WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

L. M. W.,
Grievant,

v. **Docket No. 2009-0537-CONS**

McDOWELL COUNTY BOARD OF EDUCATION
and WV DEPARTMENT OF EDUCATION,
Respondent.

D E C I S I O N

Grievant, L. M. W., filed grievances against her employer, McDowell County Board of Education ("MCBE"), Respondent, protesting her suspension and subsequent termination from her teaching position at War Annex School in War, West Virginia. The October 16, 2008 grievance statement provides:

> Grievant has been notified by Steven L. Paine, Superintendent of Schools, that her employment by the McDowell County Board of Education as a teacher, has been terminated, effective October 10, 2008. Her termination has been ordered on the basis of a physical confrontation which occurred between Grievant and a parent of a student on school property, in view of students. This confrontation resulted in Grievant being found guilty of battery in the McDowell County Magistrate Court. Grievant argues that she reacted in self-defense to the parent's attack on her; that school authorities did not provide assistance and protection that would have prevented the incident from occurring; and that her criminal conviction for battery, for which she was fined $5.00, are presently on appeal to the McDowell County Circuit Court.[1]

Relief Sought:

> Finding that original Order of Suspension Without Pay and the Order of Termination by Superintendent Paine are not supported by the evidence and that both Orders should be set aside; that Grievant be reinstated to her position as a teacher for the McDowell Co. Board of Education; that the

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[1] Grievant's conviction in magistrate court was nullified upon the perfection of her appeal to circuit court. Respondents do not assert that Grievant's arrest and magistrate court conviction provided the basis for the decision to terminate her employment. Respondents maintain that the underlying conduct provides an independent basis for the termination of Grievant's employment.

> Respondent be Ordered to pay the Grievant back payment of wages and of benefits for the period during which they have been wrongfully withheld from her pursuant to this matter.

Pursuant to documentation dated March 10, 2008, Grievant was informed she was suspended without pay effective immediately, with this decision to be formally ratified at a later date. Grievant was provided with an opportunity for a hearing but elected to forgo this opportunity. At a hearing held on May 1, 2008, Suzette Cook, Superintendent of McDowell County Schools, sought an extension of Grievant's suspension. It was determined that Grievant would remain on unpaid suspension until such time as the then pending criminal charges could be resolved and/or McDowell County Board of Education conducted its own investigation to determine whether disciplinary action should be taken regardless of the outcome of the criminal complaint. Subsequently, County Superintendent Cook recommended Grievant for termination. By correspondence dated October 10, 2008, signed by Steven Paine, State Superintendent of Schools, Grievant was terminated. Grievant grieved both her suspension and termination. By request, these grievances have been consolidated into the instant matter. The West Virginia Department of Education (DOE) is a responding party. A mediation session was held on June 18, 2009. Grievant appealed to level three on August 31, 2009. Level three proceedings consisted of several days of hearings held on November 18, 2009, January 25, 2010 and March 29, 2010.[2] The initial level three hearing was held before Administrative Law Judge Mark A. Barney. Then for administrative reasons, the case was reassigned to the undersigned Administrative Law Judge who reviewed the November 18, 2009 audio recording and conducted the January

[2] There were also a number of pre and post Hearing telephone conferences regarding various motions and procedural rulings.

25, 2010 and March 29, 2010 hearings in McDowell County. Grievant was present at all hearings and was represented by legal counsel Jane Moran, Attorney at Law. Respondent MCBE was represented by Gregory W. Bailey, Esquire of Bowles, Rice, McDavid, Graff & Love, LLP. The WV Department of Education appeared and was represented by its general counsel, Heather L. Deskins.

This matter became mature for decision on or about June 1, 2010, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. Parties submitted fact/law proposals.

Procedural Issue

The West Virginia Board of Education (WVBE) voted to intervene into the operation of McDowell County Schools in November of 2001 pursuant to the authority conferred upon it by WEST VIRGINIA CODE § 18-2E-5. During the time period relevant to this grievance, as a result of the intervention and, as a result of the WVBE's delegation of authority to the state superintendent, all personnel hiring and termination in the McDowell County School system must be made by the State Superintendent of Schools. Disciplining classroom teachers in intervention counties is only different from the process utilized in other counties in that the county superintendent conveys recommendations regarding termination and other disciplinary action to the State Superintendent rather than to the county board of education. The termination of the Grievant's employment was recommended by Superintendent Suzette Cook to the State Superintendent in accordance with the foregoing and was approved by the State Superintendent as reflected in a letter dated October 10, 2008.

Synopsis

Grievant was suspended and ultimately terminated by Respondents from her teaching position subsequent to an altercation with the relative of a student, in the school, on March 6, 2008. Grievant maintains she has been improperly sanctioned. Grievant by Counsel contends Respondents, failure to allege an offense covered by the provisions of W. VA. CODE § 18A-2-8 and further avers that the charges imposed between the initial suspension and the notice of termination were inappropriate and did not properly warrant termination. Respondents contend that their actions were lawful and it is proper to terminate Grievant's employment in the circumstances of this case.

Considerable deference is afforded to employers in disciplinary situations. Respondents had discretionary options in the circumstances of this case. Nevertheless, Respondent (DOE) elected to terminate Grievant. Respondents deemed prior disciplinary actions and performance observations coupled with the March 6, 2008 incident constituted grounds for termination of Grievant's employment. Respondents aver that Grievant's termination was the result of conduct which constituted insubordination and willful neglect of duty. It has not been demonstrated that the disciplinary measure levied was so clearly disproportionate as to constitute an abuse of discretion.

Accordingly, this grievance is DENIED.

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

Findings of Fact

1. During the times relevant to this grievance, the WV Department of Education (DOE), has been in control of personnel decisions for McDowell County Board of Education. (*See* WEST VIRGINIA CODE § 18-2E-5).

2. Grievant was first employed in the McDowell County School system in 2001. Grievant's employment with the McDowell County School system was not continual employment at the same school.[3]

3. Grievant was employed as the 6th Grade Elementary Education Core teacher at the War Annex in War, West Virginia in the 2007-2008 school year.

4. On March 6, 2008, Grievant sent JF[4] from her classroom to the Principal's office to obtain a BIF (Behavior Infraction Form). A call was made to student JF's home and his guardians were informed he had or was being biffed from Grievant's class.

5. Susie Bailey, Clarice Bailey and John Bailey went to War Annex. John Bailey is the father of student JF. Susie Bailey and Clarice Bailey at that time served to some degree as the child's caretaker, although formal legal guardianship may not have been established at the time.

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[3] Grievant testified that her teaching experience in McDowell County, West Virginia began in Berwin Elementary School as a long-term substitute for one year, 2001-2002. Grievant transferred to Mt. View High School where she was riffed after one year. In the Fall semester of 2002 Grievant was employed at War Elementary where she stayed until she was riffed in 2003. In 2004 she was employed at Yeager High School where she taught Business for one year. As used herein, "RIF" refers to "reduction in force" as the term is used in WEST VIRGINIA CODE § 18A-4-8b.

[4] Consistent with the Grievance Board's practice, this student and all minors referenced will be referred to by initials in this decision.

6. During the morning of March 6, 2008, Grievant found herself in Assistant Principal Cheryl Cruey's office participating in a discussion with Assistant Principal Cruey, Susie Bailey, Clarice Bailey and John Bailey regarding student JF.

7. The office in which this meeting occurred was not conducive for everyone to be seated. There was not sufficient space and/or chairs for everyone to sit.

8. Susie Bailey demanded to know why JF had been biffed. Clarice Bailey expressed her opinion that Grievant singled JF out for unjustified discipline and was unfair in her grading of the boy's work.

9. Grievant communicated earlier events which predicated JF being sent to the Principal's office for bif papers. Whether student JF was indeed biffed was not readily apparent. The meeting became heated very quickly.

10. Grievant and Ms. Clarice Bailey exit the office. The testimony as to who physically exited first is not consistent nor confirmed by independent verification.

11. An altercation transpired between Grievant and Ms. C. Bailey outside the office in an area without surveillance camera coverage.

12. The incident between Grievant and Ms. C. Bailey was contentious. Each related the events in diversely differing veins.

13. Assistant Principal Cruey, who had been in her office with John Bailey, heard commotion in the hall. When she reached the hall, she found Grievant standing against one wall and Clarice Bailey against the opposite wall. VW, a student friend of Clarice Bailey, was in direct contact with Ms. C. Bailey positioning himself in a manner between the parties and saying, "No auntie . . . ; don't hit her."

14. VW at that time was a student at War Annex. He and a number of other male students were in a nearby room. The other students were identified as ZB, TD and JH.

15. Grievant told Assistant Principal Cruey that Ms. C. Bailey had struck her ("she hit me").

16. Clarice Bailey communicated that Grievant inexplicably started hollering like a mad woman and had conversely hit her.

17. Ms. Bailey indicated she was led (God guided her to stand still) not to retaliate. Further, a student (VW) known to Ms. Bailey interjected himself between the two and communicated something akin to "No, Auntie don't hit her .... I love you."

18. Who hit, or shoved, who first is not readily known.

19. Grievant and Ms. C. Bailey are not of similar size and appearance. Grievant is of smaller physical stature than Ms. Bailey.

20. Grievant made physical contact with Ms. C. Bailey to the degree that Ms. Bailey's glasses were knocked off. The contact is a fact. It is the circumstances of the contact that is debated.

21. Grievant called 911. Local law enforcement was contacted. A law enforcement officer eventually arrived at War Annex in response to this event.

22. Prior to leaving the school on March 6, 2008, Grievant prepared a written statement regarding the events that had transpired.

23. The written statement provided to Assistant Principal Cruey by Grievant bears little resemblance to the events as described in her Level III testimony in 2010.

24. Grievant's written statement, on March 6, 2008, described the incident as follows:

> As I walked out of the office, Ms. Bailey followed me and began to push me. She stated, "You better remember. I know where you live." She hit her body into mine and knocked me off balance. I yelled for someone to call the police. Ms. Bailey began to swing at my head. She put all of her weight into a punch at the right side of my head. She left a red mark on my ear and side of my head. I called 911. (R Ex 18).

25. Sometime after leaving the school, Grievant went to a local hospital Emergency Room.

26. Clarice Bailey, after leaving the school on March 6, 2008, went to the McDowell County Magistrate Court and obtained a warrant for Grievant's arrest on charges of battery.

27. Both Grievant and Ms. C. Bailey contend the other caused physical damage to their respective person.

28. The School's surveillance video offered into evidence did not capture the incident in question.[5]

29. Deputy James Mundy, then with the McDowell Sheriff's Department commenced inquiry into the incident of March 6, 2008 at War Annex later on the same day of the event.

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[5] Further, the evidence relating to how the surveillance video was compiled and edited is confusing. The video is edited to the point that it may not be reliable to show the timing or sequence of events that preceded the incident. Carlisle Chewning, the individual responsible for compiling the video testified that the video he manipulated had no date/time stamp information. The DVD offered into evidence revealed such information. Mr. Chewning was never asked to identify or authenticate the DVD that was offered into evidence. A chain of custody for this medium was not established.

30. Deputy Mundy spoke with Grievant and Ms. Bailey on March 6, 2008.[6] He spoke with Grievant on the phone and met with Ms. C. Bailey in person.

31. Early morning on March 7, 2008, Deputy Mundy returned to War Annex.

32. Oral statements were gathered from certain students known to officials to be in the vicinity of the incident in discussion. Students who provided statements on March 7, 2008 to Deputy Mundy included TD, ZB, JH and VW.

33. Deputy Mundy was initially unable to communicate with Grievant on March 7, 2008. Grievant had retained legal counsel and had been advised not to provide any further statement.

34. When Deputy Mundy did meet with Grievant he did not observe any physical injury to Grievant. She communicated that her ear was hurting. She did not make Deputy Mundy aware of any pictures or medical evidence regarding injuries she sustained as a result of the incident on March 6, 2008.

35. Officer Mundy spoke with numerous students of War Annex on March 7, 2008.

36. Deputy Mundy spoke with the students of War in the presence of their parent or legal guardian. A number of these oral statements were summarized and memorialized as written documents.

37. Student ZB communicated directly with Officer Mundy regarding the incident of March 6, 2008. Further ZB provided a written statement on March 7, 2008 which provided as follows:

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[6]Deputy Mundy testified in McDowell County Circuit Court that he saw a scratch on Ms. C. Bailey's face on March 6, 2008.

> I was sitting in the principal's office and heard arguing coming from a parent teacher conference. I saw Ms. W. slap [JF's] aunt and knock her glasses off of her face. I saw her slap the left side of her face. [VW] came out and started to break up the argument. I didn't see Ms. Bailey hit Ms. W. Ms. Bailey was saying Ms. W. hit me first and Ms. W. started saying call the police, Ms. Bailey hit her first. (R Ex 19).

38. A student identified as TD, a 14 year old minor, communicated what he had observed to Officer Mundy regarding the events of March 6, 2008 and further provided a written statement. The document was written on March 7, 2008.

39. On the evening of March 6, 2008 Grievant was verbally informed she was suspended, with pay, while further inquiry into the event was transpiring.

40. On March 10, 2008, the Board of Education of McDowell County issued a Notice of Immediate Suspension of Grievant's employment, without pay, continuing until the criminal complaint filed by Clarice Bailey in the McDowell County Magistrate Court was resolved "…and/or until the McDowell County Board of Education conducts its own investigation to determine whether it should take disciplinary action regardless of the outcome of the criminal complaint."

41. On April 14, 2008, Superintendent Suzette Cook issued a notice that a hearing would be conducted by the State Superintendent of Schools or his designee on May 1, 2008 to ratify Grievant's suspension without pay. Grievant was provided an opportunity for a hearing but elected to forgo this opportunity. The West Virginia Department of Education intervened in the operations of the McDowell County Board of Education, limiting County Boards authority in the employment of school personnel and delegating this authority to the State Superintendent of Schools.

42. On October 10, 2008, Steven L. Paine, State Superintendent of Schools, issued a Notice of Termination of Grievant's employment on the basis of his finding that she "… did hit and/or shove the parent/guardian of one of your students in the hallway of the War Annex. This conduct, which occurred in view of the students, lead to you being charged with and subsequently convicted of battery. Further, even apart from your criminal conviction, your actions constitute insubordination, willful neglect of duty and immorality."

43. Grievant advised Respondents that her conviction was on appeal. Grievant filed a timely grievance to her termination alleging that she had acted in self defense and that the school authorities had failed to provide assistance and protection that would have prevented the incident from occurring.

44. Grievant was convicted of battery in the McDowell County Magistrate Court (July 3, 2008) but on appeal of the Magistrate's Order she was later found to be Not Guilty by the McDowell County Circuit Court (November, 2008).

45. During level three grievance proceedings, Respondent presented Administrators from McDowell County Schools in which Grievant had taught. Witnesses testified regarding problems which arose between Grievant and the Administrators or Grievant and her students during her tenure in the respective schools.

46. The subject of the Grievant's interaction with others was a theme throughout a number of observations and evaluations she received over the course of her employment with Respondent (eg. Needs to work on the area of maintaining effective communication with parents, students & staff).

47. Grievant strongly asserted that anyone who provided negative comments regarding her performance was in league to harm her. Grievant is of the opinion that decision makers employed by Respondent(s) were motivated to retaliate against her for her stance on past conduct of Respondent MBOE.

48. The source of the statements contained in the Grievant's evaluations and observations were not centralized. Statements were from a number of different Administrators, including Cheryl Cruey, former War Annex Assistant Principal; Dennis Jarvis, Fall Elk River Principal; Katherine Sorah, Assistant Superintendent MCBE; and Alvin Cline, former Mount View Middle School Principal. These individuals previously worked with or served in a supervisory capacity over Grievant at various times in the McDowell County School system.

49. Grievant's employment history provides that she has been formally reprimanded on more than one occasion. Formal written reprimands include letters dated October 24, 2005 (R Ex 14), November 16, 2007 (R Ex 16), and January 7, 2008 (R Ex 17).

50. The October 24, 2005 reprimand pertained to a heated confrontation between Grievant and a parent which caused a disturbance in the school. (R Ex 14). Grievant was employed at Mount View Middle School. The reprimand was signed by Assistant Superintendent Carolyn H. Falin.

51. Grievant was unwilling to acknowledge shortcomings in her conduct toward others as reflected in a number of prior evaluations and observations. Her explanations of the expressions of concern regarding her conduct toward others, as reflected in prior observations and evaluations, included:

Cruey – retaliation for a report of testing irregularities made to the Department of Education;

Sorah - retaliation for a report of testing irregularities made to the Department of Education; and

Cline – retaliation based upon a letter Grievant wrote about a latex allergy problem.

52. Grievant asserted that prior letters of reprimand she received did not reflect shortcomings in her conduct.

53. Grievant asserted that a letter of reprimand authored by Assistant Superintendent Carolyn H. Falin was in retaliation to the Grievant's report of testing irregularities.[7]

54. Grievant promulgated that the letter of reprimand authored by Assistant Superintendent Peggy E. Freeman was the product of confusion on Ms. Freeman's part.

55. Investigation of Grievant's conduct with regard to the March 6, 2008 incident also included a review of Grievant's employment history with the McDowell County School system. This included but is not necessarily limited to Grievant's personnel file, disciplinary issues, evaluations, peer observations, complaints, commendations/awards and teaching credentials.

56. In review of Grievant's employment with McDowell County School system Respondents noted that throughout Grievant's tenure, she has had difficulty with students, parents and others repeatedly. Grievant had been employed in a number of

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[7] Grievant further asserted that Ms. Falin had been threatened by the Superintendent so as to cause the letter of reprimand to be issued. When cross-examined as to the factual basis for such a serious allegation, Grievant admitted that she was speculating.

different schools with a host of administrators; however, certain difficulties were reoccurring with what was perceived to be increasing severity.

57. State Superintendent, Dr. Steven Paine, hired Suzette Cook as the McDowell County Superintendent of Schools effective July 1, 2007. The termination of Grievant's employment was recommended by Superintendent Suzette Cook to the State Superintendent and was approved by the State Superintendent as reflected in the termination letter dated October 10, 2008. (R Ex 2).

58. By letter dated October 10, 2008, Grievant was informed by State Superintendent of Schools, Steven L. Paine, that her employment had been terminated. The termination letter among other information stated that;

> The basis for your termination is as follows:
>
> On March 6, 2008, while employed as a teacher at War Elementary School, you did hit and/or shove the parent/guardian of one of your students in the hallway of the War Annex. This conduct, which occurred in the view of students, lead [sic] to you being charged with and subsequently convicted of battery. Further, even apart from your criminal conviction, your actions constitute insubordination, willful neglect of duty, and immorality.

(R Ex 2).

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.,* Docket No. 96-23-174 (Apr. 30, 1997); *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). *Hanshaw v. McDowell County Bd. of Educ.,* Docket No. 33-88-130 (Aug. 19, 1988). "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. The 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*.

The instant grievance filed by Grievant L. W. challenges the sufficiency of Respondents' evidence to support the grounds stated for her initial suspension. Grievant contends Respondents' failure to allege an offense covered by the provisions of W. VA. CODE § 18A-2-8 invalidates the sanction(s) taken. Further, Grievant by Counsel contends that the additional charges imposed between the initial Notice of Suspension and the final Notice of Termination, were inappropriate and improper. Retaliation is inferred repeatedly as a motive for Respondents' conduct. Lastly, Counsel points out that if termination is coupled with previous complaints regarding Grievant's performance, nowhere in the testimony or exhibits was there evidence of a

determination of whether the fault found with Grievant was correctable or any measurable plan for correction was utilized.

It is recognized that Respondents had discretion in the circumstance of this case. Yet ultimately, Respondent DOE chose to discharge Grievant. Respondents maintained this decision was rational and not motivated by undue (improper) factors. Respondents, in review of Grievant's tenure with the McDowell County School system, referred to past performance evaluations and highlighted that Grievant had a history of encounters (clashes) with parents, and staff. Further, Respondents stress that they are not required to show, beyond a reasonable doubt, that the Grievant battered the guardian of a student while on school grounds. Respondents are only required to show that the Grievant was guilty of such conduct by a preponderance of evidence under the grievance procedure.[8]

WEST VIRGINIA CODE § 18A-2-8 identifies the types of conduct that can result in disciplinary action and provides, in pertinent part:

> (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.

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[8] The undersigned ALJ concurs with Respondents' Counsel in that the appropriate burden of proof applicable to this disciplinary matter is the preponderance standard. The undersigned is of the opinion that Respondents may not, in the circumstances of this case, claim that the Magistrate Court conviction is the basis for Grievant's termination. Nor may Grievant claim that the outcome of the appeal of her conviction resolves the question of whether or not she acted in self-defense. The Circuit Court's consideration of self-defense in the appeal of her magistrate court conviction only serves to support a conclusion that the State failed to prove her guilt beyond a reasonable doubt – not that the Grievant proved self-defense by a preponderance of the evidence. Different standards and the verdict only does not validate the accuracy of the defense.

Respondent (MCBE) provided Grievant written notice of its preliminary determination to suspend and intent to investigate further. (R Ex 1). It is not necessary 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. *See Jordan v. Mason County Bd. of Educ.*, Docket No. 99-26-080 (July 6, 1999). Respondents by Counsel maintain Grievant was on notice that her conduct was sanctionable up to and including discharge. It is ambiguous to what degree Grievant is aware, specifically, of the conduct/behavior for which she has been sanctioned, unacceptable employee conduct deemed insubordination and willful neglect of duty (pattern of behavior). It is more likely than not that Grievant believes she has been terminated exclusively as a result of the March 6, 2008 incident.

I. Credibility

An incident occurred on March 6, 2008 at War Annex School in McDowell County, West Virginia. There are several differing versions of the events that took place. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. In the circumstances of this case, assessment of several of the witnesses' testimony is deemed prudent.

The volatile nature of Clarice Bailey is not the issue before the undersigned, there is no doubt that Ms. Bailey is an opinionated black woman who has had more

than her fair share of confrontations, verbal and physical.[9] A valuable piece of information, in discussion, and relevant to this decision is whether Grievant struck Ms. Bailey.[10] Further, and perhaps even more elusive is the true nature of the circumstance in which Grievant came into physical contact with Ms. Clarice Bailey. Grievant made contact with Ms. C. Bailey to the degree that Ms. Bailey's glasses were knocked off her face. The contact is a fact (attested to and collaborated to by at least 3 witnesses). It is the circumstances of the contact that is much debated. Ms. C. Bailey alleges Grievant without provocation struck her, while Grievant maintains she was in defense of her person. Grievant's recollection of facts varies with time and event, sometimes self defense is implied, other times it's involuntary incidental contact by Grievant that causes Ms. Bailey's glasses to be dislodged from her face.

Credibility and trustworthiness is a commodity that should never be squandered. Grievant and Ms. C. Bailey offer significantly differing versions of what occurred between them prior to and on March 6, 2008. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative

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[9] On November 21, 2008, during the McDowell Circuit Court appeal of Grievant's underlying Magistrate conviction, Ms. Bailey characterized herself as a "strong, independent black woman . . . that doesn't get a whole lot of help from anyone, and is willing to let people know if [she's] dissatisfied." (November 21, 2008, Circuit Court Trial Transcript).

[10] It is also of importance and relevant to the discussion whether Ms. Bailey struck Grievant.

Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1993). In the circumstances of this case, it is necessary to delve into the credibility of several witnesses and Grievant.

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999); *Perdue, supra*.

The undersigned finds Grievant is less than reliable with regard to time, place, and detail. Grievant has a vested interest in the instant subject matter; however, her statements are not consistent. Her rendition of events change with what could be depicted as short term objectives. Inconsistencies include but are not limited to point of contact, force and number of physical blows received, and her actions before and after physical contact. While it is understandable that an incidental fact could be misstated, Grievant's recollection of detail and incident is more problematic, there is a pattern to Grievant's actions. Grievant is adroit and manipulative. Grievant's demeanor is dubious. This finding is based upon the first hand observation of Grievant and review of the record in its entirety. While Ms. C. Bailey is brash and abrasive, she

doesn't alter or even attempt to mask her personality. Principal Dennis Jarvis described Grievant as very artful, articulate and manipulative with answers (quick of thought).

Grievant and Ms. C. Bailey are not similar in nature. This is not a bad nor good thing, it is what it is. There are plausibility concerns with both individuals' renditions of various facts of this case. It is readily evident that there is bad blood between Grievant and Ms. C. Bailey.

The nature of Clarice Bailey is not easily depicted. Her behavior transcends typical hearing behavior. Ms. Bailey's demeanor is not readily comprehended via one medium, or snippets of dry transcripts. In her appearance(s) before this Administrative Law Judge (ALJ), as well as in review of audio tape and written transcripts alike, it is obvious that Ms. Bailey is a very opinionated and strong willed black female, who believes her perception should be exalted (an opinion not necessarily widely held by others). It was evident in her responses, and in her refusal to respond to some of counsel's questions, that she was no stranger to legal proceedings. Ms. Bailey made it abundantly clear she would speak her mind and not hold back her opinion for anyone. Ms. Bailey's credibility is not without its own share of deficiency. Ms. Clarice Bailey's testimony regarding past interactions between Grievant and herself is not plausible. Stemming from real or perceived treatment of JF, there had been tension between these two women well before the March 6, 2008 incident. Nevertheless, this is not the definitive issue in dispute, the question remains was Grievant's physical interactive contact with Ms. Bailey justified and/or excusable in the circumstances of this case.

It did not bolster Grievant's credibility to oppugn the authenticity of her written statement provided at the time of the March 6, 2008 incident.[11] Grievant's efforts would have been better served to explain variation of fact and/or incomplete statements. Grievant's actions and mannerism tended to lend validity to the assertion by others that Grievant is willing to say anything that serves her purpose. The written statement provided to Assistant Principal Cruey by Grievant on March 6, 2008 bears little resemblance to the events as described in Grievant's Level III testimony in 2010.[12] Grievant's attempt to disclaim responsibility for her written statement and the significant inconsistencies it revealed bears directly upon the credibility of her testimony.

Grievant introduced evidence of treatment she received for physical injuries, maintaining the injury was a result of her confrontation with Ms. C. Bailey. Respondent very skillfully highlights that due to the lapse in time between treatment and the incident, it is not possible to conclusively attribute Grievant's injuries to the actions of Clarice Bailey. The medical documentation offered by Grievant to support her position

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[11] When the Grievant was confronted during cross-examination with a written statement she provided contemporaneously with the incident, she attempted to assert that she was not the author. Grievant claimed if the statement was not signed and dated, it was not her statement. It was necessary to call Assistant Principal Cruey to testify as to the circumstances surrounding the written statement prepared by the Grievant in order to establish its genuineness. Ms. Cruey was able to produce the original statement provided to her by the Grievant.

[12] Grievant testified during the Level III hearing that she exited Ms. Cruey's office; she was struck with a blow to the back of the head with a fist by Clarice Bailey; and she turned and stated, "You've really messed up, that was a felony." Grievant testified that she then pointed to a sign that was hanging in the hallway that described a criminal offense involving threats and battery against school employees. Allegedly, Ms. Bailey then began slapping the right side of Grievant's face.

is not conclusive with regard to place and time of causation.[13] Steven Overby testified that the Grievant informed him that she had an appointment with an eye specialist when leaving the school on March 6, 2008. According to Grievant's testimony, no appointments with physicians had been made at that point in time in connection with the alleged injuries suffered. Mr. Overby, a former husband of Grievant, testified that he noticed Grievant's eye was red but did not testify to any other injury. While Grievant offered into evidence pictures allegedly taken prior to medical treatment which purports to show scratches and redness, none of the medical reports offered by Grievant mentioned any bruising or redness. Ms. Bailey raised the possibility that Grievant's injuries were self-inflicted in an effort to bolster her version of events. The evidence does not allow for such a possibility or other cause for the Grievant's injuries to be ruled out.

There were several students who provided statements and testified throughout the course of the various legal proceedings that have been convened subsequent to the March 6, 2008 event. Some testimony was more plausible than others. Each student provided some insight, but their testimony is also recognized to be laced with some degree of bias and obstructed observation.

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[13] Assistant Principal Cruey testified that the Grievant stated that she had a previous eye injury and requested permission to leave the school in order to have her eye examined to determine whether the injury had been aggravated. (L-3 testimony, November 2009). The medical records submitted by the Grievant make no reference to a distinction between a prior injury and any subsequent aggravation, leaving the possibility that the medical evidence offered by the Grievant related to an injury sustained prior to the incident in discussion.

The testimony of student MBH is suspect for several reasons. She told no one what she saw at the time of the incident (further no one witnessed her presence). Grievant visited MBH's home in order to solicit her testimony. Student MBH provided a version of events more consistent with the live testimony of Grievant and inconsistent with the Grievant's contemporaneous written account of the incident. Interestingly and as noted in the circuit court proceedings, student MBH's movement through the school is suspiciously not captured by any of the four surveillance cameras. Not one! The testimony of Student MBH deviated from that offered by all other witnesses, including Grievant. Inconsistencies include the admitted actions of Grievant and known time period of events.[14] In review of the previously cited credibility assessment factors, the undersigned determines that student witness MBH is not found to be credible nor the information provided to be reliable. The overall plausibility of the information offered contradicts verifiable facts of evidence.

Oral statements were gathered from identified students (TD, ZB, JH and VW) known to officials to be in the vicinity of the incident in discussion. Certain students provided written statements on March 7, 2008 to Deputy Mundy. Not all of the written statements were presented as evidence for the instant grievance. While the amount or lack of detail specified by these statements has been debated, it is evident that these documents were drafted to memorialize the information the student witnesses

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[14]Student MBH testified that she observed the incident during a time frame that is inconsistent with when it occurred. MBH testified she observed the incident during her 7th period class with Ms. Masterson. She departed the class and among other actions went to visit the door of a class containing her boyfriend. According to the testimony of Teacher Howard Mitchell, the class period described by student MBH (7th period) did not begin until after lunch at 1:15 p.m. The incident in discussion occurred prior to lunch.

presented orally. Three or more male students were in an office or room in a section of the school adjacent to Assistant Principal Cruey's office area. Each of these minors attempted to provide useful information. The details regarding what each did or did not witness is relatively homogenous with the passage of time and the artful leading and prompting of expert cross examiners. VW did intervene on March 6, during the course of a physical altercation between Grievant and his auntie (term of affection, not a blood relative). He was instrumental to an identifiable degree in ceasing further escalation of events. ZH and TD both confirm non contentious facts. But all provide a form of perspective interpretation with regard to specific detail. None are able to provide credible testimony regarding initial contact between the parties. Grievant and Ms. C. Bailey, outside of Assistant Principal Cruey's office in an area without surveillance camera coverage each contend that the other committed an unprovoked battery.

This incident warranted investigation by authorities of various jurisdictions.

It is and was reasonable for Respondents to suspend Grievant during the initial investigative stage. More than twenty different witnesses have testified with regard to one aspect or another regarding issues presented by the circumstances of relevant events. Nevertheless, despite the vast amount of time and effort spent, numerous facts are still unverified. An altercation ensued between Grievant and Ms. C. Bailey. There was physical contact between the two individuals on March 6, 2008 at War Annex (physical fighting). However, who hit, and/or shoved who, first is not evident within the confines of the credible information of record.

II. Merits

WEST VIRGINIA CODE § 18A-2-8 states, 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 WEST VIRGINIA 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).

"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. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions are closely related to actions that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

Respondents assert Grievant's actions constitute insubordination and a willful neglect of duty. To prove willful neglect of duty, the employer must establish that the

employee's conduct constituted a knowing and intentional act, rather than a negligent act. *Williams v. Cabell County Bd. of Educ.*, Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ.*, Docket No. 95-29-151 (Aug. 24, 1995); *Hoover v. Lewis County Bd. of Educ.*, Docket No.93-21-427 (Feb. 24, 1994). Willful neglect of duty encompasses something more serious than incompetence. *Bd. of Educ. v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120, 122 (1990); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996). Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. *Adkins v. Cabell County Bd. of Educ.*, Docket No. 89-06-656 (May 23, 1990).

It is not the label a county board of education attaches to the conduct of the employee in the termination notice that is determinative. The critical inquiry is whether the board's evidence is sufficient to substantiate that the employee actually engaged in the conduct. *Allen v. Monroe County Bd. of Educ.*, Docket No. 90-31-021 (July 11, 1990); *Duruttya v. Mingo County Bd. of Educ.*, Docket No. 29-88-104 (Feb. 28, 1990).

Grievant's posturing regarding much of the level three proceedings was counterproductive. Despite Counsel's repeated objection to the contrary, Grievant's personnel file and past behavior is relevant. It is the presiding ALJ's duty to determine the appropriate weight to be given to the anecdotal evidence presented. However, it is not found that Grievant's conduct in 2003, reporting an individual school's use of outdated standardized test, was sufficient to generate retaliatory actions from the instant Respondents to the extent argued by Grievant. See retaliation discussion *infra*.

A considerable amount of Grievant's actions inferred nefarious motives and secondary defenses more than they addressed the case at issue.

Respondents assert that there exist repeated unsatisfactory interactions with others throughout a number of observations and evaluations Grievant received over the course of her employment. Respondents aver that Grievant's behavior and failure to rectify or cease to be involved in these type of situations constitutes insubordination and a willful neglect of duty which are proper grounds for the termination of Grievant's employment.

It is recognized that when grounds for a school employee's dismissal include charges relating to conduct which is deemed correctable, the county board must establish 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); *McMann v. Jefferson County Bd. of Educ.* Docket No. 2009-1340-JefED (Oct. 21, 2009). Grievant contends Respondent(s) ignored the clear directive of statute and regulation that before allegations can be somehow united to serve as the basis for Grievant's termination, the Board must show an effort has been made to provide an opportunity for Grievant to improve her failings. The key to this analysis is whether or not the conduct is correctable.

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.[15] *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 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, an improvement plan was not required as Grievant's conduct is not incompetency or unsatisfactory performance that can be corrected through an improvement plan. Grievant has a degree of teaching skills and cares about the students. Failure by a Board of Education to follow the evaluation procedure in WV Board of Education Policy No. 5300 (6)(a) prohibits such Board from discharging,

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

demoting or transferring an employee for reasons having to do with prior conduct that has not been called to the attention of the employee through evaluation and that is correctable. Syl. Pt. 3 *Trimboli v. Board of Education*, 254 S.E.2d 561 (1979); *Maxey v. McDowell County Board of Education*, 575 S.E.2d 278, 2002 W.Va. LEXIS 226 (2002); See also W. VA. CODE § 18A-2-12a(b)(6).

Respondents argued that their decision was permissible in the circumstances of this case. Administrators from schools in which Grievant had taught testified regarding problems which allegedly arose between Grievant and the Administrators or the Grievant and her students during her tenure in their school. Citing the October 24, 2005 Reprimand Letter signed by Assistant Superintendent Peggy Freeman to Grievant:

> Should you have any further problems with [**], or any other student, please allow your administrator to deal with the situation. By placing yourself in the middle, you invite controversy and can hinder the accuracy of an investigation. Your principal or assistant principal will conduct disciplinary investigations, without favoritism or prejudice.
>
> West Virginia Board Policy 5310 clearly requires teachers to maintain professional work habits, i.e. to interact appropriately with other students, educational personnel, and parents. It is your professional responsibility to demonstrate this behavior in all activities at Mount View Middle School, in the classroom, during conferences, and on the phone with parents.

(R Ex 10). Respondents maintain Grievant was on notice regarding this type of behavior deficiency and the recommended corrective action. Numerous performance observations and past evaluations provided to Grievant were introduced and cited to demonstrate the position. A sample representative of comments and recommended employee behavior information provided to Grievant over the years include:

> Communication: Needs to work on the area of maintaining effective communication with parents, students & staff. Professional Work Habits: Does not follow administrative directive. Frequently ignores directives. Ex: makes inappropriate comments to students. Comments: Needs to develop effective communication skills. (January 2004 Observation, R Ex 7.)
>
> Communication: Needs to work on better communication skills between teacher/parent. Suggestions: Use sound judgment when faced with difficult students and situations. (May 2004 Evaluation, R Ex 9.).
>
> Communication: Several parents express concern with the communications they had received from Ms. W. Concerns included that what they were told was deceptive. Professional Work Habits: Interaction with student, parents and staff is often confrontational. Comments: Communicate with parents and improve the parent teacher relationship. (January 2006 Observation, R Ex 11).
>
> Classroom Climate: Students feel the classroom atmosphere is confrontational. (January 2006 Evaluation, R Ex 12).

Grievant was formally reprimanded by Assistant Superintendent Carolyn Falin by letter dated November 16, 2007, as a result of inappropriate interactions with students and warned that additional disciplinary action would result if such conduct persisted. (R Ex 16). Grievant was reprimanded by Superintendent Suzette Cook and Assistant Superintendent Falin by letter dated January 7, 2008, for inappropriate and unprofessional conduct relating to her interactions with her peers. (R Ex 17). Grievant did not challenge reprimands dated October 24, 2005, November 16, 2007, or January 7, 2008. When an employee fails to file a timely grievance challenging an earlier disciplinary action, the merits of that action cannot be challenged in a subsequent grievance proceeding. *Moore v. Mason County Board of Education*, Docket No. 00-26-360 (February 5, 2001).

When one takes into consideration the State Board of Education Policy and the record offered in support of Grievant's termination, it is not clear that the conduct complained of in this case was, indeed, correctable. The record establishes that Grievant's supervisor documented the conduct found objectionable, Grievant was aware and instructed on how to resolve identified issue(s). Grievant has had ample opportunity to correct the conduct (far in excess of a one semester improvement plan) and yet the behavior is still prevalent in Grievant's interaction with students, parents and peers. It is not established that a so-called improvement plan was discussed with Grievant. The essence of one however was repeatedly provided to Grievant.

Insubordination includes "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1,1989). In order to establish insubordination, the employer must not only demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, but that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Jones v. Mingo Co. Bd. of Educ.*, Docket No. 95-29-151 (Aug. 24, 1995); *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995). Grievant and Ms. C. Bailey participated in a physical altercation on school property which was witnessed, in part, by students. The incident did reach a level of notoriety throughout the community. Respondent has very limited tolerance when it comes to violence in our schools. This must be especially true in the case of teachers. Fighting in the halls of the school is conduct not in conformity with the accepted principles of

right and wrong behavior. Teachers function as custodians, care takers, role models, and disciplinarians of the students each day while the children are in their custody. In this case, Grievant made physical contact with Ms. C. Bailey to the degree that Ms. Bailey's glasses were knocked off. The contact is a fact. Grievant disputes the circumstances contending self-defense and/or incidental contact, not the action. This conduct certainly conflicts with the example of self control and moral behavior which teachers are expected to set for their students. Respondent established the conduct by a preponderance of the evidence. Respondent established this was not an isolated event with regard to the Grievant. A teacher physically fighting in the hallways of the school constitutes insubordination.

Unfortunate events transpire every day to all manner of individuals, such events should not unreasonably impact a person's ability to practice his or her chosen profession. It was imperative that Respondent demonstrate Grievant's conduct was not correctable. Throughout Grievant's tenure with McDowell County School system, she has had difficulty with students, parents and others repeatedly. Grievant had been employed in a number of different schools with a host of administrators; however, certain difficulties were recurring with what was perceived to be increasing severity. The grounds for Grievant's dismissal were not charges relating to incompetency, but unacceptable conduct which Grievant had been informed and afforded a substantial period of time to correct. Respondents have demonstrated that Grievant's conduct is voluntary behavior and the identified deficiencies have not been corrected despite repeated opportunity. A formal improvement plan is an exercise in futility. Respondent is not required to condone this type of behavior.

III. Reprisal

Grievant repeatedly asserted she was the victim of reprisal. WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a *prima facie* case of reprisal the Grievant must establish by a preponderance of the evidence the following elements:

> (1) that he engaged in protected activity;
>
> (2) that he was subsequently treated in an adverse manner by the employer or an agent;
>
> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
>
> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ*., Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). "[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action." *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994). Grievant contents Respondent (MBOE) is predisposed to

sanctioning her as a result of her 2003 reporting of local school activity with outdated standardized test.[16]

If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id. See Mace v. Pizza Hut, Inc.,* 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n,* 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.,* Docket No. 89-26-56 (Sept. 29, 1989). "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994). *See Sloan v. Dep't of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

Grievant has concluded and rationalized that officials employed by Respondents have a negative perception of her and her interaction with others. Further, Grievant may truly believe that Respondents are out to get her. But this belief is not enough to sustain the repetitive accusation of reprisal and conspiracy levied by Grievant against numerous administrative authorities of both Respondent agencies.

Grievant did not demonstrate through any measurable means that the actions of Respondents were tainted by nefarious motive. Grievant should not take

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[16] Grievant avers that the present action is/was unduly influenced by her reporting of McDowell County School testing improprieties. In early 2003, Grievant reported to the State Board of Education the use of outdated standardized test to prepare students for testing. The alleged violations were copyright infringements by improper use of old standardized tests.

constructive criticism as an attack. An unflattering observation can be a meritorious reflection. There is no evidence that a dispute between Grievant and the administrators of the McDowell County Board of Education regarding testing improprieties is ongoing.

Respondent DOE has been in control of personnel decisions for McDowell County Board of Education since 2001. During the time period relevant to this grievance, as a result of the intervention and, as a result of the delegation of authority to the state superintendent, all personnel hiring and termination in the McDowell County School system must be made by the State Superintendent of Schools. *See* WEST VIRGINIA CODE § 18-2E-5. Thus it is not demonstrated that the decision making authority regarding Grievant's dismissal was the same official(s) Grievant accused of testing impropriety. Finally, Grievant did not establish that she sought assistance from school officials in relation to her fear of Clarice Bailey in advance of the incident in question.

As to the severity of the penalty imposed, this is an affirmative defense. 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). "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).

Under the circumstances presented, it has not been demonstrated that the disciplinary measure levied was so clearly disproportionate to the employee's offense that it constitutes an abuse of discretion. Investigation of Grievant’s conduct with regard to the March 6, 2008 incident also included a review of Grievant’s employment

history with the McDowell County School system. This included Grievant's personnel file, commendations/awards, disciplinary issues, evaluations, peer observations, complaints, and teaching credentials. Respondents noted a theme, certain difficulties were recurring with what was perceived to be increasing severity. Grievant is and was unwilling to acknowledge any shortcomings in her conduct toward others as reflected in a number of prior evaluations and observations.

Respondents presented persuasive testimony and evidence to demonstrate that Grievant has a degree of teaching skills and cares about the students; however, the record also clearly reflected numerous confrontations between Grievant and others. A pattern Grievant is aware of and has failed to correct. This behavior constituted insubordination and a willful neglect of duty.

The events of this matter are extremely unfortunate and a regrettable incident but the undersigned cannot find that termination was too severe a penalty. Respondents had discretionary options in the circumstances of this case. Nevertheless, Respondent (DOE) elected to terminate Grievant. Given the considerable deference afforded to employers in disciplinary situations, the undersigned is without sufficient justification to rule that the discipline imposed was excessive. Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute his 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).

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 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). "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).

2. "The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. VA. CODE §18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991). *See Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975)." *Graham v. Putnam County Bd. of Educ.*, Docket No. 99-40-206 (Sep. 30, 1999).

3. 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. If the disciplinary action is taken

for unsatisfactory performance, it must follow an employee performance evaluation. W. VA. CODE § 18A-2-8.

4. 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).

5. Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. *Adkins v. Cabell County Bd. of Educ.*, Docket No. 89-06-656 (May 23, 1990).

6. Respondents established by a preponderance of the evidence that Grievant's pattern of conduct constituted willful neglect of duty.

7. To demonstrate a *prima facie* case of reprisal the Grievant must establish by a preponderance of the evidence the following elements:

> (1) that he engaged in protected activity ;
>
> (2) that he was subsequently treated in an adverse manner by the employer or an agent;
>
> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
>
> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also*

Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986).

8. Grievant did not demonstrate that the decision to terminate her employment was an act of reprisal by Respondents. Grievant failed to demonstrate that she has suffered any retaliation or reprisal.

9. Respondents established by a preponderance of the evidence that Grievant's behavior and failure to rectify or cease to be involved in confrontational situations constitutes insubordination and a willful neglect of duty.

10. Respondents established by a preponderance of the evidence that, in the circumstances of this case, Grievant's pattern of conduct constituted a terminable offense.

11. Respondents had discretionary options in the circumstances of this case. Considerable deference is afforded to employers in disciplinary situations. An Administrative Law Judge will not substitute his 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).

Accordingly, this grievance is **DENIED**.

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: August 19, 2010

_____
Landon R. Brown
Administrative Law Judge