GINA HICKS,

Grievant,

v.

DOCKET NO. 02-29-216/257

MINGO COUNTY BOARD OF EDUCATION and

WEST VIRGINIA STATE BOARD OF EDUCATION,

Respondents.

D E C I S I O N

Grievant, Gina Hicks, filed this grievance against her employer, the Mingo County Board of Education ("Board"), and the West Virginia State Board of Education ("DOE") (See footnote 1) , on July 24, 2002 (protesting her suspension), and August 21, 2002 (protesting her dismissal). (See footnote 2) A level four hearing was held in the Grievance Board's Charleston, West Virginia, office, on March 20 and 21, 2003, and this matter became mature for decision on May 22, 2003, the deadline for the parties' post-hearing briefs. Grievant was represented by Cynthia E. Evans, Esq., the Board was represented by Harry M. Rubenstein, Esq., Kay Casto & Chaney, and DOE was represented by Kelli D. Talbott, Esq., Deputy Attorney General.

SUMMARY OF EVIDENCE

August 1, 2002 Disciplinary Hearing (also Level Four Jt. Ex. 1)

Ex. 1 -

July 16, 2002 letter from David Temple to Gina Hicks; Teacher Code of Conduct; Harassment and Violence Policy.

Ex. 2 -

Statements of Nolice Hensley, Margaret Lovett, Janet D. Varney, Debbie Adams, Vivian Livingood, Debbie Moore, Barbara Hager, Karen Browning, Bill Kirk; June 28, 2002 memorandum from Karen Browning to David Temple; June 28, 2002 Magistrate Court Order of Protection; June 27, 2002 Complaint filed by William Stiltner.

Ex. 3 -

Statements of Barry Blair, Donia Hicks; Performance Evaluations for Gina Hicks.

January 28, 2003 Unemployment Compensation Hearing (also Level Four Jt. Ex. 2)

ALJ Exhibits

Ex. 1 -

August 29, 2002 Deputy's Decision.

Ex. 2 -

August 15, 2002 Fact Finding Statement.

Board Exhibits

Ex. 1 -

June 26, 2002 statement of Karen Browning.

Ex. 2 -

June 28, 2002 memorandum from Karen Browning to David Temple.

Ex. 3 -

Undated Statement of Nolice Hensley.

Ex. 4 -

June 26, 2002 statement of Bill Kirk.

Ex. 5 -

June 26, 2002 statement of Margaret Lovett.

Ex. 6 -

June 26, 2002 statement of Janet Varney.

Ex. 7 -

June 26, 2002 statement of Debbie Adams.

Ex. 8 -

June 26, 2002 statement of Debbie Moore.

Ex. 9 -

June 27, 2002 complaint by William Stiltner.

Ex. 10 -

June 28, 2002 Magistrate Court Order of Protection.

Ex. 11 -

July 9, 2002 letter from David Temple to David Stewart.

Ex. 12 -

July 16, 2002 letter from David Temple to Gina Hicks.

Complainant (Hicks) Exhibits

Ex. 1 -

2001-2002 Performance Evaluation.

Level Four Joint Exhibit

Ex. 1 -

Final Agreed Order, Circuit Court of Mingo County, Civil Action No. 02-C-209 (August 22, 2002).

Level Four Board Exhibits

Ex. 1 -

August 13, 2002 letter from David Stewart to David Temple.

Ex. 2 -

August 14, 2002 Minutes of the Board.

Ex. 3 -

June 26, 2002 transcript of message from Gina Hicks to Barb Hager.

Ex. 4 -

June 26, 2002 transcript of message from Gina Hicks to Debbie Adams.

Level Four Grievant's Exhibits

Ex. 1 -

February 13, 1998 Intervention Agreement.

Ex. 2 -

July 9, 2002 letter from David Temple to David Stewart.

Ex. 3 -

January 1992 Indictment, Circuit Court of Mingo County.

Testimony

The Board presented the testimony of David Temple, William Kirk, Karen Browning, Nolice Hensley, Barbara Hager, Margaret Lovett, Debbie Moore (by phone), Debbie Adams, and Brenda Skibo.

Grievant testified in her own behalf, and presented the testimony of Robert Ooten, David Stewart, Tim Blair, Joe Chapman, William Stiltner, and Barry Blair.

Based upon a review of the testimony and evidence in its entirety, I find the following facts have been established by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant was employed for more than 12 years by the Board as a special education teacher, until her termination, effective July 16, 2002. She had satisfactory performance evaluations for all 12 years. She had never been disciplined or reprimanded during her employment with the Board.

2. On June 26, 2002, Grievant got into a personal argument with her boyfriend, William Stiltner, at the Board's central office during work hours. Mr. Stiltner was the Board's Treasurer. (See footnote 3) Grievant was not working as a classroom teacher at the time, as school had closed for the summer. 3. Grievant arrived at the Board office at approximately 8:00 a.m. on June 26, 2002, to collect her paycheck. Grievant was going out of town, and Mr. Stiltner had told her she could pick the check up, rather than having it sent by mail.

4. When Grievant arrived at the Board office, she was escorted by the custodian, Margaret Lovett, into Barbara Hager's office in Accounts Payable. Grievant asked if Mr. Stiltner was in, because she wanted to get her check. At that time, Ms. Hager was the only other employee present besides the custodian, and Grievant waited with her until Mr. Stiltner or his secretary arrived.

5. Mr. Stiltner had spent the previous night in the Treasurer's office, because he did not want to see or talk to Grievant.

6. Ms. Hager was unaware that Mr. Stiltner had spent the night in his office, and was there that morning.

7. When Mr. Stiltner's secretary, Debbie Adams arrived, Ms. Hager asked her if Mr. Stiltner was in the office yet. Ms. Adams was aware Mr. Stiltner had spent the night in his office, and knocked on his door to wake him up. She told him Grievant wanted to see him, and he told her to give him a few minutes to straighten up.

8. Ms. Adams got Grievant a cup of coffee in a styrofoam cup.

9. Shortly thereafter, Mr. Stiltner went to Ms. Hager's office, and he and Grievant started arguing in the hallway outside that office.

10. Ms. Hager and Ms. Adams went back to the Payroll Office, where by then other employees had begun to gather, and closed the door. Ms. Adams called Assistant Superintendent Karen Browning, and told her she needed to go to the Accounts Payable office. 11. In the meantime, Grievant and Mr. Stiltner went into a room where they continued arguing. Grievant asked Mr. Stiltner where he had been the last couple of days, and he replied a motel.

12. Grievant became very angry at this remark, as she believed he was taunting her with his affairs, and she tossed her cup of coffee on him.

13.

Grievant did not throw a tape dispenser at Mr. Stiltner.

14. Grievant and Mr. Stiltner proceeded back out into the hallway, and Ms. Browning attempted to intervene, telling them they needed to take their argument outside of the Board office.

15. Grievant became angry at Ms. Browning, told her it was none of her business, and told her she knew how she went home, and she just might not make it.

16. While Grievant was addressing Ms. Browning, Mr. Stiltner slipped away, got on the elevator, and exited the building.

17. Grievant and Ms. Browning then went down the stairwell and exited the building as well.

18.

Grievant did not tell Ms. Browning she would “kill” her.

19. Mr. Stiltner got into a Board car in the parking lot and locked the doors. Grievant pounded on the doors, yelling at Mr. Stiltner to let her in. Ms. Browning told Mr. Stiltner he needed to talk to Grievant, and to take their personal business off Board property.

20. About that time, Superintendent David Temple and Transportation Director Bill Kirk drove into the parking lot, and Mr. Temple intervened in the situation, telling Grievant and Mr. Stiltner to leave the Board property. 21. Mr. Stiltner drove off the Board property, and Grievant got in her car and followed him to the end of the parking area. They spoke through their car windows for a few moments, and then Mr. Stiltner proceeded to pull out. Grievant backed her car out at the same time. Mr. Stiltner drove back to the upper area of the parking lot, and Grievant left the premises.

22. Superintendent Temple observed Grievant backing out at the same time Mr. Stiltner pulled his car away, and believed she was attempting to hit Mr. Stiltner. He directed Mr. Kirk to call the police. Grievant did not hit the Board car.

23. Two sheriff's deputies arrived a short time later. One of the deputies was Tim Blair, Grievant's brother. When informed what had transpired regarding his sister, Deputy Blair informed Mr. Temple and Ms. Browning that he was Grievant's brother.

24. The deputies spoke with Mr. Temple and Ms. Browning, who indicated they did not want

Grievant to go to jail, but to just stay away from the Board office. Deputy Blair said he would talk to his sister.

25. Mr. Temple and Ms. Browning assumed the deputies would do an investigation and get back to them.

26, Since no charges were filed against Grievant, the deputies did not take any further action with regard to the incident, and did not contact either Mr. Temple or Ms. Browning.

27. That afternoon, Grievant telephoned the Board office several times to apologize, but no one answered the telephone. She left one voice message, but hung up the other times. 28. Ms. Browning called Chief Deputy Pack the next day to inquire what was happening with the investigation. He informed her of several options the Board could take, and told her it would be better if Mr. Stiltner filed for a restraining order against Grievant, and charged her with battery, as then she would do jail time.

29. That same day, Mr. Kirk drove Mr. Stiltner to the police station, where he filed for a restraining order against Grievant. He did not press criminal charges against her.

30. By letter dated July 16, 2002, Mr. Temple suspended Grievant from her employment. The Board also sought and obtained an injunction against her from entering school property. The parties agreed to certain limitations as reflected in an August 22, 2002, Agreed Final Order of the Circuit Court of Mingo County, West Virginia.

31. A hearing was held on August 1, 2002, before the Board. By letter dated August 13, 2002, State Superintendent of Schools, Dr. David Stewart, notified Mr. Temple that the decision to suspend Grievant was upheld, and also that Grievant should be terminated from her employment.

32. The Board met on August 14, 2002, and approved the suspension and termination of Grievant's employment.

33. In 1998, the West Virginia Board of Education and the State Superintendent of Schools intervened in the administration of public education in Mingo County. The Intervention Agreement which set forth the terms and conditions of the intervention indicated the terms of the agreement would end on June 30, 2002.

34. The State Board's intervention into the operation of Mingo County schools continued after the expiration of the Intervention Agreement. The State Board determined that control should not be returned to the Board on July 1, 2002, because the State Boarddid not find that educational

circumstances warranted the return of such control. Furthermore, the Board did not object to the continued control of the State Board of Education. The State Board's intervention into the affairs of Mingo County Schools continued until December 11, 2002.

35. State Superintendent of Schools David Steward appointed Assistant Superintendent Stanley Hopkins to conduct Grievant's pre-termination hearing. Superintendent Temple and the Board were present at the hearing.

36. Subsequently, Dr. Stewart approved Mr. Temple's recommendation that Grievant be suspended and terminated from employment, and the Board unanimously approved the recommendation at a Board meeting on August 14, 2002.

37. At a regularly scheduled public meeting on December 11, 2002, the State Board held a joint meeting with the Board in Williamson, West Virginia. During that meeting, the State Board voted unanimously to return control of the Mingo County schools to the Board.

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). "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. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number ofwitnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he 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. Dept. of Health and 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.; See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

The authority of a county board of education to discipline an employee must be based upon one

or more of the causes listed in W. Va. Code § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

W. Va. Code § 18A-2-8 provides, in pertinent part:

> 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 contendre to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee evaluation pursuant to section twelve of this article.

Superintendent Temple's termination letter states, in pertinent part:

> This will confirm that I have been investigating the incident of June 26, 2002, when you came to the Board of Education office and engaged in extremely dangerous and threatening behavior. Such behavior is totally unacceptable for a teacher in our school system. In particular, you refused to leave the Board of Education office after being requested to do so by the AssistantSuperintendent of Schools. You used profanity and made lethal threats. You also threw coffee on a school employee and hit him with a heavy tape dispenser. In addition, you made comments derogatory and threatening in nature to other school employees and otherwise interrupted business of the Board of Education. Furthermore, you have made numerous telephone calls to the Board of Education Office, which have been disruptive in nature.

LIV Jt. Ex. 1(1).

Based upon the foregoing, Superintendent recommended Grievant be terminated for "insubordination and your violation of the Harassment and Violence Policy and the Teacher Code of Conduct." LIV Jt. Ex. 1(1). Board counsel claimed for the first time in his proposed findings of fact and conclusions of law that Grievant's conduct also constitutes immorality under the statute. As the proper focus is whether the charge of misconduct is proven, not the label attached to such conduct, the claim of immorality will be addressed. Gillespie v. Kanawha County Bd. of Educ., Docket No. 90-20-496 (June 6, 1991)(citing Russell v. Kanawha County Bd. of Educ., Docket No. 90-20-415 (Jan. 24, 1991)).

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." Butts v. Higher Educ. Interim Governing Bd., 569 S.E.2d 456 (W. Va. 2002)(per curiam). See Olson v. Kanawha County Bd. of Educ., Docket No. 02-20-380 (May 30, 2003); Riddle v. Bd. of Directors, So.

W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Olson, supra; Riddle, supra; Webb, supra.

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, andthe 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). “Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions.” Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. Maxey v. W. Va. Dept. of Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995).

“Immorality is a imprecise word which means different things to different people, but in essence it also connotes conduct 'not in conformance 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.' [Citation ommitted.]” Golden v. Bd. of Educ. of County of Harrison, 169 W. Va. 63, 67, 285 S.E.2d 665, 668 (1981); Snodgrass v. Wetzel County Bd. of Educ., Docket No. 97-52-384 (Dec. 15, 1997); Harry v. Marion County Bd. of Educ., 203 W. Va. 64, 506 S.E.2d 319 (1998). “Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires at least an inference of conscious intent.” See Hayes v. Kanawha County Bd. of Educ., Docket No. 94-20-143 (June 28, 1995), citing Youngman v. Doerhoff, 890 S.W.2d 330 (Mo. 1994).” Wahl v. Mineral County Bd. of Educ., Docket No. 98-28-175 (Sept. 14, 1998).

In addition to charges of insubordination and immorality, the Board alleges Grievant violated two specific Board policies. The Board's Harassment and Violence Policy provides, in pertinent part:

> No student, staff member or member of the public, during any school related activity or during any education sponsored event, whether in a building or other property used or operated by the Board shall engage in sexual, racial or ethnic/religious harassment or violence. Persons found to have violated this prohibition shall be subject to the penalties in Section F of this policy.

LIV Jt. Ex. 1(1).

This policy goes on to define sexual harassment, racial harassment, sexual violence, racial violence, religious/ethnic violence, and assault. The word “assault” contained in the definition of racial violence, as “a physical act of aggression or assault upon another because of, or in a manner reasonably related to race.” Id.

The Teacher Code of Conduct provides, in pertinent part:

> To provide students with quality educational opportunities which reflect both excellence and equity, every teacher in the public schools of West Virginia shall:
>
> 1. Demonstrate a belief that all students can learn;
> 2. Give assignments that make learning relevant;
> 3. Teach responsible citizenship and life skills;
> 4. Treat each student fairly;
> 5. Promote a safe and positive learning environment;
> 6. Be a good adult role model;
> 7. Exhibit a caring, honest and professional attitude;
> 8. Maintain professional growth and development;
> 9.

Communicate with parents;

10.

Recognize the community as a partner in educating students;

11.

Maintain confidentiality; and

12.

Abide by policies and regulations.

LIV Jt. Ex. 1(1).

The charges against Grievant set forth in Superintendent Temple's termination letter will be addressed in turn.

1.

Extremely Dangerous and Threatening Behavior.

There is no dispute that Grievant engaged in a volatile argument with Mr. Stiltner at the Board office on June 26, 2002. She admits throwing her styrofoam cup of coffee on him, yelling at him, and attempting to get into the Board car with him. Mr. Stiltner testified he was not burned by the coffee, nor was he afraid for his safety during the argument with Grievant. He just wanted to avoid her altogether because he knew the confrontation about their breakup would not be pleasant.

There is no dispute Grievant yelled at Ms. Browning when she attempted to intervene in the argument. Ms. Lovett, the custodian, overheard Grievant telling Ms. Browning she knew how she went home, and she just might not make it. Grievant also told Ms. Browning it was none of her business, and said things about Ms. Browning's personal life. Despite Grievant's ranting, however, Ms. Browning also testified she was not afraid of Grievant at any time during the confrontation. She testified she became a little more concerned after the incident when she was taking statements from the other employees who were in the office that day.

Grievant did not hit Mr. Stiltner or Ms. Browning. She did not tell Ms. Browning she would “kill” her, although an inference could be made from her statement that Ms. Browning might not make it home. With the exception of Debbie Moore, none of the other individuals present in the Board office

that day testified they were afraid of Grievant, or afraid for their own safety. Ms. Moore testified by phone that she was “scared to death.”

The employees in the Board office gathered in one office, not because they were afraid of Grievant, but simply to get away from the confrontation. However, once in the office, there was gossip that Grievant “might” have a gun, or had been known to carry a gun, and thatshe had threatened to kill Mr. Stiltner in the past. No evidence was presented that Grievant had a gun, and of course, she never used, or attempted to use, a gun during the incident. No evidence was presented that Grievant had threatened to kill Mr. Stiltner, and he denied she ever made such a threat to him. (See footnote 4)

In the parking lot, Grievant did pound on the Board car, attempting to get Mr. Stiltner to let her in. Grievant did not attempt to “ram” the car, or block Mr. Stiltner from driving the car away from her.

There is no question Grievant's behavior was childish, volatile, and out of control. However, the undersigned finds no evidence to support the description of Grievant's behavior as “extremely dangerous and threatening.”

2.

Refusing to leave the office.

Ms. Browning instructed Grievant to leave the Board office, and she did not. Instead, she yelled at Ms. Browning, made personally derogatory remarks to her, and told her she “might not make it home.” Once in the parking lot, Grievant again refused to leave at Ms. Browning's directive. It was not until Mr. Temple arrived that Grievant got in her car and drove off the Board's property. The Board has proven Grievant engaged in this behavior.

3.

Use of profanity and lethal threats, and making derogatory comments.

Ms. Browning testified Grievant used profane language toward her, specifically, that she should mind her own “damn” business. No one else heard Grievant use profanity, however, given the heated nature of the argument, it is possible Grievant did tell Ms. Browning to mind her own “damn” business. Grievant did tell Ms. Browning she knew how she went home, and that she just might not make it. However, Ms. Browning herself testified she did not take this statement as a threat, and was not afraid for her safety. Therefore, the undersigned concludes Grievant did not make “lethal threats.” Grievant did make personally derogatory comments to Ms. Browning. Therefore, the Board has

proven Grievant uttered the word “damn”, and made derogatory comments to Ms. Browning.

4. Throwing coffee and tape dispenser.

Grievant admits she threw coffee on Mr. Stiltner. Grievant denies throwing the tape dispenser, and Mr. Stiltner testified Grievant did not throw a tape dispenser at him. The only evidence regarding the tape dispenser was that it was on the floor of the room where Grievant and Mr. Stiltner were arguing. No witnesses saw Grievant throw the tape dispenser. The Board has proven Grievant threw coffee on Mr. Stiltner, but has not proven she threw the tape dispenser.

5. Threatening telephone calls.

The Board has failed to prove this charge against Grievant. The evidence presented demonstrated Grievant attempted to call the employees who were present during her confrontation with Mr. Stiltner to apologize for her behavior. She left a voice message to that effect, and when no one would answer the telephone after that, she justhung up. There simply is no evidence to support the charge that Grievant was making “threatening” phone calls to the Board office.

6. Interrupting Board business.

There is no doubt the confrontation between Grievant and Mr. Stiltner, which lasted approximately 1-1/2 hours total, interrupted the business of the Board, although the undersigned is not convinced the entire time period should be attributed to Grievant. The employees in the Board office decided to gather in one office with the door closed, and then watch out the window when the argument moved outside, when they could just as easily have gone back to their duties. Nevertheless, Grievant's behavior certainly caused a disruption of the Board's business the morning of June 26, 2002.

The charges that have been proven, specifically Grievant's conduct towards Ms. Browning, and disrupting the Board's business, constitute insubordination as set forth in W. Va. Code § 18A-4-8. Grievant's supervisor gave her a directive to leave the Board office and premises, and Grievant did not. Grievant yelled at her supervisor, used the word “damn”, and made derogatory remarks to her. This lack of respect for her supervisor warrants the label of insubordination.

The charges that have been proven do not constitute “immorality.” Having an argument with one's boyfriend, and saying things in anger to one's supervisor, does not rise to the level of conduct which would be contrary to the moral code of the community, is not “wicked,” and does not compromise acceptable standards of sexual behavior.

With respect to the Board policies referenced above, the undersigned finds that Grievant's

conduct did not violate any provisions of the Harassment and Violence Policy, as written. The provisions of that policy relate strictly to sexual, racial, ethnic, and religiousharassment, and acts of violence appurtenant thereto. The Policy, as written, simply does not apply to Grievant's argument with her boyfriend and supervisor.

The Board does not specify which provisions of the Teacher Code of Conduct Grievant violated, but suffice it to say there are a few which could be applicable to Grievant's conduct. Therefore, the Board has proven Grievant violated this Policy.

Grievant asserts in her defense that the Board failed to follow policy by not placing her on an Improvement Plan before terminating her, and that termination is too harsh a punishment, and not proportional to the offenses proven. Grievant also asserts it was improper and illegal for the State Board of Education to appoint a hearing examiner for her disciplinary hearing before the Board, and for State Superintendent of Schools David Stewart to author her letter of termination.

Grievant relies on the recent West Virginia Supreme Court of Appeals Decision of Maxey v. McDowell County Bd. of Educ., 2002 W. Va. LEXIS 226, 575 S.E.2d 278 (2002), for support that she should have been placed on an Improvement Plan to correct her behavior. However, the facts of the instant case are significantly different from those presented in Maxey. For example, Ms. Maxey made a statement that she should have blown her supervisor's head off at a subsequent meeting concerning an issue involving her performance evaluation. The Court made a distinction between an actual threat and Ms. Maxey's comment which was a statement about something she should have done in the past. While her comment was certainly inappropriate, the Court found that it did not amount to a threat. Also, the Court placed significance on the county's improper evaluation procedures and found that the manner in which certain county administrators handled Grievant's evaluation actually contributed to or exacerbated the situation that ledto the problem behavior. The Court did not condone Ms. Maxey's behavior, but instead remanded the case for a determination of whether or not the behavior was correctable.

Traditionally, the “correctability” question does not come into play unless the conduct is related to job performance. Mason County Bd. of Educ. v. State Supt. of Schools, 165 W. Va. 732, 274 S.E.2d 435 (1980); Clement v. Ohio County Bd. of Educ., Docket No. 90-35-366 (Apr. 30, 1991). If discipline relates to poor job performance, boards of education are required to determine if the deficiencies are correctable and to afford employees the opportunity to improve their performance via implementation

of a plan of improvement. The theory that there ought to be an opportunity to improve the behavior is based in a West Virginia Board of Education Policy that entitles employees to regular evaluations and a right to be notified of any deficiencies in their performance. State Board of Education Policy 5300. Since Ms. Maxey's conduct was found to have arisen out of the performance evaluation process, the Court made the connection that it was a performance issue, thus triggering the requirement for an inquiry into the correctability of Ms. Maxey's behavior.

By contrast, in the case at hand, the conduct for which Grievant was terminated had nothing to do with deficiencies in her job performance such that a plan of improvement might be utilized to correct the behavior. Rather, Grievant's behavior resulted from a “lover's quarrel” with her boyfriend, which just happened to occur at the Board office. Based upon the foregoing discussion, the undersigned finds Grievant was not entitled by law to an improvement plan following her behavior on June 26, 2002.

Nevertheless, the undersigned does find one significant similarity between the Maxey case and the instant case. The Court in Maxey did not view Ms. Maxey's commentthat she should have blown her supervisor's head off to be a threat, in light of all of circumstances. Likewise, the undersigned does not find Grievant's comment that she knew where Ms. Browning lived, and that she might not make a home, to be a threat, but merely a statement made in the heat of an argument. Ms. Browning herself did not even view it as a threat. This does not mean that Grievant's behavior was excusable in any way, merely that it is not extremely dangerous or violent behavior such as the Board has attempted to portray.

Grievant alleges the discipline imposed on her is disproportionate to the offense, as well as excessive in relation to other employees who have engaged in misconduct. “The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was 'clearly excessive or reflects an abuse of the ageny['s] discretion or an inherent disproportion between the offense and the personnel action.' Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).” Meadows v. Logan County Bd. of Educ., Docket No. 00-23-202 (Jan. 31, 2001). “[M]itigation 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. Dept. of Health and Human Resources, Docket No. 96-HHR- 183 (Oct. 3, 1996). "Respondent has substantial discretion to determine a penalty in these types of situations, and the [Grievance Board] shall not substitute her judgment for that of the employer. Tickett v. Cabell County Bd. of Educ., Docket No. 97-06-233 (Mar. 12,1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997)." Meadows, supra.

A penalty disproportionate to other employees guilty of similar offenses is a factor to be considered in determining whether a particular penalty is excessive. See Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994); Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997).

Moreover, an employer must demonstrate the existence of a "rational nexus" between its employee's off-duty actions and the employee's job responsibilities in order for those actions to appropriately form the basis for personnel discipline. See e.g., Bledsoe v. Bd. of Educ. of Wyoming Co., ___ W. Va. ___, 394 S.E.2d 885 (1990); Golden v. Bd. of Educ. of Harrison Co., 169 W. Va. 63, 285 S.E.2d 665 (1981); Best v. Univ. of W. Va. Bd. of Trustees, Docket No. 91-BOT-216 (Oct. 11, 1991).

The parties stipulated that Danny Perkins, a teacher and coach for Mingo County Schools, punched a parent of one of his student players after a basketball game. The parent pressed charges against Mr. Perkins, but the Board did not. Mr. Perkins was not terminated from either his coaching or teaching positions for this incident, but he was suspended from his coaching duties for half a season, and ordered by the Board to attend anger management sessions.

The parties stipulated that Henry Clay Moore, a teacher for the Mingo County Schools, had previously been convicted of two felonies and a misdemeanor for delivery and possession of alcohol and marijuana to minors in his home. Those convictions were subsequently reversed by the West Virginia Supreme Court of Appeals in State of West Virginia v. Henry Clay Moore, 186 W. Va. 23, 409 S.E.2d 490 (1990). Subsequently, Mr.Moore was again indicted for growing marijuana, but never prosecuted for that charge. LIV G. Ex. 3. Mr. Moore is still a teacher in Mingo County.

Conversely, the Board presented evidence of a classroom teacher, David Bell, who had been terminated for immorality for kissing an eighth-grade female student, and writing her love notes. See Bell v. Mingo County Bd. of Educ., Docket No. 97-29-172 (Mar. 10, 1998).

Superintendent Temple attempted to minimize the Danny Perkins incident by stating he couldn't be sure that Mr. Perkins' hitting the parent was an assault, inferring that the punch might have been in the form of self-defense. There is simply no evidence that this was the case, and in fact, the Board stipulated to the events. Mr. Perkins quite simply punched a parent in the course of his duties as a basketball coach. Grievant did not hit anyone, although she admittedly did throw a half-cup of coffee on Mr. Stiltner, and none of her actions were in the course of her duties as a classroom teacher.

There can be no comparison to Grievant's conduct and Mr. Moore's or Mr. Bell's behavior, both of which clearly fall within the definition of immorality. Drugs and sex involving minors will always be wrong, and will always be wicked. An argument with a boyfriend is neither.

Grievant is a 12-year employee of the Board, has always had satisfactory evaluations, and has never had any form of discipline taken against her in the past. To order Danny Perkins to undergo anger management therapy, and not at least offer Grievant the same benefit is patently unfair, and termination for her behavior is clearly disproportionate to Mr. Perkins' punishment. Nevertheless, Grievant's behavior was insubordinate and improper, and she should receive some discipline for her conduct. Grievant acknowledges her conduct was wrong, she has undergone counseling, and has expressed remorse. The undersigned believes a 20-day suspension without pay is sufficient.

Grievant argues the State Board of Education did not have the authority to control the affairs of the Mingo County Board of Education at the time she was terminated from her employment, and thus, her pre-termination hearing conducted by a designee of the State Superintendent of Schools in the presence of the Board, and the State Superintendent's termination of her was improper. Grievant argues the Intervention Agreement signed by the President of the West Virginia Board of Education, the State Superintendent of Schools, the President of the Board, and the Interim Superintendent of Schools for Mingo County, provides that the State Board's intervention into the operation of Mingo County schools was to end of June 30, 2002. Grievant was terminated after this date.

Contrary to Grievant's assertions, however, the State Board's intervention into the operation of Mingo County schools continued after the expiration of the Intervention Agreement. Dr. Stewart testified the State Board determined that control should not be returned to the Board on July 1, 2002, because the State Board did not find that educational circumstances warranted the return of such control. Furthermore, the Board did not object to the continued control of the State Board of Education. The State Board's intervention into the affairs of Mingo County Schools continued until

December 11, 2002. At a regularly scheduled public meeting on that date, the State Board held a joint meeting with the Board in Williamson, West Virginia. During that meeting, the State Board voted unanimously to return control of the Mingo County schools to the Board. Paragraph 12 of the Intervention Agreement provides that the "rights of the State Board and the County Board shall . . . be governed by applicable law, rather than this agreement" in the event the State Board continues its intervention after June 30, 2002. Applicable law includes W. Va. Code § 18-2E-5, the statute which outlines the State Board's and the State Superintendent's authority in intervention circumstances. W. Va. Code § 18-2E-5(l)(4)(C)(i) permits the State Board to limit the authority of the county superintendent and the county board as to the employment and dismissal of personnel. Furthermore, W. Va. Code § 18-2E-5(l)(4)(C)(iii) permits the State Board to delegate to the State Superintendent the authority to conduct hearings on personnel matters, or to appoint a designee to conduct such hearings, and the authority to render the resulting decisions on personnel matters.

Pursuant to his authority, Dr. Stewart designated Dr. Stanley Hopkins, Assistant State Superintendent, to conduct a pre-termination hearing based upon Grievant's misconduct. The pre-termination hearing was held on August 1, 2002, in Mingo County. Mr. Temple and the Board were present.

Subsequently, Dr. Stewart issued a letter dated August 13, 2002, ratifying Mr. Temple's recommendation to suspend Grievant without pay pending the outcome of her pre-termination hearing, and terminating her effective August 14, 2002. In his letter, Dr. Stewart cited W. Va. Code § 18-2E-5 for the authority for his actions. At a public meeting held on August 14, 2002, the Board unanimously approved Mr. Temple's recommendation of Grievant's suspension and termination.

Dr. Stewart and the State Board properly exercised their statutory authority to conduct the Grievant's personnel hearing and to terminate her employment for goodcause. Grievant was not denied her due process. She had notice and a reasonable opportunity to be heard before termination from employment. That is all that is required by law. Farley v. Bd. of Educ. of Mingo County, ___W. Va. ___, 365 S.E.2d 816 (1988).

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).

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 W. Va. Code § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

3. W. Va. Code § 18A-2-8 provides, in pertinent part:

> 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 contendre to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee evaluation pursuant to section twelve fo this article.

4. Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Directors/So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was inexistence 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).

5. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. Maxey v. W. Va. Dept. of Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995).

6. "Immorality is a imprecise word which means different things to different people, but in essence it also connotes conduct 'not in conformance 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.' [Citation omitted.]" Golden v. Bd. of Educ. of County of Harrison, 169 W. Va. 63, 67, 285 S.E.2d 665, 668 (1981); Snodgrass v. Wetzel County Bd.

of Educ., Docket No. 97- 52-384 (Dec. 15, 1997); Harry v. Marion County Bd. of Educ., 203 W. Va. 64, 506 S.E.2d 319 (1998). “Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires at least an inference of conscious intent.” See Hayes v. Kanawha County Bd. of Educ., Docket No. 94-20-143 (June 28,1995), citing Youngman v. Doerhoff, 890 S.W.2d 330 (Mo. 1994).” Wahl v. Mineral County Bd. of Educ., Docket No. 98-28-175 (Sept. 14, 1998). 7. The Board has proven Grievant engaged in conduct constituting insubordination.

8. The Board has failed to prove Grievant engaged in conduct constituting immorality.

9. “The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was 'clearly excessive or reflects an abuse of the ageny['s] discretion or an inherent disproportion between the offense and the personnel action.' Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).” Meadows v. Logan County Bd. of Educ., Docket No. 00-23-202 (Jan. 31, 2001).

10. “[M]itigation 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. Dept. of Health and Human Resources, Docket No. 96-HHR-183 (Oct. 3, 1996). “Respondent has substantial discretion to determine a penalty in these types of situations, and the [Grievance Board] shall not substitute her judgment for that of the employer. Tickett v. Cabell County Bd. of Educ., Docket No. 97-06-233 (Mar. 12, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997).” Meadows, supra.

11. A penalty disproportionate to other employees guilty of similar offenses is a factor to be considered in determining whether a particular penalty is excessive. SeePhillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994); Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997).

12. Moreover, an employer must demonstrate the existence of a “rational nexus” between its employee's off-duty actions and the employee's job responsibilities in order for those actions to appropriately form the basis for personnel discipline. See e.g., Bledsoe v. Bd. of Educ. of Wyoming Co., ___ W. Va. ___, 394 S.E.2d 885 (1990); Golden v. Bd. of Educ. of Harrison Co., 169 W. Va. 63,

285 S.E.2d 665 (1981); Best v. Univ. of W. Va. Bd. of Trustees, Docket No. 91-BOT-216 (Oct. 11, 1991).

13. Grievant has proven that termination for her insubordinate conduct is grossly disproportionate to the discipline given other school employees, specifically Danny Perkins for assault on a parent.

14. Grievant has proven her conduct has no rational nexus to her duties as a classroom teacher.

15. The West Virginia Board of Education and the State Superintendent of Schools properly exercised their authority under W. Va. Code § 18-2E-5 after the Intervention Agreement ended.

Accordingly this grievance is **GRANTED**. Grievant's termination is rescinded and replaced with a 20-day suspension, without pay. The Board is hereby **ORDERED** to immediately reinstate Grievant to her position of classroom teacher, and compensate her in the form of back pay and benefits, with interest, from August 21, 2002, to the time she is reinstated into her position.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State 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 record can be prepared and properly transmitted to the appropriate circuit court.

_____

MARY JO SWARTZ

Administrative Law Judge

Dated: June 24, 2003

Footnote: 1

West Virginia State Board of Education was joined as a party by Order dated December 19, 2002.

Footnote: 2

The grievances were consolidated by Order dated September 4, 2002.

Footnote: 3

Mr. Stiltner has since been terminated by the Board.

Footnote: 4

The Board's counsel attempted, over Grievant's counsel's objection, to introduce evidence of past incidents between Grievant and Mr. Stiltner. The Board declined to allow such evidence during the disciplinary hearing, and the undersigned Administrative Law Judge followed the Board's judgment, as her review is of the sufficiency of the Board's decision in light of the information it had at the time the decision was made.