WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KENNETH W. JOHNSON,
Grievant,

v. **Docket No. 2011-0178-CONS**

KANAWHA COUNTY BOARD OF EDUCATION,
Respondent.

D E C I S I O N

Grievant, Kenneth W. Johnson, filed this grievance against Kanawha County Board of Education ("KCBE"), Respondent protesting disciplinary actions taken against him as a result of employee misconduct. This is a consolidated grievance. Grievance Docket Nos. 2010-1398-KanED and 2011-0092-KanED were consolidated for decision at Level 3 by an August 20, 2010 Order.[1] Grievant seeks to be reinstated with "full payment of back pay, benefits and to be made whole in every way."

Pursuant to correspondence dated March 12, 2010, Grievant was advised that allegations had been made concerning his abusive language and use of profanity in communicating with students at Ben Franklin Career Center. By letter dated April 19, 2010, Grievant was advised of the specific allegations against him and that a hearing would be held in order to receive evidence relating to whether or not the Superintendent should recommend disciplinary action against Grievant. A Pre-disciplinary Hearing was held at level one on May 20, and June 2, 2010 regarding the allegations of Grievant's misconduct. Grievant was present and represented by legal counsel for the evidentiary

[1] Grievant was suspended with pay from his job on March 12, 2010 and filed a grievance on April 29, 2010, Docket No. 2010-1398-KanED. Grievant was terminated from his job on July 14, 2010 and did not receive pay from June 25, 2010 to July 14, 2010. Grievant filed a grievance on July 21, 2010, Docket No. 2011-0092-KanED.

hearing which transpired over the course of two days. The decision issued on June 23, 2010 by Hearing Examiner George Beckett recommended the employment of Grievant be terminated. Grievant was advised by letter dated June 25, 2010 of his suspension without pay and that the Superintendent of Schools intended to recommend to the Kanawha County Board of Education that Grievant's employment be terminated. Respondent KCBE voted to terminate Grievant's employment at its meeting held on July 14, 2010. Grievant was notified by letter dated July 15, 2010. Grievant appealed. Grievant's counsel requested that the grievances of Docket No. 2010-1398-KanED and Docket No. 2011-0092-KanED be consolidated for the purpose of hearing and decision. A level three hearing was held before the undersigned Administrative Law Judge on September 21, October 19, and October 20, 2010, in the Grievance Board's Charleston office. Grievant appeared with Counsel, Katherine L. Dooley, Attorney-at-Law. Respondent was represented by its General Counsel, James W. Withrow.

This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about December 10, 2010. Both parties submitted fact/law proposals.

Synopsis

Grievant was suspended and ultimately terminated by Respondent from his teaching position at Ben Franklin Career Center. Grievant used abusive, profane and intimidating language in the presence of and directed towards students, even after having been warned and directed on multiple occasions to stop such or similar behavior.

Grievant had previously been warned, reprimanded, and even suspended for inappropriate employee behavior. Grievant had been directed to act in a professional manner in the performance of his duties. As a West Virginia Kanawha County Board of Education employee, employed to teach students, the professional standard applicable to Grievant's conduct does not endorse and/or condone the use of profane, abusive, harassing or threatening language. In the circumstances of this case, Grievant's actions constituted insubordination. Grievant's employment was terminated. Grievant has not established Respondent's disciplinary actions were unlawful, excessive, arbitrary and/or capricious. 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. Grievant was employed by Respondent as an instructor of the Heavy Equipment Operator class at Ben Franklin Career Center. Grievant had been so employed for approximately twelve years, commencing in the year 1997.

2. The Ben Franklin Career Center is an institution of learning within the auspices of Kanawha County Board of Education. There are West Virginia State and County statutes, rules and regulations relevant to an employee's conduct which are applicable to West Virginia public school employees, e.g., *see* W. VA. CODE § 18A-1-1 *et seq*; W. VA. CODE § 126 C.S.R. 162 (2002); WV Board of Education Policy 5310.

3. Grievant was an instructor of a class which teaches adult students how to operate and maintain various pieces of heavy equipment. Students are provided

classroom and "hands on" instruction on the equipment. The length of the class encompasses approximately one year and begins in early January. Generally, students are able to get their class work done during the winter months and are working with the equipment in the spring, summer and fall.

4. Grievant is very knowledgeable about heavy equipment and is extremely concerned with safety.[2]

5. The individuals in Grievant's classes are students of various ages and backgrounds. There are widely varying degrees of mechanical ability and experience with machinery among the students. A significant amount of the class is composed of individuals who have been laid off or are between careers.

6. Many of Grievant's past students have gone on to have successful careers in heavy equipment operation, construction and mining.

7. Grievant invited previous students to return and speak with new classes and advise students of what the class would be like. Previous students who spoke to new classes advised students that they could not be "thin skinned" in Grievant's classroom.

8. During the duration of Grievant's tenure as an instructor at Ben Franklin, there have been reported incidents of note between Grievant and others. Some events were determined to be significant enough to warrant disciplinary actions. Grievant has been disciplined for unprofessional and disrespectful behavior.

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[2] While not contested by Respondent, this point is highly stressed by Grievant. Grievant began working in the construction industry at an early age with his father and has had personal experiences which make him very safety conscious. Grievant's dedication to safety and knowledge of heavy equipment is not the issue in contention.

9. Conduct infractions for which Grievant has been disciplined have included loud and inappropriate language. Disciplinary actions have included unofficial and official verbal warnings, written reprimand and suspension.

10. In prior years, Tom Owens, a former principal at the school, received reports of Grievant using inappropriate language around students. Former Principal Owens spoke to Grievant on several occasions about this and advised him not to use inappropriate language. Grievant never used profanity in the presence of Mr. Owens.

11. Retired Principal Owens' attitude toward Grievant was more tolerant of Grievant's so-called use of a military style of training for his students. In response to earlier resistance to Grievant, Principal Owens had occasion to advise others to be patient with Grievant and his teaching method would later make sense to them.

12. Retired Principal Owens neither witnessed nor was told that Grievant treated students differently based on their race. Dennis Robinson, a 2007-2008 African-American student of Grievant, indicated that he did not find Grievant to be a racist.

13. In the spring of 2008, John Baird, the current Principal of the school, asked Grievant to dig a trench in order to relocate an overhead telephone line. Grievant would not perform the work until all utility lines, including a gas line were located. There was some difficulty getting the gas line located. Principal Baird inquired of Grievant on a couple of occasions about the digging of the ditch. After some period of time, Mr. Baird requested the maintenance department from Kanawha County Schools dig the ditch. Personnel from the Kanawha County Schools' maintenance department dug the ditch at no cost to the school and without encountering any problems.

14. The situation surrounding whether Grievant and his students could or should have been able to dig the trench in a timely fashion became a point of contention. Teachers, students and others were aware that the Principal and Grievant did not concur regarding when, how and if the ditch could or should be dug. Each focused on a different aspect of the situation.

15. On January 15, 2009, Grievant became concerned about an insurance form that was provided to the students. Grievant expressed his concerns to Don Todd, the counselor for the adult students. Grievant was not satisfied with Mr. Todd's representation regarding the coverage and began communicating with Mr. Todd in a loud and abrasive manner. Grievant's actions were perceived to be disrespectful.

16. Principal Baird issued a written reprimand to Grievant advising him that his actions were unacceptable and would not be tolerated. Grievant did not grieve or otherwise contest the written reprimand.

17. Grievant was advised that assistance could be provided without cost through Respondent's Employee Assistance Program. Grievant was further advised that any future problems would result in disciplinary action.

18. On or about April 23, 2009, Grievant became engaged in a confrontation with a student.

19. The student recorded a part of the conversation on his cell phone.

20. In the recording Grievant can be heard using the "f" word and other curse words many times during a six minute portion of the conversation. Among other things, Grievant can be heard uttering words to the effect, that the student wouldn't "amount to shit," and this or some student's "didn't come here for nothin' but a fuckin' check."

21. Grievant was advised that the Superintendent of Schools was considering disciplinary action for inappropriate interaction with the student.

22. The resolution of this matter included Grievant agreeing to a five-day suspension. Grievant was "directed" by the Superintendent of Schools to conduct himself in a professional manner at all times in the performance of his duties. Grievant was further advised that any similar incidents "will result in disciplinary action up to and including termination of employment." Grievant did not grieve or otherwise contest this suspension.

23. Following Grievant's five-day suspension, Principal John Baird attempted to place Grievant on an improvement plan. Principal Baird failed to meet requirements of West Virginia State Board of Education Policy and, thus, could not legally do so.

24. As a consequence of the procedural shortfall, Principal Baird could not force Grievant to participate with the plan of improvement. Grievant declined the plan of improvement and told Mr. Baird that he would be unable to complete it.

25. Grievant had an opportunity to participate with a plan of improvement in 2009. In fact, he had two identified opportunities; an ill-fated attempt to force him to comply with an improvement plan and later an opportunity to voluntarily participate in such a plan.

26. Grievant declined to voluntarily participate in the structured improvement plan available to him in July, 2009.

27. In early January 2010, a new heavy equipment class began and a significant portion of the students was composed of individuals who had been laid off from long-time jobs. Generally, these students enrolled in the class to learn a new trade as a part of their

unemployment benefits program. Their benefits are contingent upon their continued enrollment and satisfactory progress in the program.

28. Grievant informed students that the student from the previous year who recorded his cursing wasn't there for long after reporting him.

29. Information tending to be characterized as complaints was communicated to school administrative personnel by students of the 2010 heavy equipment operator's class. This information was about how they were being treated by Grievant.

30. Upon receipt of such complaint(s) regarding Grievant, Principal Baird and another administrator, Don Todd, spoke to the students in the heavy equipment operator's course soliciting their comments regarding Grievant.

31. Several students in Grievant's class relayed facts and opinions about Grievant's interaction with them, individually and collectively. The students provided details of numerous incidents of conduct by Grievant, including abusive language, cursing, humiliation and threats.

32. With regard to the instant allegations of inappropriate behavior, testimony was obtained from not less than seven students in Grievant's 2010 heavy equipment operator's class. The students provided details of numerous incidents of Grievant cursing, intimidating, humiliating and threatening them.

33. Student Reginald Kelly, a 34 year old African-American, relayed several experiences with Grievant which he indicated caused him to be uncomfortable and discouraged from coming to class;

a. The class, individually, was signing up to use a particular website, described as "ToolingU," and the site required the students to provide their name, including a middle initial. Student Kelly advised Grievant that he had no

middle name. Grievant advised the student that he "couldn't get on there if you don't have a fucking middle initial, and you're not going to come in here and run my class." At some point in the exchange Grievant indicated that he would "give [Kelly] a fucking middle initial. Your middle initial's going to be "N" and I don't care how you take it. We can go up the street, down the street."

b. Student Kelly took Grievant's designation of "N" as a racial slur and further took the invitation to go up or down the street as an offer to fight. Several minutes later Grievant indicated that he meant "n" for "none."

34. Grievant told student Kelly to "get your head out of my ass" and to stick a newspaper "up your ass." On another occasion, Grievant reportedly called Mr. Kelly an "idiot" and a "dumb ass."

35. Student Kelly testified at the Level 1 evidentiary hearing and the Level 3 proceedings.

36. Student Terry Casto completed a truck driving course before coming to Ben Franklin. He had prior experience on heavy equipment and doing light maintenance. Casto was laid off from Century Aluminum with 14 years of service. Student Casto testified at the Level 1 and Level 3 grievance proceedings.

37. Student Casto heard the conversation between Grievant and Reginald Kelly concerning signing on to "Tooling U". Student Casto perceived Grievant's use of "N" for a middle initial remark to Mr. Kelly to be racial; however, Mr. Casto did hear Grievant later indicate that the "n" stood for 'none.'

38. One morning prior to the start of class, student Casto asked Grievant about being able to access a website at home and Grievant began yelling in response that he didn't have time to fool with Mr. Casto. When Casto indicated that Grievant must have misunderstood, Grievant said, "I didn't misunderstand. You don't know who you're fucking

with. I'll crawl up one side of you and down the other." On another occasion Grievant asked student Casto how he would straighten out a belly pan. Casto proposed a solution and Grievant got his nose within two inches of student Casto's and said "What are you, fucking stupid?"

39. Student Claude Mullenix was laid off from a position as a material expediter at Alcan and had some mechanical experience. He witnessed Grievant's frequent use of profanity and also took Grievant's "N" remark to Mr. Kelly to be racial. Student Mullenix assisted other students who lacked mechanical ability and were reluctant to ask Grievant for help as they did not want to be verbally attacked. Mr. Mullenix heard Grievant verbalize that the "n" stood for "none."

40. Student Joey Absten, an individual with a farming background, who took the course because he had always wanted to operate large machinery, was also subjected to verbal abuse from Grievant. Grievant called him "a stupid mother fucker" and compared Absten to his seven year old grandson. On another occasion Grievant directed student Absten to a manual to find specifications for gapping a spark plug. Grievant told Absten that, "If you can find the gap settings in there, I'll kiss your ass." Mr. Absten began to ask other students for help rather than approach Grievant. Student Absten noted that Grievant used profanity on a daily basis and also took the "N" remark to Mr. Kelly to be a racial slur.

41. Student Stephen Scott Baker is a former roofer who enrolled in order to obtain a better paying, steadier job. Student Baker compared the class to the Jerry Springer show. Grievant could be very nice one minute and would then get mad and start hollering the next. Baker had more than one confrontation with Grievant. Grievant had occasion to call student Baker an idiot. The encounter continued outside at Grievant's

suggestion and, in Baker's words, they got close. Baker was not threatened by Grievant's use of profanity. However, on occasion, student Baker elected to direct questions to other students instead of his teacher so as to diminish and avoid possible confrontations with Grievant.

42. Student Anthony Rife came to the Heavy Equipment Operator class after being laid off as a crane operator at Century Aluminum. While noting that confrontations occurred frequently, student Rife had an incident with Grievant after Mr. Rife left the keys in a fork truck. Student Rife acknowledged that this was an oversight on his part in the school setting. Grievant became very agitated about this safety violation. The student and Grievant exchanged words. Grievant called Mr. Rife a "stupid mother fucker." Grievant got close to Mr. Rife and put his finger in Mr. Rife's face. Mr. Rife told him to step back and get his finger out of his face.

43. Student Matthew Casto, (cousin of Terry Casto), was uneasy while in Grievant's class and consciously chose not to ask questions of Grievant for fear that such would open him to verbal assault by Grievant.

44. Various members of the 2010 heavy equipment operator's class have relayed and testified to information and events deemed relevant to the issues in contention numerous times, including but not necessarily limited to, the initial investigation, Kanawha County Pre-Disposition Hearing and the WV Grievance Board Level Three Hearing.

45. Grievant used profanity and abusive language in the presence of and/or toward students of the 2010 heavy equipment operator's class.

46. Grievant told one student, "if you didn't ask so many fucking questions and start participating you would learn more."

47. More than one student became hesitant to ask questions in class as Grievant could and was frequently inclined to call them names and embarrass them in front of their classmates. In an attempt to minimize this occurrence, students oftentimes directed their questions to classmates rather than risk being the subject of Grievant's outburst.

48. With regard to Grievant's use of profanity in the classroom setting, Grievant verbalized to the students in the 2010 class that they could report him to the school principal or counselor but he had friend(s) on the School Board.

49. The 2010 heavy equipment operator's class at Ben Franklin Career Center consisted of 13 adult men who signed up to learn a new trade. Individually, each was from a working class background and was not necessarily shocked to hear cuss words. There is a difference between an isolated cuss word or two and the prolific use of profanity, and demeaning language in a classroom setting.

50. Grievant executed a "Teacher's Continuing Contract of Employment" in which Grievant agreed, among other things, to "honestly demean myself in the teaching profession." Resp. Ex. 5. As a teaching instructor at Ben Franklin Career Center, Grievant was employed in the field of education, not the construction industry.

51. Principal Baird did not seek implementation of an improvement plan prior to the termination of Grievant in 2010.

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 Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). An employee of a county board of education may be suspended or dismissed for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of *nolo contendere* to a felony charge. W. VA. CODE § 18A-2-8. "The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. VA. CODE §18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991). *See Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975). *Graham v. Putnam County Bd. of Educ.*, Docket No. 99-40-206 (Sep. 30, 1999).

Grievant, with some equivocation, admits that his language in front of students can be of an adult nature. However, he contends that, under the circumstances, disciplinary action is unwarranted and excessive. There are some incidental discrepancies with the facts of this matter; however, with regard to the crucial facts, the parties do not dispute that Grievant used words of a profane nature (cuss words) on a frequent basis during instructional periods, in the presence of, and at times toward students. Grievant has admitted using profanity in his classroom. Further, the undersigned is aware that several of the students used profanity and testified that profanity or "shop talk" itself wasn't

offensive, *per se.* Nevertheless, Respondent maintains, in the circumstances of this case, it is proper to discipline Grievant for conduct which was clearly inappropriate and violated both county and state policies regarding expected conduct from school employees. The Grievance Board has previously recognized that the use of profanity constitutes insubordination as set forth in W. VA. CODE § 18A-2-8. *Showalter v. Marshall County Board of Education*, Docket No. 07-25-165 (May 28, 2008); *Parrish v. Jackson County Bd. of Educ.*, Docket No. 06-18-432 (June 11, 2007).

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.*, 223 W.Va. 431, 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).

Much to do has been made over Grievant's assignment of "n" or "N" to Reginald Kelly, a 34 year old African-American, as a middle initial. The facts are ambiguous as to Grievant's true intent. This was an unfortunate situation; such controversy should be avoided when foreseeable. It is not established that Grievant treated students differently based on their race. Dennis Robinson, a 2007-2008 African-American student of Mr. Johnson's indicated that he did not find Grievant to be racist. Grievant has aided students of all races to achieve employment in the construction industry.

Insubordination involves the "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 Education*, Docket No. 26-89-004 (May 1, 1989). In order to establish insubordination, an employer must demonstrate that 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. *Jones v. Mingo County Bd. of Education*, Docket No. 95-29-151 (Aug 24, 1995); *Conner v. Barbour County Bd. of Education*, Docket No. 94-01-394 (Jan. 31, 1995).

At the time the actions of Grievant took place, Kanawha County Board of Education had an Administrative Regulation, G49A, in effect which provides, in part:

4.2 All West Virginia school employees shall:

4.2.1. exhibit professional behavior by showing positive examples of preparedness, communication, fairness, punctuality, attendance, language, and appearance.

4.2.2. contribute, cooperate, and participate in creating an environment in which all employees/students are accepted and are provided the opportunity to achieve at the highest levels in all areas of development.

4.2.3. maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination.

4.2.4. create a culture of caring through understanding and support.

4.2.5. immediately intervene in any code of conduct violation, that has a negative impact on students, in a manner that preserves confidentiality and the dignity of each person.

4.2.6. demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior.

4.2.7. comply with all Federal and West Virginia laws, policies, regulations and procedures.

Resp. Ex. 2.

Grievant presented for consideration that the action taken against him was arbitrary and capricious as a result of Grievant standing up to the administration for his students. Specifically, his refusal to dig a trench when a gas line had not been identified, and his bringing to his student's attention that an insurance form presented to them was improper and should not be completed by the students. Grievant has strongly inferred that the source of his current trouble is that he does not get along with Principal Baird. The undersigned is not persuaded. It may be true that Grievant and Principal Baird will never be friends; however, there has been no evidence presented which established that Mr. Baird treated Grievant differently than he treated other staff members. It is not established that Principal Baird held Grievant to a different standard than the one expected of all

teaching employees at Ben Franklin Career Center. Conversely, Grievant seeks to have his actions, to some degree, evaluated in the shadow of what he purports to be trade behavior. [3]

Grievant engaged in loud and inappropriate language with another staff member in January of 2009; engaged in inappropriate, abusive and threatening language with a student in April of 2009; and used profane, abusive, harassing and threatening language with students throughout the duration of his interaction with the 2010 class. Grievant's behavior was controllable; evident in that Grievant never cursed or used abusive or threatening language while being observed by his supervisors.

While it is admitted that a certain amount of vulgar language may be customary in the construction trades; abusive, intimidating, harassing or threatening language or behavior is never appropriate in the classroom. More to the point, Grievant is not employed in the construction industry when providing instructions to students at Ben Franklin Career Center. For the last eleven years, Grievant has been a teacher in the public school system. It is reasonable to expect him to conduct himself accordingly. Grievant is subject to the West Virginia and Kanawha County Employee's Code of Conduct, none of which endorses the use of profane, abusive, harassing or threatening language. Additionally, Grievant was specifically instructed by his superiors that such conduct, as exhibited in this case, was unacceptable in the school system. The most recent communication to Grievant from the Superintendent of Schools, advised Grievant that future misconduct could lead to the termination of employment.

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[3] Grievant attempted to attribute his behavior to the fact that he had spent his life in the construction industry and that such behavior is acceptable in the construction industry (just habit).

This Grievance Board has previously recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988) (*citing Weber v. Buncombe County Bd. of Educ.*, 266 S.E.2d 42 (N.C. 1980)). Insubordination can be shown through an employee's "blatant disregard for the authority" of his second-level supervisor. *Sexton, supra* at 10.

An employee's belief that management's decisions or directions are incorrect, absent a threat to the employee's health or safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. *Lilly v. Fayette County Bd. of Educ.*, Docket No. 97-10-084 (Feb. 11, 1998). *See Parker v. W. Va. Dep't of Health and Human Resources*, Docket No. 97-HHR-042B (Sept. 30, 1997). *See generally, Meckley v. Kanawha County Bd. of Educ.*, 181 W. Va. 657, 383 S.E.2d 839 (1989) (*per curiam*). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990) (*citing Meads v. Veterans' Admin.* 36 M.S.P.R. 574 (1988)). An employee may not disregard a direct order or the directions of a supervisor based upon his belief that the order is unreasonable or without merit. *See McKinney v. Wyoming County Bd. of Educ.*, Docket No. 92-55-112 (Aug. 3, 1992).

Grievant knew what type of behavior was expected of him in regard to his interactions with the students in his charge. Grievant had been warned and advised regarding such behaviors. Less than one year prior to the incidents involved in this disciplinary action, Grievant had been directed by the Superintendent of Schools to act in

a professional manner in the performance of his duties. Superintendent Duerring's letter of April 29, 2009 gave Grievant "one more" chance. Profanity in the school setting is prohibited conduct for school employees, regardless of its impact. Having failed to comply with numerous prior directives to change his behavior, even though Grievant has demonstrated that he can control his behavior, it is found that Grievant's repetitive disregard of legitimate orders and reasonable expectation constitutes insubordination. As has been held in previous cases, the use of profanity is clearly prohibited by applicable educational policy, and it is appropriate for employees to be disciplined for such violations. *See Showalter, supra*; *Parrish*, *supra*. Grievant's repetitive inappropriate actions constituted insubordination.

Lastly, Principal Baird did not seek to implement an improvement plan prior to the termination of Grievant in 2010. Grievant has also asserted that he should have been placed on an improvement plan prior to being subjected to termination. Poignantly, Respondent's response highlighted that the concept of an improvement plan is to assist an individual in improving his or her performance when the individual lacks the knowledge and skills necessary to perform his or her job duties. Grievant's performance of his job duties is not in question in this action. Grievant's misconduct in this case is insubordination, i.e., violation of written policies, and both oral and written directives for him to change his behavior. The undersigned is persuaded by Respondent's argument, coupled with the fact that Grievant had opportunity to avail himself of an improvement plan, regarding this and/or extremely similar conduct. Grievant chose not to participate with the improvement plan(s) of 2009. Grievant refused to adjust his classroom behavior.

The argument that discipline is excessive given the facts of the situation is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). The 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).

In summation, Grievant was employed in the field of education, not the construction industry. The standard of conduct and employment atmosphere of a professional educator is known to Grievant. Grievant used inappropriate, abusive, harassing and intimidating language in the presence of and directed towards students, even after having been warned and directed on multiple occasions to stop such behavior. Grievant had been reprimanded and even suspended for such behavior. Grievant’s actions constituted insubordination. In the circumstances of this case, Respondent did not act arbitrarily and/or capriciously. Further, Grievant failed to establish Respondent’s disciplinary actions were excessive or reflects an inherent disproportion between the offense and the disciplinary action levied.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. 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 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); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

2. A board of education may suspend or dismiss any person in its employment for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a *nolo contendre* to a felony charge. W. VA. CODE § 18A-2-8. Suspension or dismissal of a teacher or school employee pursuant to W. VA. CODE § 18A-2-8 must be exercised reasonably, not arbitrarily and 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); *De Vito v. Board of Education of Marion County,* 285 S.E.2d 411 (W.Va. 1981); *Harry v. Marion County Board of Education,* 203 S.E.2d 319, Syl. Pt. 1 (1998); *Maxey v. McDowell Co. Board of Ed.*, 575 S.E.2d 278 (2002).

3. 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.*, 223 W.Va. 431, 675 S.E.2d 907(2009).

4. Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors/So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). Insubordination " encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988) *citing Weber v. Buncombe County Bd. of Educ.*, 266 S.E.2d 42 (N.C. 1980).

5. Grievant's use of profanity in a school setting, after having been warned against such conduct, constituted insubordination. *Showalter v. Marshall County Board of Education*, Docket No. 07-25-165 (May 28, 2008); *Ferrari v. Putnam County Board of Education*, Docket No. 99-40-528 (April 25, 2000).

6. An employee's belief that management's decisions and directions are incorrect, absent a threat to the employee's health or safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. *See Parker v. W. Va. Dep't of Health and Human Resources*, Docket No. 97-HHR-042B (Sept. 30, 1997). *See generally, Meckley v. Kanawha County Bd. of Educ.*, 181 W. Va. 657, 383 S.E.2d 839 (1989) (*per curiam*).

7. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health*

Dep't, Docket No. 90-H-128 (Aug. 8, 1990) (citing *Meads v. Veterans' Admin.* 36 M.S.P.R. 574 (1988)).

8. In order to establish insubordination, an employer must demonstrate that 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).

9. The argument that discipline is excessive given the facts of the situation is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

10. The 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).

11. Grievant failed to meet his burden of demonstrating the penalty was clearly excessive or reflects an inherent disproportion between the offense and the personnel action.

12. Respondent met its burden of proof by a preponderance of the evidence, and proved the charges against Grievant that led to his dismissal.

13. Respondent has proven by a preponderance of the evidence that Grievant used unacceptable, profane language in front of students, on a repeated basis, and in reference to one or more students, after being warned and disciplined for this type of inappropriate behavior.

14. Respondent demonstrated its disciplinary actions, in the facts of this case, were not arbitrary, capricious or clearly excessive.

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: May 27, 2011

Landon R. Brown
Administrative Law Judge