THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

G. BAKER NEAL,
Grievant,

v. **Docket No. 2017-2157-CabED**

CABELL COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, G. Baker Neal, is employed by Respondent, Cabell County Board of Education as a teacher and was previously employed as a coach. On May 5, 2017, Grievant filed this grievance against Respondent stating, "Grievant contends that he was improperly terminated from his extracurricular contract as Cabell Midland High School Boy's [sic] Basketball Coach. Furthermore, discipline was not progressive in nature, too severe, without just cause and unwarranted." For relief, Grievant seeks "for his position to be made full-time and whole as boy's [sic] basketbal[l] coach at Cabell Midland High School, and any other relief the grievance evaluator deems appropriate."

The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held on September 25, 2017, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by counsel, John Everett Roush, AFT-WV/AFL-CIO. Respondent was represented by counsel, Leslie K. Tyree, Esquire. This matter became mature for decision on November 17, 2017, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a teacher and was previously employed as a head basketball coach. Grievant's extracurricular coaching contract was terminated for his repeated use of profanity. Respondent proved that, after being suspended for use of profanity and being counseled regarding the same, Grievant was insubordinate when he again used profanity. Grievant's conduct did not relate to professional incompetency and was not correctable, so Grievant was not entitled to a plan of improvement. Respondent proved it was justified in terminating Grievant's contract for his insubordination and violation of the code of conduct. Grievant failed to prove that the penalty of termination should be mitigated. Accordingly, the 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 is employed by Respondent as a teacher and was previously employed in an extracurricular position as a head basketball coach.

2. By letter dated November 2, 2016, Superintendent William A. Smith suspended Grievant for five days for use of profane language towards a student and for approaching another student about the incident, after being directed not to discuss the investigation. Superintendent Smith found that Grievant "did not exhibit professional behavior" or "maintain an acceptable level of self-control." Superintendent Smith recommended Grievant seek counseling for anger management. Grievant did not protest the suspension before the Board or file a grievance.

3. Following the suspension, Principal Lloyd McGuffin spoke with Grievant regarding his use of profanity and questioned Grievant whether he would be able to coach without using profanity. Principal McGuffin instructed Grievant not to use profanity.

4. In December 2016, two students alleged that Grievant called them "dumbass." Superintendent Smith directed Administrative Assistant Over Secondary Schools David Tackett to have a conference with Grievant and Principal McGuffin. Grievant initially denied the allegation, and then conceded that he did not remember saying it, but might have said it. Principal McGuffin again told Grievant the use of profanity had to stop. Grievant received no discipline for this instance.

5. On March 1, 2017, at the end of an emotional and frustrating sectional game, Grievant, while standing at the end of the players' bench, said the word "fuck."

6. Assistant Principal Curtis Mann, who supervises the school's athletics director, learned of this incident from Rodney May, one of Grievant's two assistant coaches, who reported it during his annual evaluation conference sometime in early March. Assistant Principal Mann conducted an investigation in which he interviewed six students, Grievant's two assistant coaches, Mr. May and Christian Gray, and Grievant. Assistant Principal Mann found that the students all corroborated that Grievant used profanity during practices and five of the students corroborated that Grievant said "fuck" during the sectional game. Mr. Gray neither confirmed nor denied that Grievant had used profanity during the sectional game. Grievant stated that he could not remember using profanity.

7. On March 9, 2017, Assistant Principal Mann circulated a survey to winter sport student athletes. Assistant Principal Mann was new to his position, having started

in November 2016. He had used such a survey in his previous employment to good effect, and wanted to do the same thing in his new position. The purpose of the survey was to evaluate the athletic programs, not the coaches.

8. On March 13, 2017, Assistant Principal Mann completed Grievant's annual evaluation, rating him as meeting standards for coaching and unsatisfactory for professional and interpersonal relations. The evaluation specifically lists Grievant's inappropriate language as a deficiency.

9. On March 27, 2017, Assistant Principal Mann submitted his report of the investigation and attached incident report forms that had purportedly been completed in hand writing by the interviewees. Only Mr. May's report was signed. None of the reports are sworn.

10. On April 6, 2017, Principal Lloyd McGuffin, Assistant Principal Mann, Assistant Superintendent Todd Alexander, Grievant, and Grievant's union representative met to discuss the allegations.

11. By letter dated April 14, 2017, Superintendent Smith informed Grievant that he would be recommending the Board terminate Grievant's extracurricular contract for violation of Respondent's Code of Conduct. Superintendent Smith found that Grievant had continued to use profanity after his five-day suspension and after Principal McGuffin had specifically instructed that the use of profane language was prohibited. Superintendent Smith found that Grievant had used profane language both at practices and during the sectional game.

12. On an unspecified date, the Board adopted Superintendent Smith recommendation to terminate Grievant's extracurricular contract.

Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2008). "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. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

Respondent alleges Grievant violated the State Board of Education's Code of Conduct and was insubordinate when he used profanity during practices and a sectional game. Grievant asserts Respondent failed to prove the charges against Grievant. In the alternative, Grievant argues his conduct was correctable, for which he should have received a plan of improvement, and that the punishment should be mitigated.

Accordingly, the undersigned must make credibility determinations. 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).

Grievant asserts Mr. May is not credible because Mr. May was previously suspended as a coach for alleged inappropriate comments. Mr. May's demeanor was appropriate. His testimony was earnest, forthright, and certain. There is no evidence Mr. May has any bias against grievant or other reason to testify untruthfully. Further, Mr. May's testimony is also not specifically contradicted. The only other eyewitness who testified, Mr. Gray, consistently said he could neither confirm nor deny that Grievant used profanity in the sectional game. Grievant does not specifically deny that he used profanity in the sectional game, but states that he does not recall doing so, although he admits it was a highly emotional game and he may have slipped. Grievant's assertion that Mr. May is somehow not credible because Mr. May had been suspended for allegedly making inappropriate comments more than twenty years ago, which suspension was overturned by the Grievance Board, has no merit. Mr. May is credible.

Mr. Gray's demeanor was appropriate. He was professional and direct. Although Mr. Gray has known Grievant for some time, and Grievant recruited Mr. Gray to play basketball, there is no indication Mr. Gray has any bias. Mr. Gray's testimony that he did not hear Grievant use profanity in practice is supported by Mr. May's testimony. As to the alleged use of profanity in the sectional game, Mr. Gray consistently stated that he could neither confirm nor deny the statement was made. Mr. Gray is credible.

Assistant Principal Mann's demeanor was appropriate. He was calm, forthright, and appeared to have a good memory of events. There is no evidence Assistant Principal Mann has any bias against Grievant or motive to be untruthful. Assistant Principal Mann's testimony regarding the survey is plausible. Assistant Principal Mann is credible.

Principal McGuffin's demeanor was appropriate. He was professional, detailed, and appeared to have a good memory of events. There is no evidence Principal McGuffin has any bias against Grievant or motive to be untruthful. Principal McGuffin is credible.

Grievant's credibility is not actually at issue. Grievant does not specifically deny that he used profanity at the sectional game, stating only that he does not recall doing so, while admitting that he was emotional at the game. Finding that statement to be credible is not probative to the question of whether Grievant actually used profanity or not as he could have used profanity in an emotional state and simply not remembered.

In addition to testimony, Respondent presented the written statements of six students as evidence in the level three hearing. These statements are hearsay.[1] Relevant hearsay is admissible in administrative hearings. *Gunnells v. Logan County Bd. of Educ.,* Docket No. 97-23-055 (Dec. 9, 1997). The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *Id.*; *Sinsel v. Harrison*

[1] "Hearsay includes any statement made outside the present proceeding which is offered as evidence of the truth of the matter asserted." BLACK'S LAW DICTIONARY 722 (6th ed. 1990).

County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-H-115 (June 8, 1990).

Respondent offered no explanation why the students were not called to testify. The written statements are not signed or sworn. In addition to stating that Grievant had used profanity in the sectional game, five students also said that Grievant had used profanity during practice. While the students' statements that Grievant used profanity in the sectional game are corroborated by Mr. May, the students' statements that Grievant used profanity during practice are contradicted by both Mr. May and Mr. Gray who testified that they did not hear Grievant use profanity at any practice. Therefore, the students' statements are entitled to no weight.

Therefore, Respondent has proven that Grievant used profanity during the sectional game, but did not prove Grievant used profanity during practices. Respondent asserts it was justified in terminating Grievant's contract as this use of profanity violated the code of conduct and was insubordinate. Grievant argues that termination was not justified because he was entitled to a plan of improvement.

The authority of a county board of education to terminate an employee 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, 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).

The Code of Conduct codified in the State Board of Education's Legislative Rule requires all employees to:

> 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).

Grievant's use of the word "fuck" clearly violates the Code of Conduct in that it is unprofessional language and it exhibited poor conduct and self-control. Respondent asserts this violation, coupled with the previous suspension for the use of profanity and the multiple conversations administrators had with Grievant regarding his use of profanity,

constitutes insubordination. In order to establish insubordination, a county board must demonstrate a policy or directive applied to the employee, was in existence at the time of the violation and that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Domingues v. Fayette County Bd. of Educ.*, Docket No. 04-10-341 (Jan. 28, 2005). The Grievance Board has previously recognized that the use of profanity, after an employee has previously been warned about such conduct, constitutes insubordination. *Johnson v. Kanawha County Bd. of Educ.,* Docket No. 2011-0178-CONS (May 27, 2011); *Showalter v. Marshall County Board of Education*, Docket No. 07-25-165 (May 28, 2008); *Parrish v. Jackson County Bd. of Educ.*, Docket No. 06-18-432 (June 11, 2007).

In this case, the Code of Conduct clearly prohibits the language Grievant used, he had already served a suspension for similar language, and administrators had multiple conversations with Grievant in which they stated such language was unacceptable. Respondent has proven Grievant was insubordinate when he used the word "fuck" in the sectional game.

Grievant argues he was entitled to a plan of improvement. The West Virginia Supreme Court of Appeals has held that "where the underlying complaints regarding a teacher's[2] conduct relate to his or her performance . . . the effect of West Virginia Board of Education Policy is to require an initial inquiry into whether that conduct is correctable." *Maxey v. McDowell County Bd. of Educ.,* 212 W. Va. 668, 575 S.E.2d 278 (2002). The

[2] Although the Court's discussion in *Maxey* referred to a teacher, the statutes in the case apply with equal force to all public school employees. *See* W. VA. CODE §§ 18A-2-8 and 18A-2-12a.

provisions of Policy 5300 referred to by the Court have since been codified in West Virginia Code § 18A-2-12a and state the following:

> (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 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. All school personnel are entitled to due process in matters affecting their employment, transfer, demotion or promotion….

The Court discussed this provision of Policy 5300 in detail in the case of *Mason County Bd. of Educ. v. State Superintendent of Sch.,* 165 W. Va. 732 (W. Va. 1980) where it wrote:

> Our holding in *Trimboli, supra,*[3] requires that a dismissal of school personnel be based on a § 5300(6)(a) evaluation after the employee is afforded an improvement period. It states that 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, supra,* and in *Rogers, supra,*[4] be understood to mean an offense of conduct which affects professional competency.

[3] *Trimboli v. Bd. of Educ. of the County of Wayne*, 163 W. Va. 1, 254 S.E.2d 561 (1979).

[4] *Rogers v. Bd. of Educ.,* 125 W. Va. 579, 588, 25 S.E.2d 537 (1943).

Id at 739. Concerning what constitutes "correctable" conduct, the Court noted that "it is not the label given to conduct which determines whether § 5300(6)(a) procedures must be followed but whether the conduct complained of involves professional incompetency and whether it directly and substantially affects the morals, safety, and health of the system in a permanent, non-correctable manner." *Id.* "[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).

"A review of past improvement plans and disciplinary action 'can establish an employee was on notice of his inappropriate behavior, and that a continuing pattern of behavior is present which has proven not correctable.' *Bierer v. Jefferson County Bd. of Educ.*, Docket No. 01-19-595 (May 17, 2002). *Byers v. Wood County Bd. of Educ.*, Docket No. 2013-2075-WooED (Oct. 31, 2013). To rule otherwise, 'would result in an endless cycle of employee improvement, relapse into old work habits, and the need for additional evaluations and plans of improvement.' *Dalton v. Monongalia County Bd. of Educ.*, Docket No. 2010-1607-MonED (Nov. 23, 2010), Affirmed, Kanawha County Cir. Ct., Civil Action No. 11-AA-2 (May 12, 2011)." *Yoders v. Harrison County Bd. of Educ*., Docket No. 2016-0129-HarED (Jan. 15, 2016).

Grievant's use of profanity, despite prior disciplinary actions and counseling, was not professional incompetency; it was insubordination. Therefore, Grievant is not entitled to an improvement plan. Even if Grievant were so entitled, Grievant's conduct is not correctable. He had already been given an opportunity to correct his conduct following the disciplinary action and counseling, and again used profanity. Although Grievant states that he does not recall his use of profanity, in his testimony, Grievant spoke about how emotionally charged coaching can be and that he is very passionate. It appears that under such emotional stress, Grievant cannot control his language even when he has faced disciple and been counseled. Therefore, his misconduct is not correctable.

Grievant also argues that his termination should be mitigated. "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). An 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 the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995). *See Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). "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). *See Austin v. Kanawha County Bd. of Educ*., Docket No. 97-20-089 (May 5, 1997).

Grievant did not provide evidence of good work history or evaluations. The one evaluation he presented relating to this position shows an unsatisfactory rating in one of the two categories. The evidence also shows Grievant was clearly advised that profanity was prohibited.

Grievant asserts that other employees with similar infractions have received lesser punishments. A softball coach received a written reprimand for use of profanity. The instance with the softball coach does not appear to be similar to Grievant in that Grievant had previously been suspended for profanity and had been counseled to not use profanity. The softball coach had no prior discipline or counseling for profanity, and the investigation into the incident did not reveal exactly what the softball coach had said. Grievant also cites the discipline of Mr. May, who received a suspension. Mr. May's discipline is not relevant. Mr. May's discipline was overturned by grievance action and occurred more than twenty years ago.

Grievant argues that the penalty was excessive. Grievant cites *Trembly v. Preston County Board of Education*, Docket No. 00-39-355, in support of his contention that the punishment should be mitigated as termination is too harsh a penalty for the use of profanity. In *Trembly*, the employee was suspended for saying to a student, "Shit, I need

that paper." The administrative law judge found that the punishment should be mitigated to a written reprimand. However, the administrative law judge's decision to mitigate was overturned by the circuit court, and the suspension was reinstated. Further, Grievant's case would be distinguishable from *Trembly* in that Grievant had already served a lengthy suspension for his use of profanity. Based on the previous suspension and counseling that had failed to correct Grievant's behavior, the penalty of termination was not excessive.

Grievant also asserts that the survey was done to "find something" on Grievant and that his evaluation and discipline were based on the survey, which appears to be an argument that the discipline was arbitrary and capricious. This view is not supported by the record. Both Mr. May and Assistant Principal Mann testified that Mr. May told Assistant Principal Mann about the profanity during his evaluation in early March. The survey also went out on March 9th. Contrary to Grievant's assertion that the survey was used for discipline, Mr. Mann was informed of the conduct in Mr. May's evaluation conference, and not by the survey, and he gathered Incident Reports from the students regarding Grievant's use of profanity, and did not use the survey results. Mr. Mann's testimony that he had previously used the survey in a former job and wanted to do the same in his new position is credible and plausible. Sending a survey of all the student athletes for all of the winter sports to "find something" on Grievant, when Mr. Mann already had the complaint of Mr. May to prove Grievant's misconduct, is not plausible. Grievant's assertion that the survey was used in his evaluation is also not plausible. The survey was emailed on Thursday, March 9, 2017. Grievant was evaluated on March 13, 2017. It is

unlikely Assistant Principal Mann would have received the survey results and based the evaluation on the results in such a short span of time.

Grievant failed to prove that mitigation of the punishment is warranted in this case. The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2008). "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. W. Va. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

2. The authority of a county board of education to terminate an employee 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, 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. The Code of Conduct codified in the State Board of Education's Legislative Rule requires all employees to:

> 4.2.1. exhibit professional behavior by showing positive examples of preparedness, communication, fairness, punctuality, attendance, language, and appearance.
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> 4.2.2. contribute, cooperate, and participate in creating an environment in which all employees/students are accepted and are provided the opportunity to achieve at the highest levels in all areas of development.
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> 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).

4. In order to establish insubordination, a county board must demonstrate a policy or directive applied to the employee, was in existence at the time of the violation and that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Domingues v. Fayette County Bd. of Educ.*, Docket No. 04-10-341 (Jan. 28, 2005). The Grievance Board has previously recognized that the use of profanity, after an employee has previously been warned about such conduct, constitutes insubordination. *Johnson v.*

Kanawha County Bd. of Educ., Docket No. 2011-0178-CONS (May 27, 2011); *Showalter v. Marshall County Board of Education*, Docket No. 07-25-165 (May 28, 2008); *Parrish v. Jackson County Bd. of Educ.*, Docket No. 06-18-432 (June 11, 2007).

5. Respondent proved that, after being suspended for use of profanity and being counseled regarding the same, Grievant was insubordinate when he again used profanity.

6. The West Virginia Supreme Court of Appeals has held that "where the underlying complaints regarding a teacher's conduct relate to his or her performance . . . the effect of West Virginia Board of Education Policy is to require an initial inquiry into whether that conduct is correctable." *Maxey v. McDowell County Bd. of Educ*., 212 W. Va. 668, 575 S.E.2d 278 (2002). The provisions of Policy 5300 referred to by the Court have since been codified in West Virginia Code § 18A-2-12a and state the following:

> (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 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. All school personnel are entitled to due process in matters affecting their employment, transfer, demotion or promotion….

7. The Court discussed this provision of Policy 5300 in detail in the case of *Mason County Bd. of Educ. v. State Superintendent of Sch.,* 165 W. Va. 732 (W. Va. 1980) where it wrote:

> Our holding in [*Trimboli v. Bd. of Educ. of the County of Wayne, 163 W. Va. 1, 254 S.E.2d 561 (1979).*] requires that a dismissal of school personnel be based on a § 5300(6)(a) evaluation after the employee is afforded an improvement period. It states that 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, supra, and in [*Rogers v. Bd. of Educ.,* 125 W. Va. 579, 588, 25 S.E.2d 537 (1943)]. be understood to mean an offense of conduct which affects professional competency.

Id at 739.

8. Concerning what constitutes "correctable" conduct, the Court noted that "it is not the label given to conduct which determines whether § 5300(6)(a) procedures must be followed but whether the conduct complained of involves professional incompetency and whether it directly and substantially affects the morals, safety, and health of the system in a permanent, non-correctable manner." *Id.* "[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).

9. "A review of past improvement plans and disciplinary action 'can establish an employee was on notice of his inappropriate behavior, and that a continuing pattern of behavior is present which has proven not correctable.' *Bierer v. Jefferson County Bd. of*

Educ., Docket No. 01-19-595 (May 17, 2002). *Byers v. Wood County Bd. of Educ*., Docket No. 2013-2075-WooED (Oct. 31, 2013). To rule otherwise, 'would result in an endless cycle of employee improvement, relapse into old work habits, and the need for additional evaluations and plans of improvement.' *Dalton v. Monongalia County Bd. of Educ*., Docket No. 2010-1607-MonED (Nov. 23, 2010), Affirmed, Kanawha County Cir. Ct., Civil Action No. 11-AA-2 (May 12, 2011)." *Yoders v. Harrison County Bd. of Educ*., Docket No. 2016-0129-HarED (Jan. 15, 2016).

10. Grievant's conduct did not relate to professional incompetency and was not correctable, so Grievant was not entitled to a plan of improvement.

11. Respondent proved it was justified in terminating Grievant's contract for his insubordination and violation of the code of conduct.

12. "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). An 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 the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995). *See Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-

145 (Aug. 8, 1989). "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). *See Austin v. Kanawha County Bd. of Educ*., Docket No. 97-20-089 (May 20, 1997).

13. Grievant failed to prove that the penalty of termination should be mitigated. 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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: December 29, 2017

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Billie Thacker Catlett
Chief Administrative Law Judge