THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MICHAEL BURCH,

Grievant,

v. **Docket No. 2023-0936-HrdED**

HARDY COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Michael Burch, was dismissed from his employment with Respondent, Hardy County Board of Education. On June 26, 2023, Grievant filed a grievance directly to level three, pursuant West Virginia Code § 6C-2-4(a)(4), stating:

> Grievant's employment terminated without cause. Failure to provide improvement period. If discipline was warranted, [it] should have been much lesser punishment.

As relief, Grievant requests reinstatement with backpay. A level three hearing was held before the undersigned at the Grievance Board's Westover office on September 9, 2024. Grievant appeared in person and was represented by Andrew Katz, Esq. Respondent appeared by Superintendent Sheena Van Meter and was represented by Kimberly Croyle, Esq., Bowles Rice LLP. This matter matured for decision on October 31, 2024. Each party submitted written Proposed Findings of Fact and Conclusions of Law (PFFCL).

Synopsis

Respondent dismissed Grievant from his teaching position for bullying and harassing his students with name calling and gender biased comments. Grievant denies some of the alleged actions and claims others were out of context and not in his dismissal

letter. Grievant asserts his conduct is correctable and warrants mitigation. Respondent proved Grievant engaged in willful neglect of duty, insubordination, and immorality and that his conduct was not correctable, justifying his dismissal. Grievant failed to prove mitigation or lack of due process. Thus, this grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant, Michael Burch, was employed by Respondent, Hardy County Board of Education, as a science teacher at Moorefield High School between fall 2020 and spring 2023.

2. When Grievant was with Roane County Schools in 2019, the West Virginia Department of Education (WVDE) suspended Grievant's teaching certificate for one year due to inappropriate conduct. Grievant was required to complete 40 hours of professional development, including coursework in boundary training.

3. On January 11, 2020, Grievant provided a sworn statement to WVDE, stating in part as follows:

> [I]f I'm in class and someone is having trouble or something, I might put my hand on their back … . I didn't have any bad intent with that so I didn't see it as being an issue, but after taking the classes and going to the Boundary Training and so forth, you learn that it's not necessarily your intent that matters, it's how people perceive it and you have to respect other people's boundaries. .. . You have to respect them for who they are and be aware of what they might find uncomfortable or offensive.

4. On April 14, 2020, Grievant entered into an agreement with WVDE in which he acknowledged the following:

> Mr. Burch's teaching certificates were suspended because he engaged in inappropriate conduct with a rational nexus to his teaching position by crossing the professional boundaries thereby exhibiting behaviors that made female students uncomfortable such as displaying unwanted attention on female students and making sexually suggestive and other inappropriate comments in class. Mr. Burch also used aggressive physical behavior with students.
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> Mr. Burch further violated WVDE Policy 5902 "Employee Code of Conduct," as it pertains to positive and appropriate communication. See Policy 5902, 4.2.1. During the intervening time between the hearing and entry of the Order suspending Mr. Burch's Professional Certificates, he was again suspended by Roane County Schools and Superintendent Richard D. Duncan, Ph. D. recommended his termination. Mr. Burch again engaged in inappropriate conduct toward female students in his science classroom.
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> The WVDE investigation related to Mr. Burch reveals a history of successive suspensions for violations of the West Virginia Board of Education Employee Code of Conduct and inappropriate and unwanted interactions with students. Among WVDE's concerns, Mr. Burch repeatedly crossed boundaries.

5. Grievant began working for Respondent at the start of the 2020 – 2021 school year after WVDE provisionally reinstated his teaching credentials.

6. When Grievant started with Respondent in August 2020, he acknowledged that he received and understood the following policies:

   a. Racial, Sexual, Religious/Ethnic Harassment and Violence Policy – Hardy Co. Policy GAD.
   b. Bullying, Harassment, and Intimidation Policy – Hardy Co. Policy GAD.
   c. Discrimination Policy – Hardy Co. Policy GAB.
   d. Employee Code of Conduct – WVDE Policy 5902.

7. On August 15, 2022, Grievant again acknowledged that he received and understood these policies, along with Respondent's policy on Inappropriate Physical and Emotional Boundaries.

8. On December 8, 2021, Grievant was issued a letter of reprimand for initiating physical contact with a female student when he playfully chased her with a dry erase marker until he had her backed up against the wall (after the marker she dropped touched him). Grievant was warned that further inappropriate conduct would result in disciplinary action.

9. In March 2023, Grievant was suspended with pay for three days for having physical contact with students after placing his hands on their shoulders to back them away from a door.

10. Concurrently, A.G.[1], a female student, was in Grievant's chemistry class during the 2023 spring semester. The class started with 7 students but whittled to 2 students (A.G. and a male student) after Grievant encouraged the others to drop the class, thinking it would be too difficult for them. To get A.G. to compete with the remaining student, Grievant told her, semi-playfully, that "men are superior," "women are emotional," and "women need approval from men." Grievant also called students "retarded." Grievant told A.G. that the perfect woman does not have tattoos or piercings and that these "look like a good time, not a long time." Eventually whenever the other student was absent, A.G. would avoid Grievant's class. A.G. never complained to administrators because her understanding was that other students had complained, and nothing had happened. An administrator later approached A.G. about her experiences.

11. M.W.[2], a female student, was in a different chemistry period with Grievant in the 2023 spring semester. Grievant told the class that "women always have to depend

[1]Initials are used to protect the student's identity.
[2]Initials are used to protect the student's identity.

on men" and "women are too emotional." Grievant also called M.W. "retarded" and "stupid," and belittled other students. Grievant waited until the end of the semester in May to complain to the administration.

12. Sometime in May 2023, M.W. submitted a written statement to Respondent. Regarding "sexist comments," M.W. wrote that Grievant said, "women always have to depend on men, women wouldn't know what to do without men, women wouldn't be anywhere without men, and women are too emotional (when a girl overreacts)." Regarding "name calling," M.W. wrote that Grievant "calls students retarded/stupid – ex. if someone gets a problem wrong he calls them retarded (has personally called me retarded about 5 times) – says many students will never succeed in/past high school."

13. On Grievant's three annual evaluations with Respondent, Principal Patrick McGregor issued Grievant the highest rating of "accomplished" on many elements. Grievant received "accomplished" in his first and last years (most recently on May 18, 2023), for the most relevant element of "teacher establishes and maintains a safe and appropriate learning environment." In his second year, Grievant received the next highest rating of "distinguished" for this element.

14. On May 23, 2023, Superintendent Van Meter met with Grievant to review the allegations. Grievant admitted to saying that women need confirmation from men; that women with tattoos are here for a good time, not a long time; and that he called students retarded but explained these statements were taken out of context and he was only joking.

15. On May 23, 2023, as required by West Virginia Code 18A-2-8, Superintendent Van Meter submitted a Disciplinary Report to WVDE, stating in part:

> [Grievant] made several sexist comments to female students, including the following: "Women need constant confirmation

> from men" (this was in regard to a female student asking if she had the correct answer on an assignment). "Women always have to depend on men." "Women are too emotional." "Women don't know what to do without men." When a young lady asked for help [Grievant] told her that she was retarded and asked if she needed a man's help. The boy next to her was asked by [Grievant] if he got the answer correct and when he said yes, [Grievant] asked the female student if she needed a man's help and then said "See, you need a man to get the right answer." The male student reported that he was uncomfortable for the female student and didn't know what to say so he just laughed. Both the male and female student (only two in this class period) asked to be placed somewhere else for the rest of the year because [Grievant] made them uncomfortable. Both students reported that comments like this were common. Students also reported that [Grievant] uses the term "retarded" frequently referring to students that make mistakes or ask for help. This behavior is a violation of the WV Code of Conduct as well as violation of the bullying and harassment policy. [Grievant] was made aware and admitted to making [these] comments in a joking manner.

16. On May 31, 2023, Superintendent Van Meter sent Grievant a letter notifying him that she would be recommending his dismissal to the Board, stating in part:

> The reason for this recommendation is violation of Hardy County Schools policy GADA, Bullying, Harassment, and Intimidation. Specifically, you called students retarded. You also made comments to female students of a gender bias nature including, but not limited to, "women need constant affirmation from men" and "women who look like they had a tackle box blow up on their face and have graffiti on their bodies are here for a good time, and not a long time." These comments were humiliating and intimidating to students.
>
> You have requested a hearing before the board regarding the recommendation for termination of your position. That hearing will take place on June 12, at 4:00 pm …

17. The substance of Respondent's relevant policies was not submitted into evidence.[3] However, the WVDE Policy 5902, Employee Code of Conduct, is contained in WVDE's legislative rules and states that 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.
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> 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.
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> 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.
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> W. VA. CODE ST. R. § 126-162-4.2 (2002).

18. On June 12, 2023, Grievant appeared for a due process hearing before the Hardy County Board of Education. Among other allegations, Grievant admitted to the Board that he said, "women are too emotional" and "women need a man," but explained that it was meant to be motivational. The Board voted to terminate Grievant's contract.

[3]Respondent only submitted the relevant substance of these policies in its PFFCL.

19. On June 13, 2023, Superintendent Van Meter sent Grievant a letter that simply stated, "At a meeting of the Hardy County Board of Education on June 12, 2023, the Board voted to terminate your contract of employment with Hardy County Schools, effective May 23, 2023."

20. On June 5, 2023, WVDE sent Grievant a letter notifying him that its investigation could affect his Professional Teaching Certificate and outlined the allegations against him as follows:

> [Respondent's] initial report of your behavior alleges that you "made several sexist comments to female students" that include:
>
> - "Women need constant confirmation from men" (this was about a female student asking if she had the correct answer on an assignment).
> - "Women always have to depend on men."
> - "Women are too emotional."
> - "Women don't know what to do without men."
> - When a young lady asked for help, [Grievant] told her she was retarded and asked if she needed a man's help.
> - The boy next to her was asked by [Grievant] if he got the answer correct, and when he said yes, [Grievant] asked the female student if she needed a man's help and then said, "See, you need a man to get the right answer." A male student (in the class) reported feeling uncomfortable with the female student and didn't know what to say, so he just laughed. The male and female students (only two in this class period) asked to be placed elsewhere for the rest of the year because [Grievant] made them uncomfortable. Both students reported that comments like this were common. Students also said that he uses the term "retarded" frequently, referring to students that make mistakes or ask for help.

21. On August 4, 2023, Grievant emailed WVDE a response, in relevant part, as follows:

> The statements are highly embellished, completely untrue or taken completely out of context. I do NOT call people retarded. … As per the accusation of women needing help from men, that was completely out of context. I had a class with only two kids in it, which does tend to create a more

> casual environment. … Was trying to get a little friendly competition going on to get both of them to up their game. She was clearly the stronger student, and we all knew it. … she got comfortable and started slacking … The boy … started to work a bit harder. … I friendly teased her a little bit with some banter about the battle of the sexes, and how she might need to ask him how things are done, etc.

Discussion

The grievant bears the burden of proof in a grievance that does not involve a disciplinary matter and must prove his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). In disciplinary matters, the burden of proof rests with the employer to prove that the action taken was justified, and the employer must prove the charges against an employee by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3. "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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

The authority of a county board of education to suspend or terminate an employee's contract must be based on one or more of the causes listed in West Virginia Code § 18A-2-8 and must be exercised reasonably, not arbitrarily or capriciously. Syl. Pt. 2, *Parham v. Raleigh County Bd. of Educ*., 192 W. Va. 540, 453 S.E.2d 374 (1994); Syl. Pt. 3, *Beverlin v. Bd. of Educ*., 158 W. Va. 1067, 216 S.E.2d 554 (1975); *Bell v. Kanawha County Bd. of* Educ., Docket No. 91-20-005 (Apr. 16, 1991). The causes are:

> 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, a finding of abuse by the Department of Human Services in accordance with §49-1-1 et seq. of this code, the conviction of a misdemeanor or a guilty plea or a plea of nolo contendere to a misdemeanor charge that has a rational nexus between the conduct and performance of the employee's job, 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(a).

> A county board of education has the duty and authority to provide a safe and secure environment in which students may learn and prosper; therefore, it may take necessary steps to suspend or dismiss any person in its employment at any time should the health, safety, or welfare of students be jeopardized or the learning environment of other students has been impacted. A county board shall complete an investigation of an employee that involves evidence that the employee may have engaged in conduct that jeopardizes the health, safety, or welfare of students despite the employee's resignation from employment prior to completion of the investigation.

W. VA. CODE § 18A-2-8(d).

While the letter of dismissal did not give a reason for Grievant's termination, Superintendent Van Meter's recommendation letter notified Grievant that the basis was "bullying, harassment, and intimidation" in calling students "retarded" and "making comments to female students of a gender bias nature," "including but not limited to, 'women need constant affirmation from men' and 'women [who have tattoos and piercings] are here for a good time, and not a long time.'" Respondent elaborated on the gender bias comments at the level three hearing with evidence that Grievant also told students that "women are too emotional," "women always have to depend on men," "men are superior," "women need approval from men," and "women don't know what to do without men."

Respondent labels this conduct willful neglect of duty, insubordination, and immorality. Willful neglect of duty "encompasses something more serious than 'incompetence,' which is another ground for teacher discipline … The term 'willful' ordinarily imports a knowing and intentional act, as distinguished from a negligent act." *Bd. of Educ. of the County of Gilmer v. Chaddock*, 183 W.Va. 638, 640, 398 S.E.2d 120, 122 (1990).

Insubordination "at least includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued by the school board or by an administrative superior. . .This, in effect, indicates that for there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd./Shepherd Coll.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). [F]or a refusal to obey to be "wilful," the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." *Id.*, 212 W. Va. at 213, 569 S.E.2d at 460. 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), aff'd, *Sexton v. Marshall University*, 182 W. Va. 294, 387 S.E.2d 529 (1989).

"Immorality is an imprecise word which means different things to different people, but in essence it also connotes conduct 'not in conformity with accepted principles of right

and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior.' WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED 910 (2d ed. 1979)." *Golden v. Bd. of Educ*., 169 W. Va. 63, 67, 285 S.E.2d 665, 668 (1981).

Grievant does not appear to contest that the alleged actions outlined in the dismissal letter would, if true, violate Respondent's policies. These policies apparently prohibit conduct that interferes with student education or creates a hostile or intimidating environment. Clearly, the allegations in the recommendation letter would violate the WVDE Code of Conduct mandating that school employees maintain a culture of caring, ethical behavior, and a safe environment devoid of bullying. The discipline enacted for the same would also be in line with State code allowing dismissal of employees who negatively impact student welfare and learning.

Regarding the allegations in the intent to dismiss letter, Grievant contends that he did not call people "retarded," only actions; that he never said, "women need affirmation from men;" and that his comments about women with piercings and tattoos were in the context of coaching students to succeed in the workplace. Even if Grievant was referring to actions rather than people, the students did not perceive that distinction. Further, Superintendent Van Meter testified that Grievant's advice against tattoos and piercings would have been alright had it not been framed in a gender biased manner. Given Grievant's prior issues at Roane County Schools, these two admissions, even in the claimed context, are sufficient to justify Grievant's dismissal. In conjunction with the yearlong suspension of his teaching certificate by WVDE and his subsequent training on

maintaining appropriate boundaries with students, Grievant was on notice that this sort of behavior was not acceptable.

Ironically, after the prior incidents, Grievant gave a sworn statement to WVDE about insight he gained from boundary training, writing, "you learn that it's not necessarily your intent that matters, it's how people perceive it and you have to learn to respect other people's boundaries." Then, after a year with Respondent, Grievant was reprimanded for initiating physical contact with a female student when he playfully chased her and had her backed up against a wall. Respondent warned Grievant against further inappropriate conduct and again cited his training on being mindful of boundaries from the student's perspective. When Grievant again crossed student boundaries with his "motivational" gender biased comments, he was already on notice that his admitted actions could make females students uncomfortable and cause an unsafe learning environment. Given Grievant's prior discipline, boundary training, and history of boundary violations, Grievant's admitted conduct is sufficient to justify his dismissal.

As for the "affirmation" remark mentioned in the letter and denied by Grievant, Superintendent Van Meter testified that Grievant admitted to saying that "women need confirmation from men," and that he stated his reason was to create friendly competition. "Affirmation" and "confirmation" are synonymous. As for the other alleged gender biased comments not in the letter, Grievant initially denied some of them and contends that the recommendation letter did not provide him with notice that he was being dismissed for this second set of allegations. Interestingly, WVDE also sent Grievant a letter outlining all the allegations. In his response to WVDE, Grievant only denied calling people "retarded," implying that all the other remarks were simply taken out of context. However, Grievant

admitted under direct examination that, to create competition, he told students that women “rely” on men for the right answers. On cross examination, Grievant also admitted to telling students that women “need” men and have to “depend” on men, but that he does not believe this and only said it to motivate students.

Respondent’s provision of additional examples of Grievant’s gender biased comments during the level three hearing was not the first time Grievant was given an opportunity to respond to them. Even before his due process hearing with the Hardy County Board of Education, Grievant met Superintendent Van Meter to review most, if not all, of these allegations. Superintendent Van Meter testified that Grievant admitted to making sexist comments to create friendly competition. After the due process hearing, Grievant was again given an opportunity to respond when WVDE sent him a letter outlining many of the additional allegations. Grievant did not specifically deny any allegation in his email response to WVDE, except to calling people retarded. In this email, Grievant admitted to saying “women need help from men” but explained that it was only meant to motivate.

At the level three hearing, Grievant denied saying “women need confirmation from men,” “men are better than women,” or “women are too emotional.” On cross examination, Grievant was asked about admitting during his due process hearing that he said, “women are too emotional” and “women need a man.” Grievant did not deny this but simply answered that the context was to create competition. Grievant also admitted on cross examination to saying “women have to depend on men” but explained the context was to motivate.

These additional admissions are unnecessary to make the case against Grievant, as the gender biased comments are interchangeable, at least in their biased nature, if not in the meaning of words like “affirmation,” “confirmation,” “rely,” “depend,” and “need.” Respondent hinted as much in Grievant’s dismissal letter by giving some instances of his “gender bias” comments while noting that these were a limited representation of the gender biased comments that led to Grievant’s dismissal.

While there is the impression of a factual dispute, the undersigned does not see one, but will, out of an abundance of caution, do a credibility assessment. In situations where “the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required.” *Jones v. W. Va. Dep’t of Health & Human Res*., Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res*., Docket No. 2009-0540-DOC (Nov. 13, 2009); See also *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ 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. *Id*., Burchell v. Bd. of Trustees, Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997). Not every factor is necessarily relevant to every credibility determination. In this situation, the relevant factors include

demeanor, motive, opportunity to perceive, attitude toward the action, the consistency of prior statements, and plausibility.

Grievant had motive, as the consequence of his discipline was dire given his prior history. Tellingly, his statements were inconsistent. At times, he acquiesced either overtly or through his silence, such as when asked why he made certain admissions to the Board during the due process hearing. At times, he denied allegations, such as "women need affirmation from men." But when questioned about his admission to the Board that he did say that "women need confirmation from men," Grievant did not deny making the admission. Perhaps he saw a technical distinction between "confirmation" and "affirmation," even though the words are synonymous. It is noteworthy that Grievant seemed to absolve himself of any responsibility for even his admitted actions by providing excuses to justify them. For instance, he admitted to saying "retarded," but only in regard to actions. Even on allegations he did not dispute, such as "women [who have tattoos and piercing] are here for a good time, and not a long time," Grievant attempted to justify this as acceptable advice on how to succeed in life and, ignoring the boundary issues he had been previously disciplined for and received training on, failed to acknowledge how these words could affect female students. Surprisingly, in his email response to WVDE's detailed rendering of the accusations against him, Grievant did not make any denials except to calling people "retarded." Grievant did not deny saying that "women always have to depend on men," "women are too emotional," and "women don't know what to do without men." At level three, Grievant admitted to saying women "need" men, but explained it was to motivate and create competition. Interestingly, "need" is similar in meaning to, if not synonymous with, "rely," "depend," and "don't know what to do without."

As for students M.W. and A.G., their testimony was consistent with multiple prior statements given verbally or in writing. Grievant attacked their credibility, arguing they had waited until the end of the semester to complain, that M.W. was bitter because Grievant gave her a "B" which ruined her chance at valedictorian, and that A.G. conspired with M.W. due to their friendship. Yet, when questioned, these students seemed genuine in their dread of interacting with Grievant and seemed earnest and mature. Each student consistently relayed that Grievant called them and other students "retarded" and "stupid" and said that "women are too emotional." As for Superintendent Van Meter, there was no accusation, let alone evidence, that she disliked or targeted Grievant. It appeared that she was giving Grievant every opportunity to succeed after hiring him despite his prior discipline and suspension of credentials by WVDE. Yet, she was consistent with the students in testifying that Grievant admitted to her that he called students "retarded" and that he said that "women need confirmation from men." Which leads to the conclusion that Superintendent Van Meter and students M.W. and A.G. are more credible than Grievant. Thus, Respondent proved Grievant engaged in the alleged actions.

Grievant's conduct is insubordination and willful neglect of duty. Grievant was previously disciplined for crossing boundaries and was thereafter trained to recognize boundaries after WVDE suspended his teaching certificate for a year. He thus knew what was expected of him when he chose not to comply by again crossing those boundaries. Grievant's bullying amounts to immorality because it is not in line with views of acceptable behavior for a teacher or an adult in a position of authority over children. Respondent proved by a preponderance of the evidence that Grievant was given every chance to correct his behavior and that his conduct was not correctable.

Grievant further attempts to challenge a prior incident that led to ungrieved discipline from Respondent. "If an employee does not grieve specific disciplinary incidents, he cannot place the merits of such discipline in issue in a subsequent grievance proceeding. *Jones v. W. Va. Dept. of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *See Stamper v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-144 (Mar. 20, 1996); *Womack v. Dept. of Admin*., Docket No. 93-ADMN-430 (Mar. 30, 1994). In such cases, the information contained in prior disciplinary documentation must be accepted as true. *See Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994)." *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997), aff'd, Monongalia Cnty. Cir. Ct. Docket No. 97-C-AP-96 (Dec. 7, 1999), appeal refused, W.Va. Sup Ct. App. Docket No. 001096 (July 6, 2000).

Grievant also argues that his dismissal warrants mitigation because his conduct is correctible and his performance stellar as documented in his outstanding evaluations. "[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was 'clearly excessive or reflects an abuse of agency 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)." *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995), aff'd, Kanawha Cnty. Cir. Ct. Docket No 95-AA-66 (May 1, 1996), appeal refused, W.Va. Sup. Ct. App. (Nov. 19, 1996).

An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex*

rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996) (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "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).

"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 Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996); *Olsen v. Kanawha County Bd. of Educ*., Docket No. 02-20-380 (May 30, 2003), aff'd, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), appeal refused, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ*., Docket No. 93-45-105 (Mar. 31,

1994); *Cooper v. Raleigh County Bd. of Educ*., Docket No. 2014-0028-RalED (Apr. 30, 2014), aff'd, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

Respondent was only required to determine whether Grievant's conduct was correctable if it related to performance rather than willful neglect of duty.

> [A] board must follow the § 5300(6)(a) 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, in view of the nature of the conduct examined in *Trimboli [v. Board of Education of the County of Wayne*, 163 W.Va. 1, 254 S.E.2d 561 (1979)], and in *Rogers [v. Board of Education*, 125 W.Va. 579, 25 S.E.2d 537 (1943)], be understood to mean an offense or conduct which affects professional competency.

Mason County Bd. of Educ. v. State Superintendent of Sch., 165 W. Va. 732, 739; 274 S.E.2d 435 (1980). The provisions of Policy 5300 have since been codified in West Virginia Code § 18A-2-12a, which provides:

> (6) All school personnel are entitled to know how well they are fulfilling their responsibilities and should be offered the opportunity of open and honest evaluations of their performance on a regular basis and in accordance with the provisions of section twelve [§ 18A-2-12] of this article. All school personnel are entitled to opportunities to improve their job performance prior to termination or transfer of their services. Decisions concerning the promotion, demotion, transfer, or termination of employment of school personnel, other than those for lack of need or governed by specific statutory provisions unrelated to performance, should be based upon the evaluations, and not upon factors extraneous thereto. . . .

Concerning what constitutes correctable conduct, the Court in *Mason County Bd. of Educ*. noted that:

> [I]t 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 morals, safety, and health of the system in a permanent, non-correctable manner.

"[T]he factor which distinguishes willful neglect of duty and insubordination from unsatisfactory performance is that the employee knows [his] responsibilities, and is competent to perform them, but elects not to complete them. When an employee's performance is unacceptable because [he] does not know the standard to be met, or what is required to meet the standards, and [his] behavior can be corrected, the behavior is unsatisfactory performance. *Bierer v. Jefferson County Bd. of Educ*., Docket No. 01-19-595 (May 17, 2002)." *Waggoner v. Cabell County Bd. of Educ*., Docket No. 2008-1570-CabED (Oct. 31, 2008). Respondent concluded that Grievant's conduct was willful neglect of duty, insubordination, and immorality rather than unsatisfactory performance. This conclusion was not arbitrary and capricious, given Grievant's previous boundary training and infractions. Respondent proved that Grievant's conduct was sufficiently knowing and intentional to conclude it was not correctable. Grievant knew his responsibilities, was competent to perform them, and chose not to heed boundaries he had been trained to recognize, despite his stellar evaluations.

Grievant implies he was denied due process because factual allegations were later added to the ones in the letter recommending dismissal. Yet, the letter stated that the basis of the recommendation was Grievant's gender biased comments and that the examples given were only some of the gender biased comments. This letter preceded Grievant's due process hearing with the Hardy County Board of Education. Grievant was allowed to respond at the due process hearing. Grievant does not contend that he was not given all the allegations at the due process hearing. Nor did he present evidence that

any failure to allow him to address an allegation would have changed the outcome of his dismissal.

Grievant has the burden of proof on due process claims. Civil service employees have "a property interest arising out of the statutory entitlement to continued uninterrupted employment." Syl. Pt. 4, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 156, 241 S.E.2d 164, 166 (1977). That property interest "warrant[s] the application of due process procedural safeguards to protect against the arbitrary discharge of such employee under Article 3, Section 10 of our constitution." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 283, 332 S.E.2d 579, 583 (1985) (*per curiam*) (*citing Waite*). The WVSCA "'has traditionally shown great sensitivity toward the due process interests of the government employee by requiring substantial due process protections,' including, generally, predischarge notice and a hearing. *Major v. DeFrench*, [169 W. Va. 241, 255], 286 S.E.2d 688, 697 (1982)." *Buskirk*, 175 W. Va. at 283, 332 S.E.2d at 583. In determining the due process that is required for public employees, the WVSCA has determined that "[t]he constitutional guarantee of procedural due process requires "'some kind of hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment.' *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 [84 L. Ed. 2d 494, 105 S. Ct. 1487] (1985)." Syl. Pt. 3, *Fraley v. Civil Serv. Comm'n*, 177 W. Va. 729, 730, 356 S.E.2d 483, 484 (1987).

"The essential due process requirements, notice and an opportunity to respond, are met if the tenured civil service employee is given 'oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story' prior to termination." *Fraley*, 177 W. Va. at 732, 356 S.E.2d at 486 (*citing*

Loudermill at 546). Grievant received due process in receiving notice of and participating in a predetermination meeting before the Board where he gave his side of the story and admitted to some of the additional allegations. Grievant failed to prove he was denied due process. It should be noted that even if Grievant had been denied due process, the remedy would not entail reversal of discipline unless Grievant could show that the outcome would have been different had he received due process. "Reinstatement would be appropriate only if the appellant's dismissal would have been prevented by a pretermination hearing. *See Nickerson v. City of Anacortes*, 45 Wash. App. 432, 441, 725 P.2d 1027, 1032 (1986)." *Fraley*, 177 W. Va. at 733, 356 S.E.2d at 487. Respondent proved by a preponderance of the evidence that Grievant engaged in insubordination, willful neglect of duty, and immorality, and that his conduct was not correctable, justifying his dismissal. Grievant did not prove by a preponderance of the evidence that he was denied due process, that the outcome would have been different, or that mitigation is warranted. Accordingly, the grievance is DENIED.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The grievant bears the burden of proof in a grievance that does not involve a disciplinary matter and must prove his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). In disciplinary matters, the burden of proof rests with the employer to prove that the action taken was justified, and the employer must prove the charges against an employee by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

2. The authority of a county board of education to suspend or terminate an employee's contract must be based on one or more of the causes listed in West Virginia Code § 18A-2-8 and must be exercised reasonably, not arbitrarily or capriciously. Syl. Pt. 2, *Parham v. Raleigh County Bd. of Educ*., 192 W. Va. 540, 453 S.E.2d 374 (1994); Syl. Pt. 3, Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975); *Bell v. Kanawha County Bd. of Educ*., Docket No. 91-20-005 (Apr. 16, 1991). The causes are:

> 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, a finding of abuse by the Department of Human Services in accordance with §49-1-1 et seq. of this code, the conviction of a misdemeanor or a guilty plea or a plea of nolo contendere to a misdemeanor charge that has a rational nexus between the conduct and performance of the employee's job, 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(a).

3. Insubordination "at least includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued by the school board or by an administrative superior. . .This, in effect, indicates that for there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim*

Governing Bd./Shepherd Coll., 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (per curiam).

4. Willful neglect of duty "encompasses something more serious than 'incompetence,' which is another ground for teacher discipline … The term 'willful' ordinarily imports a knowing and intentional act, as distinguished from a negligent act." *Bd. of Educ. of the County of Gilmer v. Chaddock*, 183 W.Va. 638, 640, 398 S.E.2d 120, 122 (1990).

5. "[T]he factor which distinguishes willful neglect of duty and insubordination from unsatisfactory performance is that the employee knows [his] responsibilities, and is competent to perform them, but elects not to complete them. When an employee's performance is unacceptable because [he] does not know the standard to be met, or what is required to meet the standards, and [his] behavior can be corrected, the behavior is unsatisfactory performance. *Bierer v. Jefferson County Bd. of Educ*., Docket No. 01-19-595 (May 17, 2002)." *Waggoner v. Cabell County Bd. of Educ*., Docket No. 2008-1570-CabED (Oct. 31, 2008).

6. Respondent proved by a preponderance of the evidence that Grievant engaged in insubordination, willful neglect of duty, and immorality, and that his conduct was not correctible, justifying his dismissal.

7. “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 Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996); *Olsen v. Kanawha County Bd. of Educ*., Docket No. 02-20-380 (May 30, 2003), aff'd, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), appeal refused, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004).

8. Grievant did not prove by a preponderance of the evidence that mitigation is warranted.

9. "The essential due process requirements, notice and an opportunity to respond, are met if the tenured civil service employee is given 'oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story' prior to termination." *Fraley*, 177 W. Va. at 732, 356 S.E.2d at 486 (*citing Loudermill* at 546).

10. "Reinstatement would be appropriate only if the appellant's dismissal would have been prevented by a pretermination hearing. *See Nickerson v. City of Anacortes*, 45 Wash. App. 432, 441, 725 P.2d 1027, 1032 (1986)." *Fraley*, 177 W. Va. at 733, 356 S.E.2d at 487.

11. Grievant did not prove by a preponderance of the evidence that he was denied due process or that the outcome would have been different if it had been denied.

Accordingly, this grievance is DENIED.

"The decision of the administrative law judge is final upon the parties and is enforceable in the circuit court situated in the judicial district in which the grievant is employed." W. VA. CODE § 6C-2-5(a) (2024). "An appeal of the decision of the administrative law judge shall be to the Intermediate Court of Appeals in accordance with §51-11-4(b)(4) of this code and the Rules of Appellate Procedure." W. VA. CODE § 6C-2-

5(b). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such an appeal and should not be named as a party to the appeal. However, the appealing party must serve a copy of the petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b) (2024).

DATE: December 16, 2024

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Joshua S. Fraenkel
Administrative Law Judge