MARJORIE J. MAXEY,

Grievant,

v. **Docket No. 97-33-208R**

McDOWELL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

On April 24, 1997, Marjorie Maxey, Grievant, submitted this grievance directly to Level IV, in accordance with W. Va. Code § 18A-2-8, challenging her dismissal by Respondent McDowell County Board of Education ("MCBOE"). By Decision dated April 30, 1998, this grievance was denied. The Grievance Board Decision was affirmed by the Circuit Court, but reversed by the West Virginia Supreme Court of Appeals, and the case was remanded to the Grievance Board. Maxey v. McDowell County Bd. of Educ., 212 W. Va. 668, 575 S.E.2d 278 (2002).

Following a pre-hearing conference, additional days of hearing were held on September 2, 2003, and June 14, 2004. (See footnote 1) On July 2, 2004, the case was placed in abeyance while the parties attempted to reach a settlement agreement. After a conference call on August 13, 2004, the parties agreed the grievance would remain in abeyance, and that during this time MCBOE would incur no further financial liability. On January 18, 2005, the undersigned Administrative Law Judge was notified the parties had not reached a settlement, and Grievant's attorney was directed to submit his brief by February 28, 2005. This case became mature for decision on that date, after receipt of Grievant's proposedfindings of fact and conclusions of law. (Respondent had previously submitted its proposals.)

Instructions from the West Virginia Supreme Court of Appeals

The West Virginia Supreme Court of Appeals ("Court") stated it did not take issue with previous Administrative Law Judge Lewis Brewer's Findings of Fact, but found MCBOE had not assessed

whether Grievant's behavior was correctable pursuant to the State Board of Education Policy 5300. Policy 5300 is titled "Board of Education Relations with School Employees." At Section 2.6, the Policy notes the right of an employee to receive an "open and honest evaluation of his/her performance on a regular basis." An employee is entitled to an opportunity to improve "his/her job performance" prior to termination.

The Court directed, "[u]pon remand, the Grievance Board, after taking of such evidence as may bear on the issue, shall determine whether or not the conduct of the [Grievant] is correctable under a feasible improvement plan." The Maxey Court noted it did not "assert that the actions of the [Grievant], in failing to demonstrate an appropriate level of respect for her supervisor, in interrupting and arguing with him, and in making bizarre comments concerning shooting him, did not constitute insubordination," but insubordination did not occur "in the act of failing to sign observation forms, where a signature clearly was intended as an acknowledgment that the individual had been provided with the opportunity to discuss and understand the criticisms or comments contained therein."

The Court noted the "initial confrontations between [Grievant] and her supervisor were primarily performance related and reflected personality conflict and the absence ofconstructive communication." The Court held, "[t]he insubordination [of failure to sign the observation form] was derivative of the original performance issue," and the Court believed this action "cannot be held to totally eclipse the underlying performance issues and cannot subvert the employee's right to the protections of Policy 5300." Further, the Court held that "by permitting the insubordination claim to overshadow the performance-related issues and form an entirely separate and distinct basis for termination, the Board has simply chosen to label the conduct as insubordination and has thwarted the purpose of Policy 5300." See Mason County Bd. of Educ. v. State Superintendent of Schools, 165 W. Va. 732, 274 S.E.2d at 435 (1980). The Court noted that it had "plainly stated in Wilt v. Flanigan, 170 W. Va. 385, 294 S.E.2d 189 (1982), 'the provisions of 5300(6)(a) must therefore be strictly construed in favor of the appellant to ensure that she received the full guarantee of protection intended to be encompassed by the policy promulgated by the West Virginia Board of Education.'" 170 W. Va. at 390, 294 S.E.2d at 194. Since there was no assessment as to whether Grievant's behavior was correctable before her termination, the Grievance Board was directed to determine this issue as required by Policy 5300.

The Court held MCBOE would have the burden of showing Grievant's conduct was not and is not

correctable and further directed:

> Upon determining the issue, the Grievance Board shall re-instate the termination if the conduct is found not correctable. . . . [I]f found correctable, the Board shall endorse an appropriate improvement plan. If the Appellant is shown to be prepared to return to the classroom forthwith, it may be so ordered. Alternatively, the Grievance Board may order reinstatement at such future stage in the improvement plan as permits the return of the Appellant to the classroom with the stress and anger-control issues under reasonable control. The Appellant's reinstatement as a classroom educator may be conditioned upon satisfactory completion of the any such initial requirements in a fair and reasonable improvement period and reinstatement shall anticipate that Appellant will carry out the remainder of the improvement plan after reinstatement.

The Grievance Board was also directed to assess whether Grievant was entitled to back pay and to calculate this amount. These directions were given:

> The proper amount of the award should be determined by consideration of the Appellant's lost wages until she obtained comparable employment; in the event it appears that she was medically unable able to obtain comparable employment, back pay should be calculated, if at all, only from the date that it appears that she became capable of returning to the classroom free of the stress and anger-control issues that gave rise, at least in part, to her conduct discussed in this opinion, all reduced by any interim part time wages received outside the times Appellant was unavailable for work due to her mental state. See Syl. Pt. 2, Mason County Bd. of Educ. v. State Superintendent of Schools, 170 W. Va. 632, 295 S.E.2d 719 (1982).

The Court also noted it did "not sanction in the least [Grievant's] comments toward Mr. Spencer; or irrational behavior such as falling to ones knees in class or parent-teacher conferences and other such stress or anger-related conduct, nor do we believe that a teacher exhibiting irrational behavior should remain in the classroom." And stated that "the improvement period is the appropriate tool if the conduct can be corrected."

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact. The Findings of Fact of the former administrative law judge are incorporated in these facts.

Findings of Fact

Information from prior Level IV Hearing and Decision

1. At the time of her termination, Grievant had been employed by the MCBOE as a classroom teacher for approximately seventeen years. She was teaching at Bartley Elementary School (BES).

2. Grievant's immediate supervisor was Principal James Spencer, who was then serving in his first year as Principal at BES. 3. Shortly after the beginning of the 1996-97 school year,

Grievant successfully bid into a new teaching position for a split fourth/fifth grade at (BES). Grievant had previously taught a split seventh/eighth grade class at the same school.

4. As the school year progressed, Grievant's working relationship with Mr. Spencer deteriorated. Mr. Spencer's initial observation of Grievant's performance, conducted on November 18, 1996, contained some comments indicating areas where Grievant needed to improve her performance. These comments had been gathered throughout the school year, and some of the issues had been addressed previously. He noted Grievant needed to improve her monitoring of special education students and interacting with parents, co-workers, and administrators. Mr. Spencer reported Grievant complained about having to do her required work, such as grading papers and writing lesson plans, had made statements of "mistrust, disrespect, and defiance," and became "loud" when individuals tried to discussion issues with her. Grievant also complained about the two prior principals who were her supervisors. Grievant declined to sign this Teacher Observation Form. See Admin. Ex 1 in J Ex 1 at initial Level IV hearing.

5. Grievant had been caring for her mother at home since December 1991, when her mother suffered a disabling stroke. Subsequently, Grievant's mother was hospitalized for 40 days before she passed away on January 27, 1997. In addition, Mr. Maxey's father passed away on December 28, 1996, and his uncle passed away on January 16, 1997. Further, Mr. Maxey's mother was hospitalized for an operation at some point in this same time frame.

6. On March 5, 1997, Mr. Spencer presented Grievant with a second Teacher Observation Form which he had prepared after observing her classroom on March 3, 1997. The comments on this form were from observations from the second half of the school year and from the time spent in the classroom.

7. This March 5, 1997 observation had many positive comments on it. But it also had negative comments that directed Grievant to stop slamming doors and speaking loudly to students, assume control of students assigned to her classroom when the music or special education teacher were not able to supervise these students, insure students were in their seats during instructional time, and to cease making negative remarks to him in the presence of students. He noted he had received parental complaints about Grievant's difficulty in discussing "everyday" issues with parents.

8. Grievant declined to sign the observation form, threw it to the floor, and stepped on it. After Mr. Spencer provided Grievant with a "clean" copy (See footnote 2) of the observation form on March

6, 1997, Grievant again refused to sign the form to acknowledge that Mr. Spencer had discussed his observations with her because she did not feel she had been given an opportunity to respond to the negative remarks. When Mr. Spencer explained to Grievant he would have to take her to MCBOE's Central Office in Welch, should she continue to refuse to sign the form, Grievant offered to draw him a road map to Welch.

9. Mr. Spencer reported this incident to his immediate supervisor, MCBOE then- Assistant Superintendent Larry Lane, who advised MCBOE's then-Superintendent, Dr. J. Kenneth Roberts. Mr. Spencer had frequently consulted Mr. Lane during the school year for advice on how to deal with Grievant. 10. On the morning of March 7, 1997, Dr. Roberts called Grievant to a meeting in his office with Mr. Spencer, Mr. Lane, and himself. Grievant's husband, also employed by MCBE as a classroom teacher, was directed to bring Grievant to MCBE's Central Office in Welch because he routinely transported Grievant to and from work.

11. Grievant did not want her husband present during the meeting and did not request representation.

12. During the course of the March 7, 1997 meeting, Mr. Spencer discussed the comments resulting from his observation of March 3, 1997. Grievant repeatedly interrupted him even though Dr. Roberts had told Grievant to wait until he finished his report, and then she would have her opportunity to talk. During this discussion, Grievant told Mr. Spencer, "Mr. Spencer, had I shot you I would have been in less trouble. I'd have been over in the jail, and the taxpayers would be supporting me, and I wouldn't be worried about any employment."

13. Following Grievant's comment, which Mr. Spencer perceived as a threat, Mr. Spencer left the room for approximately 15 minutes. Upon his return, Grievant said, "Mr. Spencer, if I was going to blow your head off, I would have already done it." At that point, Mr. Spencer left the meeting and did not return.

14. Grievant agreed with other witnesses that at the conclusion of the meeting she made a comment about leaving by climbing out a window, stating she was so humiliated she would have "crawled through the floor."

15. Grievant acknowledged in her initial Level IV testimony that she made several “very unpleasant” comments during the meeting. See Finding of Fact 34 for different testimony at the Level IV remand hearing. 16. At the conclusion of the meeting, Dr. Roberts notified Grievant of his

intent to recommend that MCBOE terminate her employment under W. Va. Code § 18A-2-8 for reasons listed in the March 7, 1997 letter.

> On Friday, March 7, 1997, a conference was conducted with you, Mr. James Spencer, Mr. Larry Lane, and myself. The purposes [sic] of this conference was to address your behavior and charge of insubordination in throwing your observation on the floor, stomping it, and refusing to sign it. During this conference you showed a great degree of intemperance including threatening your own life and threatening to shoot Mr. Spencer in the head.
>
> Therefore, due to continued acts of disrespect, these specific incidents of insubordination, and your demonstrations of intemperance you are being suspended for thirty days and recommended for dismissal as per WV Code 18A-2-8. I intend to make this recommendation at the McDowell County Board of Education regular meeting scheduled for Monday, March 17, 1997.
>
> A hearing before the McDowell County Board of Education concerning this action will be held at the above meeting prior to the above recommendation being made. You may be represented by council [sic] or anyone of your choosing if you so desire. Please confirm in writing with me by Friday, March 14, 1997, if you plan to attend this hearing.

J Ex 2. (At the initial Level IV hearing.)

17. Following a pre-disciplinary hearing before MCBOE on April 7, 1997, MCBOE voted on April 15, 1997, to terminate Grievant's employment for insubordination.

18. Administrative Law Judge Brewer found that despite a litany of apologies at the initial Level IV hearing for her statements at the meeting in March 1997, Grievant remained patently emotional, hostile, and angry toward Mr. Spencer, who was not present, as well as Dr. Roberts, who was in the hearing.

19. Administrative Law Judge Brewer found that given these statements were made eleven months after the incident which gave rise to her termination, it was difficultto accept Grievant's claim that her "verbal incontinence was merely based on transitory stress."

20. Administrative Law Judge Brewer found Grievant repeatedly provided non- responsive answers and made emotional, gratuitous comments while being questioned by her counsel, indicating she continued to have difficulty restraining her emotions, and maintaining a rational train of thought.

Information from Medical Records (See Resp. No. 1 at Level IV remand hearing.)

21. On March 11, 1997, Grievant requested her family doctor, Wayne Brackenrich, to send her for a "psychological referral, in that she may have to use legal action to get her job back." Dr. Brackenrich noted Grievant's mother's lengthy illness, recent death, and that Grievant served as her mother's care giver. He diagnosed Grievant as having situational stress with generalized anxiety and mild depression, and recorded her report of episodes of shaking, tearfulness, and irritability. He believed Grievant was suffering from a grief reaction that should resolve in six months. He referred Grievant to psychologist Terry Lusher. Mr. Lusher replied to Respondent's request for Grievant's medical records stating that no permanent client records are maintained, and once the account is settled, even the dates of service are deleted.

22. Mr. Lusher did write Dr. Brackenrich with the results of his evaluation and testing of Grievant. Although this letter does not have a date, the psychological test results are dated March 25, 1997. Mr. Lusher noted Grievant's problems with her principal which she described as a personality conflict. Mr. Lusher found Grievant to be depressed and stated the issues with her principal had caused her to be emotionally distraught and hadaffected her sleep and appetite patterns. Notably, the death of Grievant's mother was not mentioned at all.

23. The psychological testing revealed Grievant to be oriented to seek the bright side of life, was pleased with herself, possessed a sense of specialness which may persist with little external confirmation through genuine accomplishment or social approval, possessed only a modest desire to attend to the needs of others, preferred to arrange her concerns so they are logical and unambiguous, actively sought structure to guide her work and personal life, was likely to react negatively if a task was too demanding, actively sought to advance her own self-interest to the point where she became inflexible, was likely to become lost in details, was rigid about procedures, and was closed to innovation. These test results noted Grievant might appear insensitive in dealing with others, as she overlooked interpersonal niceties, needed to keep a distance from the unknown, and had an "unusual adherence to social conventions."

24. Dr. Brackenrich saw Grievant on April 1, 1997, and she reported she had better control of her temper, but continued to suffer from fatigue and insomnia. Her diagnosis was situation anxiety and depression. At a follow-up check on April 30, 1997, Grievant reported she felt better, had no outbursts of rage, and counseling was helping.

25. On December 23, 1997, Grievant told Dr. Brackenrich she felt her anxiety was under control now that she was out of the school situation, and she still did not want to take medication.

26. On February 3, 1998, Mr. Lusher called Dr. Brackenrich to report that Grievant was having forced/pressured speech, delusional thinking, and borderline evidence of a psychosis. Because Grievant had refused voluntary hospitalization, Mr. Lusherdirected Grievant to see Dr. Brackenrich "ASAP." Grievant demonstrated delusional thinking as she reported to Dr. Brackenrich that at times she believed her husband was someone else. During Dr. Brackenrich's interview, Grievant interrupted him constantly, demonstrated forced speech, circular reasoning, delusional thinking, inappropriate affect, and high anxiety and animation. Dr. Brackenrich diagnosed "depression with early psychosis with delusional thinking." Dr. Brackenrich prescribed medication and noted additional treatment would be necessary if Grievant did not respond to this approach.

27. Dr. Brackenrich saw Grievant for follow-up on March 3, 1998. She was much improved and no longer had forced speech, circular reasoning, or high anxiety. Dr. Brackenrich recommended Grievant take the medication for a minimum of six months and continue to remain off work.

28. Six months later at her August 18, 1998 appointment, Grievant told Dr. Brackenrich she wanted off the psychotropic medication, was doing well, and "worked off" her anxiety. At this time Grievant exhibited no evidence of psychosis or severe depression. This was her last visit to Dr. Brackenrich.

29. On July 24, 2001, Grievant saw Dr. Gary Craft for shoulder pain. Grievant also reported "whole body cramps," and stated she had become quite apprehensive since the flood. History and physical exam revealed no medical allergies, an anxiety disorder, and contusion and strain of the right arm and shoulder. The only medication prescribed was over-the-counter Tylenol. Grievant testified at the Level IV remand hearing that her all over body cramps were the result of her body's allergic reaction to medication, even though she was only taking Tylenol at the time and has no known allergies. **Behavior and Statements at Level IV Remand Hearing** (See pages 18 -34 for supporting data and explanation.)

30. Grievant only actively sought employment during the time she received unemployment in 1997 and for a few months in 1998. Much of this information had to be obtained from Grievant's husband because Grievant could not remember where and when she had applied for jobs. (Grievant also explained she looked for work between the two Level IV remand hearing days, but could not

remember when she did this. This seeking of employment consisted of making cold calls at three stores and asking if they needed any help. Grievant also testified she walked in knee-deep snow to pick up an application to Flowers Bakery, but decided she did not want to work there because it was too dangerous to get there. She also talked to an individual at the home show about a boarding school, but refused to give this man her name when he expressed interest.)

31. Grievant frequently testified that she would take just about any job that would put food on the table, as she was hungry, but would testify in the next sentence she could not accept employment until this grievance was resolved. Grievant would follow this statement with the assertion she would take any job that would pay her a decent wage.

32. Grievant has not earned any income since her termination in 1997.

33. Grievant testified she was always "looking" for work. After clarifying questioning, it became clear what Grievant meant was that when she went past various places of business, she would say to herself that she could work there. She gave as an example of looking for work that when she came in the hearing room on September 2, 2003, she told herself maybe I could be a judge. 34. While Grievant had agreed at the initial Level IV hearing that she had made inappropriate remarks, she testified at the Level IV remand hearing that since these comments were not made during work time, but were made at lunch or after work, they could not be seen as inappropriate remarks, and there was basically nothing wrong with making these types of comments to her supervisor. If a work conference were to occur after what she considered her work hours, i.e., when her students left, nothing she would say would or could be considered unprofessional.

35. At hearing Grievant exhibited the following behaviors in response to simple questions from Respondent's attorney:

a) Speech: pressured (See footnote 3) , multiple interruptions of others even after repeated reminders, at times inappropriately loud

b) Memory: poor, both for long-term and short-term recall

c) Thought processes: unable to focus, tangential (See footnote 4) , rambling, loose associations, frequent dichotomies (1. would take any work/could not work until grievance resolved; 2. Greatest fear is having someone in her classroom/no problems whatsoever with people coming into her classroom, observing her and giving criticisms); exaggerations; at times irrational

d) Affect/mood: inappropriate anger, poor impulse control, crying e) Inappropriate

remarks and behaviors: calling to Jesus to come down to the hearing room; complaints of chills throughout her body in response to her thoughts; inability to follow the simple and frequently repeated rules involved in answering questions at hearing. (For example: do not interrupt, listen to the question, answer the question asked, and do not talk when another person is talking because the hearing is on tape.)

DISCUSSION

In this remand hearing, the West Virginia Supreme Court of Appeals has assigned the burden of proof to MCBOE. This assignment is typical in disciplinary matters. W. Va. Code § 18-29-6; Nicholson v. Logan County Bd. of Educ., Docket No. 95-23-129 (Oct. 18, 1995); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). 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). This burden of proof is by a preponderance of the evidence. A preponderance of the evidence is evidence which is 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 proven is more probable than not. See Black's Law Dictionary 1344-45 (4th ed. 1968); Petry v. Kanawha County Bd. of Educ., Docket No. 96- 20-380 (Mar. 18, 1997).

I. Purpose of the remand hearing The first direction of the West Virginia Supreme Court of Appeals was to decide whether Grievant's inappropriate and insubordinate behavior was "correctable under a feasible improvement plan." Maxey, supra. The Court noted Grievant's failure to demonstrate an appropriate level of respect for her supervisor, in interrupting, arguing, and making bizarre comments concerning shooting him, and believed this behavior constituted insubordination. The Court also believed Grievant's conduct of falling to her knees in class or parent-teacher conferences and other such stress or anger-related conduct was inappropriate, and did not believe "a teacher exhibiting irrational behavior should remain in the classroom."

II. Grievant's behavior

The undersigned reviewed Grievant's behavior as identified in the classroom observations, testimony of individuals who attended the March 7, 1997 meeting, Grievant's behavior during the initial Level IV hearing, and the doctor's reports from 1997-2001. Next, the undersigned examined

Grievant's behavior during the two days of hearing in 2003 and 2004. In this review and examination, the undersigned noted the stress placed on Grievant prior to her termination by the illness and death of her mother, as well as the two deaths on her husband's side of the family. The undersigned also noted the termination and 2001 flood were stressors for Grievant.

Next, the undersigned examined the behavior exhibited by Grievant as she answered questions posed by Respondent's attorney and the undersigned. These questions were basically non-threatening and information seeking. Grievant's behavior and response to these questions raised profound doubts about her ability to perform adequately in a classroom setting, as her replies were unfocused, non-responsive,peculiar, inappropriate, and, at times, down right bizarre. Further, these same responses raised grave doubts that she could deal professionally with any administrator who would have criticisms of her conduct, especially if Grievant were required to change or correct her actions.

The undersigned Administrative Law Judge recognizes that the true flavor of Grievant's responses cannot be gleaned from a cold record, but will give numerous examples that demonstrate Grievant's continuing, unrestrained, irrational/illogical behavior.

During the fall of 1996, Mr. Spencer reported Grievant did not want to complete required special education monitoring forms, became confused when the school schedule was not followed exactly, threw things, cried, and stated she wished she would die when directed not to discuss negative comments in front of students, complained about grading papers, using required goals and objectives, and when a parent wanted to know why her son had marks on his neck, Grievant would not explain, but complained about the student's behavior and fell on her knees before the parent. Grievant also called the necessary paperwork "shit." See pre-disciplinary hearing transcript. Mr. Spencer frequently called Mr. Lane to ask for guidance in dealing with Grievant's behavior.

In the March 1997 observation, Mr. Spencer noted Grievant's prior problems with bringing a student to the office because she did not want to keep him, even though it was her responsibility, slamming the door after being told she was required to keep the student, and problems with student discipline. During the discussion of this observation, Grievant stated she had been browbeaten, asked why Mr. Spencer was picking on her, interrupted frequently, and again fell on her knees. See pre-disciplinary hearing transcript.

Grievant's Responses at the Initial Level IV Hearing 1. Grievant was asked if she had an

evaluation during the 1996 - 1997 school year, and she responded, "I did not have an evaluation. I had two observations. The second observation ended with my termination and I was told that it wasn't even going to go to Welch." This statement is incorrect. After Grievant's second refusal to sign the second observation, Mr. Spencer stated they would need to go to Welch to talk to Superintendent Roberts, and they did. After Grievant's remarks in this meeting, especially the two comments about shooting Mr. Spencer, Dr. Roberts told Grievant he would recommend her termination. Test. Grievant, Initial Level IV Hearing at 10, 24.

2. Grievant used words oddly. She called Mr. Spencer's attachment to her observation "a listing." This term apparently referred to the list of areas needing improvement. She stated her remark about shooting Mr. Spencer was an "advertisement" to let the other men in the room know she needed fair play. Test. Grievant, Initial Level IV Hearing at 11, 27, 29, 31, 38, & 39.

3. Grievant agreed she had repeatedly interrupted Mr. Spencer during his review of the second observation form on March 7, 1997. She stated she was not allowed to talk, and that is why she did that. In later testimony Grievant agreed she did get to talk and "Mr. Lane was kindly listening." Grievant interrupted during the initial Level IV hearing and had to be directed to listen to the question. Test. Grievant, Initial Level IV Hearing at 22, 23, 33, 35, 37, 38, & 39.

4. At this Level IV hearing, Grievant testified, that when Dr. Roberts called his secretary in to transcribe the termination letter, "I did look at the Secretary and told her I was a name not a number. And here this morning, I want to say that I am a name - Marjorie Maxey, and not a number." Test. Grievant, Initial Level IV Hearing at 24. 5. In response to Grievant's attorney's question of did she need time to compose herself, Grievant responded. "Yes, sir. I'm composed. But when I relive it (the termination meeting), I'm not composed when I think of the days of hunger I had to go through in order to earn that degree, which you all so conveniently put down on paper! Yes, Ms. Maxey is controlled!" Test. Grievant, Initial Level IV Hearing at 25.

6. Grievant had difficulty staying focused and answering questions. Test. Grievant, Initial Level IV Hearing at 20, 26, & 39.

Grievant's Responses at the Level IV Remand Hearing - Day One

1. Grievant testified she had difficulty with both her long-term and short-term recall throughout this hearing, and this fact was clearly demonstrated by her testimony. (See Pages 15 & 56 for examples). Grievant was frequently unable to focus on the question asked and would go off on a

tangent in her answers. (See Pages 17 - 18, 29, 31, 32, & 46 for examples and Page 30 for Grievant's admission that she has trouble focusing). Additionally, Grievant frequently interrupted others. (See Page 27 for an example).

2. When asked about the time between her appointment with Mr. Lusher, Grievant responded, "I don't really recall. I really don't, because this _ _ a lot of time elapsed, and _ and I'm not trying to avoid any questions or anything. I just _ really that's been so much time lapsed, that it just seems like this was all a dream, you know? And you wonder when you're gonna wake up and the dream will end. When will it end?" Test. Grievant, Level IV Remand Hearing, Day 1 at 10.

3. In February 2001, Grievant had surgery after being seen in the emergency room for hemorrhaging last had lasted for three days. Grievant testified she was ready to return to full-time work the day after this surgery. 4. Grievant was asked about why she went to Dr. Peters. Grievant responded she went for a gynecological exam, "Because at that time, a working lady keeps up with these things. Now, since I've been unemployed and food's scarce on the table, I don't go regular for mammograms and gynecological exams. And it sends cold chills over me just to tell you this." When asked if she had any health insurance coverage Grievant responded, "Health in _ health insurance coverage is good but you have to pay initial _ initial payments and I have 2 daughters. One daughter has to be cared for, one daughter -- is 20, but she is not an adult -- in a -- in a working profession. My daughter comes first, if I have to eat weeds, my daughter comes first. And -- and the chills are beginning. . . " Test. Grievant, Level IV Remand Hearing, Day 1 at 14.

5. Grievant exhibited odd thinking, as represented by this response about whether she received stress medication from Dr. Ramadan. "I believe one of them was. But you see, my body, I'm _ I'm -- I'm decent with my body. I've _ I've _ I try to keep a clean temple, but my body, even vitamins, see my bod _ and _ and I don't even like telling you this. But my body sets up an immunity to vitamins and things." There is no evidence in any of Grievant's medical records indicating Grievant is allergic to any medication, in fact just the opposite fact is noted. Additionally, Grievant did take psychotropic medication in 1998 with positive effects. Test. Grievant, Level IV Remand Hearing, Day 1at 18. (See also at Page 56 where Grievant states her body had whole body cramps as a reaction to medication. See also Resp. No. 5 at Level IV remand hearing detailing shoulder pain after the flood accompanied by whole body cramps. Respondent's attorney informed Grievant she did not need to tell her these personal details, and Grievant's attorney's again reminded Grievant just to answer the questions

asked.) 6. Grievant explained she was going to have to "have closure to this [grievance] before _ if you offered me a million dollar job and I'm a million dollar lady, I'd be hesitant to take it until we had closure to this case." Test. Grievant, Level IV Remand Hearing, Day 1at 26. When asked if she had stopped looking for work, Grievant responded, "No, ma'am. In the back of my mind, every time I make a journey anywhere, I'm consciously looking. And see even after the flood, when I'm in a position to relocate, because you know, you're not gonna wanna stay in a flood prone zone to have the recurrences, I've been consciously looking for an apartment and employment that would be substantial enough to maintain a lifestyle that would not be inferior for a human being. And I mean I'm gonna have to have access to the job and I'm gonna have to get to the job and I'm gonna have to perform the job, that I understand, but first you have to get the job." When ask to clarify this because of her first statement, Grievant responded, "Well, no _ no, that kinda goes in with it. I'm saying until we get closure to this, I'm not gonna feel free intrinsically with whatever offers comes [sic] along, although I will accept an offer. Do you hear me?" Test. Grievant, Level IV Remand Hearing, Day 1 at 27. (See Pages 28, 29, 31, & 47 for more examples).

7. When asked to identify specifically where she had looked for work in the past year Grievant stated, "I've looked everywhere. When I entered this room I thought well I could be a Judge." Test. Grievant, Level IV Remand Hearing, Day 1 at page 31. (See page 45 for another example of "watching/looking" for work.)

7. At times Grievant gave odd responses to the questions.

a. When asked about whether she applied for work in 2001, Grievant stated "I don't remember. You see you're giving me these dates, I remember your face but I don't remember your name." Test. Grievant, Level IV Remand Hearing, Day 1 at 32. b. When talking about why she didn't remember where and when she had applied for work, Grievant stated, "I'm sure I did. But when _ when details _ details when it all comes at you and _ and you're so hungry you don't go half the time, then you're worried about food." Test. Grievant, Level IV Remand Hearing, Day 1 at 33. It should be noted Grievant was actually overweight as verified by her medical records.

c. After stating she had talked to one of "the ladies" at the 4-H about employment so she could get "word of mouth advertisement," she said her phone had been out of order since 1991. Test. Grievant, Level IV Remand Hearing, Day 1 at 45 - 46.

d. When asked to clarify her statement that she had worked for food, Grievant explained that

during the flood she "worked" to get across the creek to pick up food and "worked hard not to cry." Test. Grievant, Level IV Remand Hearing, Day 1 at 48.

Grievant's Responses at the initial Level IV Hearing - Day Two (See footnote 5)

1. During day two of the remand hearing Grievant continued to have great difficulty with her memory, as she was not even able to recall what she did just a few months ago. The dichotomy she felt about seeking employment was very clear, and she was more unfocused, tangential, and confused. She interrupted more frequently and exhibited pressured speech. Her thinking was muddled and odd. The following examples are given to demonstrate these conclusions.

a. KB [Attorney Bayless]: Correct. [You have] not earned any money since employment with MCBOE was terminated.

GRIEVANT: To my knowledge, no, but there again you see somebody might have said to me Marge, I'll give you a dinner tonight and might have said I'll be there, Johnny on the spot.

KB: But that is not the same as earning money from working.

GRIEVANT: Well, you indicated it was when I told you about the flood [raises voice, angry] and I had to work to get across the creek to get out to get the food [louder, red face, angry] and then you told me. Oh, it sends chills over me yet! [Anger escalating] You told me are you sure you reported that earnings on your income tax! Mercy Lord, Mercy Lord. [Loud, quaking voice] I had to work to. . . .

JF: [Attorney Fuchtenberger] to Grievant: You need to. . . . [Trying to stop Grievant.]

GRIEVANT: [interrupting] get across. . . .

JF: You need to. . . [Again, trying to stop Grievant.]

GRIEVANT: [to JF] No. [to KB] But these questions, Mercy Lord, did I report that free can of food on my income tax. [Voice loud and shaking] Did I report it? Did I report it? Lord Jesus, send your power just now, we need it.

KB: Ms. Maxey, I'm sure I don't think I would have asked you if you reported a can of food on your income tax.

GRIEVANT: Well I might have mixed up, but I'm sure that was the question I was asked. [Note two contradictory thoughts and difficulty admitting she was incorrect.]

KB: My question today is have you earned any wages that . . .

GRIEVANT [Interrupting]: Have I earned any wages . . .

KB: That would be required to be reported on your income tax since March of 1997, since your employment with the board.

GRIEVANT: I sit up nightly looking at coupons to see what I can afford at the grocery store. When you sit up all night until two o'clock in the morning to see what you can afford at the grocery store without asking - my husband works yes, but there are certain things I want that doesn't come under - under - and that's the reason a woman works to begin with - uh. . . . is for a degree of independence. Yes, you love your husband, your husband is a good man, but you were an individual. I was an individual teacher, my individual qualifications should speak for themselves, my individual employment should have spoken for itself.

KB: Ms. Maxey, I'm going to take that to mean no, that you have not had a job of any sort where you made money that had to be reported on your income tax since the board of education.

GRIEVANT: To my knowledge, no, but you see I enter so many contests it's liable to come just any day I'm waiting for that ship to sail in.

KB: During the time that, of that last year, that 1996-1997 school year. . . .

GRIEVANT [Interrupting]: Yes, Ma'am.

KB: When you were employed up through March of 1997. . . .

GRIEVANT [Interrupting]: Yes, Ma'am.

KB: . . . do you believe you exhibited any irrational behavior. . . .

GRIEVANT [Interrupting]: exhibited any irrational behavior. . . .

KB: at school?

GRIEVANT: I would be there by 6, I would grade my papers until school time started, some days I didn't get lunch, and then I would wait after school for my ride to come. So would, would a little irrationality on an occasion or two might be uh, might be seeable you reckon maybe.

. . .

KB: During the time you taught the last year, 1996-1997 school year, did you experience any stress that you could identify in the classroom while working with students

GRIEVANT: Yes, ma'am. I was so overloaded, I was so overloaded, in, in about December 1996 (See footnote 6) , I believe it was, I was so overloaded, I had gone early that morning to sit at a table, to sit at a table, to do all that I had to do so I could possibly have Christmas free with my two children at home and my invalid mother. As I went to get up, I fell, and I still got knots on my head where I fell. And I hobbled along [loud, angry voice], I hobbled along [escalating] on a broomstick for two or three days, I would say that was a little bit of stress. And as all the other stress, do you want to know what stresses me? When they send somebody into my classroom, I let this person take charge, but at the moment somebody else enters in my classroom I fell the greatest unease, that ever was. [Voice shaking, speech fast.] And, and this even, even this round table is a prime example of it, because I think that every child should have private confidentiality, and at the time that I ever let somebody else enter my room, I feel that all confidentiality has left. Because theystart comparing those kids, and the job is not to compare the kids, the job is to enhance the children. [Speech continued pressured throughout this response.]

III. Is Grievant's behavior correctable

The first issue the West Virginia Supreme Court of Appeals has directed the undersigned Administrative Law Judge to determine is a question of fact, is Grievant's behavior correctable or subject to remediation? In assessing this issue, the undersigned Administrative Law Judge found § 6.19 of Education Law by James Rapp to be of assistance. Lexstat 2-6 Education Law § 6.19 from Chapter 6, "Faculty and Staff Employment and Dismissal." Section 6.19 discusses remediation of conduct. This resource noted the reasons for the fact finder's determination should be clearly stated

so the reviewing court can pass judgment on the correctness of the decision. This directive is the reason the undersigned Administrative Law Judge included so much information about Grievant's behaviors and actions.

Deficiencies in classroom performance are usually found to be correctable, while Improvement Plans are not required for conduct that does not involve teaching. Educ. Law at § 6.16 [4][a] (citing Potter v. Kalama Pub. School Dist., 644 P.2d 1229 (Wash. 1982)). Additionally, behavior which was originally correctable can become irremediable if it continues over a long period of time and the employee fails to correct the behavior after being told. Educ. Law at § 6.16 [4][b] (citing Gilliland v. Bd. of Educ., 570 N.E.2d 322 (Ill. 1977)).

Many courts have found conduct non-correctable when there were several behaviors, and they were continuous in nature. Bd. of Educ. v. Harris, 578 N.E.2d 1244 (Ill. 1991) (teacher's continued refusal to accept classroom assignment after repeatedverbal warnings from administrators was irremediable conduct); Gilliland, supra (dismissal upheld without notice to correct where teacher dismissed for incompetence, cruelty, negligence and other causes, where conduct extended over a period of four years despite numerous parental complaints culminating in discussions between teacher and superiors concerning conduct); Glover v. Bd. of Educ., 316 N.E.2d 534 (Ill. 1974) (various problems of discipline, lack of proper learning atmosphere and lack of rapport with students which continued over time was irremediable); Kallas v. Bd. of Educ., 304 N.E.2d 527 (Ill. 1973) (persistent lack of teacher, board, pupil, parent, administrator rapport plus teacher's failure to control temper in classroom, justified dismissal as irremediable). Additionally, In McCutcheon v. Board of Education, 419 N.E.2d 451 (Ill. 1981), a principal's continuing disrespect for school policies and a pattern of insubordination which included threats and attacks on school personnel was found to be non-correctable.

The lengthy list and examples of Grievant's behavior over the years, demonstrates Grievant's problematic behavior is pervasive, ongoing, and frequently irrational. Obviously, Grievant has difficulty with focusing, thinking, and remembering, as well as difficulty with poor impulse control, as demonstrated by angry outbursts without provocation. Many more examples of these types of behavior could have been given, especially from the second day of the remand hearing.

Grievant has been informed of these problems without change. She had meetings and discussions with her principal, as well as other professionals. While the undersigned Administrative

Law Judge agrees with the West Virginia Supreme Court of Appeals that Mr. Spencer certainly could have handled many issues in a better manner, it was also clear from Grievant's behavior at hearing that any conversations with Grievant to discussdeficiencies would be difficult, filled with her interruptions, and would probably not result in Grievant's understanding either the issues or the need for change.

Despite Grievant's claims to the contrary, it is quite clear she either cannot or will not control her behavior and responses. Grievant would not or could not answer the questions asked, disregarded her attorney's assistance, and was rude to Respondent's attorney without cause. Repeated, simple, concrete directions given to Grievant by the undersigned Administrative Law Judge were ignored. Grievant continued to interrupt and give non-responsive answers, and it was necessary to take breaks during these two short hearing days for Grievant to compose herself.

Of even more concern were Grievant's irrational behavior, disordered thinking, and inability to remember. Grievant loudly proclaiming she had chills all over her body and asking Jesus to attend the hearing, her occasional statements of irrational ideas, such as she could return to work full-time the day after surgery, and her clear inability to recognize the fact she made contradictory statements one after the other, is the type of conduct that would prevent Grievant from returning to the classroom. Further, Grievant's admitted inability to remember and process information is not correctable, and the undersigned Administrative Law Judge finds this incapacity would also prevent Grievant from returning to the classroom.

While this type of analysis may not be the kind expected by the West Virginia Supreme Court of Appeals on remand, the undersigned Administrative Law Judge is unable to come to any other conclusion, given the evidence presented by the entire record. It is sad to see a teacher with this many years of experience unable to return to the classroom, but all decisions regarding teachers must be examined with the best interestof the students in mind. While it is unclear if Grievant's inability to correct her conduct is due to willfulness or some type of psychological problem she refuses to recognize, this issue is not for the undersigned to decide. (See footnote 7) The end result is the same, Grievant's irrational and inappropriate behavior is not correctable, and she should not be returned to the classroom.

IV. Payment of Statutory Attorney Fees

The West Virginia Supreme Court of Appeals directed the "limited statutory attorney fees

prescribed in West Virginia Code § 18-29-8 (1992) "should also be considered and ordered as appropriate." West Virginia Code § 18-29-8 provides as follows:

> In the event an employee or employer appeals an adverse level four decision to the circuit court or an adverse circuit court decision to the supreme court, and the employee substantially prevails upon such appeal, the employee or the organization representing the employee is entitled to recover court costs and reasonable attorney fees, to be set by the court, from the employer.

Since this Code Section specifically states these fees are to be determined by "the court," the undersigned Administrative Law Judge cannot assess or order these fees, and Grievant's attorney is directed to file his fee petition with the circuit court.

The above-discussion will be supplemented by the following Conclusions of Law.

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). "A preponderance of the evidence isevidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). 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. Dep't of Health and 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.; 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).

2. Behavior which was originally correctable can become irremediable if it continues over a long period of time, and the employee fails to correct the behavior after being told. Educ. Law at § 6.16 [4][b] (citing Gilliland v. Bd. of Educ., 570 N.E.2d 322 (Ill. 1977)).

3. Conduct is usually found to be non-correctable when there was more than one behavior, and these behaviors were continuous in nature. Educ. Law at § 6.16 [4][b; Bd. of Educ. v. Harris, 578 N.E.2d 1244 (Ill. 1991); Gilliland, supra; Glover v. Bd. of Educ., 316 N.E.2d 534 (Ill. 1974); Kallas v.

Bd. of Educ., 304 N.E.2d 527 (Ill. 1973).

4. Behavior which includes threats and attacks on school personnel is non- correctable. See McCutcheon v. Bd. of Educ., 419 N.E.2d 451 (Ill. 1981).

5. A review of all the evidence of record demonstrates Grievant's inappropriate and irrational behavior is of a longstanding nature and is pervasive. As evidenced by Grievant's behavior and testimony, she is either unable or unwilling to change her conductto adapt to the rules and requirements expected in a professional setting. Grievant responds poorly to disagreements and directions to modify her actions, at times to the point of falling on her knees, interrupting and speaking loudly, and audibly beseeching Jesus to come and help her. Grievant's behavior is not correctable.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of McDowell County and 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: April 29, 2005

Footnote: 1

Grievant was represented by counsel, J.W. Feuchtenberger, and Respondent was represented by counsel, Robert Edward Blair during the initial Level IV proceedings and by Kay Bayless, Esq., on remand. Several continuances were agreed to by the parties and granted for good cause.

Footnote: 2

Grievant did not want to sign the form that she had stepped on.

Footnote: 3

Pressured speech is rapid, virtually non-stop, and difficult to interrupt. See I. Gregory & D. Smeltzer, Psychiatry, Essentials of Clinical Practice, 1st ed. (1977); and A. Freedman, H. Kaplan, and B. Sadock, Comprehensive Textbook of Psychiatry/II, 2d ed. 1975.

Footnote: 4

Tangential comments are statements that are superficially related and derail the response with the effect that the desired goal is never reached. See Comprehensive Textbook of Psychiatry/II, supra; Psychiatry, Essentials of Clinical Practice, supra.

Footnote: 5

The undersigned Administrative Law Judge had no transcript for day two at the time this decision was issued.

Footnote: 6

This event occurred in December of 1995.

Footnote: 7

While not an issue directly addressed at hearing, it was clear from Grievant's testimony that she did not want to take any medications, as she believes she is allergic and her body was a temple.