WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DUSTIN PAUL TURNER,

Grievant,

v. **Docket No. 2011-0177-PleED**

PLEASANTS COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Dustin Paul Turner, is employed by the Respondent, Pleasants County Board of Education, ("Board") as a teacher. He is assigned as a teacher of Senior Civics at St. Mary's High School. At all times relevant to this grievance, Mr. Turner was also serving as the Varsity Soccer Coach at St. Mary's High School. Dustin Turner filed a grievance directly to level three dated August 16, 2010.[1] As his Statement of Grievance Mr. Turner alleged:

> The event causing this grievance was seven day suspension from coaching duties without pay and a four day suspension from teaching duties without pay. The following policies and statutes were misapplied and misinterpreted as a basis for the suspension: Title IX, Pleasants County Board of Education Code of Conduct Policy 6.2.4, 8.2.4, West Virginia Board of Education Employee Code of Conduct Policy 5902. The following statutes and policies were also violated: West Virginia Board of Education Policy 126-18-7, West Virginia Code § 18A-2-8, and Pleasants County Board of Education Policy 6.2.2. Evidence for the aforesaid suspension also failed to meet the requirement of a preponderance of the evidence.[2]

Grievant seeks the following relief:

> . . . lost wages, attorney fees, and expunging my personnel file of all records

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[1] Pursuant to W. VA. CODE § 6C-2-4(a)(4), a grievant may file directly at level three for a number of reasons including contesting a suspension without pay as in this case.

[2] The Statement of Grievance and Relief Sought are set out herein as they appear on the grievance form.

related to this suspension.[3]

Grievant was originally notified of the suspension by Superintendent of Schools, Joe Super, in a letter dated July 22, 2010. A hearing related to the suspension was held before the Board on August 9, 2010.[4] A level three hearing was held October 1, 2010, and June 6, 2011, at the Charleston office of the West Virginia Public Employees Grievance Board.[5] Grievant Turner personally appeared at the hearing and was represented by Dean A. Furner, Esquire. Respondent was represented by Rebecca M. Tinder, Esquire. At the conclusion of the hearing the parties agreed to submit Proposed Findings of Fact and Conclusions of Law which were received at the Grievance Board on July 11, 2011. This matter became mature for decision on that date.

Synopsis

Respondent alleges that Grievant violated Title IX, West Virginia Board of Education Policies 4200 and 2421 by discriminating against female students while coaching a soccer team and against female staff members in the high school. Respondent also alleges that Grievant violated Employees Codes of Conduct by discussing inappropriate topics in his

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[3] It is well established that the Grievance Board does not have the authority to award attorney fees. *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996); *Cosner v. Div. of Highways*, Docket No. 2008-0633-DOT (Dec. 23, 2008).

[4] A transcript of the hearing was included as part of the factual record in this matter.

[5] The first day of hearing was held by Administrative Law Judge ("ALJ") Wendy Elswick. Subsequent to that hearing, ALJ Elswick left employment with the Grievance Board and the matter was assigned to the undersigned ALJ to conduct the second day of hearing and render a decision.

classroom. Finally, Respondent claims Grievant violated county policy related to searching student property. Respondent suspended Grievant from coaching for seven days and teaching for four days for insubordination because he allegedly intentionally violated these laws and policies.

Respondent was unable to prove that Grievant intentionally violated any law or policy. Additionally, any inappropriate conduct committed by Grievant was correctable and suspension was not consistent with the requirements of W. VA. CODE § 18A-12a(b)(6).

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant Dustin Turner has been employed by the Pleasants County Board of Education for over four years as a teacher of civics and history at St. Mary's High School.

2. During the 2009 and 2010 school year, Grievant Turner also served as the head varsity soccer coach at St. Mary's High School. Both girls and boys played together on the team. This was Grievant's first year as a coach and his assistant was coaching for the first time.

3. In October of 2009, parents of one of the girl soccer players registered a complaint alleging that Grievant had violated the provisions of Title IX[6] by treating the girls on the soccer team less favorably than the males on the basis of their gender. They also complained about statements that Grievant had made in his senior civics class. Prior to this

[6] Title IX is a federal law prohibiting discrimination on the basis of sex by education institutions receiving federal funds. The more complete title is, Title IX of the Education Amendments of 1972. 20 U.S.C. §§ 1681 - 1688. Herein it will simply be referred to as "Title IX."

time, some of the senior girls on the soccer team and their parents had complained to the Athletic Director and a guidance counselor regarding the playing time the girls were receiving.

4. Superintendent of Schools, Francis Joseph Super, EdD assigned Randy Simmons PhD to conduct an investigation into the allegations. Mr. Simmons is the Respondent's Director of Special Programs as well as the coordinator for some federal programs including Title IX.

5. Director Simmons procured advice regarding conducting the investigation from an investigator employed by the State Department of Education and then interviewed students, parents, and staff members employed at the high school.

6. Director Simmons did not inform Grievant that a Title IX complaint had been made against him and did not take Grievant's statement regarding the complaints until he had interviewed all other parties. Grievant was informed of the complaint for the first time in July 2010.

7. After completing his investigation, Director Simmons issued a report to Superintendent Super. In the conclusion section of the report Director Simmons noted:

> It would be the opinion of this investigator that it has been substantiated that questionable/inappropriate comments have been made in the classroom as well as with the soccer team members. . . Adults interviewed have clearly voiced that they are not comfortable with the dynamic between Mr. Turner and his interaction with females. Mr. Turner was able to provide his philosophy and explanation of why some issues could be misconstrued. . . [7]

8. After receiving the report from Director Simmons, Superintendent Super met

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[7] *2010 Title IX Investigation.* Respondent's Exhibit 3 offered at the Board of Education hearing.

with Grievant on July 12 and 22, 2010. By letter dated July 24, 2010, the superintendent informed Grievant Turner that he was suspending Mr. Turner without pay from his coaching duties for seven days on July 26, and August 2 through 9, 2010, and his classroom duties for seven days. He was also suspending Grievant Turner from his teaching duties without pay for seven days from August 23 through 31, 2010. The reasons for this action were set out as follows:

- . . . [Y]our treatment, while acting as a coach, of female soccer players/students violated Title IX in that you [a] repeatedly referred to the co-ed team as a boy's team, [b] treated female players/students less favorably than their male counterparts, [c] only cut female players from the team, [d] commented that the worst boy was better than the best girl player, and [e] were generally more attentive to the male players than the female players. [f] it was reported that the sexism was blatant and offensive to the female staff members.[8]
- . . . [Y]ou made an inappropriate comment about special education students/individuals with disabilities.
- . . . [T]opics you were discussing in Civics class, including, but not limited to, your religious beliefs, intelligent design, and the home birthing process, were not proper subjects for this class.
- . . . [Y]ou searched the content on students' cell phones without permission.[9]

9. Superintendent Super alleged that Grievant's classroom conduct violated Pleasants County Board of Education Employee Code of Conduct Policy 6.2.4 and the WVBE Employee Code of Conduct Policy 5902, "as well as laws relating to search and

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[8] Superintendent Super alleged that these actions violated West Virginia Board of Education ("WVBE") Policy 2421 the *Racial, Sexual, Religious/Ethnic Harassment and Violence Policy.*

[9] Respondent's Exhibit 1 from the Board of Education Hearing.

seizure."[10]

10. At the beginning of the 2009-2010 season, Grievant held soccer tryouts for the first week. Approximately twenty-eight[11] students tried out. The players were observed by Grievant Turner and the Assistant Soccer Coach, Anthony Miller, for sprint speed, endurance, experience and soccer skills. Grievant and Miller discussed the players and decided together who should make the team. At the end of the tryout period, one student quit and three others were cut to bring the team size to twenty-four players. All three of the players who were cut were girls.

11. The students who were cut had not played soccer before and were generally not as skilled as the players who made the team. Some of the players and the assistant coach believed one boy player who was not cut may not have been as skilled as some of the other players who were cut. However, that student had been playing soccer for eight years and had better endurance and faster sprint speed than the players who were cut. Additionally, the assistant coach lobbied the head coach to keep this player because he felt that playing a sport was very important to him. None of the students who were cut from the team complained.

12. After the tryout week Grievant Turner was approached by two boys who had been out of town for that week but wanted to be on the team. One of the students had been on a family vacation and one had been at high school band camp.

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[10] No specific laws related to search and seizure were identified in either hearing nor in Respondent's post-hearing proposals.

[11] There was varying testimony regarding the number of students who tried out and the number who quit or were cut. The most consistently used numbers are the ones set out herein.

13. Grievant Turner consulted with Athletic Director, Denny Vinderlick, and Principal, David Gaul, to see if he was allowed to let these players try out for the team after the initial tryout period was over since they could not be present that week. Both of these officials informed Grievant that this practice had been done before and agreed that Grievant could let these students try out as long as they were judged by the same criteria as the original players were.[12]

14. Grievant Turner allowed the two boys to try out for the team. He also allowed a girl who was a foreign exchange student to try out as well. The girl had initially gone out for volleyball but quickly changed her mind and wanted to play soccer because she had played that game for many years. All three of these students were told that they would be evaluated for a week for speed, endurance and soccer skills to see if they would make the team. All three proved to be experienced and skilled players, and they all made the team.

15. One of the boys who tried out late for the team was the son of Michelle Runnion.[13] Ms. Runnion expressed some concern about her son making the team after coming late and Grievant told her she need not worry because the worst boy player was better than the best girl player.[14] No one else was present during this conversation and Ms. Runnion did not tell anyone about it until other complaints were made regarding Grievant.

16. At a team meeting near the beginning of the season, Grievant told the team

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[12] Prophetically, Athletic Director Vinderlick cautioned Grievant that this practice might cause some controversy.

[13] Ms. Runnion is a member of the Board of Education. However, Grievant did not know that at the time and Ms. Runnion did not tell him.

[14] Grievant Turner vehemently denies that he made this statement.

that the St. Mary's soccer team was a boys team with girls playing on it. This statement upset some of the female players and they complained to the assistant coach. Grievant explained that according to WVSSAC[15] rules, if a varsity team had one boy on it the team had to play a boys team schedule. The WVSSAC rules do not list co-ed[16] varsity teams. All teams are listed as boys and girls.[17]

17. There were two team captains, Jessica Nichols and Logan Coplin; both were seniors. There were six senior girls on the team. After the initial tryouts and the addition of the three players who came thereafter, there were twenty-two players on the team; eleven girls and eleven boys.[18]

18. The team practices started and ended with stretching which was lead by the team captains. After the stretching, the team was split up by gender into two groups to work on specific drills. Assistant Coach Miller took the girls and Grievant took the boys. Roughly half way through practice, the two groups switched with Grievant working with the girls and Mr. Miller working with the boys. The girls and the boys received roughly equal attention and training from both coaches.[19]

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[15] West Virginia Secondary Schools Athletic Commission.

[16] Co-educational meaning that both boys and girls participate.

[17] It was alleged that Grievant made this statement many times but the evidence only demonstrated that he made it once.

[18] It was never fully explained how the number was reduced to twenty-two, but the assistant coach indicated that he believed some players quit at the beginning of the season.

[19] Board of Education Hearing Testimony of Assistant Coach Miller and team member Samantha Stevens.

19. During the course of the season, some of the senior girls complained to the assistant coach, the athletic director,[20] and Assistant Principal, Jayne Tebay, that they were not receiving enough playing time in the games and that they were being treated less favorably than the boys. Assistant Principal Tebay reported these complaints to Principal Gaul and told Director Simmons that she and other female staff members believed that the treatment of the girl soccer players was blatant sexism and offensive.[21]

20. Three or four girls were in the starting line-up for nearly every game and the players received playing time based upon their ability and the effort that they exhibited in the practices during the week leading up to each game. If a player missed practice he or she might not start.[22] An effort was made by the coaches to get all players some playing time in each game. Team Captain Jessica Nichols started in eight of the twelve games for which statistics were kept during the 2009-2010 season.[23]

21. While the team was on the field warming up for an away game in October 2009, Captain Jessica Nichols was irritable because the boys were not cooperating with her.

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[20] The athletic director received some complaints from the parents of senior girls that they were not receiving enough playing time.

[21] There was no testimony offered that Assistant Principal Tebay or any of the female staff members observed Grievant's treatment of the soccer players at practice or in games. Their perception of how the girls were treated was based solely upon the complaints they received from some of the girls and conversations among themselves.

[22] Board of Education Hearing Testimony of Assistant Coach Miller and Samantha Stevens, a junior girl soccer player.

[23] The statistician quit in late October as part of a protest by the senior girls.

Katie Heller[24] told Jessica Nichols that Logan Coplin, the other team captain, said that Jessica was being bitchy and the only reason she was mad was because she didn't start.[25]

22. Ms. Nichols became very angry and immediately confronted Mr. Coplin about calling her a name. Logan Coplin told Ms. Nichols that she needed to wait until after the game to discuss the issue and they separated.

23. Immediately after the game ended, Ms. Nichols confronted Mr. Coplin again on the team bench and began yelling at him to admit that he had called her a name. Mr. Coplin refused to argue with her and stated that on the field was not the place to have the discussion. Ms. Nichols continued to confront him and another player tried unsuccessfully to intervene. Eventually the parents of Ms. Nichols became involved in the confrontation as well.

24. While Jessica Nichols and her parents were berating Logan Coplin for allegedly calling Jessica a name, Grievant was meeting with other players and their parents to work out details as to how the players were getting home. Some of the players wanted to ride home with their parents instead of riding on the team bus. Grievant was making certain that all students actually had a way home.

25. The parents of Ms. Nichols were yelling at Grievant to come and take care of the name calling incident. Grievant eventually came over to the bench where the confrontation was taking place. By that time, Logan Coplin had walked away from the

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[24] Ms. Heller was a senior girl on the soccer team and she was also in Grievant's Civics Class.

[25] Respondent's Exhibit 10, Statement of Katie Heller taken by Assistant Principal Tebay.

conflict and boarded the team bus. Grievant Turner convinced the parents that on the opposing team's field after the game was not the place to resolve the dispute and they all left.

26. Sometime that evening Grievant told Jessica Nichols that she had to apologize to the team for her outburst on the field before she would be allowed to play again. Ms. Nichols' father called Grievant at home that night and had harsh words regarding Grievant's decision.

27. Grievant asked some of the players including Logan Coplin and was not convinced that Logan Coplin had called Jessica Nichols a bitch.

28. The senior girls commenced a boycott of practice and games[26] in protest of Grievant's decision that Jessica would have to apologize before being allowed to play. Additionally, Ms. Nichols' parents made a complaint that Grievant was violating Title IX by the way he was coaching and that he was discussing inappropriate topics in his class.

29. Principal Gaul asked Assistant Principal Tebay to take the statements of all the soccer players to determine what occurred at the away soccer game which led to the confrontation between Jessica Nichols, her parents and Logan Coplin.

30. There were mixed statements as to whether Logan Coplin called Jessica Nichols a bitch but all agreed that Ms. Nichols loudly confronted Mr. Coplin before and after the game. Principal Gaul advised Grievant that the best solution was to have both students apologize to the team. After receiving Principal Gaul's written recommendation, Grievant apologized to the team for the situation and the two players apologized to the team as well.

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[26] The testimony was unclear regarding the length of the boycott. It may have lasted for two or three games.

All of the players participated in practice and games thereafter.

31. The Social Studies Content Standards[27] for a Twelfth Grade Civics Class include the following areas of instruction:

- Examine, debate and use intellectual and participatory skills essential for informed, effective, and responsible citizenship that enable individuals to apply civic knowledge to work with others and clearly articulate ideas and interests to monitor and influence public policy, build coalitions, seek consensus, negotiate compromise, and manage conflict.
- Analyze the impact of freedom of speech and press in a democratic society and give examples of how these freedoms allow citizens to express their views, shape public policy and monitor governmental actions.
- Analyze the Bill of Rights and examine the conflicts that arise between individual freedoms as opposed to the common good concerning economic and civic conditions in today's society.
- Evaluate a current, real world conflict between individual freedom and the common good and bolster support for their position through debate.
- Develop civic judgment on past and current events, support positions, and evaluate the validity of opposing viewpoints.[28]

32. Grievant utilized different instructional formats to incorporate these and other

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[27] The West Virginia Board of Education adopts Content Standards as instructional goals and objectives for all subjects taught in West Virginia Schools. The Content Standards Social Studies are summarized as follows:

> 4.1. The West Virginia Board of Education has the responsibility for establishing high quality standards pertaining to all educational standards pertaining to all education programs (W. Va. Code §18-9A-22). The content standards and objectives provide a focus for teachers to teach and students to learn those skills and competencies essential for future success in the workplace and further education. The document includes content standards for social studies; an explanation of terms; objectives that reflect a rigorous and challenging curriculum; and performance descriptors.

126-C.S.R.44D § 4.1

[28] West Virginia Board of Education *Twelfth Grade Content Standards: Civics for the 21st Century*, pages 104-108.

Content Standards including classroom discussion of issues, informal debates, and mock legislation which was passed through a classroom legislature and submitted to the Grievant (acting as governor) who either signed it or vetoed it.

33. One topic of discussion and debate was college professors who were fired for teaching intelligent design as an alternative to evolution. These professors brought suit in federal court arguing that their dismissal violated their academic freedom. Grievant used this topic to explore the First Amendment's guarantee of freedom of speech and its application to academic freedom. A few students and their parents complained that this constituted Grievant bringing his Fundamentalist Christian beliefs into the classroom.

34. On another occasion Grievant engaged the students in a discussion regarding whether it would ever be appropriate for a society to sacrifice a single person for the good of many others. The students began talking about the one and asking whether it would matter if the person were disabled or poor etc. At some point, someone raised the issue of a special needs person and Grievant made a comment to the effect that they were "a dime a dozen." Some of the students were offended by this off-hand comment. Grievant tried to explain that he was only taking an opposing position and that he did not really feel that way.

35. Grievant has six children. During the school year, his wife was expecting their sixth child. They were going to deliver the baby at home instead of at a hospital. From time to time, a student would ask Grievant about the pregnancy and the home birth process. Grievant would answer the student's question and move on. Most of these discussions occurred away from class time.

36. Principal Gaul had received no complaints regarding the topics or content of

Grievant's class until after the October parental complaint regarding the soccer field incident. Principal Gaul met with Grievant to discuss a complaint he had received regarding the "dime a dozen" statement and that he may be discussing his religious beliefs in class, specifically, "intelligent design." Grievant explained how the subjects had come up as part of what he believed to be legitimate discussions regarding constitutional rights and social issues. Principal Gaul suggested that Grievant use less controversial and simpler examples for the students in the future.

37. Grievant received excellent evaluations and is considered an excellent teacher.[29]

38. Assistant Principal Tebay and Principal Gaul shared the responsibility of evaluating the staff at St. Mary's High School. Principal Gaul was responsible for the evaluation and supervision of Grievant.

39. From time to time, Assistant Principal Tebay would send e-mails to Grievant seeking information or data. Grievant would routinely ignore those requests. Ms. Haught is the Guidance Counselor who was assigned to the senior class during the 2009-2010 school year. She routinely sent e-mails to the teacher of the seniors requesting that they provide her with notice when students were not doing well academically so that she might provide assistance. Grievant routinely ignored Ms. Haught's e-mails as well. Ms. Tebay complained to Principal Gaul about Grievant's actions and opined that Grievant ignored her because she was a woman.

40. Students are not allowed to use or display cell phones during school at St.

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[29] Testimony of Principal Gaul and Assistant Principal Tebay.

Mary's High School. If a student is caught using a cell phone in class the teacher may confiscate it and take it to the principal's office where the student may retrieve it at the end of the day.[30]

41. The St. Mary's High School Handbook states that searches of student lockers or personal effects "may be conducted by school personnel and/or their designee and all searches should be witnessed by at least one person when practical." Respondent's Exhibit 3.

42. Grievant Turner caught a student texting on his cell phone during Grievant's class. Grievant confiscated the cell phone and looked at the screen. Grievant discovered the identity of another student at the school that the offender was engaged in a text conversation with and reported that student for a violation of the cell phone policy as well.

43. Grievant was accused of making an improper search of the student's cell phone as a result of this incident. Superintendent Super testified that it was the practice that all searches of student property were to be conducted by the school principal notwithstanding the clear written policy to the contrary.

44. A Marine Corp Recruiter came to St. Mary's High School to meet with senior students. Katie Heller asked Grievant if she could leave his class to meet with the Recruiter. Grievant noted that Ms. Heller had no plans to join the Marine Corp and had no reason to meet with the Recruiter. Ms. Heller told Grievant that she wanted to meet with the Recruiter to ask questions on behalf of a boy she knew who was interested in joining the Marines. Grievant told her that she could not leave class for this and stated that the

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[30] Respondent's Exhibit 3, St. Mary's High School Handbook.

Recruiter just wanted to hit on her.

45. Undeterred by Grievant refusing her request, Ms. Heller used her cell phone to contact a friend who was working in the school office and asked him to have her called from class to the office. The second student complied and Ms. Heller was called out of class to report to the front office where she met with the Marine Recruiter. Grievant went into the hall, saw Ms. Heller and noted that she was out of class without permission and told her to return to class. Ms. Heller received two days of in school suspension for leaving class without permission. Grievant apologized to Ms. Heller for stating that the Recruiter just wanted to hit on her and said his fatherly instincts had taken over.

46. Ms. Heller's mother made a complaint regarding the incident and the comment Grievant made to her daughter. She and her daughter requested that Katie Heller be removed from Grievant's class for the remainder of the year and that request was granted.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It must be determined by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying determines the

weight of the testimony." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

W. VA. CODE § 18A-2-7 provides that "[t]he superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter." The authority of the county board of education to suspend or dismiss an employee must be based upon one or more of the causes listed in WEST VIRGINIA CODE § 18A-2-8, 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). WEST VIRGINIA CODE § 18A-2-8 provides that

> [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 contendre to a felony charge.

A number of Grievance Board decisions have held that an employer can establish insubordination by demonstrating a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995); *Domingues v. Fayette County Bd. of Educ.*, Docket No. 04-10-341 (Jan. 28, 2005).

Respondent suspended Grievant from his coaching duties for seven days[31] and from his teaching position for four days. The coaching suspension was based upon the alleged violation of Title IX and West Virginia Board of Education Policy 2421, *Racial Sexual, Religious/Ethnic Harassment and Violence Policy* ("Policy 2421"). 126 C.S.R. 18 §§ 1 *et seq*.. Respondent based Grievant's classroom suspension on alleged violations of Pleasants County Board of Education Employee Code of Conduct Policy 6.2.4 and WVBOE Employee Code of Conduct, Policy 5902 as well as laws relating to search and seizure. Respondent argues that Grievant knew of these policies and willfully violated them which would make him guilty of insubordination justifying his suspension pursuant to W. VA. CODE § 18A-2-8. Grievant asserts that he did not discriminate against female soccer players or female staff members. He argues that his classroom comments were consistent with the Content Standards for a Senior Civics Course and that his actions with regard to the cell phones were in compliance with the written rules of the school. Ultimately, Grievant asserts that he did not intentionally violate any laws, policies or rules and the Respondent has failed to prove that the suspensions were justified.

The two suspensions will be discussed separately herein.

Coaching Suspension:

Respondent is accused of violating Title IX and West Virginia Board of Education Policy 2421 related to sexual harassment by his actions as a coach. Title IX begins with a basic statement of public policy:

(a) Prohibition against discrimination; exceptions

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[31] The soccer season has been over for some time and Grievant chose not to coach the next season.

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .

20 U.S.C. § 1681[32]

Under Title IX, as a general matter, in providing any aid, benefit, or service, a recipient of federal aid may not limit any person in the enjoyment of any right, privilege, advantage, or opportunity, on the basis of sex. 65 Fed. Reg. at 52870. Through the application of this law the opportunities of women and girls to participate in interscholastic athletics have been greatly enhanced. Respondent points out in its post-hearing proposals that the State Board of Education has adopted the concepts of Title IX into West Virginia Board of Education Policy 4200 ("Policy 4200"). 126 C.S.R. 82 §§ 1 *et seq*. After first adopting the public policy statement quoted from Title IX, Policy 4200 lays out how the statute's provisions are applied in West Virginia by stating generally that:

> No student is to be denied equal opportunity for participating in any program of the public schools on the basis of sex, race, color, religion, handicapping condition, age or national origin. County boards of education are to provide all students equal access to and equal opportunities for participating in any course their schools offer. All course offerings must be conducted as being open to both male and female students.

126 C.S.R. 82 § 3.1. The policy specifically addresses the application of the law to extracurricular activities such as interscholastic athletics:

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[32] For an informative discussion of Title IX's provisions and how they are applied *See*: The United States Department of Justice *Title IX Legal Manual,* on the world-wide web at http://www.justice.gov/crt/about/cor/coord/ixlegal.php#IV.

> 3.4 Extracurricular Activities – Members of both sexes, regardless of their race, color, religion, handicapping condition, age or national origin, must be granted equal access to extracurricular activities. In order to insure equal access for all students in extracurricular activities the following criteria are adopted:
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> 3.4.1. In athletic programs, where selection of participants is based on competitive skill, except for interscholastic football and wrestling, which are considered contact sports in West Virginia, schools must provide separate noncontact sport teams for males and females or a single noncontact sport team open to both sexes.

126 C.S.R. 82 § 3.4.

Consistent with this policy statement, a co-ed soccer team was created at St. Mary's High School.[33] The athletes who participated on this team had to be selected on competitive skill without regard to their sex. Grievant Turner and his Assistant Coach established four criteria for assessing the students who tried out for the team. For the first week of practice they assessed players based on their sprint speed, endurance, experience and soccer skills. At the end of that week three players were cut and one quit. They were all female. However, both coaches testified that sex was not a factor in the selection process and all witnesses agreed that these students were not very skilled. One male was kept on the team who some witnesses believed had less soccer skills than two of the females who were cut. Two females speculated that his selection was based upon gender bias. However, Assistant Coach Miller testified that he lobbied for keeping the student because Miller knew his family and thought that playing a sport was very important to the student. Grievant

[33] It is worth noting that Grievant advocated for separate soccer teams for boys and girls but the principal felt the school had insufficient students to support separate teams. There was no indication that any school official took steps to comply with the provisions of 126 C.S.R. 82 §§ 3.4.2 or 3.4.4 which require annual surveys to determine interest in female teams and affirmative action to inform females of opportunities to participate.

Turner noted that even though this player was small in stature, he had faster sprint speed and greater endurance than the females who were cut. Additionally, he had been playing organized soccer for eight years and the females who were cut had no prior soccer experience. Given these factors he made the assessment that this was the correct player to keep.

Grievant Turner articulated valid criteria based upon competitive skills for the selection of the players to keep and cut on the soccer team. Assistant Coach Miller verified these were the criteria utilized and that the sex of the players was not a factor in the selection. The speculation of the student athletes that the selection was based upon gender bias does not prove a violation of Title IX or Policy 4200 by a preponderance of the evidence.

After the tryouts, Grievant Turner allowed three players who could not be present during the first week of practice to try out for the team even though other players had already been cut. Grievant believed that it was unfair to eliminate these players merely because they were not able to attend the first week.[34] Being a first year coach he consulted the athletic director and the principal before allowing these players to try out. The athletic Director told him that other coaches had allowed late tryouts and it was permissible. Grievant allowed the players to try out for a week and they all made the team. Both Grievant Turner and Assistant Coach Miller testified that they assessed these players for a week like they had done with everyone else and utilized the same criteria. Two males and

[34] As noted in the findings of fact, one male player had been on a family vacation, one had attended band camp and a female exchange student had tried out for another sport that she decided was not for her.

one female were then added to the team. All witnesses agreed that these three were skilled players who should have made the team. Because these players were selected by the same sex-neutral criteria as all other players, Respondent did not prove that allowing these players to join the team after other players had been cut violated Title IX or Policy 4200.

There were ultimately an equal number of girls and boys on the soccer team; eleven of each. Each practice was started and ended with stretching that was led by the team captains; one senior boy and one senior girl. The team was then split for drills that were conducted by the two coaches. Assistant Coach Miller took the females for the first half of practice and Coach Turner took the boys. At the practice mid-point the two coaches switched and the girls went through Coach Turner's drills and the boys worked with Assistant Coach Miller. All players received equal amounts of instruction and attention from each coach during practice.[35]

Respondent asserts that the division of the team along gender lines for practice violated Title IX and State Board Policy 4200. However, to violate these policies simply separating the sexes for practice does not violate the statute or policy. Separate but equal treatment of the sexes is encouraged by both Title IX and Policy 4200.[36] The public policy

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[35] Testimony of Assistant Coach Miller and soccer player Samantha Stevens.

[36] "Separate educational facilities for purposes of race were found to be inherently unequal and therefore unconstitutional by the United States Supreme Court in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). No similar ruling has been made with regard to Title IX. Further, Policy 4200 specifically states that "schools must provide separate noncontact sport teams for males and females."

is only violated when females receive less favorable treatment based upon their sex. Two of the female students felt that the practice arrangement was unfair but Assistant Coach Miller testified that all students received equal attention regardless of their gender.

The same two female players and/or their parents complained to Assistant Coach Miller, Guidance Counselor Haught, Assistant Principal Tebay, Athletic Director Vanderlick and others that the girls were not receiving enough playing time. Team Captain Jessica Nichols was a starter for the soccer team the previous season. She complained that she rarely was picked to start by Grievant and that the girls in general received little playing time. However, the statistics that were kept for the first twelve games indicated that Ms. Nichols started eight of those twelve games, that three or four females started every game and females received significant playing time in each game. Assistant Coach Miller and Samantha Stevens testified that the starters were picked based upon how hard each player worked in practice the previous week and comparative soccer skills. Assistant Coach Miller indicated that he and Grievant made an effort to get all the players some playing time but sometimes missed someone in the heat of the competition. Given the totality of the testimony, Respondent did not prove that Grievant violated Title IX or Policy 4200 by splitting the males and females during practice or by his decisions regarding playing time.

Board of Education member,[37] Michelle Runnion, brought her son to soccer practice the second week of the season. Her son missed the first week of practice because he was attending band camp. Ms. Runnion and Grievant had a conversation about her son trying out for the team away from everyone else. Ms. Runnion indicated that she was concerned

[37] Grievant did not know at the time that Ms. Runnion was on the Board of Education and Ms. Runnion did not tell him this fact.

about her son missing the first week and she stated that Grievant replied that she need not worry because the worst boy on the team was better than the best girl. No one else heard the comment and Ms. Runnion stated that she did not share what was said with anyone until the investigation was underway regarding alleged Title IX violations. While this comment was inappropriate and could be taken as an indication of Grievant's views of his team, there is not evidence that it was shared with the students or that Grievant treated the players differently due to their gender rather than their skills. Ms. Runnion said that she was not offended by the comment at the time but might have been if she had a girl on the team. This private conversation, between two adults, was not a violation of Title IX or Policy 4200.

At the start of the season, Grievant told the players that they were on a boys' team that had girls playing on it. Many of the female players were upset by this comment and told Assistant Coach Miller about their feelings. Assistant Coach Miller expressed the concerns of the females about this statement to Grievant. Grievant explained to Mr. Miller and later to the team that he did not mean to diminish the girls by his statement. Rather, he was emphasizing that the WVSSAC did not have a schedule for co-ed teams. As long as one boy was on the team it had to play boys teams and compete against boys teams in the post season. Grievant Turner did not repeat this statement during the season and referred to the team neutrally or as a co-ed team thereafter. While this statement was unfortunate and lead to difficulty for Grievant, it was not proven that it was made with discriminatory intent and did not result in different treatment of the players based upon their sex.

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 Gramlich v. Div. of Motor Vehicles,* Docket No. 2010-0929-DOT (June 14, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.,* Docket No. 2009-1588-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.,* Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999); *Fox v. W. Va. Dept. of Health & Human Res.,* Docket No. 2010-0089-DHHR (July 15, 2010).

Jessica Nichols is a talented soccer player who started the previous season. She was upset because she did not believe that Grievant was giving her the starting or playing time she believed she deserved and the boys did not respond to her directions as a captain as well as they did to Logan Coplin. Katie Heller was also a senior on the team and a friend of Ms. Nichols. They were both upset with Grievant's characterization of the team as a boys' team on which girls were allowed to play. They testified that Grievant made this statement many times throughout the season. The remaining girls on the team boycotted practice and games when Ms. Nichols was required to apologize for her on-field conduct at an away game. Ms. Nichols was motivated to cause problems for Grievant for perceived slights regarding her soccer ability. She exaggerated the actions of Grievant and exhibited a very negative attitude during her testimony. Ms. Heller was disciplined for an incident that took place in Grievant's class and she was supportive of her friend, Ms. Nichols, as were

the remainder of the senior girls.[38]

On the other hand, Assistant Coach Miller is an adult and had nothing to gain or lose by testifying. He neither praised Grievant nor criticized him, but gave a factual account of the events of the season. He noted that he might have done some things differently, but did not believe that Grievant ever treated the girls on the team less favorably than the boys. He noted that Grievant had made the comment about it being a boys' team but that he only said it once and explained why the comment was made. Likewise, Samantha Stevens testified that any difference in treatment received by males and females was based upon effort and skill rather than gender. Since Grievant was no longer her coach, she had no particular motive to influence her perception of the facts.

Given the circumstances, the testimony of Assistant Coach Miller and Samantha Stevens was more credible than that of Ms. Nichols and Ms. Heller. That is not to say that either of these ladies intentionally lied, but rather that their perception of events was clearly affected by their feelings. Therefore, where the testimony of these individuals differed, more weight was given to the testimony of Assistant Coach Miller and Ms. Stevens.

At an away game in October 2009, Ms. Heller told Ms. Nichols that Logan Coplin had said that Ms. Nichols was being "bitchy" and was mad because she did not start.[39] Ms. Nichols became very angry and confronted Mr. Coplin on the sidelines before the game demanding that he make his comments to her face. Mr. Coplin convinced Ms. Nichols that

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[38] For a chilling account of the possible effects of peer pressure on teenagers' testimony see *The Crucible,* a fictionalized account of the Salem witch trials by Arthur Miller.

[39] Respondent's Exhibit 10, Hand-written statement of Katie Heller.

the issue would have to wait until after the game. Immediately after the game, Ms. Nichols again loudly confronted Mr. Coplin about his alleged statements. Again Mr. Coplin indicated that they should discuss the matter later at a more appropriate place. Ms. Nichols continued her tirade and was not distracted when two different players tried to intervene. Eventually Ms. Nichols' parents joined in the confrontation, also insisting that Mr. Coplin repeat and apologize for his alleged comments. Eventually, Mr. Coplin refused to listen and went to board the team bus. Grievant left issues regarding transportation with other players to tell the Nichols family that the issue would be addressed at another time. Grievant did a brief investigation and could not confirm what, if anything, Mr. Coplin had said regarding Ms. Nichols.

That night Ms. Nichols' father called Grievant and became loud regarding the situation. Grievant indicated that Ms. Nichols' behavior on the field in front of the spectators was unacceptable and she would have to apologize to the team for her actions before she was allowed to play again. This decision led to the Title IX complaint being filed by the Nichols and a boycott of the team by the senior girls and the statistician. Upon being informed of the complaint, Principal Gaul asked Vice Principal Tebay to look into the incident. Within a few days, Ms. Tebay had all of the players gather in one room and give written statements regarding the incident. After reviewing these statements Principal Gaul sent Grievant a written notification that he recommended that the issue be resolved by requiring both Mr. Coplin and Ms. Nichols to apologize. Both players apologized to the team for their behavior and Grievant apologized that the incident seemed to further divide the team. Respondent argues that Grievant's initial decision to require Ms. Nichols to apologize but not Mr. Coplin was evidence of sexual discrimination. Grievant was not making either

player apologize for their comments before the game. Ms. Nichols' punishment was based upon her inappropriate confrontation of another player on the field in front of all the spectators. This action was more than simple name-calling but a display that reflected poorly on the team as a whole. While Grievant might have conducted a more complete investigation into the comments made by Mr. Coplin, the larger issue was the public outburst which would most likely have led to discipline of any player, male or female. Grievant's handling of this situation may not have been what his supervisors would have done given the benefit of hindsight, but there is no evidence that Grievant's actions were motivated by the sex of the participants. Any disparity of discipline was clearly a result of the severity of the participants' conduct, not their gender.

Policy 2421 prohibits sexual harassment in the public schools. It specifically states the following:

> No student, staff member or member of the public, during any school related activity or during any education sponsored event, whether in a building or other property used or operated by a county board of education, RESA or the West Virginia Department of Education or in another facility being used by any of those agencies, shall engage in sexual, racial or ethnic/religious harassment or violence.

126 C.S.R. 18 § 3.2

The policy defines sexual harassment by stating:

> Sexual Harassment - Sexual harassment consists of unwelcome sexual advances, requests for sexual favors, sexually motivated physical conduct or other verbal or physical conduct or communication of a sexual nature when:
>
> . . . that conduct or communication has the purpose or effect of substantially or unreasonably interfering with an individual's employment or education; or

> creating an intimidating, hostile or offensive employment or educational environment.

126 C.S.R. 18 §§ 4.1 & 4.1.3.

Finally the policy provides that:

> [S]exual harassment may include but is not limited to:
>
> f. unwelcome behavior, verbal or written words or symbols directed at an individual because of gender:
>
> g. the use of authority to emphasize the sexuality of a student in a manner that prevents or impairs that student's full enjoyment of educational benefits, climate or opportunities.

126 C.S.R. 18 § 4.1.4.

Superintendent Super stated that Grievant had violated these provisions of Policy 2421 by his actions as a coach. These provisions generally relate to an accusation creating a hostile environment. The Grievance Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13,1997); *Rogers v. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2009-0685-MAPS (Apr. 23, 2009). The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, at 22, (1993). Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiffs position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 81,118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (quoting *Harris, supra*).

Grievant's decisions regarding tryouts and playing time were based upon objective skill criteria and not gender. He allowed the girls and boys to be separated during practice

but provided the same instruction for all players. His discipline for the October events was based upon the severity of the conduct and not the sex of the participants. Grievant made two statements that could have led to the belief that females were not treated as well as boys. One was where he referred to the team as a boys' team and the other was the comment made to Ms. Runnion. Grievant explained his boys' team comment in the context of the WVSSAC rules and most of the team members accepted his explanation. However, some team members held onto the comment to fuel their grudge related to the lack of playing time. The comment made to Ms. Runnion was made to her alone and not repeated by either adult until after the complaints were made. This comment could not have a negative impact upon the students soccer experience since they did not hear the coach make it. Grievant admits that as a first time coach he made some unfortunate choices with his handling of the team. However, under all the circumstances, his actions did not create a hostile or abusive environment as contemplated by the law and policy.

Classroom Conduct -

Respondent alleges that Grievant was guilty of violating Policy 2421 in that his sexism was blatant and offensive to female staff members. The testimony related to this allegation is provided by Assistant Principal Tebay and Guidance Counselor Haught. Ms. Tebay noted that both she and Counselor Haught sent Grievant a number of e-mails and he generally ignored them all. Ms. Tebay was requesting information for school procedures and discipline and Ms. Haught's e-mails were requests for grade information related to senior students so that she could intervene if students were struggling. Ms.Tebay opined that this treatment was based upon her gender. Ms. Tebay also stated that Grievant did not talk much to the female staff and seemed to believe he was above

them. Finally, she described a trip that Grievant had taken to a sporting event with other staff members. Ms. Tebay indicated that Grievant regaled the others with his religious beliefs the entire trip and was intolerant of the views of the other travelers. The Senior girls complained about their playing time to Ms. Tebay and Ms. Haught who felt the students had valid complaints, even though neither of them discussed these complaints with Grievant or Assistant Coach Miller.

There is scant proof that Grievant violated Policy 2421 in his treatment of his staff members. There is no indication that he was more responsive to e-mail requests from male colleagues. Grievant could have just as easily been ignoring all e-mail requests. Ms. Tebay noted that Grievant was more responsive to Principal Gaul, but he communicated with Grievant verbally or in writing. Additionally, Principal Gaul was Grievant's evaluating supervisor which easily explains why Grievant would be sensitive to Mr. Gaul's requests. The fact that Grievant was somewhat zealous with his religious beliefs with other adults and that he had little personal interaction with staff members does not relate to the gender of the staff. Rather, it reflects upon other aspects of his personality which some might find abrasive, but certainly does not constitute a hostile work environment related to sexual harassment. Ms. Tebay admitted that she had observed Grievant in his classroom and that he was an excellent teacher. Respondent did not prove that Grievant's behavior created a hostile environment for his female colleagues based upon their sex.

Respondent also argues that Grievant violated Policy 2421 by telling Katie Heller that the marine recruiter just wanted to hit on her. Ms. Heller had tried to get out of Grievant's Civics class to see the recruiter on behalf of a friend that she said was interested in enlisting. Grievant did not allow her to leave class on this flimsy basis and

made the alleged offensive comment. Ms. Heller then used her cell phone to text a fellow student requesting that he call her to the office for a fake reason enabling her to meet with the recruiter anyway. Grievant uncovered Ms. Heller's ruse and gave her two days of in-school detention. Ms. Heller complained to Principal Gaul and Ms. Heller was allowed to transfer from Grievant's class for the rest of the year. It stretches credulity to think that this one comment could be so offensive to a senior in high school as to require her to transfer from Grievant's class. The more reasonable explanation is that Ms. Heller was upset because her deception was discovered and she was punished. While possibly not the wisest thing to say to Ms. Heller, Grievant's comment was not sufficient to create a hostile educational environment for a reasonable person and did not violate Policy 2421.

Superintendent Super alleged that Grievant violated the employee code of conduct policies of both the Pleasants County and the State Boards of Education, by making an inappropriate comment about special education students and by discussing topics such as intelligent design and home birthing in his class. It is revealing that no students complained about any of these issues during Grievant's teaching career until the complaints were made regarding his coaching. The statement about the special education student was brought to Principal Gaul's attention and he met with Grievant who explained that the statement was made in the context of a discussion regarding the ethical issue of sacrificing one person for the good of the many. Grievant had explained to the class that he was taking an opposing view to encourage them to think about the issue. Principal Gaul cautioned Grievant to be more careful with his comments in the future.

Principal Gaul also discussed with Grievant a complaint that Grievant was imposing his religious views on the class by teaching "intelligent design" over "evolution". Grievant

explained that the topic of intelligent design was only raised in the context of teaching academic freedom as part of the First Amendment. Grievant used an actual court decision involving college professors who alleged their rights to academic freedom were violated because they were fired for teaching intelligent design. The First Amendment and freedom of speech are topics contained in the CSOs for a Senior Civics class. Principal Gaul advised Grievant that he may be using examples that were too complex for high school seniors and suggested that Grievant try to find less controversial examples.

Finally, Grievant was criticized for discussing with students the fact that his child was born at home instead of a hospital. Grievant credibly testified that he did not take up class time with such discussions. However, the students were aware that his wife had delivered a baby at home and asked questions outside of class about it. Grievant briefly answered these questions and then moved on. It is unlikely that child birth remains a mystery to high school seniors and answering questions in a brief and non-graphic way may be the best way to deal with such inquiries.

Principal Gaul felt that he had effectively and appropriately dealt with these issues. Along with Assistant Principal Tebay, Principal Gaul testified that Grievant was an excellent teacher and Grievant's evaluation reflected this belief. Grievant was never given a negative evaluation, never placed on an improvement plan and never given a verbal or written improvement plan. Rather he was suspended for four days for insubordination for allegedly violating the Employees Codes of Conduct.

As previously stated herein, an employer can establish insubordination by demonstrating a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and

intentional to constitute the defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995); *Domingues v. Fayette County Bd. of Educ.*, Docket No. 04-10-341 (Jan. 28, 2005). There is no evidence that Grievant intentionally violated the Employees Codes of Conduct by the foregoing examples. His comment related to special education students was inappropriate, but made in the context of a legitimate classroom discussion. The discussion of intelligent design was clearly done in conjunction with an appropriate issue for Senior Civics as reflected in the State CSOs. Finally, childbirth is taught in High School Health classes. Principal Gaul addressed these complaints and took appropriate corrective action.

In the recent decision of *Zirkle v. Mason County Board of Education*, Docket No. 2009-1525-MasED (June 16, 2011), Administrative Law Judge Ronald Reece noted the following:

> 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. [*Maxey v. McDowell County Bd. of Educ* ., 212 W. Va. 668, 676 (W. Va. 2002).] 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*.

Zirkle supra. In *Maxey,* Justice Albright notes that the Court had previously held that "It is not the label given to conduct which determines whether § 5300(6)(a) procedures must be followed but whether the conduct forming the basis of dismissal involves professional incompetency and whether it directly and substantially affects the system in a permanent, noncorrectable manner." *Maxey supra,* (quoting *Mason County Board of Education v. State Superintendent of Schools*, 165 W.Va. 732, 274 S.E.2d 435 (1980)").

Subsequent to the West Virginia Supreme Court's decision in *Maxey supra,* the West Virginia Legislature placed the precise language from Policy 5300 relied upon in that decision in W. VA. CODE § 18A-2-12a(b)(6). This action further emphasizes the importance of progressive discipline of public school teachers in cases alleging misconduct that is correctable.[40]

In this case, complaints were made that Grievant discussed inappropriate topics in his Senior Civics Class. Principal Gaul discussed these complaints with Grievant and made suggestions of corrective action. Principal Gaul properly concluded that if Grievant's action were problematic they were certainly correctable. There was no showing that Grievant's classroom conduct "directly and substantially affects the system in a permanent, noncorrectable manner." In fact, any misstatements Grievant made were minor and easily correctable. Suspending him for four days was not in compliance with the requirements of W. VA. CODE § 18A-2-12a(b)(6).

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[40] For a brief and interesting discussion on the social value and necessity of progressive discipline for professional educators, see Justice Starcher's concurring opinion in *Maxey supra.*

Finally, Grievant is accused of violating the Board's policies related to search and seizure by viewing information on student cell-phones after he confiscated them when students were using them in class. The testimony indicated that when Grievant caught a student texting in his class he looked at the phone and discovered the identity of another student whom Grievant's student was texting. The issue of whether this activity actually constitutes a search does not need to be reached because the St. Mary's High School Handbook restates the county policy by noting that searches of student lockers or personal effects "may be conducted by school personnel and/or their designee and all searches should be witnessed by at least one person when practical." Respondent's Exhibit 3. Respondent asserts that, notwithstanding the written policy, teachers are instructed to leave searches to the principals. W. VA. CODE § 18A-2-12a(b)(7) requires that "All official and enforceable personnel policies of a county board must be written and made available to its employees." Grievant complied with Respondent's written policy related to the conducting of searches by school personnel. If Respondent wishes to change this policy in an enforceable way, it must do so in writing.

Respondent failed to prove that Grievant intentionally violated Title IX, Policy 4200, Policy 2421 or either Code of Professional conduct. Respondent also failed to prove that Grievant violated any written policy or law related to search and seizure. Ultimately, if any of Grievant's classroom conduct was inappropriate, it was correctable and suspension for that conduct without first taking progressive, corrective action violated the requirements of W. VA. CODE § 18A-2-12a(b)(6). Consequently, the Grievance is GRANTED.

Conclusions of Law

1. As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989) "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*.

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

3. The authority of the county board of education to suspend or dismiss an employee must be based upon one or more of the causes listed in WEST VIRGINIA CODE § 18A-2-8, 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). WEST VIRGINIA CODE § 18A-2-8 provides that

> [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 contendre to a felony charge.

4. An employer can establish insubordination by demonstrating a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the

defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995); *Domingues v. Fayette County Bd. of Educ.*, Docket No. 04-10-341 (Jan. 28, 2005).

5. Together, Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681 - 1688) and West Virginia Board of Education Policy 4200 state that no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity[41]" in West Virginia public schools, including extracurricular athletics. Policy 4200 specifically states:

> 3.4.1. In athletic programs, where selection of participants is based on competitive skill, except for interscholastic football and wrestling, which are considered contact sports in West Virginia, schools must provide separate noncontact sport teams for males and females or a single noncontact sport team open to both sexes.

126 C.S.R. 82 § 3.4.

6. West Virginia Board of Education Policy 2421, *Racial, Sexual, Religious/Ethnic Harassment and Violence Policy* prohibits sexual harassment in West Virginia Public Schools. The policy defined "sexual harassment" in part as follows:

> [S]exual harassment may include but is not limited to:
>
> f. unwelcome behavior, verbal or written words or symbols directed at an individual because of gender:
>
> g. the use of authority to emphasize the sexuality of a student in a manner that prevents or impairs that student's full enjoyment of educational benefits, climate or opportunities.

126 C.S.R. 18 § 4.1.4.

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[41] 20 U.S.C. § 1681.

7. Respondent did not prove by a preponderance of the evidence that Grievant knowingly or intentionally violated Title IX or Policies 4200 or 2421 with regard to the players on the 2009-10 St. Mary's Soccer team nor the students in his Civics class nor the facility and staff of the High School.

8. Respondent did not prove by a preponderance of the evidence that the topics taught in Grievant's class were inappropriate to the extent that they violated The Employees Codes of Conduct of the West Virginia or Pleasants County Boards of Education.

9. 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. . . . 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. *Maxey v. McDowell County Bd. of Educ* ., 212 W. Va. 668, 676 (W. Va. 2002); *Zirkle v. Mason County Board of Education*, Docket No. 2009-1525-MasED (June 16, 2011).

10. "It is not the label given to conduct which determines whether § 5300(6)(a) procedures must be followed but whether the conduct forming the basis of dismissal involves professional incompetency and whether it directly and substantially affects the system in a permanent, noncorrectable manner." *Maxey supra,* (quoting *Mason County*

Board of Education v. State Superintendent of Schools, 165 W.Va. 732, 274 S.E.2d 435 (1980)).

11. Respondent did not prove by a preponderance of the evidence that Grievant's classroom conduct "directly and substantially affects the system in a permanent, noncorrectable manner." In fact, any misstatements Grievant made were minor and easily correctable. Suspending him for four days was not in compliance with the requirements of W. VA. CODE § 18A-2-12a(b)(6).

Accordingly, the grievance is GRANTED and the suspensions of Grievant are void. Respondent is ORDERED to remove any reference to these suspensions from Grievant's personnel file and to pay Grievant the equivalent to the seven days pay and benefits he would have earned as a soccer coach and the four days pay he would have earned as a classroom teacher had he not been suspended, plus appropriate statutory interest on both amounts. 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 21, 2011

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE