THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BRIAN PHILLIPS,
Grievant,

v. **Docket No. 2017-2333-CONS**

BOONE COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Brian Phillips, was employed by Respondent, Boone County Board of Education ("Board"), as a classroom teacher at Sherman High School. Mr. Phillips filed an expedited grievance at level three[1] dated May 11, 2017, alleging that he had been suspended without pay for an indefinite period based upon false accusations of misconduct.[2] As relief Grievant seeks reinstatement with back pay, interest, and restoration of benefits.

Mr. Phillips filed a second form for an expedited grievance dated May 24, 2017, alleging that he was fired without just cause, violation of progressive discipline, discrimination, and violation of his statutory and common law rights. Once again, Grievant seeks reinstatement with back pay, interest, and restoration of benefits.

Grievant moved that the two grievances be consolidated for hearing and decision because they were both based upon the same allegations and would involve the same parties and witnesses. Respondent objected to the consolidation, arguing that the

[1] *See* W.VA. CODE § 6C-2-4(a)(4) for authorization to file a grievance directly to level three under specified circumstances.
[2] Grievant was suspended without pay while an investigation was being conducted concerning the allegation of misconduct made by students.

suspension and dismissal were two discrete acts involving different burdens of proof so they should be heard separately. An Order consolidating the matters for hearing and decision was entered on June 12, 2017.[3] A level three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board on two days: August 15, 2017, and October 3, 2017. Grievant personally appeared and was represented by Andrew J. Katz, Katz Working Families' Law Firm, L.C. Respondent appeared through Superintendent, Jeffrey Huffman, and was represented by Rebecca M. Tinder, Bowles Rice, LLP. This matter became mature for consideration upon receipt of the Proposed Findings of Fact and Conclusion of Law submitted by both on November 13, 2017.

At the close of the hearing, the parties were instructed to place their proposals in the United States mail no later than Thursday, November 9, 2017. Grievant's counsel mailed his proposals on November 10, 2017. Respondent moved that the proposals not be considered because they were mailed after the due date. Mr. Katz admitted that he mailed his proposals a day late. Because both proposals reached the Grievance Board on the same date, it is more likely than not that Grievant's counsel did not receive Respondent's proposals prior to mailing his and Respondent was not disadvantaged in any way by the mailing date of Grievant's proposals. The Supreme Court has repeatedly admonished the lower tribunals to uphold the legislative intent of simple, expeditious and fair grievance procedures, and to give such procedures flexible interpretation in order to

[3] While the two Board actions were separate, they are inexorably intertwined. They are based upon the same allegations. If the dismissal is upheld the suspension is also proper. If the dismissal is overturned, Grievant is reinstated effective the date he was originally suspended pending the investigation.

carry out the legislative intent. *See Duruttya v. Board of Educ*., 181 W.Va. 203, 382 S.E.2d 40 (1989). The grievance process is not "to be a procedural quagmire where the merits of the cases are forgotten." *Spahr v. Preston County Bd. of Educ*., 182 W. Va. 726, 391 S.E.2d 739 (1990).[4] Accordingly, Respondent's motion was denied.

Synopsis

Grievant was dismissed from employment as a teacher for allegedly having several inappropriate conversations with students and making sexually charged comments. The allegations were based upon statements given by students in one of his classes. Grievant argues that the students' allegations are not true and were brought as part of a plan by the students to get him fired. He opined that the students perpetrated this ruse because they thought his assignments and tests were unfair and the students were not getting the grades they wanted. Grievant also argues that he was entitled to be informed of any shortcomings through performance evaluations and given an opportunity to improve before disciplinary action was taken. Grievant also alleges that Respondent broke an agreement regarding prior actions and that the punishment was out of proportion to any misconduct he may have committed.

Respondent proved that Grievant, more likely than not, made the inappropriate comments alleged by the students, and his conduct was not correctable so as to require

[4] *See also*, *Fayette County Bd. of Educ. v. Lilly*, 184 W. Va. 688, 403 S.E.2d 431 (1991); *Syl. Pt.1 Triggs v. Berkeley County Bd. of Educ*., 188 W. Va. 435, 425 S.E.2d 111 (W. Va. 1992); *Hale v. Mingo County Bd. of Educ.*, 199 W. Va. 387, 484 S.E.2d 640 (1997); *State ex rel. Catron v. Raleigh County Bd. of Educ*., 201 W. Va. 302, 496 S.E.2d 444 (1997); *Ewing v. Bd. of Educ. of the County of Summers*, 202 W. Va. 228, 239, 503 S.E.2d 541, 552 (1998); *Barthelemew v. West Virginia Div. of Corrections*, 207 W. Va. 601, 535 S.E.2d 201 (2000); *Bd. of Educ. v. Airhart*, 212 W. Va. 175, 569 S.E.2d 422 (2002).

an improvement plan. Grievant did not show that the punishment was clearly excessive or constituted an abuse of discretion.

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.

Findings of Fact

1. Grievant, Brian Phillips, was employed by Respondent, Boone County Board of Education, for approximately ten years. Most of that time he was a Spanish teacher at Sherman High School.

2. In mid-January 2017, Sherman High School Principal, Roy "Tod" Barnette received a complaint from a female student regarding comments Grievant allegedly made during class regarding her relationship with another female student. The complaining student requested that her schedule be changed.

3. Principal Barnette initiated an investigation regarding the allegations against Grievant. Students were individually interviewed and written statements were taken. Some students gave more than one written statement.[5]

4. Students enrolled in Grievant's Spanish class gave signed written statements to Principal Barnette regarding statements Grievant allegedly said in late December 2016.

5. One statement was dated January 13, 2017, and alleged the following events occurred in Grievant's class.

- A female student said she confronted Grievant about getting into the student's personal business. When Grievant heard that she was dating a particular girl he

[5] The students' statements were entered into the record as Respondent Exhibit 1 with all of the student names redacted.

said “She already went through all of the guys” and asked “What’s to like about her?”

- Grievant allegedly said about a student’s mother who was a bus driver something to the effect that, It wouldn’t matter if the mother was driving a rusty beat up truck, she would still look hot. The student was in Grievant’s class.

6. Six statements were given by students dated January 17, 2017. Nearly all the events involve students engaged in conversations into which Grievant interjected. Those statements related the following events which allegedly occurred in late December 2016.

- A female student had made a “salt dough” Christmas ornament in Art class before the previous period. She was showing it to others and said she was going to try to trick her boyfriend into eating it. Grievant asked “What cookie is he going to eat, that cookie or your cookie.”[6]

- Female students were discussing their attire for an upcoming formal dance. One of the students asked another if she was wearing heels or flats. The student replied “heels.” The second student asked her if she thought her date would mind her being taller. Grievant interjected that the guy usually wants to be tallest. The student found this to be offensive because she was going to the formal with another girl. The students believe Grievant was aware of that and was being “rude” and “super disrespectful.”

- A student was talking about her brother when he got into a fight with another boy in middle school a few years before. Grievant seemed to imitate the boy in a high-pitched voice saying something to the effect of “Oh no, Stop, I don’t like it.”[7]

- When one of the students asked if she could have “make up” work to raise her grade Grievant allegedly replied “you already wear a lot of makeup.”

- The student who was going to the formal with another girl was showing a fellow student pictures of her date in formals she was considering wearing. When Grievant looked at the photo he said “Wow!” When the student said she thought the dress her date was wearing was too revealing Grievant said “She can’t help it if she has a body like that.”

[6] A student testified that they believed that Grievant was referring to the student’s genitalia when he said “your cookie.” Five of the statements related this event.
[7] The students testified that by his voice and actions, Grievant was implying that the boy was gay.

- The student whose mother is a bus driver was talking to another student about accidently seeing her mother come out of the shower. Grievant interjected "Describe it to me in detail, I'm so jealous."

These were all students in Grievant's second block class. One of the students also complained that Grievant reduced the number of questions on a test for the sixth block class, and that Grievant had a student in the class whom he favored because she always did her assignments.

7. A student from the Grievant's sixth block class gave a written statement to Principal Barnett dated January 20, 2017. This was the student who was going to the formal with a girl in Grievant's second block class. She wrote that she was showing a picture of her formal dress to another girl and Grievant leaned back in his chair and said, "Oh yeah, I saw the picture of you, very impressive." She wrote that Grievant also mentioned to her that the "dude" likes to be taller. She was offended because her date was not a "dude."[8]

8. Another statement dated January 20, 2017, repeated many of the statements listed in the January 17, 2017, statements. The girl also added that when she told Grievant that she had a "D" in the class, he responded "you're welcome."

9. A female student made a written statement saying that Grievant rubs her shoulders from the back occasionally. Once while rubbing her shoulders he said, "I love you like the daughter I never had, wait I have a daughter." She also complained that she made poor grades in Grievant's class and that he does not provide study guides for his tests.

[8] This was the only student who was not in Grievant's second block class to give a statement or make a complaint regarding Grievant's in class discussions.

10. Three of the students who gave the statements dated January 17, 2017, gave additional statements dated March 24, 2017, stating that Grievant told them he was "black from the waist down." Grievant also pointed at his waist and asked, "Is anything sticking out."

11. During this same time period, a group of students who called themselves the "Reptilians" were circulating memes[9] through social media which showed unflattering pictures of members of the faculty and made ridiculing remarks about them. Grievant was a target of the Reptilians. He has a large waistline and a picture showed him with his shirttail out and said something about Mr. Phillips sticking out. Two male students in the hallway told Grievant to "quit sticking out" and then showed him the meme.

12. NP, a male student in the second block class, would write "Reptilians are here" on Grievant's white board before class a few times.[10] When Mr. Phillips asked him what it meant the student said he was just joking around and erased it.

13. While testifying, more than one student described the incident where Grievant, while pointing at his midsection, asked a student if anything was sticking out. The students implied that Grievant was referring to his genitalia sticking out.

14. Grievant admitted to asking a student in his second block class if anything was sticking out, but stated that he was talking about his shirttail because he was sensitive about the "reptilian" meme. It is more likely than not that Grievant was referring to his shirt or waistline when asked about something sticking out.

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[9] 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." D*ictionary.com Unabridged*. Random House, Inc. 1 Sep. 2017.

[10] Grievant Exhibit 9, an email to Principal Barnette from Grievant dated February 19, 2017.

15. Student LD[11] was in Grievant's class and gave written statements related to most of the allegations of Grievant making inappropriate statements in class. He testified about these allegations and stated that each of these incidents made him feel uncomfortable.

16. While the investigation was pending, LD was asked by another teacher at Sherman High School why he was no longer in Grievant's class. LD told the teacher that he was pulled out of the class because he felt uncomfortable with the things Grievant said in his class. The teacher reminded LD that he had just been written up for making a very offensive statement in his class and asked LD if he was truly uncomfortable with anything Grievant said. LD admitted that he was not really offended by Grievant's conduct, he just wanted to get out of the class.[12]

17. KJ was a student in Grievant's class. She met with a group of her friends after Grievant's class to discuss what action they should take about him. Four other students in the class who gave written statements were in that group including LD. Two other students who wrote statements were heard discussing how difficult Grievant's class was and student MB was allegedly overheard to say she was going to "start a war."[13]

18. In January and February 2017, an investigation was underway concerning alleged embezzlement by employees at the Board's bus garage. This investigation was

[11] Consistent with the practice of the Grievance Board, the names of students are not used. *See, D.H. v. Div. of Rehab. Ser*., Docket No. 2011-0792-DEA (Jun. 17, 2013).
[12] When questioned about this conversation with the teacher, LD remembered the conversation and the teacher's question but testified he did not remember his reply. Additionally, the teacher testified that he was concerned about a student making up a story to get him in trouble so he documented his exchange with LD on WVEIS.
[13] MB admitted to saying that she was going to complain to the office about Grievant but denies using those specific words.

publicized in the local and statewide news media. Grievant participated in discussion with his students about a Board employee who was alleged to be a subject of that investigation. Part of the discussion involved the school employee previously having extramarital affairs. The students testified that they had not heard about the alleged affairs before Grievant discussed them.

19. One of the students in Grievant's class is closely related to one of the employees whom Grievant discussed as being involved in the affairs. The student was upset about hearing about the alleged affair for the first time in this public setting and was sad about the incident.

20. Another student had a close relationship with a different employee who was the spouse of one of the people Grievant named as a participant in the affairs. The student informed the employee about Grievant's discussion with his class. The employee reported this incident to the school administration.

21. Grievant denied talking with the students about extramarital affairs, but admitted discussing the embezzlement investigation, as well as the employees who were the subjects thereof.

22. Two complaints were lodged with the school administration in March 2017 while the administration's investigation was underway. The administration allowed some students to complete their classwork in the administrative office area rather than attend Grievant's class. LD was one of the students who availed himself of that option.

23. In March 2017, Principal Barnette received two emails and a letter from the mother of student LD who is in Grievant's second block class. She repeated the allegations LD had previously made in his written statement and complained that her son

was being singled out as a “whistleblower”. She also complained that her son and other students who were doing their work in the office instead of Grievant’s class were receiving three times the work as those who remained in the class.[14] She sent copies of her communications to Director of Safe Schools, Anthony Tagliente, and Superintendent, Jeff Huffman. (Respondent Exhibits 9,10, & 11).

24. Grievant’s counsel requested copies of all Grievant’s Teacher Evaluations which were conducted while Grievant was employed by the Board. He received seven documents. (Grievant Exhibits 1 – 7). The evaluations are dated December 11, 2006, April 17, 2007, January 29, 2009, May 28, 2009, May 25, 2010, May 21, 2015, and June 7, 2016.[15]

25. Grievant received a ranking of “Meets Standards” on every performance indicator in the evaluations from 2006 through 2010. The ratings changed on the evaluations issued in 2015 and 2016. Grievant received a rating of “Accomplished” for every rating standard but one for the evaluations completed in 2015 and 2016. The one exception was a rating of “Distinguished” for the criterion “The teacher demonstrates a deep and extensive knowledge of the subject,” on the 2015 evaluation.

26. There are no comments or criticisms on any of Grievant’s evaluations related to improper discussions or activities with students on any of Grievant’s annual evaluations.

[14] The source of her information was her son LD.
[15] No explanation was offered for the lack of annual evaluation for the 2011 through 2014.

27. Grievant sent four emails to Principal Barnette between January 24, 2017, and March 2, 2017, reporting problems with students in his second block class. The emails contained the following information:

- January 24, 2014, - In class, MB told Grievant that he "should just leave because no one is learning and she and several students had gone to the office about [him]." "MB talks incessantly in my class and rarely does any work. Yet she blames my teaching methods." MB and other students in that block admitted that they rarely studied at home. (Grievant Exhibit 8).

- February 19, 2017, - Grievant reported the existence of the Reptilian Tweeter account which was being used by a group of students to ridicule teachers including Grievant. Grievant discovered the existence of this posting on Friday, February 17, 2017. (Grievant Exhibit 9).

- March 1, 2017, - Grievant reported that NP from his second block class was the owner of the "Sherman Reptilians" Tweeter account which had its first tweet on February 1, 2017, and as of that date the last tweet was dated February 16, 2017. In addition to teachers, the site ridiculed at least one student who was believed to be autistic.[16] (Grievant Exhibit 10).

- March 2, 2017, - Grievant reported on a meeting he and the principal had the day before with the parents of CT who was in Grievant's second block. CT was one of the students who asked to do her assignments in the office area rather than Grievant's classroom. She was the student who was related to one of the employees accused of embezzlement. She had raised the embezzlement issue but did not know of her relative's involvement until Grievant mentioned his name which Grievant had seen in the news. The student also said that other kids were pressuring her to say something about Mr. Phillips and she wanted to get out of the situation. After the meeting, CT returned to Grievant's class.[17] (Grievant Exhibit 11).

28. Grievant received a written reprimand dated June 8, 2007, for telling in appropriate joke to students in his classroom at Sherman High School. (Respondent

[16] NP was the student who occasionally wrote "Reptilians are here" on the white board in Grievant's second Block class.

[17] CT was one of the students who gave a written statement and when testifying denied that she had been pressured to do so.

Exhibit 2).[18] In a document written by Grievant on September 5, 2011, discussing the 2007 incident, Grievant wrote, "I thought the students enjoyed the joke immensely since they were laughing loudly and telling me how funny it was." (Respondent Exhibit 12).

29. By letter dated February 17, 2014, Grievant was suspended without pay pending an investigation into allegations that he made inappropriate comments to students in his classroom. During the initial interview, Grievant admitted to referring to a bi-racial student as "Brown Sugar." Grievant also admitted that when a student showed him a picture of a woman with body tattoos, he stated "I would not kick her out of bed unless she wanted to do it on the floor." Grievant told investigators that he joked a lot with the students because he wanted them to like him and because the students were telling jokes so he joined in. (Respondent Exhibit 3.)

30. The investigation was brought to a close by a letter from then Superintendent, John Hudson, dated June 17, 2014. Superintendent Hudson started the letter by noting that Grievant's suspension from February 17, through May 14, 2014, "was for investigation only." Accordingly, the suspension was "not a disciplinary event" and would not be "used as such in the future." Grievant was not paid for the time of the investigation but was paid from the date the investigation ended May 13, 2014, through the remainder of the school year and was considered to be on "a paid non-disciplinary leave" for that time period. Superintendent Hudson finished the letter by stating:

> Based upon the assurances you have given to me, I will neither take nor recommend disciplinary action against you for any of the acts described in my prior letters or that

[18] The joke Grievant admitted to telling was "You know your mamma is so fat that the only way she can lose weight is to drink a 'dick' flavored Slimfast." (Respondent Exhibit 4, letter dated May 1, 2014 by Superintendent Hudson related to a subsequent investigation).

> came to my attention during the investigation or up through today's date.
>
> However, nothing in this letter is intended to deny the issues and concerns expressed in my prior letters. Nor is this letter intended to tie my hands in the event that your job performance after this date raises similar or other concerns. I hope that will not be the case.

(Respondent Exhibit 5).

31. In a letter dated March 31, 2017, Superintendent Huffman, placed Grievant on suspension without pay until the next meeting of the Board. At that meeting Superintendent Huffman would request that the Board ratify his suspension and terminate Grievant's employment. Grievant was given notice of the meeting date and his opportunity to appear before the Board with representation. (Respondent Exhibit 6).

32. Superintendent Huffman cited twenty-two allegations of inappropriate comments which the students had reported.[19] He stated that Grievant's actions violate the Employee Code of Conduct and the Expected Behavior in Safe and Supportive Schools Policy and constituted willful neglect of duty and insubordination. *Id.*

33. A hearing was held before the Board on May 17, 2017. Grievant and Respondent were represented by their respective counsel set out above. By letter dated May 19, 2017, Superintendent Huffman informed Grievant that the Board had voted on May 17, 2017, to accept his recommendation and terminated Grievant's employment.

[19] *See, e.g.,* FOFs 5 & 6, *supra.*

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).

"'The authority of a county board of education to dismiss a [school employee] under W. Va. Code (1931), 18A-2-8, as amended, must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously.' *Syllabus, DeVito v. Board of Education of Marion County*, 169 W.Va. 53, 285 S.E.2d 411 (1981); S*yllabus, Fox v. Board of Education of Doddridge County*, 160 W.Va. 668, 236 S.E.2d 243 (1977); *Syllabus Point 3, Beverlin v. Board of Education of Lewis County*, 158 W.Va. 1067, 216 S.E.2d 554 (1975)." *Syl., DeVito v. Bd. of Educ*., 173 W. Va. 396, 317 S.E. 2d 259 (1984).

The reasons listed W. VA. CODE § 18A-2-8 for which a school public employee may be dismissed are set out as follows:

> (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.

Id.

Respondent asserts that Grievant is guilty of willful neglect of duty and insubordination. The term "willful neglect of duty" encompasses something more serious than incompetence. The term "willful" ordinarily imports a knowing and intentional act, as distinguished from a negligent act. *Bd. of Educ. of the County of Gilmer v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120 (1990); *Williams v. Cabell County Bd. of Educ*., Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ*., Docket No. 95-29-151 (Aug. 24, 1995); *Hoover v. Lewis County Bd. of Educ*., Docket No. 93-21-427 (Feb. 24, 1994). “Willful neglect of duty may be defined as an employee’s intentional and inexcusable failure to perform a work-related responsibility. *Adkins v. Cabell County Bd. of Educ.*, Docket No. 89-06-656 (May 23, 1990).

For there to be "insubordination," the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be willful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd./Shepherd Coll.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curium*). The disobedience must be willful, meaning that "the motivation for the disobedience [was] contumaciousness or a defiance of, or contempt for authority." *Id.*, 212 W. Va. at 213, 569 S.E.2d at 460 (citation omitted). "Employees are expected to

respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990).

The underlying principle in these causes for dismissal is that the employee's conduct must be a knowing and intentional disregard of mandatory duties or authority. This is a heavy burden given that Respondent must prove that the reason for Grievant's behavior was more than simple negligence. *Tolliver v. Monroe County Bd. of Educ.,* Docket No. 01-31-493 (Dec. 26, 2001); *Stover v. Mason County Bd. of Educ.,* Docket No. 95-26-078 (Sept. 25, 1995); *Hoover v. Lewis County Bd. of Educ.,* Docket No. 92-21-427 (Feb. 24, 1994).

The Board terminated Grievant's employment for allegedly making inappropriate comments and participating in several inappropriate conversations with the students in his Spanish class at Sherman High School.[20] Respondent argues that Grievant's conduct violated West Virginia Board of Education ("WVBOE") Policy 5902 *Employee Code of Conduct,* which requires public school employees to *inter alia*:

- § 4.2.1. - exhibit professional behavior by showing positive examples of communication, and language;
- § 4,2,3. - maintain a safe and healthy environment free from harassment, bias and discrimination; and,
- § 4.2.6. - demonstrate responsible citizenship by maintaining a high ethical of conduct, self-control and moral/ethical behavior.

Id.

Respondent also asserts that Grievant's conduct violated WVBOE Policy 4373, *Expected Behavior in Safe Supportive Schools,* by exhibiting behavior that emphasized

[20] The alleged comments are fully described in the foregoing Findings of Facts and will not be repeated in this discussion.

"the sexuality of student[s] in a manner that prevents or impairs [their] full enjoyment of educational benefits, climate/culture or opportunities." *Id.*

Respondent's position is that violation of these policies after being made aware of them and committing the alleged conduct after being previously warned not to constitutes "insubordination" and "willful neglect of duty" as those terms are contemplated in W. VA. CODE § 18A-2-8.

There can be little doubt that, if Grievant engaged in the conduct the students alleged, his language and communication with the students would have been unprofessional in violation of WVBOE Policy 5902, and the many references to the sexual behavior of the students would have violated WVBOE Policy 4373.

Grievant agreed that many of the alleged comments would violate the sexual harassment policy.[21] However, Grievant claims that he did not engage in the conduct of which he is accused. Grievant admits that he discussed the embezzlement investigation because one of the students raised the issue. He also admits that he accidently gave information to a student indicating her sister was gay when asking how the student was doing in college. He asserts that he did not know the student was unaware of her sister's sexual preference. Grievant denies all the remaining allegations. He argues that they were fabricated by the students in the second block because they were not doing their work and were getting lower grades than they expected to receive.

Grievant specifically argues that the testimony of the students was not credible given the totality of the record. He also asserts Superintendent Huffman relied on prior allegations of misconduct to support his decision to terminate Grievant's conduct in

[21] *See* Grievant's Proposed Finding of Fact 33, citing the level three hearing recording.

violation of a written agreement resulting in failure to follow the policy of progressive discipline. A related issue raised by Grievant is that any misconduct he committed was correctable and should have been cited in his evaluations and triggering an opportunity to improve. Finally, Grievant asserts that any discipline he receives should be mitigated by his long tenure of acceptable service with the Board and termination of his employment is disproportionate to any misconduct he may have committed.

The first issue to be addressed is the disparity in the testimony of the students and Grievant. The students all stated that the incidents set out above, as well as others, occurred in Grievant's classroom. Grievant only admits to discussing the embezzlement investigation and the employees who were allegedly involved. He denies making any of the alleged inappropriate comments and opines that the students made these up because they thought his class was too difficult.

. In situations where the existence or nonexistence of certain material facts hinges on the credibility of conflicting witness testimony, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.,* Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.,* Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ*., Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp*., Docket No. 93-HHR-050 (Feb. 4, 1994).

The Grievance Board has applied the following factors to assess a witness's testimony: (1) demeanor; (2) opportunity or capacity to perceive and communicate; (3) reputation for honesty; (4) attitude toward the action; and (5) admission of untruthfulness.

Additionally, the administrative law judge 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' information. *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); *Elliott v. Div. of Juvenile Serv.,* Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999).

Student CT testified that Grievant made the inappropriate comments set out above. She is sixteen years old and took Grievant's Spanish 1 class last year. CT was nervous when testifying as one would expect from a person her age. However, she made appropriately eye contact and answered questions put to her without hesitation. She used age appropriate language and did not appear coached. She was reluctant but not evasive which is consistent with the testimony that she initially felt pressured by her friends. She was upset with Grievant's comments about the female bus operator because MB is the driver's daughter and her close friend. She was also upset and embarrassed when Grievant mentioned an affair between two school employees because one of them was a close relative and CT had not been told about the incident before. CT's testimony was credible.

Student LD is a different matter. He was very confident and answered quickly but sounded like he was telling a prepared story he had told many times. He professed under oath that he was very embarrassed by the comments Grievant had made in class. When confronted with the testimony of a teacher who had disciplined him for making a highly

offensive remark in his class he remembered the details of the conversation except for his answer to the question of whether he was truly offended by Grievant's conduct. The teacher testified credibly that LD admitted he was not offended but just wanted to get out of class. LD also had a motive for animosity against Grievant because he was not making the grades he was accustom to in Grievant' class. LD's demeanor and apparent deception on an important issue render the remainder of his testimony suspect and not credible.

Student KS also answered quickly and her testimony seemed rehearsed, but she did not display the hubris of LD. She also related the same inappropriate incidents set out by CT. She stated that she had talked to another teacher about Grievant's conduct and was advised to report it to the office which is why she made a written statement. Her demeanor was appropriate for a witness her age and her testimony was credible.

Student MB also repeated the alleged inappropriate conduct with which Grievant is accused. She is the daughter of the bus operator Grievant spoke about. She appeared to be angry but not unreasonably so. Her rendition of the events was consistent with that of the other witnesses. MB was accused of saying that she was going to war with Grievant. She stated that she was upset and openly said she was going to complain about Grievant's conduct but denied using the specific words "going to war."[22] She was also upset with Grievant because she felt his class was unfairly difficult and included that as part of her complaints. While it was apparent that MB was disdainful of Grievant, her testimony appeared to be straightforward and credible.

[22] Even if MB used those specific words, such hyperbole is not uncommon for an angry teenager and does not go to the credibility of her reasons for reporting Grievant to the administration.

Grievant was reasonably calm when he testified and appeared to be very sincere about his love of teaching students Spanish. He also made appropriate eye contact and answered questions without undue hesitation. He also appeared to be nervous which was consistent with the seriousness of the proceeding but not inappropriately so. Grievant obviously has a strong motive for denying the allegations, but that alone does not destroy the credibility of his testimony. Grievant admitted that he was suspended for telling an offensive joke to students in 2007. *See* Footnote 18 *supra.* He said that he told the students the joke because he wanted them to like him. He also appeared to attempt to mitigate the severity of this action by stating the students enjoyed the joke immensely.

Grievant was also investigated for making similar inappropriate remarks in 2014.[23] He was suspended for three months while an investigation was conducted regarding these allegations. Ultimately, the superintendent agreed to put him back to work with no disciplinary action but he was not reimbursed for the three-month suspension without pay. Most telling was the superintendent's statement that he was not calling the action a disciplinary suspension based upon the assurances Grievant had made to him. Superintendent Hudson additionally wrote:

> However, nothing in this letter is intended to deny the issues and concerns expressed in my prior letters. Nor is this letter intended to tie my hands in the event that your job performance after this date raises similar or other concerns. I hope that will not be the case.[24]

Given Grievant's history, his motivation for deception and the consistent credible testimony of most of the students, Grievant's blanket denials are simply not credible.

[23] *See* FOF 29, for examples of the alleged remarks.
[24] Respondent Exhibit 5.

Grievant had been trained on the policies cited by Respondent. More importantly, he had been warned on two prior occasions not to participate in such inappropriate conduct. Accordingly, Respondent proved the reasons for Grievant's dismissal and that he was guilty of insubordination as the term is contemplated in W. VA. CODE § 18A-2-8.

Grievant is correct in the assertion that the suspension taken in 2014 was not disciplinary and it would be inconsistent with Superintendent Hudson's letter to consider that to be a step in the progressive discipline process. Consistent with this assertion, Grievant argues that any misconduct he may have committed was correctable and he may not be dismissed for that misconduct without it being brought to his attention through performance evaluations and he has been given an opportunity to improve pursuant to WEST VIRGINIA CODE § 18A-2-12a.

The West Virginia Supreme Court of Appeals has made it clear that it is not the label given to the conduct that controls the application of W. VA. CODE § 18A-2-12a, but whether the conduct was related to Grievant's performance and is correctable. Accordingly, even when Respondent label's Grievant's conduct as "willful neglect of duty" or "insubordination" where the underlying complaints regarding an employee's conduct relate to her employment "the effect of West Virginia Board of Education Policy 5300 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). Concerning what constitutes "correctable" conduct, the question is whether the conduct directly and substantially affects the morals, safety, and health of the system in a permanent, non-correctable manner." If so, the evaluation and correction provisions do not apply. *Mason County Bd. of Educ. v. State Superintendent of Sch*., 165 W. Va. 732, 739 (W. Va.

1980).[25] The provisions of Policy 5300 referred to by the Court in these cases have since been codified in W. VA. 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 the 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. . .[26]

The misconduct in this matter was not related to the performance of Grievant's job. The comments Grievant made and matters he discussed with students were outside the scope of his employment as a teacher, and in some cases, were very personal. Inappropriate discussions with students concerning their dating habits, and allegations of extramarital affairs by school employees, directly relates to the morals and safety of the students. Additionally, because Grievant was specifically warned about such behavior and chose to do it again, his misconduct constitutes insubordination.

Grievant's conduct was not "correctable" as contemplated by WEST VIRGINIA CODE § 18A-2-12a. Consequently, Respondent was not required to raise these issues in evaluations, give Grievant an opportunity to improve, nor apply progressive discipline

[25] *See also, Trimboli v. Bd. of Educ. of the County of Wayne*, 163 W.Va. 1, 254 S.E.2d 561 (1979); and *Rogers v. Bd. of Educ*., 125 W.Va. 579, 588, 25 S.E.2d 537 (1943).
[26] This is virtually the same language which was contained in West Virginia Board of Education Policy at 5300(6)(b) and relied upon in *Maxie* and *Mason County Bd. of Educ., supra.*

before taking disciplinary action. The fact that the investigation in 2014 did not result in discipline is not controlling. More importantly, Superintendent Hudson specifically informed Grievant that if there were further occurrences of the issues raised in the investigation, these issues would be revisited.

Finally, Grievant argues that given Grievant's long career with no disciplinary actions beyond a reprimand, termination of his contract is out of proportion with the misconduct with which he is charged. "The argument that discipline is excessive given the facts of the situation is an affirmative defense, and [Grievant bears] the burden of demonstrating the penalty was clearly excessive or reflects an abuse of the agency's discretion or an inherent disproportion between the offense and the personnel action." *Hudson v. Dep't of Health and Human Res./Welch Cmty. Hosp.*, Docket No. 07-HHR-311 (March 21, 2008).

"Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case-by-case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995); *Crites v. Dep't of Health & Human Ser.*, Docket No. 2011-0216-DHHR (Nov. 16, 2011).

Given the severity of the misconduct and Grievant's prior warnings, the penalty of dismissal was not clearly excessive or an abuse of discretion. 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. "'The authority of a county board of education to dismiss a [school employee] under W. Va. Code (1931), 18A-2-8, as amended, must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously.' *Syllabus, DeVito v. Board of Education of Marion County*, 169 W.Va. 53, 285 S.E.2d 411 (1981); S*yllabus, Fox v. Board of Education of Doddridge County*, 160 W.Va. 668, 236 S.E.2d 243 (1977); *Syllabus Point 3, Beverlin v. Board of Education of Lewis County*, 158 W.Va. 1067, 216 S.E.2d 554 (1975)." *Syl., DeVito v. Bd. of Educ*., 173 W. Va. 396, 317 S.E. 2d 259 (1984).

3. The reasons listed W. VA. CODE § 18A-2-8 for which a school public employee may be dismissed are set out as follows:

> (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.

Id.

4. The term "willful neglect of duty" encompasses something more serious than incompetence. The term "willful" ordinarily imports a knowing and intentional act, as distinguished from a negligent act. *Bd. of Educ. of the County of Gilmer v. Chaddock*, 183

W. Va. 638, 398 S.E.2d 120 (1990); *Williams v. Cabell County Bd. of Educ*., Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ*., Docket No. 95-29-151 (Aug. 24, 1995); *Hoover v. Lewis County Bd. of Educ*., Docket No. 93-21-427 (Feb. 24, 1994). “

5. For there to be "insubordination," the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be willful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd./Shepherd Coll.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curium*). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990).

6. In situations where the existence or nonexistence of certain material facts hinges on the credibility of conflicting witness testimony, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.,* Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.,* Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ*., Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp*., Docket No. 93-HHR-050 (Feb. 4, 1994).

7. The Grievance Board has applied the following factors to assess a witness’s testimony: (1) demeanor; (2) opportunity or capacity to perceive and communicate; (3) reputation for honesty; (4) attitude toward the action; and (5) admission of untruthfulness. Additionally, the administrative law judge 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' information. *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); *Elliott v. Div. of Juvenile Serv.,* Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999).

8. Respondent proved the reasons for the termination of Grievant's employment, and that Grievant was guilty of insubordination, by a preponderance of the evidence.

9. Even when Respondent labels Grievant's conduct as "willful neglect of duty" or "insubordination" where the underlying complaints regarding an employee's conduct relate to her employment, "the effect of [WEST VIRGINIA CODE § 18A-2-12a] 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).

10. Concerning what constitutes "correctable" conduct, the question is whether the conduct directly and substantially affects the morals, safety, and health of the system in a permanent, non-correctable manner." If so, the evaluation and correction provisions do not apply. *Mason County Bd. of Educ. v. State Superintendent of Sch*., 165 W. Va. 732, 739 (W. Va. 1980).

11. Grievant's conduct was not "correctable" as contemplated in *Mason County Bd. of Educ. v. State Superintendent of Sch*., 165 W. Va. 732, 739 (W. Va. 1980).

12. “Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case-by-case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995); *Crites v. Dep't of Health & Human Ser.*, Docket No. 2011-0216-DHHR (Nov. 16, 2011).

13. The punishment imposed by the Respondent was not proven to be clearly excessive and mitigation of the punishment is not required in this matter.

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: January 19, 2018.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE