

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JOHNNY SCHUPBACH,

Grievant,

v.

Docket No. 2026-0473-BrooED

BROOKE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Johnny Schupbach, was dismissed from his employment with Respondent, Brooke County Board of Education. On February 19, 2026, Grievant filed a grievance directly to level three, pursuant West Virginia Code § 6C-2-4(a)(4), stating:

On February 18, 2026 the Brooke County Board of Education voted to terminate my employment at Brooke County Schools. The administration failed to provide documentation that a termination would be impending if appropriate actions were not followed. ... The reasons for the insubordination dates to a meeting between myself and the administration on November 20, 2025. The deputy superintendent states that he had explicitly stated that my participation in physical education classes is prohibited. This information was not provided in context of a physical letter of reprimand of any kind. When I view an event that could cause termination, the incident should be documented through paper form and signed by the employee in question. An incident took place on December 5, 2025, where a student had slid into my leg and at that time I hit him with a foam ball. ... There are multiple sources that engaging as a teacher in physical education fosters a more inviting learning environment by creating rapport with the students. The game continues to be played at Brooke Middle School. ... If we had known that participation was unacceptable, we would not have implemented it in our educational practices. The level of reprimand of this case does not rise to the level of termination and destroying the livelihood of a teacher that has been teaching for 14 years with no unacceptable evaluations. ...

As relief, Grievant requests, "Immediate withdrawal of termination, compensation for unused leave time, attorney fees associated with hearing."

A level three hearing was held before the undersigned via videoconference on May 8, 2026. Grievant appeared and was represented by Brett Ferro, Esq., Schrader, Duff, Law & Lowe, PLLC. Respondent appeared by Deputy Superintendent Corey Murphy and was represented by Kimberly Croyle, Esq., Bowles Rice LLP. This grievance matured for decision on June 8, 2026. Each party submitted written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Respondent dismissed Grievant for insubordination and jeopardizing student safety after he actively participated in a student game despite being directed to stop. Grievant claims he was never told not to actively participate and did not jeopardize student safety, implying his conduct is correctable and warrants mitigation, and contends his dismissal was retaliatory and that he was deprived of due process. Respondent proved Grievant was insubordinate and jeopardized student safety, that his conduct was not correctable, and that his dismissal was justified. Grievant failed to prove retaliation, a lack of due process, or that mitigation was warranted. Hence, 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, Johnny Schupbach, was employed by Respondent, Brooke County Board of Education, as a Physical Education (PE) teacher at Brooke Middle School.

2. In conducting PE class at Brooke Middle School, Grievant organized and sometimes participated in games including a game resembling dodgeball, the difference being that it used a smaller softer ball and was called “agility ball.”

3. On November 20, 2025, Deputy Superintendent Corey Murphy and Principal Jennifer Sisinni met with Grievant concerning a complaint made against him by the parent of a seventh grader. Deputy Superintendent Murphy instructed Grievant not to actively participate in games with students. (Deputy Superintendent Murphy and Principal Sisinni’s testimony).

4. During the meeting, Grievant admitted to his active participation in student games and acknowledged that he understood the directive. (Deputy Superintendent Murphy and Principal Sisinni’s testimony).

5. Grievant testified that he does not recall being directed to not actively participate in student games. Grievant testified that if he had been so directed he would have thought the directive was only applicable to the group of seventh graders the complaint emanated from and not to any other class, implying that he (would have if he had been so directed) thought it was permissible to actively participate with the fifth graders. Grievant further testified that the directive should have been in writing so he could have better processed the directive and the consequences of failing to abide by it.

6. Grievant was never disciplined for the incident that led to the verbal directive. Nor was he given a written directive against active participation in student games, told of potential consequences of active participation, or given a bad evaluation even for the incident that led to the verbal directive.

7. On Friday, December 5, 2025, Grievant and another teacher presided over a PE class of fifth graders. Grievant separated the boys and girls into “agility ball” teams and joined the girls’ team to even things out competitively. The other PE teacher did not intervene.

8. Video of the December 5, 2025, incident shows Grievant hurling the ball at the fifth-grade boys. The ball bounces back towards Grievant after his violent launch. Grievant and a boy chase the ball down. The boy slides to the ball at Grievant’s feet. Grievant grabs the ball, looks at the boy lying at his feet, and, after a brief pause, aggressively flings the ball into the boy’s stomach. The boy lies on the floor in a fetal position in obvious pain. Grievant goes back to his end of the court to regroup for the next “agility ball” bout. A group of concerned boys swiftly drag their wounded teammate off the court so as not to impede or get caught up in the “agility ball” action. The boy slowly gets up on the sidelines and walks away. Grievant approaches at a distance and appears to engage the boy in an animated manner. (Respondent’s Exhibit 5).

9. The boy was upset and told Grievant his injury was Grievant’s fault. Grievant countered that it was the boy’s fault he got injured because the boy slid into Grievant’s legs. Grievant justified his demeanor as simply showing disappointment at the boy for sliding towards him since PE teachers repeatedly tell students not to slide because they could injure themselves and others. Grievant offered to take the boy to the nurse. The boy said “no” and the game continued. The boy participated in the next game. (Grievant’s testimony).

10. Grievant usually stops the game when a student slides, to emphasize safety ramifications, but did not do so in this instance. Instead, Grievant threw that ball at the student because he wanted to make sure he got the student out. (Grievant's testimony).

11. Later, Grievant and the other PE teacher went to the office, not to report the game incident, but to report that a student was heard afterwards saying that, if he had a gun, he would shoot Grievant. (Grievant's testimony).

12. Grievant felt his dismissal was too severe a punishment and that a written directive was needed before Respondent could dismiss him.

13. Grievant testified that his punishment is emblematic of Superintendent Jeffrey Crook's bias against him. Grievant has had altercations with Superintendent Crook, beginning when the Superintendent admonished him for wearing a hat. This led to Grievant sending Superintendent Crook an email (after seeing him on his phone at a school event) telling him that in conjunction with policy the Superintendent needed to turn his phone off. Superintendent Crook again admonished Grievant to follow his directive to remove his hat.

14. Grievant testified that he would not have actively participated in student games after the November 2025 meeting if he had known the ramifications.

15. On December 8, 2025, Superintendent Crook notified Grievant by letter that he was recommending suspension pending an investigation, stating in part:

On Friday, December 5th you were participating in a game during gym class where you were throwing balls at students. During one interaction with a student who slid into your legs you threw the ball aggressively at the student on the ground hitting him in his stomach. This student was observed grabbing his belly in pain and curling up in the fetal position. At no time did you go check on this student; rather several other students pulled him off the court. Recently, during a

discussion at the school with you Mr. Murphy made clear that teachers should not be participating in the games with students, but rather be the instructor in the room. During this incident Friday this clearly did not happen.

(Respondent's Exhibit 1, Part 1).

16. On January 9, 2026, Superintendent Crook notified Grievant by letter of his suspension pending investigation, stating in part:

This letter serves to address your insubordination and conduct on December 5, 2025. You were explicitly directed by the Deputy Superintendent not to participate in physical education activities with students due to prior incidents in which your interactions with students were deemed inappropriate. Despite this directive, you disregarded the instruction and participated in the PE class. During the class, you threw a ball that struck a student in the abdomen, causing the student to fall into a fetal position in visible pain. You failed to check on the student's welfare or take appropriate action following the incident. Due to the serious safety concerns raised by your actions and the manner in which you have treated students, we have determined that you will not be permitted to return to the classroom.

(Respondent's Exhibit 1, Part 2).

17. On February 16, 2026, Grievant attended a hearing presided over by members of the Brooke County Board of Education, was represented by his attorney, and had an opportunity to present evidence.

18. On February 17, 2026, the Superintendent informed Grievant by letter that Respondent had terminated his employment, stating, "The reasons for the Board's action are the same as those set forth in my letters to you dated December 8, 2025, and January 9, 2026." (Respondent's Exhibit 2).

19. Respondent's Policy 3141 covering termination states:

The Superintendent shall have authority to recommend dismissal of professional personnel to the Board of Education.

The Board may dismiss any person in its employment at any time for:

- A. immorality;
- B. incompetency;
- C. cruelty;
- D. insubordination;
- E. intemperance;
- F. willful neglect of duty;
- G. unsatisfactory performance;
- H. a finding of abuse by the Department of Health and Human Resources in accordance with WV Code 49-9-1 et seq.;
- I. conviction of a misdemeanor or a guilty plea or a nolo contendere plea to a misdemeanor charge that has a rational nexus between the conduct and the performance of the employee's job;
- J. the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge.

A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation.

...

The Board 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, and welfare of students be jeopardized or the learning environment of other students has been impacted. ...

(Respondent's Exhibit 1, Part 5).

20. WVDE Policy 5902, Employee Code of Conduct, 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.

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.

W. VA. CODE ST. R. § 126-162-4.2 (2002).

21. While Respondent's Policy 3120 (Employee Code of Conduct) mirrors the items cited above in the WVDE Employee Code of Conduct, it also states in part:

This policy also requires that District professional employees respond immediately and consistently to incidents of bullying, harassment, intimidation, substance abuse, and/or violence or any other code of conduct violation that impacts negatively on students in a manner that effectively addresses incidents, deters future incidents, and affirms respect for individuals.

(Respondent Exhibit 1, Part 6).

22. None of the disciplinary letters notified Grievant of any laws or policies violated.

23. In 2019, Respondent issued Grievant a written reprimand for yelling in a disrespectful tone at another teacher. (Respondent's Exhibit 1, Part 9).

24. Grievant posted on social media (apparently after Deputy Superintendent Murphy committed to his version of the November 2025 meeting where Grievant was directed not to actively participate) that Brooke County Board of Education paid for

Murphy's travel from his home in Ohio County to work in Brooke County and a massive pay raise.

25. Grievant texted Deputy Superintendent Murphy, "You have your work cut out training Crooks. Watch your back dude is a snake."

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).

Grievant received written notice that he was being dismissed for insubordination and creating an unsafe environment for students by actively participating in a dodgeball-like game despite being directed not to actively participate. 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).

Respondent claims Grievant was directed to not actively participate in student games in a meeting with Deputy Superintendent Murphy and Principal Sisinni in November 2025; that Grievant acknowledged during the meeting he understood and would no longer participate; that shortly thereafter, Grievant willfully refused this directive by playing “agility ball” with his PE class; and that the directive was justified to ensure student safety. Grievant counters that Respondent did not direct him not to actively participate and that “agility ball” was widely played in Respondent’s schools and thus safe.

As Grievant contests that he was directed not to actively participate in student games, a credibility assessment is necessary. 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 motive, consistency of prior statements, and plausibility.

Grievant had motive to fabricate, as the consequence of his discipline is loss of his job. Tellingly, his statements were explicitly and implicitly inconsistent. The explicit inconsistency manifested when (instead of denying that he was directed at the November meeting to stop actively participating in student games) Grievant simply testified that he did not recall Deputy Superintendent Murphy issuing the directive. The implicit inconsistency is seen in his grievance filing where Grievant did not deny he was issued the verbal directive but rather honed his argument of entitlement to a written directive, arguing it was necessary so he could better process the directive and the consequences of violating it. It seems implausible that Grievant would have left off his grievance that he disputed the existence of the directive and instead only addressed the tangential issue of lack of a written directive, when the issue of the existence of the verbal directive was obviously more relevant to insubordination and its elements since this was the central factor in his discipline. The grievance did not even hint at a denial of insubordination or the elements thereof. Grievant likely would have been familiar with a conventional definition of “insubordination” when the allegation was given as a basis for his possible

dismissal in the letters leading up to his dismissal. Grievant would have known that “insubordination” requires some sort of directive, as the letters leading up to his dismissal explicitly informed Grievant he was insubordinate because he ignored a verbal directive by the Deputy Superintendent to not participate in PE activities with students. While Grievant more explicitly, through his attorney, denied ever receiving this verbal directive, he did not make a denial in his grievance, and in his testimony only gave a half-hearted denial in saying he did “not recall” rather than that “it never happened.”

As for Deputy Superintendent Murphy and Principal Sisinni, neither had motive to fabricate. Neither had bias against Grievant. While Respondent presented evidence (for reasons unrelated to credibility) that Grievant posted on social media that Respondent paid for Deputy Superintendent Murphy to travel from his home in Ohio County to his workplace in Brooke County, Grievant did not use this evidence to imply that it motivated Murphy to be biased against him. It appears that Grievant’s post occurred after Murphy had already committed to his version of the meeting with Grievant. Both Murphy and Sisinni had an appropriate demeanor reflecting that they were not emotionally tied to their version of the meeting. It seems likely that Grievant would have been angry at Deputy Superintendent Murphy if he felt that Murphy lied about the directive. Tellingly, Grievant made no effort to discredit Murphy or Sisinni. The evidence shows that Grievant directed his vitriol only towards Crooks and Respondent and seemingly shows concern for Murphy after his dismissal in warning him by text to watch his back from Superintendent Crooks. Both Murphy and Sisinni were consistent and steadfast in their version of the verbal directive given to Grievant by Murphy at the November meeting. Which leads to the conclusion that Deputy Superintendent Murphy and Principal Sisinni are more credible

than Grievant in their version of the November meeting. Thus, it is clear that Grievant was directed not to actively participate in student games. Respondent proved that Grievant jeopardized student safety and was insubordinate when he actively participated in “agility ball” with students on December 5, 2025.

Grievant attempts to disallow evidence of the directive issued at the November meeting by arguing that he was never informed that the meeting was disciplinary, implying that the meeting and any directive issued at the meeting must be disregarded. Whether the directive is disciplinary is a red herring. The directive against active participation in student games was not thereafter used for progressive discipline against Grievant but simply to show that Grievant met the elements of insubordination.

As for Grievant’s assertion that the directive had to be in writing given the dire consequences of violating it, there is no authority for this assertion. While Respondent could have better ensured and more easily proven that Grievant received and understood the directive by reducing it to writing, Respondent nevertheless proved that it was more likely than not that Grievant received the verbal directive and understood it.

In receiving the verbal directive, Grievant knew what was expected of him but chose not to comply. Grievant implies that the directive was unreasonable and thus invalid because “agility ball” was regularly played in PE class in all of Respondent’s schools but that Respondent never attempted to stop the game. Grievant contends that his participation was in line with the mandate to foster a good relationship with students. However, this mandate was not issued by Respondent and did not entail active participation in student games. Regardless, Respondent’s rationale against faculty participation in student games to ensure student safety is reasonable given the size and

strength differential between faculty and students and the real possibility that students could get hurt if faculty participates. Whether the student at issue was later injured is irrelevant to the validity of Respondent's safety consideration and the directive that resulted in Grievant's insubordination. 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 contends that his dismissal warrants mitigation because his conduct is correctible and his performance stellar as documented in his 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). "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3 (2018).

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 insubordination and jeopardized student safety, meaning willful neglect of duty rather than unsatisfactory performance. This conclusion was not arbitrary and capricious, given the directive against active participation that Respondent had only weeks prior given to Grievant that was reasonably meant to ensure student safety. Grievant did not present evidence that other PE teachers had received a lesser punishment for active participation in student games. 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 a direct order that was reasonably meant to ensure student safety. Thus, mitigation is unwarranted.

Grievant implies that his dismissal was motivated by retaliation. "No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination." W. VA. CODE § 6C-2-3(h). Reprisal is defined as "the retaliation of an employer toward a grievant, witness, representative or any other

participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.” W. VA. CODE § 6C-2-2(o).

“In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation must establish a *prima facie* case.” *Freeman v. Fayette Cty. Bd. of Educ.*, 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004). In syllabus point six of *Freeman*, the West Virginia Supreme Court of Appeals specifically applied the same elements required to prove a *prima facie* case under the West Virginia Human Rights Act to a claim arising from a public employee grievance stating,

[T]he burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

Id., Syl. Pt. 6, 215 W. Va. at 275, 599 S.E.2d at 698 (citing Syl. Pt. 4, *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); Syl. Pt. 1, *Brammer v. Human Rights Comm'n*, 183 W. Va. 108, 394 S.E.2d 340 (1990); Syl. Pt. 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)).

“An employer may rebut the presumption of retaliatory action by offering ‘credible evidence of legitimate nondiscriminatory reasons for its actions’ *Mace v. Pizza Hut, Inc.*, 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); see also *Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983). Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the

reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. *Mace*, 377 S.E.2d 461 at 464.” *W. Va. Dep’t of Nat. Res. v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994); *Conner v. Barbour Cty. Bd. of Educ.*, 200 W. Va. 405, 409, 489 S.E.2d 787 (1997).

Grievant did not allege, let alone prove, that he engaged in a protected activity and thus failed to make a *prima facie* case of retaliation. Even if he had, Respondent provided evidence of legitimate nondiscriminatory reasons for dismissal which Grievant failed to prove were a pretext for discrimination.

Grievant implies he was denied due process, arguing he was never disciplined for the November incident that led to the verbal directive, never given a written directive against active participation in student games, and never told of potential consequences of active participation. However, Grievant was given due process through notice of the allegations against him and an opportunity to address the charge at the due process hearing. 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 an evidentiary hearing before the Board and was given the opportunity to present his evidence. Thus, 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 jeopardized student safety by engaging in insubordination, which amounted to willful neglect of duty, and that his conduct was not correctable, justifying his dismissal. Grievant did not prove

by a preponderance of the evidence his discipline was motivated by retaliation, that he was denied due process, 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 jeopardized student safety through his insubordination, amounting to willful neglect of duty, and that his conduct was not correctible, justifying his dismissal.

7. "No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination." W. VA. CODE § 6C-2-3(h). Reprisal is defined as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." W. VA. CODE § 6C-2-2(o).

8. "In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation must establish a prima facie case." *Freeman v. Fayette Cty. Bd. of Educ.*, 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004). In syllabus point six of *Freeman*, the West Virginia Supreme Court of Appeals specifically applied the same elements required to prove a prima facie case under the West Virginia Human Rights Act to a claim arising from a public employee grievance stating,

[T]he burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's

discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

Id., Syl. Pt. 6, 215 W. Va. at 275, 599 S.E.2d at 698 (*citing* Syl. Pt. 4, *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); Syl. Pt. 1, *Brammer v. Human Rights Comm'n*, 183 W. Va. 108, 394 S.E.2d 340 (1990); Syl. Pt. 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)).

9. Grievant failed to prove retaliation by a preponderance of the evidence.

10. "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).

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

12. "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).

13. “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.

14. 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: July 16, 2026

Joshua S. Fraenkel
Administrative Law Judge