

**THE WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**FLOYD FERENCE,  
Grievant,**

**v.**

**Docket No. 2017-2282-BroED**

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

**DECISION**

Grievant, Floyd Ference, previously employed by the Brooke County Board of Education as a custodian, filed this action directly to Level Three on May 30, 2017. Grievant challenges the termination of his employment. Grievant seeks to have his contract of employment reinstated with back pay and restoration of all rights and privileges.

A Level Three hearing was conducted before the undersigned on August 1, 2017, in the Grievance Board's Westover office. Grievant appeared in person and by his representative, Joe E. Spradling, West Virginia School Service Personnel. Respondent appeared by its counsel, Richard S. Boothby, Bowles Rice LLP, and by Scott Abercrombie. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on September 14, 2017.

**Synopsis**

Grievant was employed by Respondent as a custodian at Wellsburg Middle School. The principal of Wellsburg Middle School made changes to Grievant's work assignments. Grievant was upset with the changes and confronted the principal to return him to his previous assignments. Subsequently, Grievant made comments to other custodians that

if anyone gave him any more work to do, and he could not complete the work, he was going to get a gun and start taking people out as well as anyone related to them. The record established that Respondent proved that Grievant's credible threats of violence in the workplace constituted insubordination. Termination of Grievant's employment was an appropriate response by Respondent.

The following Findings of Fact are based upon the record of this case.

### **Findings of Fact**

1. Grievant was employed by Respondent as a custodian. Grievant was one of three evening custodians who worked at Wellsburg Middle School. The other two evening custodians were Donald Clem and Kathy L. Young.

2. Grievant started his work day at Franklin Elementary School in Brooke County at 2:30 p.m. and then went to Wellsburg Middle School for the second half of his work day. He would normally arrive at Wellsburg Middle School around 6:30 p.m.

3. On Friday August 26, 2016, Jennifer Sisinni, the principal of Wellsburg Middle School, made some changes to the work assignment for the three evening custodians. Principal Sisinni explained the changes on a Job Assignment Sheet and then copies of that form were placed in the custodians' mailboxes at the school building.

4. Grievant went to Wellsburg Middle School on August 29, 2016, in an attempt to meet with Principal Sisinni and discuss the work assignment changes. Grievant met with Principal Sisinni and said he wanted to discuss the changes she made to his work schedule. Principal Sisinni explained that no change to his schedule had been made, only his job assignments had been changed.

5. Grievant then loudly asked Principal Sisinni why she thought she was able

to change his schedule. Principal Sisinni responded that she was his boss and she was allowed to make these changes.

6. Grievant repeated this question over and over to Principal Sisinni, apparently not satisfied with her response. Grievant's tone was contentious and argumentative.

7. Grievant told Principal Sisinni that he wanted his work assignment changed back to the way it was previously. Principal Sisinni told Grievant that he was welcome to come back in the afternoon when the other two evening custodians could participate in the discussion about job assignments. Grievant indicated that he was not interested in this and left the building.

8. While working at Wellsburg Middle School on August 29, 30 and 31, Grievant was uncharacteristically quiet at work, not speaking to his fellow evening custodians.

9. On September 1, 2016, Grievant arrived at Wellsburg Middle School and entered a coach's office where the evening custodians took their meal breaks. Donald Clem and Kathy L. Young, the other evening custodians, were in the lunchroom when Grievant entered.

10. Grievant, who appeared to be angry, told Mr. Clem and Ms. Young that he had been thinking about something for some time, and that if anyone gave him any more work to do, and he could not complete the work, he was going to get a gun and start taking people out as well as anyone related to them.

11. The next day, right after arriving at work around 2:30 p.m., Kathy Young spoke with Principal Sisinni about what Grievant had said the previous evening. After speaking with Ms. Young, Principal Sisinni contacted Mr. Clem and asked him to come to her office.

12. Principal Sisinni asked Mr. Clem and Ms. Young to give written statements about what they had told her. They were separated when they wrote their statements.

13. An investigation into Grievant's conduct on September 1, 2016, was conducted by more than one administrator. When confronted about the information Mr. Clem and Ms. Young provided to the administration, Grievant gave conflicting responses. In a written statement dated September 2, 2016, Grievant denied making any statement like that claimed by his co-workers. Later, when speaking to administrators Scott Donohew and Robbie Robinson, Grievant claimed that he could not remember what he said to Mr. Clem and Ms. Young.

14. When asked if he owned a firearm, he at first responded no. Grievant then corrected that statement by admitting that he possessed a handgun.

15. Scott Abercrombie, Respondent's Title IX coordinator, investigated this matter and drafted a report summarizing the investigation and presenting the facts found.

16. Respondent observes the standards set forth in West Virginia State Board of Education Policy 5902 outlining conduct expected of all West Virginia school employees. This policy provides that each employee is to maintain a safe and healthy environment, free from harassment, intimidation, bullying, and free from bias and discrimination and to maintain a high standard of conduct, self-control, and moral/ethical behavior.

17. Grievant was placed on paid leave effective September 9, 2016. On May 10, 2017, Grievant was placed on unpaid leave and notified that Superintendent Toni Shute would recommend that his employment with the Board of Education be terminated.

18. After an evidentiary hearing before the Board of Education on May 24, 2017,

Board members voted to ratify the suspension of Grievant's employment, previously imposed by the Superintendent, and to terminate Grievant's employment.

### **Discussion**

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Pursuant to West Virginia Code, school personnel may be suspended or dismissed 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 nolo contendere to a felony charge. W. VA. CODE § 18A-2-8; *Kanawha County Bd. of Educ. v. Sloan*, 219 W. Va. 213, 632 S.E.2d 899 (2006).

The authority of a county board of education to terminate an employee must be based on one or more of the causes listed in W. VA. 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).

Respondent contends that Grievant's threats of violence relating to his job assignments being changed constitutes insubordination. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(*per curiam*). See *Riddle v. Bd. of Directors/So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). "[F]or 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, supra*.

In order to establish a charge of insubordination, an employer must demonstrate 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).

West Virginia State Board of Education Policy 5902 sets forth the conduct expected of all West Virginia school employees. See Policy 5902, W. Va. Code of St. Rules § 126-

162-4 *et seq.* This policy requires West Virginia school employees to “demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior,” to “create a culture of caring through understanding and support,” and to “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.”

The record of this case is undisputed that Grievant was angry about the changes Principal Sisinni made to his work assignment at Wellsburg Middle School. Grievant told co-workers that if he was given more work which he could not complete, he was going to get a gun and take some people out. Mr. Clem and Ms. Young heard Grievant’s threats and knew towards whom those threats were directed: Principal Sisinni. In fact, Grievant angrily and loudly confronted Principal Sisinni at the very first opportunity after receiving notice of his work assignment changes. Such threats have consistently resulted in employment termination. See *T.M.D. v. Div. of Highways*, Docket No. 2009-1528-CONS (Mar. 10, 2010)(affirmed on appeal to Kanawha County Circuit Court, Civil Action #10-AA-63 (J. Webster)(Oct. 25, 2012)).

The Grievance Board has previously held that an employee who violated the Employee Code of Conduct has engaged in conduct constituting insubordination. See *Lehman v. Marshall County Bd. of Educ.*, Docket No. 2011-1046-MarED (Aug. 9, 2011). Grievant’s misconduct described herein violated the Employee Code of Conduct. Respondent has proven by a preponderance of the evidence that Grievant’s threats of violence in the workplace constituted insubordination. Respondent’s assessment of the

threat was reasonable. It would be entirely unreasonable and irresponsible to return such a person to work in a school.

The following Conclusions of Law support the decision reached.

### **Conclusions of Law**

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. Pursuant to West Virginia Code, school personnel may be suspended or dismissed 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 nolo contendere to a felony charge. W. VA. CODE § 18A-2-8; *Kanawha County Bd. of Educ. v. Sloan*, 219 W. Va. 213, 632 S.E.2d 899 (2006).

3. The authority of a county board of education to terminate an employee must be based on one or more of the causes listed in W. VA. 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).

4. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an

administrative superior." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(*per curiam*). See *Riddle v. Bd. of Directors/So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989).

5. Respondent has proven by a preponderance of the evidence that Grievant engaged in conduct constituting insubordination.

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 (eff. July 7, 2008).

**Date: September 25, 2017**

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**Ronald L. Reece**  
**Administrative Law Judge**