THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

MICHAEL WAGGONER,

Grievant,

v. Docket No. 2008-1570-CabED

CABELL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Michael Waggoner, is employed by the Cabell County Board of Education ("CCBOE") as a high school science teacher. He filed this grievance over his one-day suspension. His Statement of Grievance reads:

> **Grievant suspended for one day without pay for failing to have lesson plans at a moment[']s notice. This suspension misapplies W. Va. Code § 18A-2-8 and 18A-2-12 and 126 CSR 142. This action also constitutes prohibited discrimination, harassment and favoritism in violation of 6C-2-2.**

The Relief Sought is, "[r]ecision of the suspension and reinstatement with pay and any other benefits that were lost due to suspension; attorney's fees and costs; and removal of all references to these allegations from grievant's personnel file."

This grievance was directly filed to Level Three on May 14, 2008, and a Level Three hearing was conducted on August 11, 2008, at the Grievance Board's Charleston office. Grievant was represented by Jason Poling, Esq., of the Waters Law Group, and CCBOE was represented by Rebecca Tinder, Esq., of Bowles Rice McDavid Graff & Love, LLP. This matter became mature for decision on September 9, 2008, following the submission of the parties' proposed Findings

of Facts and Conclusions of Law.

Synopsis

Respondent asserts Grievant repeatedly did not have his lesson plans in the classroom as required by State and CCBOE policies. When Grievant did not have his lesson plans the first time, he was told to correct the problem. Grievant received a written reprimand for his second failure to have lesson plans in the classroom. The third time, Grievant was given a one-day suspension and an Improvement Plan. Respondent asserts Grievant was on notice of his refusal to follow the mandated guidelines, and when his insubordination continued, he was given the suspension.

Grievant asserts CCBOE did not follow the evaluation process required by 126 C.S.R. 142. Grievant avers the issue was one of unsatisfactory performance, not insubordination, was correctable by an Improvement Plan, and discipline could not be given until an Improvement Plan had proved to be unsuccessful.

For the reasons listed below, the undersigned Administrative Law Judge finds this grievance must be Denied.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact. The parties agreed to utilize the pre- disciplinary record and only supplemented this record at Level Three.

Findings of Fact

1. Grievant is employed by CCBOE as a high school science teacher at Cabell Midland High School. He is in his third year as a regularly employed teacher.

2. Before teaching in the Cabell County school system, Grievant had taught in Ohio for 17 years. He then left teaching to engage in other employment. He returned toteaching with CCBOE, first as a substitute, and then became a regular classroom teacher starting with the 2005 - 2006 school year.

3. At the first staff meeting of the 2007 - 2008 school year, Principal David Tackett presented a document to all teaching staff entitled "Cabell Midland High School Teacher Expectations and Information." Grievant attended this meeting. This document was discussed during that meeting, and on Page 1 at Number 6 states:

Lesson Plans: lesson plans will be checked frequently. Lesson plans shall be maintained for the current week and up to 5 days in advance. Keep lesson plans on your desk during the class period so they can be viewed when formal and informal visits are made by administrators and department heads. Lesson plans are to be written neatly and should be easily understood.

4. Daily lesson plans are required of all state teachers regardless of their tenure or experience, and this responsibility is part of the criteria used to assess a teacher's performance. 126 C.S.R. 142 § 14.2.1.c. requires a teacher to develop lesson plans to teach instructional objectives, and 126 C.S.R. 142 § 14.4.1.a. requires a teacher to prepare and implement lesson plans.

5. Grievant agrees he is required to prepare lesson plans for all his classes.

6. Because Grievant is a teacher with less than five years of county experience, he must be observed and evaluated a minimum of three times during the school year. At least one of these visits must be announced. 126 C.S.R. 142 §§ 9.1 & 9.2.

7. On October 29, 2007, Principal Tackett came to Grievant's classroom for a previously announced observation. When he asked to see Grievant's lesson plans, Grievant stated he had left them at home. 8. Principal Tackett directed Grievant to bring his lesson plans to the post- observation conference scheduled on November 2, 2007. Grievant brought a one page document containing five days worth of lesson plans for his three classes. (See footnote 1)

9. During this post-observation conference, Principal Tackett discussed the requirement to have completed lesson plans available in the classroom and for the use of a substitute, if needed. Principal Tackett did not write Grievant's failure to have lesson plans on this observation as he believed a discussion of this failure would be sufficient to correct Grievant's behavior. (See footnote 2)

10. On December 17, 2007, Principal Tackett came to Grievant's classroom for an unannounced observation. When he asked to see Grievant's lesson plans, Grievant stated he had left them at home. On the observation form, Principal Tackett noted this was the second time he had asked for Grievant's lesson plans, and he did not have them. Principal Tackett also noted other areas of concern about Grievant's classroom teaching performance.

11. During the post-observation conference, on December 19, 2007, Principal Tackett

again reiterated the requirement to have completed lesson plans available in theclassroom for his own use. Principal Tackett noted these plans would also be necessary for a substitute. Grievant informed Principal Tackett that it was impossible for him to write lesson plans that a substitute could follow, and when he knew he would be ill, he prepared a special lesson plan for a substitute to follow.

12. On December 20, 2007, Principal Tackett issued Grievant a written reprimand for insubordination because of his continuing failure to meet the requirement of having lesson plans available in the classroom. This letter found Grievant's attitude during the December 19, 2007, conference to be "flippant" and stated, "in the event you continue to ignore expectations by not having appropriate daily lesson plans available for review and the use of a substitute, I will ask the superintendent to consider discipline." He found Grievant "refused" to write lesson plans a substitute could follow.

13. The December 20, 2007, letter also directed Grievant to bring his lesson plans to Principal Tackett's office when school reopened. Grievant partially complied with this request, as school opening was delayed by bad weather.

14. By letter dated January 22, 2008, and received by CCBOE on January 28, 2008, Grievant responded to the written reprimand. Grievant indicated he had been unsure he would return for the second semester because he did not need to work, and he did not want to return to this "stressful," "hostile work environment." He responded to many of Principal Tackett's negative comments, indicated he was a "good" and "experienced" teacher, and noted he was not refusing to write lesson plans for substitutes, but believed it was impossible to write lesson plans a substitute could follow. Grievant also indicatedhe had been informed last year that as an experienced teacher, observations were not needed. (See footnote 3) Grievant did not grieve his written reprimand.

15. On March 21, 2008, Principal Tackett conducted an unannounced observation in Grievant's classroom. Grievant did not have his lesson plans. Because of this failure, Principal Tackett noted many areas could not be assessed such as instructional strategies, remediation activities, and integration of learning tools. (See footnote 4)

16. Principal Tackett requested Superintendent William Smith to consider taking disciplinary action against Grievant for failure to complete daily lesson plans. Superintendent

Smith informed Grievant of this request by letter dated March 24, 2008, and scheduled a conference on this issue for April 2, 2008.

17. Grievant and Principal Tackett met on March 27, 2008, to discuss his most recent observation. Grievant brought a representative with him to this meeting. Principal Tackett reiterated the lesson plan requirement and gave Grievant a copy of W. Va. Code § 18A-2-12, and Policy 5310. He also gave Grievant another copy of "Cabell Midland High School Teacher Expectations and Information" and his written reprimand.

18. At this March 27, 2008, conference, Grievant also received his 2007 - 2008 evaluation. While this evaluation contained many positive statements, Principal Tackett found Grievant unsatisfactory in the area of "Instructional Management System" becauseof his repeated failure to have lesson plans. Grievant was informed he would be placed on an Improvement Plan.

19. Grievant met with Superintendent Smith, and by letter dated April 4, 2008, Superintendent Smith informed Grievant he had decided to suspend Grievant for one day for insubordination. He also informed Grievant that he had directed Principal Tackett to determine if an Improvement Plan was necessary. Superintendent Smith indicated Grievant understood the concept of lesson plans and the importance of having them written and available. Superintendent Smith also found Principal Tackett was clear in his instructions to Grievant, and his requests were reasonable. Superintendent Smith also noted Grievant's statement that he later found his lesson plans for the last observation and "had an opportunity to correct the situation by producing your lesson plans for inspection, [but] you elected not to do so for reasons only you can discern."

20. Grievant filed a response to the evaluation on May 2, 2008. He repeated much of what was contained in his January 22, 2008, letter. Grievant stated Principal Tackett was angry at him for his honesty, and "that the current request for discipline revolves around that anger as opposed to a concern about the genuine need for lesson plans." Grievant also stated that since he had not seen Principal Tackett since December he "hadn't given it as much thought as I now see I should have," and "it made me angry with myself that I had given him exactly what I believed he wanted." Grievant averred he had thrown out his lesson plans, and since it was Friday he had no further need for them. (It is noted that the observation occurred

at 8:37 a.m., and lesson plans are to be completed five days in advance.)

21. Grievant now tapes his lesson plans to his desk. 22. Grievant has the ability and experience to write appropriate lesson plans. Testimony Grievant, Smith, & Tackett.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *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 of witnesses, 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. 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).

W. Va. Code § 18A-2-8 identifies the types of conduct that can result in disciplinary action and 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 contendere to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article.

It is not necessary for a board of education to identify an employee's offenses by the exact terms utilized in W. Va. Code § 18A-2-8, as long as the required written notice of charges

specifically identifies the alleged acts of which the employee is accused. *Jordan v. Mason County Bd. of Educ.*, Docket No. 99-26-080 (July 6, 1999). CCBOE provided Grievant written notice of the charges. The other issues raised by the parties will be discussed below.

I.

Insubordination

CCBOE has identified Grievant's repeated failure to provide lesson plans as insubordination. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(*per curiam*). *See 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 "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, supra. See Riddle, supra; Webb, supra*. "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) theorder (or rule or regulation) must be reasonable and valid." *Butts, supra*. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990).

As previously stated by the Grievance Board, "the factor which distinguishes willful neglect of duty and insubordination from unsatisfactory performance is that the employee knows [his] responsibilities, and is competent to perform them, but elects not to complete them. When an employee's performance is unacceptable because [he] does not know the standards to be met, or what is required to meet the standards, and [his] behavior can be corrected, the behavior is unsatisfactory performance." *Bierer v. Jefferson County Bd. of Educ.*, Docket No. 01-19-595 (May 17, 2002). Grievant's behavior can be seen as insubordination, as the problem is not a deficiency in Grievant's professional skills, but a wilful failure to perform the duties of which he is aware. *See Bierer*.

The elements identified in the *Butts* test are met: (a) Grievant did not follow the State Board of Education and CCBOE's policies; (b) Grievant was aware of these policies and aware of his

behavior; and (c) the State Board of Education and CCBOE's policies are reasonable and valid. Additionally, all parties agreed Grievant had the ability and experience to write appropriate lesson plans. CCBOE has demonstrated Grievant was insubordinate.

II. Evaluation Next, Grievant seems to assert his evaluation was flawed, as it did not meet the "open and honest" standard required by Policy. W. Va. Code § 18A-2-12a states:

> All school personnel are entitled to know how well they are fulfilling their responsibilities and should be offered the opportunity of open and honest evaluations of their performance on a regular basis and in accordance with the provisions of section twelve of this article. All school personnel are entitled to opportunities to improve their job performance prior to the termination or transfer of their services. Decisions concerning the promotion, demotion, transfer or termination of employment of school personnel, . . . should be based upon the evaluations. . . .

An evaluation is properly conducted if it is performed in an "open and honest" manner, and based on the requirements in State Department of Education Policy 5310 and W. Va. Code § 18A-2-12a. *See Brown v. Wood County Bd. of Educ.*, 400 S.E.2d 213 (W. Va. 1990); *Wilt v. Flanigan,* 170 W. Va. 385, 294 S.E.2d 189 (1982). The mere fact a grievant disagrees with his unfavorable evaluation does not indicate it was unfairly performed, nor is it evidence of some type of inappropriate motive or conduct on the part of the evaluator. *Romeo v. Harrison County Bd. of Educ.*, Docket No. 17-88-013 (Sept. 30, 1988). *See Rider v. Bd. of Trustees/Marshall Univ.*, Docket No. 99-BOT-348 (Apr. 7, 2000).

Grievant's evaluation was based on three observations. After each observation, Principal Tackett met with Grievant and informed him of the strengths and weaknesses he observed. A continuing issue was the failure to have lesson plans in the classroom as required. After the first observation, Grievant was counseled, after the second he received a written reprimand, and after the third, he received a one-day suspension.

There is no demonstrated unfairness on Principal Tackett's part. The undersigned Administrative Law Judge finds no evidence that the evaluation was not conducted in anhonest and open manner. The matter is simple -- lesson plans are required, and either Grievant had his lesson plans or he did not -- Grievant did not.

III. Improvement Plan

Grievant asserts CCBOE is required to utilize an Improvement Plan first, and if that does

not work, then disciplinary action could be considered. Grievant asserts he cannot have both a suspension and an Improvement Plan for the same offense.

First, it must be noted that an Improvement Plan is required "when a teacher's performance is unsatisfactory in any area of teacher responsibility. . . ." Resp. Exh. 1. As Grievant's 2007 - 2008 evaluation found him unsatisfactory in the area of "Instructional Management System," an Improvement Plan is necessary. This Improvement Plan is reported to be brief and consist of Grievant turning in his lesson plans on a regular basis.

Next, as previously noted by the Grievance Board, "[e]valuations and subsequent Improvement Plans are not viewed as disciplinary actions as the goal is to correct unsatisfactory performance, and improve the education received by the students." *Baker v. Fayette County Bd. of Educ.*, Docket No. 94-10- 427 (Jan. 24, 1995). (See footnote 5) Thus, it is clear the Improvement Plan and the suspension serve different purposes. The suspension isfor continued refusal to have lesson plans in the classroom as required. The simple Improvement Plan used here was to make sure Grievant is performing his required responsibilities.

Additionally, since Policy 5300 speaks to transfers, promotions, termination, and demotions, and it does not speak to suspensions, written reprimands, or verbal warnings, an Improvement Plan is not required prior to dispensing these unlisted disciplinary actions. *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003). Indeed, Grievant had already received a written reprimand for the same deficiency. Accordingly, Grievant was not entitled to an Improvement Plan prior to his suspension because the behavior had been pointed out to him, and the behavior was repeated after being placed on notice of this deficiency. *Santer, supra*. *See Maxey v. McDowell County Bd. of Educ.*, 212 W. Va. 668, 575 S.E.2d 278 (2003). Thus, Grievant's argument that he cannot have two "punishments" for the same offense is without merit. Two punishments were not given to Grievant.

IV. Lack of progressive discipline

Grievant's assertion that there was no progressive discipline is confusing. Grievant was counseled in October for his failure to have lesson plans. It is clear now that Principal Tackett should have noted this shortcoming on Grievant's observation form instead of "giving

Grievant the benefit of the doubt" and only giving this direction orally. But, the undersigned Administrative Law Judge finds Principal Tackett did give Grievant this directive, and this finding is supported by Principal Tackett's notes of the first observation. It is clear Grievant did receive the written reprimand as he responded, and in the written reprimand Grievant was put on notice that failure to correct this deficiency would result infurther disciplinary action. This written reprimand was followed by the one-day suspension when Grievant still did not have his lesson plans available at the third observation. Progressive discipline was followed here.

V. Discrimination

Grievant alleged discrimination. (See footnote 6) **"'Discrimination' means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." W. Va. Code § 6C-2-2. The West Virginia Supreme Court of Appeals has recently clarified that, in order to establish either discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:**

> **(a) that he or she has been treated differently from one or more similarly-situated employee(s);**
>
> **(b) that the different treatment is not related to the actual job responsibilities of the employees; and,**
>
> **(c) that the difference in treatment was not agreed to in writing by the employee.**

***Frymier v. Higher Educ. Policy Comm.*, 221 W. Va. 306, 655 S.E.2d 52 (2007)(*per curiam*); *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.*, Docket No. 04-CORR-278 (2005). In *Frymier*, the Court acknowledged what this Board's cases have consistently held, i.e., that the elements of discrimination and favoritism are essentially identical. *See Frymier v. Glenville State College*, Docket No.03-HE-217R (Nov. 16, 2004); *Kincaid v. Div. of Corr.*, Docket No. 98-CORR- 144 (Nov. 23, 1998); *Prince v. Wayne County Bd. of Educ.*, Docket No. 90-50-281 (Jan. 28, 1990). "[T]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]" *White, supra*.**

Grievant has failed to demonstrate discrimination. Grievant produced little evidence on this issue, and no evidence of the animosity Grievant asserted on the part of Principal Tackett was demonstrated. Just because part of the feedback given to Grievant was not positive, and he clearly did not like the information he received, does not mean it was inappropriate or constituted discrimination. *See Rider, supra.*

Additionally, both Principal Tackett and Superintendent Smith stated they had never had a situation where a teacher repeatedly failed to have lesson plans, especially after this mandate was pointed out. The only somewhat analogous situation was a teacher who received a short suspension for failure to come to work on time. Accordingly, Grievant did not meet his burden of proof, as he did not establish similarly situated employees were treated differently.

VI. Mitigation/Severity of Penalty

The argument Grievant's one-day suspension is 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 agency['s] discretion or an inherent disproportion between the offense and the personnel action." *Martin v. W. Va. FireComm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). Grievant asserts he should only be given an Improvement Plan.

"When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994). *See Austin v. Kanawha County Bd. of Educ.*, Docket No. 97-20-089 (May 5, 1997). Mitigation of a penalty is considered on a case by case basis. *Conner v. Barbour County Bd. of Educ.*, Docket No. 95-01-031 (Sept. 29, 1995); *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of

otherwise satisfactory work performance. *Pingley v. Div. of Corr.*, Docket No. 95-CORR-252 (July 23, 1996).

This Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*,Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute her judgement 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).

The undersigned Administrative Law Judge cannot find that a one-day suspension was excessive given Grievant's failure to follow state and county policies after repeated directions to do so. A review of the factors identified in *Phillips, supra*, does not indicate a different result should be reached.

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. *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 of witnesses, 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). Where the evidence equally supports both sides, theemployer has not met its burden.

***Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). *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. W. Va. Code § 18A-2-8 identifies the types of conduct that can result in disciplinary action and 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 contendere to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article.**

3. 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.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(*per curiam*). *See 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 "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, supra. See Riddle, supra; Webb, supra*. "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts, supra*. 4. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990).

5. The elements identified in the *Butts* test are met: (a) Grievant did not follow the State Board of Education and CCBOE's policies; (b) Grievant was aware of these policies and aware of his behavior; and (c) the State Board of Education and CCBOE's policies are reasonable and valid.

6. "[T]he factor which distinguishes willful neglect of duty and insubordination from unsatisfactory performance is that the employee knows [his] responsibilities, and is competent to perform them, but elects not to complete them. When an employee's

performance is unacceptable because [he] does not know the standards to be met, or what is required to meet the standards, and [his] behavior can be corrected, the behavior is unsatisfactory performance." *Bierer v. Jefferson County Bd. of Educ.*, Docket No. 01-19- 595 (May 17, 2002).

7. CCBOE has met its burden of proof and demonstrated Grievant was guilty of insubordination.

8. W. Va. Code § 18A-2-12a states:

> **All school personnel are entitled to know how well they are fulfilling their responsibilities and should be offered the opportunity of open and honest evaluations of their performance on a regular basis and in accordance with the provisions of section twelve of this article. All school personnel are entitled to opportunities to improve their job performance prior to the termination or transfer of their services. Decisions concerning the promotion, demotion, transfer or termination of employment of school personnel, . . . should be based upon the evaluations. . . .**

9. An evaluation is properly conducted if it is performed in an "open and honest" manner, and based on the requirements in State Department of Education Policy 5310 and W. Va. Code § 18A-2-12a. *See Brown v. Wood County Bd. of Educ.*, 400 S.E.2d 213 (W. Va. 1990); *Wilt v. Flanigan,* 170 W. Va. 385, 294 S.E.2d 189 (1982). The mere fact a grievant disagrees with his unfavorable evaluation does not indicate it was unfairly performed, nor is it evidence of some type of inappropriate motive or conduct on the part of the evaluator. *Romeo v. Harrison County Bd. of Educ.*, Docket No. 17-88-013 (Sept. 30, 1988). *See Rider v. Bd. of Trustees/Marshall Univ.*, Docket No. 99-BOT-348 (Apr. 7, 2000).

10. An Improvement Plan is required "when a teacher's performance is unsatisfactory in any area of teacher responsibility. . . ." Resp. Exh. 1.

11. "Evaluations and subsequent Improvement Plans are not viewed as disciplinary actions as the goal is to correct unsatisfactory performance, and improve the education received by the students." *Baker v. Fayette County Bd. of Educ.*, Docket No. 94-10- 427 (Jan. 24, 1995).

12. Since Policy 5300 speaks to transfers, promotions, termination, and demotions, and it does not speak to suspensions, written reprimands, or verbal warnings, an Improvement Plan is not required prior to dispensing these unlisted disciplinary actions. *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003).

13. Grievant was not entitled to an Improvement Plan prior to his suspension because the behavior had been pointed out to him, and the behavior was repeated afterbeing placed on notice of his deficiencies. *Santer, supra. See Maxey v. McDowell County Bd. of Educ.*, 212 W. Va. 668, 575 S.E.2d 278 (2003).

14. Progressive discipline was followed, as Grievant received a counseling and written reprimand on the same issue before he received the suspension.

15. "'Discrimination' means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." W. Va. Code § 6C-2-2.

16. The West Virginia Supreme Court of Appeals has recently clarified that, in order to establish either discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> **(a) that he or she has been treated differently from one or more similarly-situated employee(s);**
>
> **(b) that the different treatment is not related to the actual job responsibilities of the employees; and,**
>
> **(c) that the difference in treatment was not agreed to in writing by the employee.**

***Frymier v. Higher Educ. Policy Comm.*, 221 W. Va. 306, 655 S.E.2d 52 (2007)(*per curiam*); *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.*, Docket No. 04-CORR-278 (2005). "[T]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]" *White, supra*.**

17. Grievant has failed to demonstrate discrimination.

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

089 (May 5, 1997).

19. "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute her judgement 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).

20. A one-day suspension was not excessive given Grievant's failure to follow state and county policies after repeated directions to do so.

Accordingly, this grievance is DENIED.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy ofthe appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: October 31, 2008

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Janis I. Reynolds

Administrative Law Judge

Footnote: 1

The undersigned Administrative Law Judge is unclear how one lesson plan can apply to three separate classes. All his classes are advanced anatomy and physiology, but one of them is a honors class.

Footnote: 2

The undersigned Administrative Law Judge does not understand the statements in Grievant's proposals which indicate Principal Tackett "kept a secret hand written record that was never shared with Waggoner until the disciplinary hearing of May 6, 2008." As explained by Principal Tackett, he takes notes while he is in the classroom, and then he transposes the notes onto the observation form. Grievant agreed Principal Tackett had informed him of the need to have lesson plans during his post-observation conferences.

Footnote: 3

It is unclear who relayed this incorrect information to Grievant.

Footnote: 4

Grievant asserted he later found his lesson plans, but did not take them to Principal Tackett because it was too late. He indicated he showed these lesson plans to some teachers, but these teachers were not called to verify this statement.

Footnote: 5

"[T]his Grievance Board will not intrude on the evaluations and Improvement Plans of employees unless there is evidence to demonstrate 'such an arbitrary abuse on the part of a school official to show the primary purpose of the polic[ies] has been confounded.' Kinder v. Berkeley County Bd. of Educ., Docket No. 02-87-199 (June 16, 1988). See Higgins v. Randolph Bd. of Educ., 168 W. Va. 448, 286 S.E.2d 682 (1981); Thomas v. Greenbrier Bd. of Educ., Docket No. 13-87-313-4 (Feb. 22, 1988); Brown v. Wood County Bd. of Educ., Docket No. 54-86-262-1 (May 5, 1987), aff'd Kanawha County Cir. Ct., Civil Action No. 87-AA-43 (May 18, 1989), aff'd, in part, 184 W. Va. 205, 400 S.E.2d 213 (1990)." Turner v. Kanawha County Bd. of Educ., Docket No. 00-20-300 (Feb. 26, 2001)(quoting Beckley v. Lincoln County Bd. of Educ., Docket No. 99- 22-168 (Aug. 31, 1999)).

Footnote: 6

Grievant also alleged he was harassed, and others were treated more favorably. No evidence of harassment was presented. The evidence about favoritism consisted of Grievant's hearsay testimony that other teachers lesson plans were not checked, and this evidence was rebutted by Principal Tackett's direct testimony. Thus, these assertions will not be discussed further.