

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**JOHNNIE LEE CANTERBURY,
Grievant,**

v.

Docket No. 2016-0725-RaIED

**RALEIGH COUNTY BOARD OF EDUCATION,
Respondent.**

DECISION

Grievant, Johnnie Lee Canterbury, was employed by Respondent, Raleigh County Board of Education. On October 28, 2015, Grievant filed this grievance against Respondent stating:

1. Discriminatory actions against myself as compared to others.
2. Not provided with total recording of day in question - - recording has been edited for content.
3. Authority undercut by administrative official.
4. Statements were made to the opinion that if I were alone with the girls of my basketball team, I would say something inappropriate to them.
5. Statements that I had discussed this matter with several people without providing names or proof.
6. Calling me a liar.

For relief, Grievant seeks to be reinstated as a substitute teacher and head varsity coach of the Liberty and Raleigh girls basketball teams.

Grievant was dismissed from his positions as substitute teacher and coach following a hearing before the Raleigh County Board of Education. The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held on January 4, 2016, before the undersigned at the Grievance Board's

Beckley, West Virginia office. Grievant appeared *pro se*¹. Respondent was represented by counsel, Howard Seufer, Bowles Rice LLP. This matter became mature for decision on February 8, 2016, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a substitute teacher and coach. Respondent terminated Grievant's contract for insubordination. Grievant asserted that he has been discriminated against because of his religion, that other employees had received lesser discipline for more serious conduct, and that he should have received no more than a thirty-day suspension. There is no evidence that the school board or administration was improperly motivated by religious discrimination in its dismissal of Grievant. Respondent proved that Grievant's conduct violated the employee code of conduct and was insubordinate. Respondent's position that termination of Grievant's contracts was necessary due to Respondent's concern that Grievant's behavior would be repeated is reasonable and supported by the evidence. Grievant failed to prove that mitigation of his dismissal is warranted. Respondent proved that termination of Grievant's contracts was justified. 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:

¹ For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

Findings of Fact

1. At the time of his dismissal, Grievant was employed by Respondent as a substitute teacher and coach. Grievant had previously been employed by Respondent as a regular full-time teacher from December 2000 until he retired from regular full-time teaching in June 2013. Prior to beginning his teaching career, Grievant had previously worked as a coal miner and then as a social worker.

2. In September 2015, Grievant was assigned as a substitute at Trapp Hill Middle School for a teacher on a leave of absence. Grievant substituted for this teacher for multiple days. One of the classes for which he substituted was a seventh grade math class. Although the teacher had not left lesson plans for this class, Grievant had been instructed to follow the plans of another teacher who was teaching the same class.

3. On Wednesday, September 16, 2015, several days into Grievant's substitute assignment, a student in the seventh grade math class used her school-provided tablet computer to record multiple portions of the class, including a thirteen-minute segment of statements made by Grievant that were the basis for Grievant's dismissal.

4. The recording begins in the middle of Grievant's statements regarding a male student who had been disrupting class:

GRIEVANT: [unintelligible] and take away from 1, 2, 3, 4, 5, 6, 7, 8 [pause], 9, 10, 11, 12, 13, 14 other kids' education because my kid wanted to be cute. I'd beat your hind-end if you was my son. You know what? It's just like she said the other day, said, "If you show a kid respect, they'll show you respect." Excuse me, have I shown you anything but respect in this class?

STUDENT: Yes.

GRIEVANT: I have?

STUDENT: I mean, no, no. I meant, like, the [unintelligible].

GRIEVANT: Let me ask you something. When I say about 5 times to do something and you don't do it, what am I supposed to do? Say, "oh, Honey, please do that"?

STUDENT: No.

GRIEVANT: What?

STUDENT: You can take away from the kid, but you can't—

GRIEVANT: What?

STUDENT: You shouldn't say that you're going to hit somebody.

GRIEVANT: I shouldn't say what?

STUDENT: You shouldn't say you're going to hit somebody.

GRIEVANT: If it's my child, and my child is keeping 14 other kids from being educated—

STUDENT: Why don't you just put him out of the class?

GRIEVANT: Why would I what?

STUDENT: Why don't you just put him out of the class?

GRIEVANT: Because I [unintelligible] a teacher. I said if he was my son.

STUDENT: No, I'm saying if he's causing that much problem, why don't you just put him out of the class?

GRIEVANT: Because I'm [unintelligible] teachers. I couldn't put him out of class.

STUDENT: You could take away from him. You could put [unintelligible]—

GRIEVANT: Well, where would I put him!? In somebody else's class where he can act up!?

He has to be taught!

You kids got to learn that you've got to have manners. You've got to have manners, and I don't think I came in this classroom

[unintelligible] bad manners. I don't think I did, and when you're a 7th grader and you don't have good manners, you need to be taught manners. And if you don't have good work ethics, you need to be taught work ethics. That is not my job! That is your parents' job, and if you aren't being taught at home, then somebody in this school's got to do something about it. Because letting kids come into the school and disrupt it is why education is so pitiful. You didn't *have* this problem when I went to school. Then why do you have it now? Because you can't do anything with the poor little babies.

5. Grievant then proudly describes a troubling incident with his own son when Grievant's son "thought he was going to be in a gang." After describing that his son was thirteen and 6'3" and that Grievant and his son both weighed 215 pounds. Grievant stated, "I went and opened his closet door and was breaking hangers" and told him "I'll put you in a gang." Grievant declared: "My children do not disrupt other people! That's the difference between me raising my kids and other people *not* raising theirs."

6. Grievant then goes on to make disparaging remarks about his ex-wife and children and about "kids nowadays."

But, and I'm not saying that paddling is the only thing, but listen to this. When I was married, I had a little—two stepdaughters. Abbie was only about 6 when this happened. You think she didn't know that her mother was the queen of idle threats? "I'll bust your hind-end if you keep doing that!" She never did, so one day she said, "I'll take everything in your room out. I'll take your phone out and I'll take your computer out and I'll take all your games out." Abigail looked at her and said, "Mommy, I can do this for hours." Yeah, 6 years old. Looked at her and said, "I can do this for hours." She said, "I can entertain myself like this for hours." She knew her mother wasn't going to do anything. That's what's wrong with kids nowadays. "I'm going to get you if you don't quit that!" I gave them one warning. I could always whip my kids. My daughter never got a whipping from me. You know why? She never acted up. She knew what I expected. But my son told me he's going to be a butthole.

7. Grievant then continued to disparage the parents of the children in the substitute class, describing his previous fifth grade class and stating: “The kids knew what to do, and they did it, because they were disciplined and their parents raised them properly. . .”

8. Demonstrating that Grievant was not just speaking in general terms, but about the specific students in his class, Grievant said, “I came in here to teach, and some of you think that teachers should just hump² up and take anything you want to do to them.”

9. Grievant then expresses further contempt and sarcasm for the discipline process of the school.

And that’s what’s wrong with schools now. It is! There’s no discipline in schools. Put them in ISS³. They sit in there and play with their phone. Tell me I’m lying! Tell me I’m lying! They sit right in ISS and sit and text and everything else with their phones. Tell me I’m lying! Yeah, that’s a lot of discipline, isn’t it? If you were in my ISS, you wouldn’t look up, because if you did something bad enough to get in there, you’d work or you’d get suspended, one of the two. And that’s the way it should be. If you did something bad enough to get put in ISS, to get separated from the other students, you should have to work, and if you’re not working, write you up and send you home. That’s the way it should be, but that’s not the way it is. It’s “oh, Honey, I’m sorry. I offended you. I tried to get you to do some work and you didn’t want to. I’m sorry. You’re right, I’m wrong. I didn’t go to college just to mess you up.”

10. Grievant then, inexplicably, after talking about how much his girls basketball team players love him, begins talking about gay marriage.

Because they know I’m doing what’s right. And just because our society says -- that’s just like – I’ll give you a “for instance.” Just because the law says – and I’m not taking sides, okay. I’m not taking sides. I’ll give you two things. Gay rights. Just

² The transcript of the recording had the word “huff” but Grievant had stated that the word was actually “hump.”

³ In-school suspension.

because they say a man and a man can get married, and a woman and a woman can get married—just because the law says it does not make it morally right.

11. Grievant then goes on to abortion.

Just because the law says that you can kill an unborn child—just because the law says you can does not make it morally right. Now, I will take a stand on that. Killing any infant unborn is wrong. I don't care what nobody says. Fire me! I don't care. I'm not changing my tone, but people that claim that they're gay can do whatever they want to do. It doesn't offend me, because it's not none of my business. Right? If it doesn't affect me, it's none of my business, but killing an unborn child does affect me. It breaks my heart. There are so many people out here that can't have children, that want children, that if those children would be brought to term and born—okay, how can they call going to Mars and finding a speck of something on there, they call that life. How do you teach through that, is what I want to know? That's not allowed in many schools. That's not allowed. You send somebody to the room to get the kids. Okay, I'm finished. All I know is how can you say that a speck of something on Mars is life? "We found life on Mars!" But a baby growing in a woman's stomach is not life. Somebody explain that to me. How would you like to think that—if your mommy would have aborted you?

. . .

You wouldn't be here right now. You need to—guys, I'm not telling you to think its right or wrong. I'm telling you nobody's going to tell me abortion is right. If my daughter—I have a daughter—and if my daughter had gone out here and something happened—she got jumped and got raped and she'd have been expecting a child, I wouldn't have wanted her to abort it, because you know what? God said that child needs to live. That's the reason that girl got pregnant. Not the reason that she was—somebody jumped her and did that to her, but if God had wanted that baby to live, it would have been living. God has a right to give life, he has a right to take life away, and that's the *only* person that does. And you can go home and tell your mommy and daddy, grandma and grandpa, brother and sister I said that. I couldn't care less! If they want to fire me tomorrow for me taking that stance, I'll be fired. Okay? And I mean it. I mean it with all my heart.

12. The Grievant then told the class:

I've seen the pictures of those kids that—babies—they reach up in there with those forceps and crush their brains and everything else. They're breathing, their hearts are beating, and they kill the babies. Yes?

13. When a female student then spoke up to say that she did not want to talk about it or hear it, Grievant responded:

But you want to hear your opinion, but nobody else's. That's exactly what I thought. I thought that from Friday when you said that about showing respect and stuff.

When the student answered "It makes me. . ." Grievant interrupted in a harsh and belittling manner:

Excuse me! I'm talking! I didn't interrupt you. You want *your* opinion heard, but nobody else's. That's the way the United States is now. It's just—you think it's funny? Wait 'til you grow up. Wait 'til you grow up. Wait 'til you grow up. You won't think it's so funny when you're paying your tax money to see children killed. Yeah. Go home and tell your mommy, I don't care. I really don't.

14. Grievant is then interrupted by a ringing telephone and the recording ends.

15. Grievant's tone throughout the recording is loud, aggressive, and harsh. Statements regarding student behavior and directed to students were sarcastic, contemptuous, and belittling. Grievant does suffer from partial hearing loss, but his loud tone on the recording was not the same as his tone during the level three hearing, and his volume on the recording increased with his anger.

16. That same day, in the late afternoon, the student and two other female students went to Assistant Principal, Lora Pennington, concerned about Grievant's behavior towards them. Ms. Pennington spoke with each student individually. The students were all in different classes with Grievant. The students in the morning classes

complained that Grievant was “mean” and “yelling.” The student who made the recording said that Grievant was saying inappropriate things and that she “did not want others to have to hear those same things.”

17. The student gave Assistant Principal Pennington her tablet computer so that Ms. Pennington could listen to the recording. Ms. Pennington did not listen to the recording in the student’s presence.

18. Because there were multiple recordings on the tablet, and Assistant Principal Pennington was busy and getting interrupted, she did not listen to the thirteen-minute segment in its entirety until Friday afternoon.

19. Assistant Principal Pennington believed Grievant’s statements to be inappropriate and took the tablet to Principal Jerry Bawgus.

20. Also on Friday afternoon, the recording student’s parent called the school and complained about the incident to Principal Bawgus.

21. After listening to the recording, Principal Bawgus and Assistant Principal Pennington called Randy Adkins, Director of Human Resources,⁴ who instructed him to contact Gary Nichols, Director of Secondary Education, who is Principal Bawgus’ supervisor.

22. Principal Bawgus and Assistant Principal Pennington played the recording for Director Nichols over the phone. Director Nichols instructed them to keep the tablet computer and that Director Nichols would come to the school on Monday morning.

⁴ Effective November 16, 2015, Mr. Adkins is now the Assistant Superintendent for Curriculum and Instruction.

23. On Monday morning, because they needed to return the student's tablet to her, Director Nichols played the recording from the student's tablet and recorded it on his own tablet.⁵ There is some ambient noise from this procedure on the recording.

24. Upon return to the central office, Director Nichols played the recording for HR Director Adkins and Superintendent David Price. All were disturbed by Grievant's behavior on the recording, and Superintendent Price determined that they would have a conference with Grievant regarding his behavior

25. The conference was held on September 22, 2015, and was attended by Grievant, Superintendent Price, HR Director Adkins, and Director Nichols. Using the recording, HR Director Adkins prepared a list of some of the things Grievant had said in the recording. Superintendent Price used this list to question Grievant about the statements he had made. Grievant admitted to some of the statements, firmly denied some of the statements, and disagreed with others, stating that it was not exactly what had been said or that it was not meant in that way. Grievant was then informed that the statements had been recorded. Grievant did not dispute the recording's accuracy. Grievant was not surprised or shocked by his behavior as revealed by the recording, as one would expect if this outburst was as out of character as Grievant has asserted, but Grievant was instead angered that he was going to be disciplined.

26. By letter dated September 23, 2015, Superintendent Price placed the grievant on administrative leave from his duties as a substitute teacher and coach. The letter also informed the grievant that he would ask the Board to terminate both contracts.

⁵ Director Nichols' recording is the recording that was submitted to the Board of Education and the Grievance Board as evidence.

Superintendent Price's determination was based on Grievant's "unethical and inappropriate comments that created an offensive academic environment," citing the Employee Code of Conduct, which requires teachers to demonstrate responsible citizenship by maintaining a high standard of conduct, self-control and moral/ethical behavior.

27. A pre-disciplinary hearing was held before the Board on October 13, 2015. Grievant did not assert that the recording was inaccurate. He admitted to the statements on the recording but asserted that he had been a good teacher for years and that this day was "an oddity" because of "different things were playing on my mind and I was having a bad day." Grievant stated that he had started a new medicine for cancer that was expensive and had a lot of side effects. He stated "it was something that – it wasn't anything that the child did, it was just everything that had built up over the weeks, which I had already sent one of the children on the Friday before that because of their actions in the classroom. And just every time I turned my back, it was squeak, squawk, squawk, whatever, disrupting the class and things. It just got on my nerves and everything built up and, again, I ask you to take that into consideration."

28. The Board voted unanimously to immediately terminate Grievant's contracts.

Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2008). "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's contract 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).

Respondent argues it was justified in dismissing Grievant for insubordination as his behavior violated Respondent's employee code of conduct. Respondent asserts Grievant's behavior was willful and was not an isolated incident. Grievant admits that his language was "wrong," but that extenuating circumstances contributed to his conduct. Grievant asserts he has been discriminated against because of his religion, that other employees have received lesser discipline for more serious conduct, and that he should have received no more than a thirty-day suspension.

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)).

The code of conduct for West Virginia school employees is contained in the legislative rules of the State Board of Education, which states that 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.

W.VA. CODE ST. R. § 126-162-4.2 (2002).

The incident for which Grievant was dismissed was recorded on a student's tablet computer. The recording is audio-only and is of good quality, with only a few unclear words throughout the entire recording. Grievant does not dispute that the recording and the transcript of the recording are accurate, with the exception of a few words that are not at issue in the grievance. Grievant admits that he said what he said on the recording and that the thirteen minutes on the recording are intact and have not been altered.

Grievant does object to Respondent's failure to retain the student's tablet computer and to Respondent's failure to introduce the other recordings the student made in his class that day. As Grievant does not dispute the accuracy of the thirteen-minute recording, Grievant's objection to Respondent's failure to retain the student's tablet computer is not relevant. Likewise, Respondent is not required to introduce the other recordings made on the student's computer. Grievant was dismissed only for the thirteen-minute segment. As to Grievant's contention that there may have been other recordings on the tablet that would have shown the students' "harassment" of him, there is nothing a student could have done to Grievant that would justify his behavior in that recording. Likewise, even if all the other recordings showed him to be teaching appropriately, it does not change Grievant's behavior as reflected by the recording.

Respondent specifically argues that Grievant violated Rule 4.2.6, which requires him to "demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior." Grievant unquestionably violated the code of conduct. Grievant's rant⁶ showed very poor self-control and a low standard of conduct.

⁶ Grievant, on several occasions during the process, had objected to Respondent's characterization of his outburst as a "rant." The definition of "rant" is to "[s]peak or shout at length in a wild, impassioned way." Oxford University Press, *Oxford Dictionaries*, at

He was openly contemptuous of the students, their parents, and school procedures and administration. Grievant told students, “I’d beat your hind-end if you was my son.” He opined that “education is so pitiful . . . because you can’t do anything with the poor little babies.” Grievant loudly and sarcastically mocked the in-school suspension process. Grievant compared the students to his previous fifth grade class whose parents “raised them properly,” clearly implying that the students’ own parents were not raising them properly. Grievant’s behavior continued to escalate throughout his thirteen-minute rant and culminated with him then lecturing the students on what was “morally right” and denouncing gay marriage and abortion. Grievant’s comments on these controversial topics were unprovoked, completely unrelated to the math class he was supposed to be teaching, and were made with no regard to the impact on his students.

Grievant’s behavior towards the student who expressed discomfort with Grievant’s graphic description of his beliefs regarding abortion procedures, was particularly troubling. When, despite Grievant’s lack of control and his hostile and intimidating manner, the child was brave enough to quietly and without disrespect object to Grievant’s inappropriate outburst, Grievant verbally attacked her saying loudly, “Excuse me! I’m talking! I didn’t interrupt you. You want *your* opinion heard, but nobody else’s. That’s the way the United States is now. It’s just—you think it’s funny? Wait ‘til you grow up. Wait ‘til you grow up. Wait ‘til you grow up. You won’t think it’s so funny when you’re paying your tax money to see children killed. Yeah. Go home and tell your mommy, I

http://www.oxforddictionaries.com/us/definition/american_english/rant (last visited Mar. 3, 2016). The word is a fair description of the recording.

don't care. I really don't." Grievant's tone towards the child was intimidating and belittling and wholly inappropriate.

The recording shows clearly that Grievant's behavior was not a mistake, but intentional because Grievant was utterly defiant in continuing it. In the comment above, Grievant told the student, "Go home and tell your mommy, I don't care. I really don't." Throughout the recording, Grievant made multiple other defiant comments. "I don't care what nobody says. Fire me! I don't care. I'm not changing my tone." After stating that it would be God's will if his daughter got pregnant from a rape, he stated "And you can go home and tell your mommy and daddy, grandma and grandpa, brother and sister I said that. I couldn't care less! If they want to fire me tomorrow for me taking that stance, I'll be fired. Okay? And I mean it. I mean it with all my heart." Grievant's comments regarding gay marriage and abortion showed disdain for the law and his defiance showed disrespect and contempt of the school's administration. Both of these things set a very poor example of behavior for the students in that class.

In addition, based on the evidence presented, Grievant's behavior also violated several other sections of the code of conduct. It violated Rule 4.2.1, in that it was unprofessional and showed unfairness, poor communication, and inappropriate language. Grievant's behavior violated Rule 4.2.3 in that, not only did he not maintain a safe and healthy environment, he, himself, engaged in intimidating and bullying behavior and showed bias against gay people and women seeking abortions. Likewise, he clearly was not creating "a culture of caring through understanding and support" in violation of Rule 4.2.4.

Grievant alleges discrimination, both asserting that other employees had received lesser discipline and “because I was discussing my personal religious beliefs which are not politically correct in this day and time.” Discrimination for purposes of the grievance process has a very specific definition. “‘Discrimination’ means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W. VA. CODE § 6C-2-2(d). It appears that Grievant is arguing both that his discipline was improper because it was motivated by religious discrimination and that the discipline was excessive based on discipline that others have received. Grievant’s contention that the discipline was excessive will be discussed below in addressing mitigation of the penalty.

There is no evidence that the school board or administration was improperly motivated by religious discrimination in its dismissal of Grievant. Religion was involved in this situation only because Grievant chose to rant at his seventh grade math students about his personal religious beliefs. Grievant had no legitimate purpose in raising these topics with his math class. Grievant was not dismissed because of his religion; he was dismissed for using a significant portion of his class time discussing inappropriate topics unrelated to the subject of the class in an insubordinate, hostile, and intimidating manner.

Grievant also argues that his punishment should be reduced to a thirty-day suspension. An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ.*, Docket No.

94-01-394 (Jan. 31, 1995). See *Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). 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 provided six evaluations from his personal record, all of which rated his performance as either "satisfactory" or "meets expectations" and contained many positive comments about Grievant's performance, including his relationship to his students. However, Grievant's personnel record also reflects that in November 2012, a student was transferred from Grievant's class due to a parent's complaints that Grievant was "being mean to students" and Grievant's voice level.

Grievant also provided the testimony of three of his former players on the basketball team and eight letters from former students and the parents/grandparents of former students. The first player testified that Grievant had organized the team very well and showed respect to the players. She denied that Grievant had ever talked to them inappropriately and stated that the previous coach had cussed at and flirted with them. The second player testified that the team had been disorganized and Grievant "fixed it."

She testified that Grievant had never said anything inappropriate, but that he had gotten upset with them and yelled at them once. The third player testified that she did not think Grievant would ever do anything to harm her.

The letters all paint a glowing picture of a caring and compassionate teacher who went to great lengths to make sure that his students succeeded. Most of the letters are regarding experiences with Grievant from eight or more years ago. Several of the letters are from parents/grandparents who are also friends of Grievant. Only one of the letters was from a parent with a child in the class in which Grievant had his outburst. That letter states that her child was not disturbed by Grievant's statements because "[h]e has been raised properly." That Grievant can be kind and supportive of students that he likes or who share his beliefs does not negate the fact that he has now reacted with anger and hostility toward children that he does not like or who do not share his beliefs. It is not clear if this is a recent change due to personal stressors, or if has always been so. With the exception of the letter from the one parent with the child in the class at issue, the glowing reviews of Grievant were as a teacher of elementary students who would not have the same capacity to challenge Grievant as did the students in this instance.

Grievant testified about two instances where full-time teachers were given thirty-day suspensions rather than dismissed. Grievant alleges one teacher misappropriated money and alleges the other teacher made a disparaging comment about black people. Grievant had no first-hand knowledge of either incident. Grievant testified that he asked each teacher about their discipline, but that they refused to speak to him about it. Grievant also testified that he spoke with the student who complained about the disparaging comment and was told that the comment was "those dirty black people." Grievant did not

call the student or either teacher to testify. On cross-examination, the only member of administration he questioned about the instances was HR Director Adkins, and, to him, Grievant only asked one non-specific question regarding other teachers only receiving thirty-day suspensions and why Respondent “can just pick and choose.” HR Director Adkins testified that Grievant was comparing one statement that “may have been made” to Grievant’s long outburst with many inappropriate statements and defiance that made Adkins certain Grievant would act in the same manner again. Grievant presented no other evidence of these alleged occurrences other than his own allegation. “Mere allegations alone without substantiating facts are insufficient to prove a grievance.” *Baker v. Bd. of Trustees/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998); *See Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995). Grievant’s mere allegation, without the specifics of those two instances of discipline, is not sufficient for Grievant to prove his discipline should be mitigated for that reason.

Grievant admits that his behavior was “wrong,” so there is no question that Grievant was aware that his behavior would have been prohibited by the code of conduct. Grievant also failed to demonstrate that the penalty was clearly disproportionate to his offense. Dismissal from his employment for Grievant’s insubordinate contempt and defiance was not disproportionate.

Grievant mostly argues that the circumstances present in his personal life that contributed to his behavior should justify reducing his penalty to a thirty-day suspension. Grievant asserts that he has cancer, was taking a cancer medication that was very

expensive and caused side effects, and that a family member had borrowed money from him to secretly have an abortion.

Unquestionably, these circumstances would have been very stressful for Grievant. However, these circumstances do not explain or excuse Grievant's conduct or justify the mitigation of his dismissal. Although Grievant stated that the medication has side effects, he also specifically denied in his level three testimony that the medication's side effects are what caused his outburst. So, Grievant does not argue that the outburst was due to his medical condition, but was rather caused by the stress he was under.

Grievant did not simply make an inappropriate remark while under stress. Grievant engaged in a protracted rant lasting fifteen minutes, which continued despite several comments from students indicating that they were uncomfortable and that his remarks were inappropriate. Moreover, Grievant was continually defiant multiple times during his outburst, clearly demonstrating that he knew he was being inappropriate and was making sure that the children knew he did not care. Grievant was loud, hostile, and openly contemptuous of his students, their parents, and the administration of the school. Grievant's personal problems do not explain or excuse Grievant's behavior. Furthermore, Grievant's behavior appeared to be more motivated by anger and frustration with the students themselves than the stress of his personal situation. At level three, Grievant stated that the students had "harassed" him. At the Board hearing, Grievant explained it happened because of "different things were playing on my mind and I was having a bad day." He stated "it was something that – it wasn't anything that the child did, it was just everything that had built up over the weeks, which I had already sent one of the children on the Friday before that because of their actions in the classroom. And just every time I

turned my back, it was squeak, squawk, squawk, whatever, disrupting the class and things. It just got on my nerves and everything built up and, again, I ask you to take that into consideration.” In his level three testimony Grievant specifically admitted that he was angry with the student.

Rather than an excusable reaction to stress, the evidence shows it is more likely than not that Grievant was actually angry with the students and Grievant’s behavior was motivated by that anger. While it may be true that Grievant was more prone to anger and frustration due to what was going on in his private life, most of those pressures will continue and Grievant now appears to be incapable of controlling his reactions or accepting responsibility for them.

Respondent’s concern that Grievant would repeat this behavior is reasonable and shared by the undersigned. Grievant is not truly remorseful for his behavior. While he states that he knew it was “wrong” and it would not happen again, that assertion is not supported by the evidence. Grievant was very clear in his outburst that he did not care what anyone else thought and that Respondent could fire him in that he repeated this sentiment several times. Moreover, Grievant did not admit to his statements when he was questioned by administration, and asserts now that he just did not remember making the statements that he had then denied making. However, once it was revealed to him in the meeting with administration that the outburst had been recorded, Grievant’s reaction was not shock and dismay that he had behaved in that way without realizing how inappropriate and out of control he was; Grievant’s reaction was anger that he was going to be disciplined.

As to the remainder of the allegations Grievant raised in his statement of grievance, none are relevant to the determination of whether Grievant's dismissal was proper. Grievant alleges that his authority was undercut by Ms. Pennington because a student told Grievant that Ms. Pennington had told the student that Grievant did not have the authority to change the assigned seating. Ms. Pennington denies making this statement. Regardless, even if this allegation were true, it would provide Grievant no defense of the behavior for which he was dismissed. Grievant protests statements made by Respondent that Grievant would say something inappropriate to the basketball team if he were alone with them. Respondent's concerns that Grievant would say inappropriate things to the basketball team are reasonable given the numerous inappropriate statements made to his math class and defiance of authority in making the statements. Grievant protests the accusation made, without providing names or proof, that he had discussed this matter with several people. As there was no allegation in Grievant's dismissal that he had inappropriately discussed this matter, Grievant's contention is not relevant. Grievant last protests Respondent "calling me a liar." As Grievant initially denied some of the statements he made, which denial was proven false by the recording, it is not unreasonable for Respondent to conclude that Grievant lied or to tell him so.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2008). "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's contract 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. 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).

4. 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)).

5. Respondent proved that Grievant's conduct violated the employee code of conduct and was insubordinate. Respondent proved the penalty of termination of Grievant's contracts for insubordination was justified.

6. "'Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d).

7. Grievant's dismissal was not discriminatory.

8. 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).

9. 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).

10. Respondent's position that termination of Grievant's contracts was necessary due to Respondent's concern that Grievant's behavior would be repeated is reasonable and supported by the evidence.

11. "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).

12. Grievant failed to prove that mitigation of the penalty of contract termination is warranted.

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: March 16, 2016

Billie Thacker Catlett
Chief Administrative Law Judge