

# THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**MARY DURSTEIN,**  
**Grievant,**

**v.**

**Docket No. 2017-1955-CabED**

**CABELL COUNTY BOARD OF EDUCATION,**  
**Respondent.**

## **DECISION**

Mary Durstein, Grievant, was a teacher for Respondent, Cabell County Board of Education ("Board"), for approximately seventeen years. On March 14, 2017, Ms. Durstein filed an expedite grievance<sup>1</sup> contesting the termination of her employment with Respondent. She specifically alleged:

. . . She was unlawfully terminated without just cause for exercising her First Amendment rights. Respondent clearly and unequivocally contributed to [any notoriety resulting from Grievant's speech] . . . [S]he has been discriminated against based upon the penalty she received in this case as it relates to several other similarly situated employees and former employees of Respondent. Alternatively, Grievant asserts that the disciplinary action . . . is disproportionate to the conduct at issue. . . [She was denied] the right to representation at a meeting that lead to disciplinary action. . .

In addition to general relief, Grievant seeks reinstatement with back pay, and restitution for all benefits lost due to the disciplinary action.

A level three hearing was held at the Charleston office of the West Virginia Public Employees Grievance Board over two days; May 1, 2017, and June 2, 2017. Ms. Durstein

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<sup>1</sup> W. VA. CODE § 6C-2-4 (a) (4) authorizes covered employees who have been dismissed from employment to file a grievance directly to level three of the grievance procedure.

was present and represented by Jeffrey G. Blaydes, Esquire, Carbone and Blaydes, PLLC. Respondent was represented by Richard S. Boothby, Esquire, Bowles Rice, PLLC. This matter became mature for decision of July 3, 2017, upon receipt of the last Proposed Findings of Fact and Conclusions of Law.

### **Synopsis**

Grievant, a social studies teacher, made several provocative posts on her public Twitter account which became the subject of significant notoriety when they were exposed by other Twitter users. Respondent determined that due to the nature of the posts, as well as their notoriety, it was not possible for Grievant to continue as an effective social studies teacher and terminated her employment.

Grievant argued that Respondent contributed to the notoriety of her Twitter posts, that there was no rational nexus between the posts and Grievant's job duties, that the other employees were given less discipline for similar offenses and that Respondent was barred from dismissing Grievant because her posts were protected by the First Amendment.

Respondent proved there was a rational nexus between Grievant's conduct away from work and her job duties, and that there was significant untainted notoriety to support Grievant's dismissal. Additionally, Grievant was not similarly situated with the other employees she cited to prove discrimination. Respondent proved that the Grievant's activity was not entitled to free speech protections, and the employers interests in creating a safe, healthy, and unbiased learning environment outweighed Grievant's free speech interests.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter, including the lower level transcript and exhibits, as well as, the testimony and exhibits offered at the level three hearing.

### **Findings of Fact**

1. Mary Durstein, Grievant, was employed by Respondent, Cabell County Board of Education, and assigned to teach social studies at Huntington High School. Grievant was employed by Respondent for seventeen years, the last five of which has been in her high school social studies assignment. Prior to her assignment at Huntington High School, Grievant taught middle school reading.

2. The Huntington High School student population includes approximately fifteen percent African-American pupils (around 200), smaller percentages of other ethnic minorities, including Muslim pupils, and at least one member of the faculty who is Muslim.

3. Grievant had success at her teaching position and was generally viewed as a valuable member of the faculty by her supervisors and colleagues. All of the performance evaluations submitted as evidence indicated that she met standards.<sup>2</sup>

4. Beyond her teaching assignment, Grievant participated in the Freshman Academy; volunteered to serve as the sponsor the school's Young Republican Club; and

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<sup>2</sup> Grievant's Exhibit 3. Given the testimony of at least one of her principals, it is more likely than not that she was rated as at least meeting standards on all of her performance evaluations.

at the principal's request, assumed sponsorship for the National Honor Society when the previous sponsor left that position.

5. While serving as the Honor Society sponsor, Grievant approached a student of Arabic descent<sup>3</sup> who had not previously applied for admission even though he clearly qualified. After Grievant talked with the student, he applied in his senior year and was admitted. The student's parents expressed appreciation to Grievant for encouraging their son.

6. Grievant helped raise money and contributed her own time and money to help financially disadvantaged students, including children of color.<sup>4</sup> Additionally, Grievant arranged for an African-American civil rights leader, who participated in the march on Selma Alabama, and a Holocaust survivor and noted author to speak to the students in Cabell County.<sup>5</sup>

7. The ninth-grade social studies classes taught by Grievant at Huntington High School were entitled World Studies, and utilized McGraw Hill's *World History & Geography*, as the textbook. (Respondent Exhibit 2).

8. A chapter of the text to be covered in this class is entitled The Arab Empire and covers significant issues related to Islam including: the life of Muhammad; the basic writings of the Quran; the founding and five pillars of Islam; shari'ah law; jihad; the

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<sup>3</sup> There was no evidence provided about any religious affiliation of this student. One hopes that the ALJ was not expected to assume he was a practitioner of any given faith because of his family's name.

<sup>4</sup> Incidents included funding and organizing signing ceremonies for two African American students; one for a sports scholarship and one for the Air Force enlistment. She also donated clothing and other items for a family who had lost their belongings in a house fire.

<sup>5</sup> Grievant helped raise money for these events. Grievant's students studied the "Diary of Ann Frank" immediately prior to the visit from the Holocaust survivor.

difference between Shia and Sunni Muslims; radical fundamentalists; Islamic society and the role of women; the Arab Empire's tolerance of other faiths; as well as the Arab contributions to philosophy, science history, literature, art and agriculture. *Id.*

9. One of the objectives of World Studies class is to teach the benefits of diversity and tolerance toward those who are different.

10. The 2016 primary and general elections for President were strongly contested with a great deal of coverage on television, radio, print and social media.

11. Grievant followed these elections closely and participated in social media discussions related thereto. She had a public Twitter account through which she communicated with other account holders and participated in interactive programming on the Fox news channel. She also posted comments and memes<sup>6</sup> on both her Twitter account and her Facebook page. Grievant had posted to her Twitter account for at least eighteen months.<sup>7</sup>

12. On January 8, 2017, a Twitter user sent a tweet with the hashtag “#MaryDurstainIsOverParty” saying “Nah we exposin Mary durstein’s twitter tonight I’ve had enough.”<sup>8</sup> Below this tweet is a tweet to Twitter user which contains a link to a January 8, 2017, Twitter post by Karima Neghmouche. (Respondent Exhibit 5).

13. Karima Neghmouche is a student of journalism at Marshall University. She attended Huntington High School before enrolling at Marshall. Ms. Neghmouche’s tweet

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<sup>6</sup> In this context, a “meme” is “a cultural item in the form of an image, video, phrase, etc., that is spread via the Internet and often altered in a creative or humorous way.” *Dictionary.com Unabridged*. Random House, Inc. 1 Sep. 2017.

<sup>7</sup> Posts on Twitter accounts are commonly referred to as “tweets.”

<sup>8</sup> Twitter messages are typed quickly and are limited to 140 characters. Consequently, abbreviations and shortcuts are often used and typographical errors are made. The tweets and postings quoted herein are written as they appear in the original internet sites.

contained screen captures of Grievant's Twitter posts. She obtained these screen shots by visiting Grievant's public twitter page on the internet.

14. Grievant's twitter posts include the following:

- A tweet from July 18, 2015, when participating in a Fox News interactive program stating, "Who cares if we offend Muslims at least they keep their heads on tact. (sic) They're the enemy!"
- This post was retweeted by Grievant on January 8, 2017, when the posts were made public with the message, "I'm flattered that a tweet from July 2015 is getting a lot of attention this evening. 😊😊😊😊"<sup>9</sup>
- A retweet of a meme calling for the deportation of several members of the Muslim family because they were related to a mentally ill man accused of murder.
- On May 26, 2016, retweeted a meme of a picture of President Obama placing a wreath at Hiroshima Japan with the caption, "OBAMA IN JAPAN MEMORIAL WEEKEND APOLOGIZING" over a picture of the USS Arizona Memorial in Pearl Harbor with the caption, "THIS IS WHERE YOU BELONG YOU MUSLIM DOUCHEBAG." Grievant added, "Exactly !!!!!!!!!!"
- Retweet a meme of a Muslim man and woman standing on a walkway. The woman is completely covered by a burka<sup>10</sup> and her face is not visible, with the heading: ISLAMIST ADVANTAGE: WHEN YOU DIVORSE YOUR WIFE AND REMARRY, YOU CAN STILL KEEP THE SAME PHOTO ON YOUR DESK. Grievant added: "Too funny not to tweet!"
- Retweeted a Fox News clip about the NYPD allowing Sikh officers to wear turbans and beards while on duty. Grievant commented, "only until January 20<sup>th</sup>." Another person tweeted "A President doesn't control the NYPD." To which Grievant replied: "That is true, no more political correctness after 1/20 can't wait Finally liberated 😊😊😊😊😊."

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<sup>9</sup> Four "Smiley Face" emoji's included in the original.

<sup>10</sup> A loose garment covering the entire body and having a veiled opening for the eyes, worn by Muslim women. *Dictionary.com Unabridged*. Random House, Inc. 1 Sep. 2017.

- On January 5, 2017, Grievant retweet a meme with a picture of four black teens who were accused of torturing a special needs student in Chicago with the caption: **Imagine if these were 4 white people torturing a special needs black kid!**<sup>11</sup> The person Grievant retweeted had commented, “can you imagine how many riots we would have around the country if the terrorists were white.” Grievant comments: “this could have been Obama’s children.” When asked what that meant. Grievant replied, “play on words every time something happens to young folks that’s is Obama’s quote. “This could be my son.”
- In response to receiving a meme that showed a swastika in front of Donald Trump’s face, Grievant wrote, “awesome! Do you mind if I share with my alt right<sup>12</sup> friends? 😊”
- Retweeted a Message stating “BLM<sup>13</sup> should be listed as a terrorist group.”
- In response to a teacher posting “I have students . . . where I teach who are crying & struggling & fearing for their well-being in the wake of this [Presidential] election.” Grievant replied “I want to sing to this nut . . . Cry baby, cry baby stick your finger in your eye . . . what a whiny a\*\*.”

15. Within a very short time, several Twitter users posted comments on Ms. Neghmouche’s post of Grievant’s Twitter activities expressing disdain and their intent to pass the information on as well as contact Cabell County Schools. At least one post forwarded the information to a local television station. Some of the twitter responses were from students at Huntington High School.<sup>14</sup>

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<sup>11</sup> Emphasis in the original.

<sup>12</sup> “Alt-right is defined as “a political movement originating on social media and online forums, composed of a segment of conservatives who support extreme right-wing ideologies, including white nationalism and anti-Semitism.” *Dictionary.com Unabridged*. Random House, Inc. 1 Sep. 2017. See also, Daniszewski, John (November 26, 2016). “Writing about the ‘alt-right’”. *Associated Press*.

<sup>13</sup> “BLM” is the initials for the “Black Lives Matter” movement.

<sup>14</sup> Respondent Level 3 Exhibit 2 and testimony of Jedd Flowers. More than a hundred people retweeted Ms. Neghmouche’s post of Grievant’s Twitter activities.

16. Grievant also posted a picture, taken from behind, of two apparently Muslim women wearing hijabs.<sup>15</sup> The captions above the picture stated:

**Mary Thomas Durstein 🙄 feeling disgusted with Peggy Barebo at National September 11 Memorial & Museum<sup>16</sup>**

This is what I had to look at going into the 9/11 Memorial Museum

(Respondent Rebuttal Exhibit 1).

17. During the morning of January 9, 2017, Superintendent, William Smith, and Assistant Superintendent, Todd Alexander, began getting text messages and telephone messages that there was an issue about Twitter messages from a teacher circulating through the public and schools.

18. A Twitter user<sup>17</sup> posted a tweet in the early morning hours which included the address for Cabell County Schools<sup>18</sup> which generated an instant e-mail notification to the Cabell County Schools Director of Communications, Jedd Flowers. This text included the posts which had been sent by Ms. Neghmouche and the question, “you seriously allow someone who openly posts racist tweets to teach children?”.<sup>19</sup> Director Flowers forwarded the posts to Superintendent Smith and Assistant Superintendent Alexander to alert them to the issue. No agent of Respondent initiated contact with any member of the media regarding Grievant’s tweets and re-tweets.

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<sup>15</sup> A traditional scarf worn by Muslim women to cover the hair and neck and sometimes the face. *Dictionary.com Unabridged*. Random House, Inc. 1 Sep. 2017.

<sup>16</sup> Emphasis and frowny emoji in the original.

<sup>17</sup> The user name of this person was Mrs. Gandage. The retweet was sent at 3:24 a.m.

<sup>18</sup> (@cabellschools).

<sup>19</sup> (Respondent Level 3 Exhibit 3).



19. At 10:17 a.m. Director Flowers received an e-mail from Kristen Schneider, Managing Editor for WSAZ-TV3. She wrote:

It appears we have another twitter issue regarding a teacher at Huntington High School. I know the last one turned out to be a fake account – could you check into this one please?

(Respondent Level 3 Exhibit 5). Ms. Schneider attached an e-mail the station had received about the postings on Ms. Durstein's Twitter account that identified Grievant as a World Studies teacher at Huntington High School. The sender attached copies of the material retweeted by Ms. Neghmouche and stated that the content was "highly offensive and racist toward minorities and Muslims." *Id.* Director Flowers called Ms. Schneider and said he would check into the situation.

20. Grievant met with Assistant Superintendent Todd Alexander, at the Board office on the morning of January 9, 2017. Mr. Alexander had been made aware of the postings by Mr. Flowers and Joedy Cunningham, HHS Principal. Grievant gave an explanation for each posting and agreed to close and take down her Twitter account. Mr. Alexander told Grievant not to speak with the news media regarding the posts and she complied.

21. Director Flowers was contacted about the Twitter posts by Eric Beck of the Charleston Gazette-Mail, Josie Mendez of the Huntington Herald Dispatch, Kristen Schneider of WSAZ-TV3, and Tara Wilcox of Channel 8 News. The story was picked up by the Associated Press and United Press International news services which caused the story to be published in other states and England.<sup>20</sup>

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<sup>20</sup> Level three hearing testimony of Jedd Flowers.

22. Director Flowers was interviewed by a reporter for WSAZ-TV3 and said he was first alerted about the situation early in the morning when students were complaining about some of the tweets. On camera, Mr. Flowers said:

I was pretty surprised to see these tweets. She hasn't had her fair hearing yet so she has an opportunity to explain what happened or what these tweets are, but to me they were quite surprising.<sup>21</sup>

Mr. Flowers also noted that Grievant had left the school and taken down her Twitter account.

23. A lengthy story on the issue was published by the Charleston Gazette-Mail on January 9, 2017, which discussed the content of Grievant's tweets and the reaction to them.<sup>22</sup> Mr. Flowers and Superintendent Smith were interviewed for the story. Director Flowers confirmed that the Twitter account belonged to Grievant and that she had been sent home with pay while school officials investigated the matter. He was quoted as saying "She has a right to be heard," and "We have asked her to take the account down while we're investigating the situation, but we already archived the tweets." Superintendent Smith was asked about the school system's code of conduct which he said sets forth "a certain expectation of professionalism." "That's the kind of expectation I would hold any teacher to." (Respondent Level Three Exhibit 4.)

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<sup>21</sup> (Grievant Level Three Exhibit 10) A video clip of the interview of Jedd Flowers on WSAZ-TV3.

<sup>22</sup> Ms. Neghmouche, a Marshall University student and Huntington High School graduate, was interviewed and was quoted as saying, "Of course, it offended me." "[But] it's more I'm genuinely worried about the kids sitting in her class that might be wearing a hijab or having an accent that are already going through so much." (Respondent Level Three Exhibit 4.)

24. On January 9, 2017, an article related to Grievant's Twitter post and the reaction thereto was published in the Huntington Herald Dispatch.<sup>23</sup> Once again, Director Flowers confirmed that the tweets in question were posted on Grievant's account. He also said:

[The students] did the right thing by reaching out to us and letting us know. We want the message to our students to be that all kinds are welcome at Cabell County Schools. We embrace diversity. Inclusion is essential to everything that we do.

Superintendent Smith was quoted as saying:

The tweets that you have seen – those are things we do not adhere to. We believe that all children are welcome here – all adults as well – in Cabell County schools. We want to make sure that is clear to the employees that work for us.

We expect the same conduct on social media that we do in the classroom. We don't want to deny teachers access they can have to the Internet or Facebook and all the other stuff they want to have, but they need to be cognizant of who they are speaking to. And when what they say interferes with the educational process, it becomes a problem.

(Respondent Level Three Exhibit 6).

25. Respondent's administration received many messages through social media, telephone messages and mail expressing anger and concern regarding the nature of Grievant's Twitter content. Among those was a letter from Dr. Majed Khader on behalf of the Muslim Association of Huntington. Dr. Khader reiterated the comments about Muslims and stated:

. . . Needless to say, these tweets, along with the equally inflammatory ones on African Americans, are indicative of bigotry, hatred, and I'm sorry to say, ignorance. A Muslim or

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<sup>23</sup> (Respondent Level Three Exhibit 6) The on-line version of the story was updated on January 10, 2017. The exhibit was a copy of this updated version.

African teenager attending Huntington High will definitely feel inferior or at least unwelcome in his/her own state should this behavior go unchecked.

(Respondent Exhibit 7).

26. Several students brought the tweets to the attention of a math teacher at Huntington High who is Muslim. When she saw the memes, she wept. She was asked by Principal Cunningham to write a letter concerning how the tweets affected her. She wrote in part:

. . . At the beginning of the last school year I introduced myself to Mrs. Durstein.<sup>24</sup> She has always been nice to me and we had a mutually respectful co-worker relationship. She once even offered to help when someone vandalized my home. . .

After noting that several students presented her with screenshots of Grievant's tweets she wrote:

I found them to be highly offensive. I felt threatened by her tweets which stated that Muslims should be lucky that their heads are still intact and Muslims are the enemy<sup>25</sup>. . . I was shocked to see all of these tweets and could not understand how someone, especially a teacher, could be so nice in person yet hold such racist views.

(Respondent Exhibit 8).

27. Respondent does not have a specific Internet Acceptable Use Policy, but all personnel are required to follow the West Virginia Board of Education Acceptable Use Policy 2460. Grievant signed an acknowledgement stating that she had read and understood the terms and requirements of that policy on August 8, 2016.

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<sup>24</sup> The math teacher and Grievant had abutting parking spaces at the school.

<sup>25</sup> The math teacher also note the presence of "tweets that were racist against African Americans.

28. David Tackett is an Administrative Assistant for Secondary Schools in Cabell County. His position rarely requires interaction with students.

29. Another employee complained about postings on Mr. Tackett's Facebook page. Among the postings were memes opposing gun control.<sup>26</sup> He also posted several memes supporting Donald Trump and some related to Islam. One such meme stated "Radical Islam is the Problem." Another meme showed a picture of a diving warplane dropping bombs with the caption, "BE PATIENT ISIS...OUR NEXT PRESIDENT WON'T BE A MUSLIM BROTHER." (Emphasis in original) (Grievant Exhibit 2).

30. There was no evidence that there were any other complaints and Mr. Tackett's Facebook postings did not become subject to any notoriety. On February 1, 2017, Assistant Superintendent Todd Alexander met with Mr. Tackett to discuss the complaint, instructed Mr. Tackett to take the posts down, and issued him a written reprimand. (Grievant Level Three Exhibit 2).

31. Another teacher chose to resign rather than be dismissed from employment for allowing one student to take a picture of another student "mooning" while they were meeting in her classroom.<sup>27</sup>

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<sup>26</sup> For example, on meme stated "The problem is not guns! It's hearts without God, homes without discipline, schools without prayer and courts without justice." Another showed a picture of an actor dressed like a cowboy with the caption "SORRY BUT I DON'T LISTEN TO ANTI-GUN LECTURES FROM PEOPLE WHO THINK IT'S OK TO KILL A BABY." (Emphasis in original).

<sup>27</sup> Grievant Level Three Exhibit 5) a copy of a settlement agreement between Respondent and the teacher.

32. Another teacher directed students to a website where he was performing in a band at a nightclub wearing a diaper and “thrusting” suggestively, received a ten-day suspension.<sup>28</sup>

33. Superintendent Smith met with Grievant on January 23, 2017, to discuss concerns related to the forgoing memes and tweets, charges which might be considered for discipline and gave Grievant an opportunity to respond. He then issued a letter dated January 24, 2017, informing Grievant that he was suspending her and would ask the Board of Education to terminate her employment contract. In the letter, Superintendent Smith went over the content standards Grievant was required to teach in her Social Studies class, the Twitter posts from Grievant’s account, the explanations given by Grievant for each one, and concluded:

In any case, your public statements are antithetical to the course content you are paid by the Board to impart to students, I find that your continued employment as a Social Studies teacher simply and in every way untenable.

Superintendent Smith then noted that on January 9, 2017, Grievant’s Twitter statements “became the subject of local national and international news coverage.”<sup>29</sup> Community members were voicing extreme concern about Grievant remaining in the classroom and some parents had asked for their children to be removed from her class. He concluded:

In short, your conduct has become the subject of such notoriety as to significantly and reasonably impair your capability to discharge your teaching responsibilities.”

(Respondent Exhibit 1).

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<sup>28</sup> While the web page was popular for a short time among some students, there was no evidence that it became the subject of public notoriety.

<sup>29</sup> Superintendent Smith recounted how Grievant’s Twitter statements had been brought to public and media attention through members of the public with no involvement by Respondent’s agents.

34, A hearing was held before the Cabell County Board of Education on March 6, 2017, to hear the reasons for Superintendent Smith's reasons for seeking the termination of Grievant's contract and Grievant's defense against those charges. By letter dated March 7, 2017, Superintendent Smith informed Grievant that the Board voted to ratify his previous suspension and terminate Grievant's employment for the reasons set out in the January 23, 2017, suspension letter.

35. The Cabell County Employee Code of Conduct states in part:

All Cabell County professional employees shall:

- A. Exhibit professional behavior by showing positive examples of preparedness, communication, fairness, punctuality, language and appearance;
- B. Contribute, cooperate, and participate in creating an environment in which all employee/students are accepted and are provided an opportunity to achieve at the highest levels in all areas of development;
- C. Maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination;
- D. Create a culture of caring through understanding and support.

Grievant signed a verification on August 8, 2016, that she had been made aware of this policy and its contents. (Respondent Exhibit 9).

### **Discussion**

As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

. . . See [*Watkins v. McDowell County Bd. of Educ.*, 229 W.Va. 500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education*, 227 W.Va.

525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). See also *Hovermale v. Berkeley Springs Moose Lodge*, 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) (“Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence.”). . .

*W. Va. Dep’t of Trans., Div. of Highways v. Litten*, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Respondent dismissed Grievant for comments, memes, tweets and retweets Grievant posted on her public<sup>30</sup> Twitter account which appeared to be racist and anti-Muslim. No one contends that Grievant posted to her Twitter account while she was at work or used Respondent’s equipment in doing so. The conduct for which Grievant was dismissed occurred away from work and on Grievant’s electronic devices. It is well settled that “In order to dismiss a school board employee for acts performed at a time and place separate from employment, the Board must demonstrate a 'rational nexus' between the conduct performed outside of the job and the duties the employee is to perform. *Syllabus Point 2, Golden v. Bd. of Educ.*, 169 W. Va. 63, 285 S.E.2d 665 (1981).” *Syl. Pt. 2. Woo*

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<sup>30</sup> There was no dispute that Grievant’s Twitter account was public. Grievant noted that she had very few followers but anyone could find and access the account if they were looking for it. Additionally, her followers, and their followers, and so on, could retweet anything Grievant posted. This is the nature of public media and explains why anything someone posts to a public account can become distributed world-wide in a matter of days if not hours.



*v. Putnam County Bd. of Educ.*, 202 W. Va. 409, 413 (W. Va. June 24, 1998). The West Virginia Supreme Court additionally stated:

The conduct of a teacher ceases to be private in at least two circumstances: (1) if the conduct directly affects the performance of the occupational responsibilities of the teacher; or (2) if, without contribution on the part of the school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the particular teacher to discharge the responsibilities of the teaching position.

*Woo, supra*, 202 W. Va. 409, 412.

There is no dispute that Grievant's Twitter posts received significant notoriety. They were retweeted to a wide cross section of the public by Ms. Neghmouche during the evening of January 8, 2017. By the morning of January 9, 2017, they were being circulated by the general public as well as students at Huntington High School to the extent that HHS Principal, Assistant Superintendent Alexander, and Communications Director Flowers had been separately notified of the growing issue. Indeed, Mr. Flowers had been contacted by the local television station and two daily newspapers regarding the posts shortly after arriving at work. The tweets became the topic of two lengthy newspaper stories, and television news features on two local stations in less than two days. These stories were picked up by both news services, and were featured in national and international publications. Additionally, the Board office received social media communications, e-mails, letter, and telephone calls decrying Grievant's on-line activity, and several students brought the memes to a Muslim math teacher in the High School.

There can be no doubt that Grievant's posts regarding Muslims and African-Americans became notorious on a local, and, to a certain extent, much wider scale. Grievant argues Respondent's agents contributed to the notoriety of Grievant's activities

when Director Flowers appeared in a television interview on the subject and stated, among other things, that Grievant had gone home and had closed her Twitter account. Additionally, Superintendent Smith was quoted in newspaper stories that the Cabell County School system encourages acceptance of all students and expected their employees to emulate that attitude at work and in public.

These comments may have added to the length of the news stories but certainly did not initiate them. As noted previously, the news media were on the story and seeking comments from Respondent's agents early in the morning of January 9, 2017. At least one of the commenters on social media had forwarded the tweets and identified Grievant as the poster before the administration became aware of them. Superintendent Smith candidly testified that he would have preferred that Director Flowers had not mentioned that Grievant had gone home or that she had closed down her account, but not one of the Board's employees initiated contact with the media or took any action aimed at heightening the media coverage.

In *Woo v. Putnam County Board of Education, supra*, a teacher admitted under oath in a public trial, to regular use of marijuana. Members of the community circulated a petition seeking the teacher's dismissal. It was proven that someone from the board office leaked to the press, information about public petitions and actions the board members had considered regarding the teacher while they were in executive session. Addressing this issue the West Virginia Supreme Court wrote:

Although the Board had the burden to prove sufficient notoriety that did not result from the Board's contribution, we do not see how this general burden translates into a specific burden to *disprove* the possible effect of Board-"tainted" leaked information on each of the 700 petition signers'

decision to protest appellee's continuation as a teacher. Such a burden would be practically impossible.

Rather, to prevail on this factual issue the Board could and did show to the ALJ's satisfaction, through Board officials and the petition circulators, that it was more likely than not that there was a substantial amount of "untainted" notoriety regarding the appellee.

*Woo, supra*, 202 W. Va. 409, 412. In this case, Respondent's representatives answered questions posed to them by reporters who were already heavily engaged in the story. While Director Flowers made comments regarding Grievant's account, both he and Superintendent Smith noted that she had a right to address the issues and not one agent of Respondent overtly or covertly attempted to give Grievant's conduct more public attention as was done in *Woo, supra*. The record is replete with evidence of a substantial amount of untainted notoriety regarding Grievant's conduct. In fact, it is more likely than not that the comments made by Director Flowers and Superintendent Smith did not significantly contribute to the notorious nature of the issue.

Respondent has shown a rational nexus between Grievant's conduct outside of the job and her duties as a social studies teacher. First, Grievant is charged with teaching sections relating to Islam and how that religion has influenced the world. The text notes how the Islamic community has made many positive contributions in the areas of mathematics, science and art. It would be difficult for students to reconcile Grievant's in class statements regarding these issues with her very public pronouncements that Muslims are the enemy, should be deported and disgust her when visiting a national disaster memorial where people of many faiths and nationalities were attacked and killed.

Additionally, there is a significant population of African-American students and some Muslim students who, now and in the future, will attend Huntington High School.

Social studies courses are part of the required curriculum so it is almost a certainty that many of these students would be enrolled in Grievant's classes, as they have been in the past. Certainly, Grievant's on-line comments disparaging African-Americans and demonizing Muslims would make it very difficult for students to feel welcome regardless of any efforts Grievant might take to alleviate their concerns.

Most importantly, West Virginia school officials have made a concerted effort to end bullying and cultivate school communities where all student's feel welcome. To that end, the Cabell County Board of Education has adopted a code of conduct which requires all professional personnel to:

- Contribute, cooperate, and participate in creating an environment in which all employee/students are accepted and are provided an opportunity to achieve at the highest levels in all areas of development;
- Maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination; and,
- Create a culture of caring through understanding and support.

Grievant's harsh and sarcastic comments regarding African-Americans and Muslims do not create an environment where these students are accepted and free of intimidation. To the contrary, on November 23, 2016, in response to a teacher posting "I have students . . . where I teach who are crying & struggling & fearing for their well-being in the wake of this [Presidential] election." Grievant replied "I want to sing to this nut . . . Cry baby, cry baby stick your finger in your eye . . . what a whiny a\*\*." (Respondent Exhibit 5).

Grievant's away from work behavior clearly violates the word and spirit of the Cabell County Employee Code of Conduct. A number of Grievance Board decisions have held that an employer can establish insubordination by demonstrating a policy or directive

that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995); *Domingues v. Fayette County Bd. of Educ.*, Docket No. 04-10-341 (Jan. 28, 2005); *Breck v. Putnam County Bd. of Educ.*, Docket No. 2011-1542-PutED (February 13, 2012); *Robinette v. Boone County Bd. of Educ.*, Docket No. 2014-1437-BooED (Feb. 10, 2015). Grievant's flagrant violation of the Code of Conduct meets the definition of "insubordination as contemplated for dismissal of a school board employee in WEST VIRGINIA CODE § 18A-2-8.<sup>31</sup>

Next Grievant argues that she has been subject to discrimination because her employment was terminated while other employees who had similar public incidents were given lesser forms of discipline. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA.CODE § 6C-2-2 (d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

- (a) That he or she has been treated differently from one or more similarly-situated employee(s);
- (b) That the different treatment is not related to the actual job responsibilities of the employees; and,
- (c) That the difference in treatment was not agreed to in writing by the employee.

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<sup>31</sup> **§18A-2-8. Suspension and dismissal of school personnel by board; appeal.**

(a) Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge.

*Frymier v. Higher Education Policy Comm'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant did not prove that the employees she compared herself were similarly situated. One person did post negative memes regarding Muslims which led to another employee complaint. He was given a written reprimand and took down his site. However, this employee was not a teacher, and did not teach a social studies course involving sections on Islamic culture and contributions. Of the other employees who posted different types of problematic web information one received a suspension and another was resigned rather than be dismissed. Again, neither of these situations received national and international notoriety to the extent that it would reasonably make it impossible to effectively return to their classrooms. Grievant did not prove that she was subject to discrimination as defined in the grievance statutes.

Grievant asserts that her Twitter statements were made as part of the public discourse involved in the 2016 election. As such, Grievant argues that her public statements, in the form of tweets, retweets and memes are protected by the First Amendment of the United State Constitution, prohibiting Respondent for terminating her employment based upon those statements. The First Amendment of the Constitution of the United States provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The West Virginia Supreme Court of appeals set out the standard by which the First Amendment is applied to the termination of a public-school employee in *Alderman v. Pocahontas County Bd. of Educ.*, 223 W. Va. 431; 675 S.E.2d 907 (2009).<sup>33</sup> The Court began the analysis by noting:

When this Court was previously confronted with analyzing a similar issue of free speech under the First Amendment, we relied on a case from the United States Supreme Court in holding: Under *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968), public employees are entitled to be protected from firings, demotions and other adverse employment consequences resulting from the exercise of their free speech rights, as well as other First Amendment rights. However, *Pickering* recognized that the State, as an employer, also has an interest in the efficient and orderly operation of its affairs that must be balanced with the public employees' right to free speech, which is not absolute. *Syl. pt. 3, Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1984).

*Alderson, supra*, 223 W. Va. 431, 441.

Based upon their prior decisions, the Court specifically held there are restrictions to a public employee's exercise of free-speech rights. Those restrictions were three factors enumerated as follows:

First, an employee's speech, to be protected, must be spoken as a citizen on a matter of public concern. If the employee did not speak as a citizen on a matter of public concern, then the employee has no First Amendment [protection].

The second factor that is invoked considers statements that are made with the knowledge that they were false or with

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<sup>32</sup> See also, W. VA. CONST. ART III, § 3-7. Which protects freedom of speech and of the press.

<sup>33</sup> The facts in *Alderman, supra* are significantly different than this matter but the factors and balancing test the Court set out based upon federal and state cases are applicable.

reckless disregard of whether they were false, and such statements are not protected.

The third factor that is invoked considers statements made about persons with whom there are close personal contacts that would disrupt discipline or harmony among coworkers or destroy personal loyalty and confidence, and such statements may not be protected.

*Id.*

Applying those factors to the present case, it first must be determined whether Grievant's Twitter posts were made "as a citizen on a matter of public concern." It is undisputed that Grievant's post were made during the particularly contentious 2016 Presidential election. During this election, there was significant hyperbole bandied about on social media, as well as the conventional media. The issues of immigration from majority Muslim countries and whether Muslims as a group were responsible for world-wide terrorism was made part of the political discussion by fringe groups as well as mainstream candidates. Additionally, issues relating to the alleged targeting of African-Americans by police forces gave birth to the "Black Lives Matter" movement and reactions to that movement.

Grievant's statements that "[Muslims] are the enemy," Muslim families should be deported, that she was disgusted by seeing Muslim women standing in line at the Memorial, comment of "Exactly!!!" to a retweet calling the President a "Muslim Doucebag" while offensive to many, were still part of that political discussion. Her retweets and comments regarding African-Americans were also reactions to national news events.

In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the United States Supreme Court overturned, without dissent the conviction of a teen for burning a cross in the yard of an African-American family based upon a Minnesota law which the Court found to be



constitutionally overly broad. The majority opinion noted: “[A state] may not prohibit, for example, only that obscenity which includes offensive political messages.” 505 U.S. at 388. Given this standard and the political context, Grievant’s posts are a citizen’s statements on matters of public concern and entitled to First Amendment protection.

The second factor is a determination of whether the statements are false or made with a reckless disregard for the truth. The United States has not made a policy statement that Muslims are the enemy. So, in the largest sense Grievant’s wholesale attack on the followers of that religion is not true. However, whether a group is considered an enemy of another group in society is often a matter of personal belief and conviction. Accordingly, it cannot be found that Grievant made these posts with a reckless regard for the truth, because there are groups such as the previously mentioned “alt-right” which truly believe them to be true. It appears that Grievant believes them to be true as well.<sup>34</sup>

The third factor is whether Grievant’s posts were “made about persons with whom there are close personal contacts that would disrupt discipline or harmony among coworkers or destroy personal loyalty and confidence. Such statements are not protected. Grievant’s posts tended to be directed at whole groups rather than individuals. However, in her position she has close contacts with members of those groups. Specifically, the

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<sup>34</sup> Grievant attempted to minimize the effect on some of her statements by saying that she was only speaking of Muslim extremist in her comments about Muslims being the enemy and being allowed to keep their heads. She also stated that on reflection the women at the 9/11 Memorial were very brave. These explanations are not consistent with Grievant’s multiple posts denigrating Muslims without limitation as well as African Americans. They more likely represent Grievant’s understanding that her bigoted statements may have gotten her in trouble and she is moving away from their true context to avoid the negative consequences resulting therefrom. Grievant’s testimony therefore is simply not credible. See *Yerrid v. Div. of Highways*, Docket No. 2009-1692-DOT (Mar. 26, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.*, Docket No. 2009-1583-DOT (Dec. 1, 2009).

math teacher who is a Muslim felt threatened and betrayed by Grievant's posts. Where she once had a collegial relationship with Grievant, her confidence and trust has been destroyed. Likewise, Grievant is regularly required to interact with Muslim and African-American students in the high school generally, and her social studies class particularly. It is hard to imagine how those students could have an appropriate trust relationship with Grievant and it is more likely than not that these posts would severely impact the confidence the students would have in her to be an unbiased instructor and discipline would significantly suffer.

Because of their negative nature toward Muslims and African-Americans, Grievant's post would more likely than not, disrupt discipline and harmony among her students and coworkers. Consequently, Grievant's Twitter posts are not protected speech for which Respondent would be prohibited from terminating her employment.

Finally, *Alderman, supra*, the West Virginia Supreme Court also noted that:

*Pickering* recognized that the employer has an interest in the efficient and orderly operation of its affairs that must be balanced with the public employee's right to free speech. We are further guided by the principle that, "while the First Amendment invests public employees with certain rights, it does not empower them to "constitutionalize the employee grievance." *Connick*, 461 U.S., at 154." *Garcetti v. Ceballos*, 547 U.S. 410, 420, 126 S. Ct. 1951, 1959, 164 L. Ed. 2d 689 (2006). If the speech meets the test to be considered protected speech, then a balancing test is used to determine whether the speech must be tolerated even if it would undermine the Board's authority.

As noted herein, Respondent has adopted an employee code of conduct policy which requires employees to create an environment of acceptance for all student. One which is free from harassment, bias and discrimination as well as a culture of understanding and support. Even if Grievant's Twitter met the three foregoing factors for

free speech protection, it would undermine the Respondent's efforts to create an efficient and orderly learning and working environment by indicating to the students that bias and discrimination are acceptable in the school. Respondent's interest in creating a safe healthy and unbiased learning environment outweighs Grievant's right to make bigoted public posts. Respondent was not prohibited by the First Amendment from terminating Grievant's employment based upon her post on her public Twitter account. Accordingly, the grievance is DENIED.

### **Conclusions of Law**

1. As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. "In order to dismiss a school board employee for acts performed at a time and place separate from employment, the Board must demonstrate a 'rational nexus' between the conduct performed outside of the job and the duties the employee is to perform. *Syllabus Point 2, Golden v. Bd. of Educ.*, 169 W. Va. 63, 285 S.E.2d 665 (1981)." Syl. Pt. 2. *Woo v. Putnam County Bd. of Educ.*, 202 W. Va. 409, 413 (W. Va. June 24, 1998).

3. "The conduct of a teacher ceases to be private in at least two circumstances: (1) if the conduct directly affects the performance of the occupational responsibilities of the teacher; or (2) if, without contribution on the part of the school officials, the conduct has become the subject of such notoriety as to significantly and

reasonably impair the capability of the particular teacher to discharge the responsibilities of the teaching position.” *Woo, supra*, 202 W. Va. 409, 412.

4. Respondent proved by a preponderance of the evidence that there was a rational nexus between Grievant’s conduct outside her job and the duties she had to perform as a social studies teacher.

5. Respondent proved by a preponderance of the evidence that Grievant’s Twitter activity directly affected her performance as a social studies teacher and that Grievant’s Twitter activity was the subject of significant “non-tainted” notoriety which reasonably impaired her capacity to continue as a social studies teacher in Cabell County Schools.

6. An employer can establish insubordination by demonstrating a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995); *Domingues v. Fayette County Bd. of Educ.*, Docket No. 04-10-341 (Jan. 28, 2005); *Breck v. Putnam County Bd. of Educ.*, Docket No. 2011-1542-PutED (February 13, 2012); *Robinette v. Boone County Bd. of Educ.*, Docket No. 2014-1437-BooED (Feb. 10, 2015).

7. Cabell County Board of Education has adopted a code of conduct which requires all professional personnel to:

- Contribute, cooperate, and participate in creating an environment in which all employee/students are accepted and are provided an opportunity to achieve at the highest levels in all areas of development;
- Maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination; and,

- Create a culture of caring through understanding and support.

Grievant's flagrant violation of the Code of Conduct meets the definition of "insubordination" as contemplated for dismissal of a school board employee in WEST VIRGINIA CODE § 18A-2-8.

8. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2 (d).

9. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

- (a) That he or she has been treated differently from one or more similarly-situated employee(s);
- (b) That the different treatment is not related to the actual job responsibilities of the employees; and,
- (c) That the difference in treatment was not agreed to in writing by the employee.

*Frymier v. Higher Education Policy Comm'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007);  
*Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

10. Grievant failed to prove by a preponderance of the evidence that she was similarly situated to other employees who has receive less discipline for their misconduct.

11. Public employees are entitled to be protected from firings, demotions and other adverse employment consequences resulting from the exercise of their free speech rights, as well as other First Amendment rights. However, the State, as an employer, also has an interest in the efficient and orderly operation of its affairs that must be balanced with the public employees' right to free speech, which is not absolute. *Pickering v. Board*

*of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968); *Syl. pt. 3, Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1984).

12. The West Virginia Supreme Court set out restrictions that apply to a public employee's exercise of free-speech rights:

First, an employee's speech, to be protected, must be spoken as a citizen on a matter of public concern. If the employee did not speak as a citizen on a matter of public concern, then the employee has no First Amendment [protection].

The second factor that is invoked considers statements that are made with the knowledge that they were false or with reckless disregard of whether they were false, and such statements are not protected.

The third factor that is invoked considers statements made about persons with whom there are close personal contacts that would disrupt discipline or harmony among coworkers or destroy personal loyalty and confidence, and such statements may not be protected.

*Alderman v. Pocahontas County Bd. of Educ.*, 223 W. Va. 431; 675 S.E.2d 907 (2009).

13. Grievant's Twitter posts were made as a citizen addressing issues of public concern and it is more likely than not that Grievant believed them to be true. However, the posts were sufficiently related to persons with whom Grievant was required to work to disrupt discipline, harmony, and confidence in Grievant's workplace and the performance of her job. Therefore, her Twitter posts were not subject to free speech protections.

14. "*Pickering* recognized that the employer has an interest in the efficient and orderly operation of its affairs that must be balanced with the public employee's right to free speech. We are further guided by the principle that, "while the First Amendment invests public employees with certain rights, it does not empower them to

"constitutionalize the employee grievance." *Connick*, 461 U.S., at 154." *Garcetti v. Ceballos*, 547 U.S. 410, 420, 126 S. Ct. 1951, 1959, 164 L. Ed. 2d 689 (2006). If the speech meets the test to be considered protected speech, then a balancing test is used to determine whether the speech must be tolerated even if it would undermine the Board's authority." *Alderman v. Pocahontas County Bd. of Educ.*, 223 W. Va. 431; 675 S.E.2d 907 (2009).

15. When the *Pickering* balancing test is applied to the facts of this case, Respondent's interest in creating a safe, healthy, and unbiased learning environment outweighs Grievant's right to make bigoted public posts.

Accordingly, the grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See *also* 156 C.S.R. 1 § 6.20 (2008).

**DATE: September 22, 2017.**

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**WILLIAM B. MCGINLEY**  
**ADMINISTRATIVE LAW JUDGE**