THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

WALTER S. MCMANN,
Grievant,

v. **Docket No. 2009-1340-JefED**

JEFFERSON COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant Walter McMann filed this grievance at level three against his employer, Respondent Jefferson County Board of Education, on or about March 23, 2009, alleging that he was improperly dismissed from his position as a science teacher at Charles Town Middle School. Grievant's level three Statement of Grievance, unedited, reads as follows:

> On March 11, 2008[1] the Jefferson County School Board terminated by employment as Science Teacher at Charles Town Middle School. Although the Board President tried to establish that the sole purpose of the hearing was to determine my fitness as a teacher based on a psychological examination (enclosure for those parties not in procession thereof) prepared by Fred Jay Krieg, past incidents and testimony by others make up a large percentage of the proceedings. I will address the psychological examination first.
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> I was coerced into undergoing this evaluation by being told by the Superintendent of Jefferson County Schools that if I did not take it I could be terminated for insubordination. The Superintendent further stated that even if I got a second opinion Krieg's evaluation would be the only one that she would honor, hardly an indicator that the Superintendent was acting in good faith.
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> This lack of good faith was brought home when I learned that five years ago Dr. Krieg signed a consent decree relating to the confidentiality of records and received a public reprimand for failure to properly maintain, safeguard, store and/or dispose of confidential records. He was given three years probation. I emphasized the troubling irony of a situation wherein someone

[1]The Board of Education conducted the hearing on March 11, 2009.

> with such a record and in the employ of an individual trying to fire you is the sole arbitrator determining your fate, but my concerns were dismissed by the Superintendent, Dr. Krieg, and, evidently, the School Board. I have enclosed my response to Dr. Krieg's evaluation.
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> On March 14, 2008 I received notice that I was to be terminated based on Dr. Krieg's finding that I was unfit for duty and, as such, incompetent. The Superintendent cites West Virginia Code 18A-2-8 as grounds for dismissal. Counsel is again cherry picking for grounds for termination. No where in the hearing do I recall my competency being called into question. The testimony was troubling, especially in that those testifying were under oath. No one adhered to the Board President's ruling that testimony be confined to Dr. Krieg's findings. Heretofore the grounds for dismissal had been insubordination, but since the Superintendent could not give me two examples of my being insubordinate (in spite of Counsel's coaching) I assume that they choose incompetence.
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> Although there are countless examples of the Superintendent and Counsel acting in mean spirited ways I will cite only the most egregious example. I have asked for the transcript of a previous board hearing and the Superintendent ignores this request. Coupled with the fact that the transcript would be useful in resolving my grievance and is mandated that it be provided under West Virginia Code, I find such action deplorable. This issue is still pending under my motion submitted to the West Virginia Grievance Board, a copy of which was given to the Superintendent.
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> Grievant seeks reinstatement into the faculty at Charles Town Middle School.

A level three hearing was held before the undersigned Administrative Law Judge on July 22, 2009, in Westover, West Virginia. Grievant appeared pro se. Respondent appeared by its counsel, Amy S. Brown. This matter became mature for consideration on August 19, 2009, the date proposed findings of fact and conclusions of law were due. Both parties have submitted their proposals.

Synopsis

Grievant's employment was terminated due to incompetency. This decision by Respondent was based on the findings and recommendation of a psychological evaluation which found that Grievant was unfit for duty. Grievant was previously suspended for

insubordination due to conduct that was unprofessional, inappropriate, and showed disrespect for his supervisor. State Board of Education Policy and controlling case law prohibit boards of education from discharging employees for reasons having to do with incompetency that has not been called to the attention of the employee through an evaluation, and which is correctable.

Respondent did not provide Grievant with any constructive evaluation related to his conduct prior to terminating his employment for incompetency. The Superintendent's recommendation was made immediately after receiving the psychological evaluation. Grievant's evaluation pointed out that his behavior could become out of control and was not acceptable in the school building; however, it did not address the central issue of whether or not Grievant's impulse control issues could be corrected. The record also established that Grievant was not provided any improvement plan which might have led to correcting his behavior. Based upon this sequence of events, Grievant's dismissal was contrary to the provisions of W. VA. CODE § 18A-2-12 because Grievant was not given a meaningful opportunity to improve his performance under an improvement plan. The Respondent exercised its authority to dismiss Grievant in an unreasonable fashion, and was arbitrary and capricious. This grievance is granted.

The following Findings of Fact are based upon the record developed at level one and level three:

Findings of Fact

1. Grievant was employed by Respondent as a classroom teacher at Charles Town Middle School for approximately seven years. He taught science.

2. Charles Hampton has been principal at Charles Town Middle School for the past four years. Grievant's history of anger control problems involving his supervisor began within the past two years.

3. Grievant was suspended on two occasions for insubordinate behavior that occurred in June and September of 2008. The basis of the charge of insubordination was Grievant's combative and defiant behavior with his supervisor.[2]

4. On October 27, 2008, Superintendent Wall advised Grievant that he was to undergo a mental health evaluation by Fred Krieg, clinical psychologist, to determine his ability to perform his responsibilities as a teacher.

5. On October 29, 2008, the Jefferson County Board of Education voted to suspend Grievant for thirty days without pay due to his insubordinate conduct of September 18, 2008.

6. Dr. Krieg conducted the mental health evaluation on October 31, 2008. The summary and recommendation of the report states the following:

> It is this examiner's professional opinion that Mr. McMann is not mentally incompetent, mentally ill, or suffering from any diminished capacity. On the other hand, it is this examiner's opinion that Mr. McMann does in fact lose control of his emotions and temper and as such, he is a detriment to be in the school building. Although he is not clearly dangerous, he is disruptive to teachers, students, and to the flow of administration. He can be embarrassing to staff and with his interactions with parents. It is this examiner's opinion that although Mr. McMann is truly dedicated to teaching and is probably a very good teacher, he does not understand how his behaviors can damage the system. There is no guarantee that incidents like this will not happen again, and as a result of that, it is this examiner's opinion that Mr. McMann is unfit for duty. He should not be allowed in the school to

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[2]This behavior is factually developed in the companion Decision to this grievance styled as *McMann v. Jefferson County Board of Education*, Docket No. 2009-0653-CONS (Oct 21, 2009).

> teach because his behavior can become out of control and this is not acceptable in a school building. Although Mr. McMann's ideas and principle are well thought out and clearly his true beliefs, there is "no right way to do the wrong thing" and that is what occurred in this case. Given Mr. McMann's inability to control his emotions, it is this examiner's opinion that he should not be allowed to return to the classroom. This examiner wants to make it clear that this evaluation does not indicate that Mr. McMann suffers from any major mental illness, just that he is "unfit for duty."

7. A meeting between Grievant, Superintendent Wall and Dale Shaffer, Coordinator of Human Resources, was conducted on December 10, 2008. The meeting was held to discuss the results of the mental health evaluation performed by Dr. Krieg. During the meeting, and for the first time, Superintendent Wall informed the Grievant that she would be making a recommendation of termination to the Jefferson County Board of Education based upon the outcome of the evaluation.

8. On February 16, 2009, Superintendent Wall wrote Grievant detailing the outcome of the meeting held on December 10, 2008. She confirmed that she would be recommending termination of Grievant's employment to the Board of Education. She outlined the following specifics relating to her concern over Grievant's ability to perform the duties associated with being a teacher:

> - Your behavior on several occasions has been out of control.
>
> - You admitted that when you get in a very agitated state, that you do not know who is there or exactly what you say at the time of the situation.
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> - You admitted that you do not remember all that took place during the two incidents of insubordination which occurred in June and September 2008.
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> - You do not feel that you must follow the chain of command.
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> - You do not work well in a system and do not follow protocol.

9. On March 11, 2009, the Jefferson County Board of Education voted to terminate Grievant's employment.

10. On the day of the incident in June 2008 involving a tornado threat at the school, Principal Charles Hampton asked Grievant to take charge of his class and escort them back to their classroom. Grievant did so, albeit in a defiant manner. Grievant was given a five-day suspension.

11. On the day of the second incident in September 2008, Grievant was upset due to his supervisor's mandate concerning serving the balance of the five-day suspension. Grievant became upset and told Mr. Hampton this was a moot point and stated, "I quit." Mr. Hampton followed Grievant out of his office and down the corridor. Mr. Hampton asked Grievant if he was leaving and if a substitute needed to be contacted. Grievant was ostensibly distancing himself from the principal in order to avoid a confrontation.

12. The record reflects multiple discussions between Grievant and his supervisor of a possible improvement plan. Grievant has requested clarification as to how he could improve his conduct and why Respondent acted in certain ways. Grievant was not placed on an improvement plan, and no improvement plan was ever prepared by Respondent.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *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). "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 determines the weight of the testimony." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). 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 & 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*.

Respondent contends that the findings contained in Dr. Krieg's evaluation were sufficient to substantiate the charge of incompetency; that is, Grievant is not fit to discharge the required duties of a classroom teacher. Grievant counters that, based upon the rapid sequence of events leading to the termination of his employment, his dismissal was contrary to the provisions of W. VA. CODE § 18A-2-12 because he was not given an opportunity to improve his performance under an improvement plan.

W. VA. CODE § 18A-2-7 provides that "[t]he superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter." W. VA. CODE § 18A-2-8 goes on to state, in part, that:

> (a) 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.

Dismissal of an employee under W. VA. CODE § 18A-2-8 "must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously." Syl. Pt. 3, in part, *Beverlin v. Board of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975); Syl. Pt. 4, in part, *Maxey v. McDowell County Board of Education*, 212 W. Va. 668, 575 S.E.2d 278 (2002); Syl. Pt. 7, in part, *Alderman v. Pocahontas County Bd. of Educ.*, __ W.Va. __, 675 S.E.2d 907(2009).

The West Virginia Supreme Court of Appeals has found reversible error in the event an Administrative Law Judge does not assess whether Grievant's behavior was correctable pursuant to the State Board of Education Policy 5300.[3] *Maxey*, *supra*. In addition, "[f]ailure by any board of education to follow the evaluation procedure in West Virginia Board of Education Policy 5300 . . . prohibits such board from discharging, demoting or transferring an employee for reasons having to do with prior misconduct or incompetency that has not been called to the attention of the employee through evaluation, and which is correctable." *Id.* "A board must follow the West Virginia Board of Education Policy 5300 . . . procedures if the circumstances forming the basis for suspension or discharge are correctable. The factor triggering the application of the evaluation procedure and correction period is correctable conduct. What is correctable conduct does not lend itself to an exact definition but must be understood to mean an offense or conduct which affects professional competency." *Id.* Policy 5300 "envisions that where a teacher exhibits problematic

[3]That policy is now referred to as Policy 5310, 126 C.S.R. 142. It is worth noting that the legislature codified the specific improvement plan language from Policy 5300 in W. VA. CODE § 18A-2-12a(b)(6).

behavior, the improvement plan is the appropriate tool if the conduct can be corrected. Only when these legitimate efforts fail is termination justified." *Id*.

In the instant case, Respondent contends that under the facts and circumstances presented that an improvement plan was not required as Grievant's conduct is not incompetency or unsatisfactory performance that can be corrected through an improvement plan. This contention raises the point that the terms "incompetence" and "unsatisfactory performance" are frequently used interchangeably, as their definitions tend to overlap. Respondent goes on to argue that, while no one was harmed during the two incidents of insubordination, Respondent cannot take the chance that students, staff members, or members of the community could become involved in another of Grievant's outbursts if he was returned to the classroom. Certainly a tenable position; however, it ignores the rights and procedures that are addressed by West Virginia Board of Education Policies 5300 and 5310.

Policy 5310 provides the following procedure and description relating to a teacher's performance that is deemed unsatisfactory in certain areas of classroom teachers' responsibilities:

§126-142-11. Improvement Plan for Classroom Teachers.

11.1. An improvement plan shall be developed by the supervisor and teacher when a teacher's performance is unsatisfactory in any area of teacher responsibility as contained in §126-142-13.

11.2. The improvement plan shall designate how the teacher shall meet the criteria. The improvement plan shall:

11.2.1. identify the deficiency(ies),

11.2.2. specify the corrective action to remediate the deficiencies,

11.2.3. contain the time frame for monitoring and deadlines for meeting criteria, but in no case shall an improvement plan be for more than one (1) semester in length, and

11.2.4. describe the resources and assistance available to assist in correcting the deficiency(ies).

11.3. After a teacher has successfully corrected deficiency(ies) the teacher must continue to meet standards.

§126-142-13. Classroom Teachers' Responsibilities.

13.1. Job descriptions for teachers shall include the following responsibilities:

13.1.1. implements programs of study,

13.1.2. fosters a classroom climate conducive to learning,

13.1.3. utilizes instructional management systems models that increase student learning,

13.1.4. monitors student progress towards mastery of instructional goals and objectives,

13.1.5. communicates effectively within the educational community, and with parents on a regular basis,

13.1.6. meets professional responsibilities, and

13.1.7. effective July 1, 2003, demonstrates competency in the knowledge and implementation of technology standards.

When one takes into consideration State Board of Education Policy and the record offered in support of Grievant's termination for incompetency, it is clear that the conduct complained of in this was, indeed, correctable and subject to an improvement period. Grievant has been employed by Respondent for approximately seven years and all his evaluations have been satisfactory. However, in quick succession he was disciplined two times for acts of insubordination that ultimately led to the Superintendent's requirement that Grievant submit to a mental health evaluation. The record reflects that this downward

spiral began as a personality conflict between Grievant and Mr. Hampton and escalated from that point. Nothing in the record establishes that Grievant's supervisor documented any conduct that he found objectionable that occurred in the classroom. The record strongly suggests that Grievant functioned in the classroom with considerable skill and caring for his students. The record clearly reflects that initial confrontations between Grievant and his supervisor reflected personality conflict and the absence of constructive communication.

The sole basis for Superintendent Wall's recommendation to the board that Grievant's employment be terminated was the report of Dr. Krieg. That evaluation clearly establishes that although Grievant is not dangerous, he is disruptive to teachers, students, and the flow of administration. He can be embarrassing to staff and with his interactions with parents. Oddly enough the examiner notes that Grievant is dedicated to teaching and is probably a very good teacher. Nevertheless, Grievant does not understand how his failure to control his emotions and his behavior can damage the system. The undersigned does not believe that a teacher exhibiting irrational behavior should remain in the classroom. However, an improvement period is designed to address just such a problem. As noted above, improvement plans are appropriate for deficiencies in fostering a classroom climate conducive to learning; communicating effectively within the educational community, and with parents on a regular basis; and meeting professional responsibilities.

Respondent contends that under the totality of the circumstances it was not in the best interest of students or Jefferson County Schools for Grievant to return to the classroom. Grievant does not seem to be able to control his behavior or responses. However, although a so-called improvement plan was discussed with Grievant by Principal

Hampton during the conclusion of the 2007-2008 school year, Principal Hampton did not follow through with any monitoring at the beginning of the new school year. Moreover, the undersigned must conclude, from lack of evidence to the contrary, that Grievant's behavior and work was acceptable for the five-year period prior to the difficulties beginning with Mr. Hampton. As Justice Starcher pointed out in his concurring opinion in *Maxey*, "If making some kind of off-hand remark about 'shooting a principal' is a dischargeable offense, then I venture to say that more than a few West Virginia classroom teachers have qualified in past years. The fact is that good people who are under severe stress can get angry and say stupid things - but that is not a reason to fire them."

The Court in *Maxey* held that the board of education 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 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. *Id*.

Respondent has not demonstrated that Grievant's conduct was not and is not correctable. Accordingly, Grievant is entitled to an improvement plan. The improvement plan in this matter should focus on meaningful and constructive communication between Grievant and his supervisor. Perhaps this apparently difficult task could be facilitated through a referral to an improvement team to act as a buffer and diplomat for Grievant.

The improvement plan should also include the appropriate counseling for Grievant to control his emotional outbursts.[4] In order to assure that Grievant is sincerely addressing anger management issues, the undersigned deems it appropriate to require Grievant present to Respondent documentation that he has attended an anger management assessment and received a recommended course of counseling with a licensed mental health provider before reinstatement.

The undersigned may be living in a fool's paradise and change may prove impossible in this case. But, the procedures set forth in Policy 5310 must be followed in every dismissal pursuant to W. VA. CODE § 18A-2-8 on the grounds of incompetency, which are correctable. The undersigned finds that Grievant's behavior did not directly and substantially affect the morals, safety, and health of the school system in a permanent, non-correctable manner. In addition, it appears from the limited record on the issue that the conduct of Grievant is correctable under a feasible improvement plan. Accordingly, the undersigned finds that Respondent's dismissal of Grievant was improper.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. 156 C.S.R. 1 § 3 (2008); *Hoover v. Lewis County Bd. of Educ.*, Docket No. 93-21-427 (Feb. 24, 1994); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989).

2. When grounds for a school employee's dismissal include charges relating to incompetency or conduct which is deemed correctable, the county board must establish

[4]The undersigned asked Grievant at level three if this was acceptable, and Grievant acknowledged it was.

that it complied with provisions of West Virginia Department of Education Policy 5310 requiring it to inform the employee of his deficiencies and afford him a reasonable period to improve. *Mason County Bd. of Educ. v. State Supt. of Schools*, 165 W. Va. 732, 739, 274 S.E.2d 435, 439 (1980); *See also Maxey v. McDowell County Board of Education*, 575 S.E.2d 278, 2002 W.Va. LEXIS 226 (2002).

3. County boards of education have the burden of proof to show that conduct was not and is not correctable. *Maxey*, *supra*.

4. Respondent did not establish that Grievant's conduct was not and is not correctable.

5. Grievant's dismissal was not based upon an observation and evaluation of his performance, and he was not afforded an improvement period to correct any deficiencies in his performance.

Accordingly, this grievance is **GRANTED**, and Respondent is directed to reinstate Grievant, with back pay, seniority, and benefits into the faculty at Charles Town Middle School following documentation that Grievant has attended an anger management assessment and received a recommended course of counseling with a licensed mental health professional or provider. Respondent is **ORDERED** to develop a feasible improvement plan consistent with this Decision.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included

so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: October 21, 2009

Ronald L. Reece
Administrative Law Judge