do the same. This attitude confirms that the Board's decision to terminate him was necessary.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. VA. CODE § 18-29-6; *Hoover v. Lewis County Bd. of Educ.,* Docket No. 93-21-427 (Feb. 24, 1994); *Landy v. Raleigh County Bd. of Educ.,* Docket No. 89-41-232 (Dec. 14, 1989). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. The authority of a county board of education to terminate an employee must be based on one or more of the causes listed in West Virginia Code § 18A-2-8 and must be exercised reasonably, not arbitrarily or capriciously. Syl. Pt. 2, *Parham v. Raleigh County Bd. of Educ.*, 192 W. Va. 540, 453 S.E.2d 374 (1994); Syl. Pt. 3, *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). The causes are:

> 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.

W. VA. CODE § 18A-2-8(a).

3. "Immorality is an imprecise word which means different things to different people, but in essence it also connotes conduct 'not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior.'" *Golden v. Board of Education of County of Harrison*, 169 W. Va. 63, 67, 285 S.E.2d 665, 668 (1981) (citation omitted). *See also Harry v. Marion County Bd. of Educ*., 203 W. Va. 64, 506 S.E.2d 319 (1998); *Kennard v. Tucker County Bd. of Educ*., Docket No. 01-47-591/628 (Mar. 12, 2002).

4. Immoral conduct "need not be of a sexual nature." *Kimble v. Kanawha County Bd. of Educ*., Docket No. 2009-1640-KanED (Nov. 30, 2009) ***aff'd***, Kan. Co. Cir. Ct. Civil Action No. 09-AA-205 (July 2, 2013) (citing *James v. West Virginia Bd. of Regents*, 322 F. Supp. 217 (S.D. W. Va. 1971) ***aff'd***, 448 F.2d 785 (4th Cir. 1971); *Bledsoe v. Wyoming County Bd. of Educ.*, 183 W. Va. 190, 394 S.E.2d 885 (1990); *Smith v. Kanawha Co. Bd. of Educ.*, Docket No. 2008-0286-KanEd (July 18, 2008); *Powell v. Hardy Co. Bd. of Educ.*, Docket No. 04-16-412 (April 4, 2005)).

5. Respondent proved by a preponderance of the evidence that Grievant's conduct, though not of a sexual nature, was immoral.

6. Willful neglect of duty is a knowing and intentional, rather than negligent, act, and is more serious than just incompetence. *Bd. of Educ. v. Chaddock*, 183 W.Va.

638, 640, 398 S.E.2d 120, 122 (1990) (per curiam); *Costello v. Monogalia County Bd. of Educ.* No. 13-0039 (W.Va. Supreme Court, November 8, 2013) (memorandum decision).

7. Respondent proved by a preponderance of the evidence that Grievant's encouragement of an inappropriate relationship with a student was in violation of policy and constituted willful neglect of duty.

8. In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ.,* Docket No. 94-01-394 (Jan. 31, 1995).

9. This Grievance Board has previously recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988) (*citing Weber v. Buncombe County Bd. of Educ*., 266 S.E.2d 42 (N.C. 1980)).

10. Respondent proved by a preponderance of the evidence that Grievant's violation of policy and failure to follow the orders of administration was insubordinate.

11. 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).

12. "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).

13. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994). *See Austin v. Kanawha County Bd. of Educ*., Docket No. 97-20-089 (May 5, 1997).

14. Grievant failed to prove that his punishment should be mitigated.

Accordingly, the 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: April 30, 2014

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Billie Thacker Catlett
Administrative Law Judge