WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

FRANK TETRICK,
Grievant,

v. **Docket No. 2010-1359-CalED**

CALHOUN COUNTY BOARD OF EDUCATION,
Respondent.

D E C I S I O N

Grievant, Frank Tetrick, filed a grievance against Calhoun County Board of Education ("CCBE"), Respondent, on April 16, 2010, protesting his suspension and termination from employment as the Director of Support Services. Grievant asserts that Respondent's disciplinary actions were an excessive improper response to lawful behavior. Grievant requests all available relief including back pay, reinstatement, seniority, benefits, expungement of the record and attorney fees.[1]

Grievant was informed he was suspended without pay and that a recommendation to terminate his employment would be tendered to the Calhoun County Board of Education by a March 26, 2010, document signed by the Superintendent of Calhoun County Schools, Roger D. Propst. Subsequent to a hearing before the School Board held on April 12, 2010, Grievant was notified of the Board's determination regarding his discharge by correspondence dated April 13, 2010. Grievant grieved both his suspension and

[1] An Administrative Law Judge for the Grievance Board is not authorized to grant attorney's fees at level three. WEST VIRGINIA CODE § 6C-2-6 (2008), 'Allocation of expenses and attorney's fees,' specifically states: "(a) Any expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense." Also *see Long v. Kanawha County Bd. of Educ.,* Docket No. 00-20-308 (Mar. 29, 2001). It is well established that the Grievance Board does not have the authority to award attorney fees, this issue will not be discussed further.

termination of employment. Grievant appealed to level three on April 16, 2010. A level three hearing was held before the undersigned Administrative Law Judge on June 7, 2010, in the Grievance Board's Charleston office. Grievant was represented by Mark McMillian, Attorney-at-Law, and Respondent was represented by Howard Seufer, Jr., Esquire of Bowles Rice McDavid Graff & Love, LLP.

This case became mature for decision on July 6, 2010, the extended deadline for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals.

Synopsis

Grievant was suspended and ultimately terminated by Respondent from his administrative position subsequent to making a surreptitious recording of a conversation between Grievant and his supervisor, the County School Board Superintendent. Respondent contends Grievant's actions constitutes insubordination and irrevocably violated the indispensable trust necessary between members of the county school administration. Grievant, by counsel, contends Respondent failed to demonstrate an offense established by the provisions of WEST VIRGINIA CODE (§§ 18A-2-7 or 18A-2-8) and further avers that the sanctions levied were excessive for lawful behavior, and does not properly warrant termination.

Respondent contends that its disciplinary actions were lawful and it is proper to terminate Grievant's employment in the circumstances of this case. Grievant's actions may well be ill advised and bad form, but pursuant to applicable W. VA. CODE (§ 62-1D-3(e)) such action is not unlawful. The information verifying measures taken by Grievant may not be prudent or advisable but it is established that, in the facts of this case, the disciplinary

actions taken were disproportionate to the lawful actions of Grievant. There exists reasonable alternative actions far short of discharge to address the situation. Insubordination was not established by a preponderance of the evidence. This grievance is GRANTED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. At the time of the disciplinary actions, Grievant was employed by Respondent pursuant to an Administrative Contract as the Director of Support Services. Grievant's most recent contract of employment (FY10-11) was approved by the Calhoun Board of Education at a March 11, 2010, Board meeting.[2] Grievant had been employed for an initial or probationary period commencing on or about July 8, 2008.

2. Superintendent Roger D. Propst commenced employment as Calhoun County Superintendent responsible for the administration of the Calhoun County School District on or about November 18, 2008.

3. There are no Assistants, Deputies, or Associate Superintendents employed by the Calhoun County School District. The Superintendent administers the system with the assistance of a management team of three Directors: a Director of Support Services, a Director of School Improvement, and a Director of Finance. Each of the administrators reports directly to the Superintendent. The Calhoun County School District is one of the smallest school districts in West Virginia.

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[2] The official written minutes relevant to the March 11, 2010, Board meeting was available as Joint Exhibits 4.

4. Goals and Objectives for Grievant's employment, were discussed and reduced to a written document by Grievant and Jane Lynch, former Superintendent of Calhoun County Schools prior to the current Superintendent's assumption of the position. *See* 126 C.S.R. 142 § 15.

5. During the first part of the 2009-2010 school year, Superintendent Propst and Grievant met to discuss Grievant's career plans. Grievant's Goals and Objectives as created by Grievant and former Superintendent Lynch were signed by Superintendent Propst.

6. There is no disciplinary issue evident in Grievant's personnel history. Grievant's quality of performance was generally regarded as completely satisfactory and no particular performance issues have been alleged or documented during his service history.

7. There was no formal mid-year performance evaluation done for Grievant by Superintendent Propst during the 2009-2010 school year period.

8. Superintendent Propst did not timely perform the mid-year evaluations required by West Virginia Code § 18A-2-12(a) and (e) and 126 C. S. R. 141 § 2.6 for any of the personnel under his direction during the 2009-2010 school year period.

9. At unspecified times late in 2009, through direct communication with Grievant, Superintendent Propst indicated to Grievant that members of the school board were displeased with Grievant's job performance and in essence wanted him out of his position with the school system.[3]

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[3] It is generally agreed and not contested that Superintendent Propst gave **no** indication that he was personally dissatisfied, exclusively attributing any discontentment to board members.

10. Grievant was concerned about any perceived negative performance issue(s) and any consequences that might arise.

11. Grievant spoke directly with a senior board member, then Vice President of the Board, Lee Evans, who informed Grievant that he was unaware of any performance concerns that the Board held regarding Grievant and seemed surprised such information was being relayed to Grievant.

12. The information received from his supervisor and that from a senior board member was not consistent. In view of his inability to reconcile that which was being told to him by the Superintendent and the denial of such by the senior board member, Grievant was concerned.

13. Grievant was concerned about his job and the conflict in information pertaining to the existence, origins and rationale for negative concerns regarding his job performance.

14. Grievant subsequently met with Superintendent Propst.[4] Superintendent Propst repeated the alleged concerns of board members, discussed the dynamics of Grievant coming from another county and the possible effects of that fact. Grievant recorded one of these meetings without the knowledge of Superintendent Propst.

15. Grievant shared a recording of a conversation between Grievant and the Superintendent with Calhoun Board Member, Lee Evans. Mr. Evans reviewed the

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[4] Grievant and Superintendent Propst worked in close proximity of one another (same building). They conceivably could and/or would communicate with one another several times on any given day. Thus, it is not identified with any degree of reliability the exact communication recorded, nevertheless, the subject matter identified was discussed.

contents of the recording and was surprised and offended by the assertions of Mr. Propst relating to board members as heard in the recording. (Lee Evans' Testimony, Tr. Pg 163).

16. Cynthia Dale, President of the Calhoun County School Board, was made aware of the recording and listened to the CD recording.

17. When Grievant's employment contract came up for annual renewal in the March 11, 2010, Calhoun School Board meeting, President Dale objected to awarding Grievant another contract, based in part upon the fact of the secret recording.

18. At the March 11, 2010, School Board Meeting, Ms. Dale disclosed to the Superintendent the existence of the recording.

19. Superintendent Propst, who had not yet had occasion to investigate the matter, recommended another contract for Grievant. Grievant along with several other employees were awarded employment contracts.

20. Grievant was nominated for reappointment to his position as found in the minutes of the School Board Meeting of March 11, 2010. Joint Exhibit 4. Grievant was reappointed after President Dale unsuccessfully requested a motion to remove Grievant from consideration. No motion was forthcoming from any member of the Board.

21. Subsequent to the March 11, 2010, meeting, Superintendent Propst commenced an investigation into the recording. This investigation has not been represented to be much more than the Superintendent communicating with Grievant.

22. On Monday, March 22, 2010, Superintendent Propst confronted Grievant about the recording. Grievant acknowledged that he had made the recording, and he did not deny giving a copy of the recording to a Board member.

23. The record does not suggest that the recording was made for any purpose other than to clarify concerns regarding Grievant's performance and apparently those having heard it were limited to the referenced board members, Lee Evans and Cynthia Dale.[5]

24. Grievant's employment with Respondent was suspended effective March 26, 2010, and he was informed that a recommendation for his termination was to be communicated to Calhoun Board of Education. The March 26, 2010, notification document provided to Grievant by Superintendent Propst stated in part:

> To say I am disappointed in your actions is a major understatement.
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> In order to accomplish the mission and objectives of any organization, there must be an element of trust between and among those employed by the organization, especially in high level administration. I can think of no plausible justification for your actions. The reasons you gave during our conference in no way changed my perception.
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> I consider your actions to be rank insubordination, a breach of trust, a repudiation of my authority as your immediate supervisor, and an extreme violation of confidentiality. Your actions have destroyed the level of trust necessary for the Superintendent-Director relationship to work effectively for the staff and students of this school system.
>
> It is not the content of the recorded conversation that is the problem, but rather the fact that you secretly recorded it, and your conscious decision to give it to a member of the Board of Education.

Joint Exhibit 2.

25. Grievant requested a hearing before the Calhoun School Board.

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[5] Grievant testified that the recording was made simply in an attempt to pin down the source of, and deal effectively with, the dubious performance allegations and his status within the Calhoun School District.

26. There was a Hearing before the Calhoun School Board on April 12, 2010. Superintendent Propst cited to the Board Grievant's surreptitious recording of the private meeting between the two of them, as well as Grievant's delivery of the recording to a Board member, without the Superintendent's knowledge or permission as justification for the termination of Grievant's employment. There was no other performance issue attributed to Grievant's discharge from employment.

27. On April 12, 2010, Respondent ratified Grievant's suspension and voted to terminate his contract of employment. Grievant was officially notified by an April 13, 2010, letter, Joint Exhibit 3, which stated that the basis for the Board's action was as set forth in the March 26, 2010, letter.

28. Superintendent Propst did not consider any alternative disciplinary action other than dismissal of Grievant as a remedy to this situation.

Discussion

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). An employee of a county board of education may be suspended or dismissed only for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge. W. VA. CODE § 18A-2-8. "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)." *Graham v. Putnam County Bd. of Educ.*, Docket No. 99-40-206 (Sep. 30, 1999).

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.

Respondent has labeled Grievant's behavior as insubordination. Insubordination has been described, defined and exemplified in numerous manners with that there is no doubt. What is of issue is whether the deed(s) of Grievant truly exemplifies an actionable cause for discharge. Respondent maintains that the definition of insubordination encompasses more than a refusal to carry out an explicit order. This is recognized as an accurate statement. However, Respondent has inferred and Superintendent Propst has explicitly stated that Grievant's conduct is defiant of authority, constituting insubordination. This is debatable.

Traditionally speaking, 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). "[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*. "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).

It is further acknowledged that the definition of insubordination encompasses more than an explicit order and subsequent refusal to carry it out; it may also involve a flagrant or willful disregard for directions of an employer, and a defiance of authority. *Graham v. Putnam County Bd. of Educ.,* 212 W. Va. 524, 575 S.E.2d 134 (2002); *Hoover v. Wirt County Bd. of Educ.,* Docket No. 2008-1482-WirED (Feb. 12, 2009). Employees are expected to respect authority. *Graham, supra; see McMann v. Jefferson County Bd. of Educ.,* Docket No. 2009-0653-CONS (Oct. 21, 2009). Insubordination may be based upon a violation of the State Board of Education's Employee Code of Conduct. *Hoover v. Wirt County Bd. of Educ.,* Docket No. 2008-1482-WirED (Feb. 12, 2009); *Marl v. Marshall County Bd. of Educ.*, Docket No. 06-25-112 (June 29, 2006); *Booth & Ware v. Randolph County Bd. of Educ.*, Docket No. 04-42-418 (Mar. 28, 2005); *Domingues v. Fayette County Bd. of Educ.,* Docket No. 04-10-341 (Jan. 28, 2005). An employee who willfully violates the Employee Code of Conduct has engaged in conduct constituting insubordination. *Geho v. Marshall County Bd. of Educ.,* Docket No. 2008-1395-MarED (Oct. 30, 2008).

West Virginia State Board of Education Policy 5902, the relevant Employees' Code of Conduct is found at W. VA. CODE R. § 126-162-4. In pertinent part, this Code of Conduct requires all West Virginia school employees to:

> 4.2.1. exhibit professional behavior by showing positive examples of preparedness, communication, fairness, punctuality, attendance, language, and appearance.
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> . . .
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> 4.2.3. maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination.
>
> . . .
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> 4.2.6. demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior.
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> 4.2.7. comply with all Federal and West Virginia laws, policies, regulations and procedures.

It is arguable whether Grievant conducted himself in a professional and responsible manner. Grievant may have shown a lack of judgment for one in his position; however, it is not clear that Grievant specifically demonstrated conduct prohibited by applicable West Virginia Code, regulation or case law.

It is not established that the elements identified in the *Butts* test are met: (a) Grievant did not refuse to obey an order, rule, or regulation. It is evident that Grievant's actions were prompted by the conduct of Superintendent Propst; (b) Grievant's behavior in the workplace is dubious conduct; however, there is no known applicable policy prohibiting the action.[6] Grievant's actions were proactive not retaliatory; and (c) There

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[6] There is no established Calhoun County School employee policy prohibiting recording conversations and W. VA. CODE § 62-1D-3(e) (2009) specifically makes the same permissible: "It is lawful under this article for a person to intercept a wire, oral, or electronic communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception unless the

exists good rationale to discourage Grievant's chosen form of information verification. It is conduct which tends to be more detrimental than productive. Nevertheless, it is not established that Grievant's behavior was truly the source of contention.

During the first part of the 2009-2010 school year, the Superintendent and Grievant met to discuss Grievant's career plans. The Superintendent discussed with Grievant the possibility of Grievant leaving for another job, as well as some criticism that the Superintendent had heard about Grievant. Nevertheless, Grievant's performance was regarded as satisfactory, no performance issues were properly alleged or documented, and he has had no outstanding disciplinary issues; however, Superintendent Propst seemed intent on showing Grievant the door even before the surreptitious recording.[7]

Superintendent Propst contended that it was not the content of the recorded meeting that warranted the suspension and termination, but rather that Grievant had, by his actions, destroyed the trust that a Superintendent must have in his Directors in order to effectively administer the Calhoun County School System. This is perplexing. The Superintendent's statements regarding the Board's perception of Grievant and his work

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communication is intercepted for the purpose of committing any criminal or tortuous act in violation of the constitution or laws of the United States or the constitution or laws of this state." The recording of the conversation between the Grievant and Mr. Propst is legal under the laws of this State.

[7] Superintendent Propst did not follow the evaluation procedure set out in West Virginia Board of Education Policy. West Virginia Code of State Regulations provides that "[e]very employee is entitled to know how well he/she is performing his/ her job, and should be offered the opportunity of open and honest evaluation of his/her performance on a regular basis." 126 C.S.R. 141 (2.6); *Maxey v. McDowell County Bd. of Educ.*, 212 W. Va. 668, 575 S.E.2d 278 (2002). Additionally, the West Virginia Code states that performance evaluation of personnel is mandatory and shall be on a regular basis. W. VA. CODE § 18A-2-12(a) and (e). Superintendent Propst failed to perform required evaluations mandated to properly document and address any deficiency in Grievant's job performance.

performance was instrumental in motivating Grievant. This fact is routinely glossed over by Respondent. Further, the true nature of the School Board's opinion regarding Grievant is not established. Ironically, it is Respondent who now contends a violation of trust.

Grievant was concerned about his job and the conflict in information pertaining to the existence, origins and rationale for any negative concerns regarding his job performance. These are legitimate concerns. Grievant acknowledged his actions and motivating factors. Grievant, in an attempt to reconcile that which was being told to him by the Superintendent and the denial of such by a senior board member, recorded a conversation pertaining to the subject matter and solicited an additional response from the Board. This behavior may not be to other's liking, but it was direct and not shown to be with malicious intent.

The School Board's reaction to Superintendent Propst's representation of their conception of Grievant's job performance is not established in the record. It is interesting that the School Board, as a whole, found Grievant's actions disruptive and sanctionable, but not Superintendent's characterization of information to Grievant. Perhaps, the Superintendent was accurate in his assertions regarding the opinion of the School Board.

In review of relevant law to the known facts of this case, Grievant's termination is not justified. Grievant did not refuse to obey an order, nor did he intentionally violate any rule, or regulation. The recording was legal under the laws of this State. Superintendent Propst is offended, but then again, he materially contributed to this situation. Superintendent Propst could have and perhaps should have been more direct in his dealings with Grievant. Grievant acknowledged his actions and motivating factors. It is not established that Grievant's intent was to undermine the Superintendent's authority.

The undersigned Administrative Law Judge does not find that Grievant violated the applicable Employee Code of Conduct, nor that the elements identified in the *Butts* test are satisfied. Respondent has not established Grievant's conduct, in the circumstances of this matter, is lawfully sanctioned by discharge. Respondent has not met its burden of proof and demonstrated Grievant is guilty of insubordination.

While the undersigned has found that Grievant did not commit the offense with which he was charged, the issue of whether the discipline was clearly excessive deserves attention as well. Grievant argues that the sanctions levied by Respondent for lawful action were excessive. The undersigned concurs. Whether the punishment imposed by the employer was excessive depends upon ". . . the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances . . . ." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995). *See* finding of fact 6, 12 and 13. 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). The instant record does not suggest that the recording was made for any purpose other than to clarify concerns regarding Grievant's performance and apparently those having heard it were limited. It is well-settled that "[c]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. pt. 3, *Dillon v. Wyoming County Bd. of Educ.*, 177 W. Va. 145, 351, S.E. 2d 58 (1986).

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997)(citations omitted). "Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable." *State ex rel. Eads v. Duncil*, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

The argument that Grievant's termination 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. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). Grievant has met this burden. Superintendent Propst acknowledges and admits as fact that he did not consider any alternative disciplinary action other than dismissal of Grievant as a remedy to this situation. Grievant was sanctioned for ill advised but lawful conduct.

Evaluation of Grievant required by WEST VIRGINIA CODE § 18A-2-12 and Title 126, Code of State Regulations, Series 141 and 142 were not properly completed.[8] Grievant's surreptitious recording, and his sharing of the CD with select members of the Board is the conduct attributed as justification for the termination of Grievant's employment. There was

[8] See specifically W. VA. CODE § 18A-2-12(a) and (e); 126 C.S.R. 141 § 2.6 and 126 C.S.R. 142 § 15.

no other performance deficiency of Grievant established. The undersigned Administrative Law Judge finds that, in the circumstances of this grievance, the disciplinary action taken against Grievant was excessive, arbitrary and capricious.

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. An employee of a county board of education may be suspended or dismissed only for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge. W. VA. CODE § 18A-2-8. "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)." *Graham v. Putnam County Bd. of Educ.*, Docket No. 99-40- 206 (Sep. 30, 1999).

3. Traditionally, insubordination includes a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued. *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). "[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*. "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).

4. It is acknowledged that the definition of insubordination may encompass more than an explicit order and subsequent refusal to carry it out; it may also involve a flagrant or willful disregard for directions of an employer, and a defiance of authority. *Graham v. Putnam County Bd. of Educ.,* 212 W. Va. 524, 575 S.E.2d 134 (2002); *Hoover v. Wirt County Bd. of Educ.,* Docket No. 2008-1482-WirED (Feb. 12, 2009). Employees are expected to respect authority. *Graham, supra; see McMann v. Jefferson County Bd. of Educ.,* docket No. 2009-0653-CONS (Oct. 21, 2009).

5. The State Board of Education's Employee Code of Conduct at 126 C.S.R. 162 directs all West Virginia school employees to "exhibit professional behavior by showing positive examples"; "maintain a safe and healthy environment"; "demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior"; and "comply with all Federal and West Virginia laws, policies, regulations and procedures." It is not established that Grievant's conduct violated relevant Employees' Code of Conduct applicable to an employee of a county board of education.

6. Respondent did not demonstrate by a preponderance of the evidence that Grievant engaged in behavior constituting insubordination.

7. Respondent's disciplinary actions of Grievant were excessive, arbitrary and capricious.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to reinstatement Grievant and provide him with the lost wages of his employment contract stemming from suspension and termination along with interest and to restore all other employment benefits which Grievant lost as result of the disciplinary action(s) including seniority and retirement benefits. The facts of this matter shall be expunged from Grievant's personnel record and the events of this grievance should not be held against Grievant or used to discriminate with regard to his employment with Respondent.

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: November 17, 2010

Landon R. Brown
Administrative Law Judge