THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ERIC SHAMBLEN,

Grievant,

v. **Docket No. 2018-0458-MnrED**

MONROE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Eric Shamblen, filed this expedited level three grievance against his employer, Monroe County Board of Education, dated September 25, 2017, stating as follows: "[w]rongfully terminated on September 21st, 2017." As relief sought, Grievant asks "[t]o have employment reinstated."

A level three hearing was conducted on December 5, 2017, and May 21, 2018, before the undersigned administrative law judge at the Raleigh County Commission on Aging in Beckley, West Virginia. Grievant appeared in person and by counsel, Joe E. Spradling, Esquire, West Virginia School Service Personnel Association. On September 11, 2018, George B. Morrone, III, Esquire, General Counsel, West Virginia School Service Personnel Association, filed a Notice of Substitution of Counsel informing the Grievance Board that he would be appearing on behalf of Grievant in this matter. Respondent, Monroe County Board of Education, appeared by counsel, Jason S. Long, Esquire, Dinsmore & Shohl, LLP. It is noted that given the substitution of counsel and the complexity of this grievance, counsel for Grievant asked for two extensions for the submission of proposed Findings of Fact and Conclusions of Law, and the same were granted for good cause shown. This matter became mature for consideration on

September 17, 2018, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a custodian. Respondent terminated Grievant's employment after it was discovered that he posted inappropriate comments on a student's posts on Facebook in violation of the Employee Code of Conduct. Respondent asserts that the violations of the Employee Code of Conduct constitute insubordination and immorality. Grievant did not deny making the comments on the Facebook posts, but denied knowing that the posts were that of a student at one of the schools to which he is assigned. Therefore, Grievant denied violating the Employee Code of Conduct, and denied engaging in acts of insubordination and immorality. Respondent proved by a preponderance of the evidence that Grievant violated the Employee Code of Conduct and engaged in acts of insubordination and immorality thereby justifying his termination. Grievant failed to prove by a preponderance of the evidence that his termination from employment was excessive or an abuse of Respondent's discretion, or that there is an inherent disproportion between the offense and the personnel action. 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. At the times relevant herein, Grievant was employed by Respondent as a custodian. Grievant had been so employed since 2002. Grievant's most recent

assignments had been at James Monroe High School (JMHS) and the Monroe County Technical Center, which are located together on one campus.

2. C.B.G.[1] was a female student attending both JMHS and the Technical Center during the school years from 2015-2017, while Grievant was assigned to and working at those locations.

3. Joetta Basile is the Superintendent of Monroe County Schools.

4. At the times relevant herein, Grievant and his wife were separated and going through a divorce. Based upon the evidence presented, it appears that at the times relevant herein, Grievant's estranged wife was also a custodian employed by Monroe County Schools.

5. C.B.G. had worked as a babysitter for Grievant's wife at various times in 2017 caring for Grievant's and his wife's children. Grievant met C.B.G. briefly on one occasion when he dropped off a toy or a game for the children while they were being babysat at his wife's residence.

6. Sometime prior to the events leading up to this grievance, Grievant's wife gave Grievant C.B.G.'s telephone number and suggested he call her if he needed a babysitter when the children were with him. However, the name given to Grievant by his estranged wife identified C.B.G. as K.G., misspelling her first name, but provided Grievant with the same telephone number that appears in C.B.G.'s Facebook profile information. Grievant called the telephone number given to him once during the summer of 2017, and

[1]The undersigned ALJ will follow the past practice of the West Virginia Supreme Court in cases involving underage individuals and will refer to the initials only of the involved student. *See In the Matter of Jonathan P.,* 182 W.Va. 302, 303 n. 1, 387 S.E. 2d 537, 538 n. 1 (1989).

spoke with his children's babysitter, C.B.G., about babysitting the children. However, Grievant did not hire C.B.G. to babysit the children because he found her rates to be too high.

7. C.B.G. had and used a social media account through Facebook. On the site, her profile name was C.B.,[2] opting to only use her first and middle name on her profile, timeline, and her posts. This was not a "fictitious" name. However, further in the profile section of her Facebook account, she identified herself by her full name, including last name, listed her phone number and email address (containing her first and last name), and stated that she lived in Peterstown, West Virginia.[3] It is noted that this information was not displayed on C.B.G.'s main Facebook profile page, or timeline. Instead, to see this information, a button, or link, called "About" would have to be selected to view this information. This "About" button was prominently displayed on the top of Facebook profile pages, or timelines, under users profile photographs, just as it was on Grievant's Facebook page, or timeline.[4]

8. At the times relevant herein, it appears that C.B.G.'s Facebook profile was set as public, as indicated by the globe icon under her name on her posts.[5] This means anyone, and not just her Facebook friends, could view her profile and posts, and possibly comment on her posts.

9. It appears that Grievant joined Facebook sometime in or about May 2017, and had two Facebook accounts. It is unclear when the second account was opened or

[2] Again, only initials will be used when referring to the student.
[3] *See*, Respondent's Exhibits 14, 15, and 16, screen shots from C.B.G's Facebook profile.
[4] *See*, Respondent's Exhibits 4 and 5, screen prints from Grievant's two Facebook profiles.
[5] *See*, Respondent's Exhibits 2, 3, 12, and 13, screen prints of C.B.G.'s posts.

why. Nonetheless, by July 2017, between his two accounts, Grievant had acquired a number of "friends," many from across the U.S., and in other countries. A large portion of Grievant's new Facebook friends were attractive women who had glamorous and/or provocative profile pictures.

10. Grievant admits that he used Facebook to "look at pictures of pretty girls," and would frequently comment on their posts and photos.

11. The parties dispute whether Grievant and C.B.G. were friends on Facebook. Based upon the documents and other evidence presented in this matter, such cannot be determined. On neither of the screen prints of Grievant's two accounts does it have C.B.G. listed as a friend. There are no screen prints showing C.B.G.'s friend list, and Grievant denied that they were "friends." C.B.G. did not testify at the level three hearing.

12. On June 24, 2017, at 12:39 a.m., Grievant posted a comment on a photo of C.B.G. that she had posted on June 11, 2017. Grievant's comment was, Wouldliketalktoyousometimeericshamblen."[6] Grievant does not dispute that he posted this comment. It does not appear that C.B.G. replied to Grievant's comment.

13. On July 23, 2017, between 7:23 a.m. and 7:26 a.m., Grievant posted four comments to a photo of C.B.G. she had posted on July 4, 2017. The four comments were consecutive, without other Facebook users commenting between them. The four comments were as follows: "Yell boy"; "Man ol man"; "When get through divorce me like to meet"; and, "Left out wife."[7] It does not appear that C.B.G. replied to any of Grievant's comments. Grievant does not deny posting these comments to C.B.G.'s Facebook page.

[6] *See*, Respondent's Exhibit 2, screen print of June 24, 2017, post.
[7] *See*, Respondent's Exhibit 3, screen print of July 23, 2017, posts.

14. It is noted that the two photos C.B.G. posted that are referenced herein were not suggestive or revealing in any way. At times, Grievant's counsel, Mr. Spradling, referred to these photographs as "glamor shots." However, they are not. They are merely good selfie photographs of a young woman wearing sleeveless summer shirts as anyone would. In one photo she is smiling, and in the other, she is not. It is that simple.

15. School Nurse Stephanie Darnell informed Assistant Superintendent Lisa Mustain of Grievant's comments to C.B.G.'s posts on or about August 15, 2017. This information was then provided to Superintendent Basile the Human Resources Director. Upon receiving the report, Superintendent Basile notified Grievant that he needed to appear at the principal's office on August 16, 2017, for a meeting.

16. On August 16, 2017, Superintendent Basile met with Grievant about the comments he made to C.B.G.'s Facebook posts. Grievant did not deny making the posts, but initially denied knowing that C.B.G. was a student. Superintendent Basile informed Grievant during this meeting that she was suspending him from employment without pay effective immediately, pending the outcome of the investigation into the matter.

17. By letter to Grievant dated August 21, 2017, Superintendent Basile confirmed what was discussed at their August 16, 2017, meeting, and Grievant's suspension without pay. Also, by this same letter, Superintendent Basile informed Grievant that there would be another meeting on August 28, 2017, at the Board's office, and that he had the right to bring counsel or a union representative with him.[8]

18. Following the meeting on August 16, 2017, Superintendent Basile and other members of the administration continued the investigation into Grievant's comments and

[8] *See*, Respondent's Exhibit 1, August 21, 2017, letter.

conduct toward C.B.G. At some point, C.B.G. talked to her principal about Grievant's comments on her posts and the responses were conveyed to Superintendent Basile. Based upon the results of the investigation, Superintendent Basile decided to recommend the termination of Grievant's employment to the Board.

19. By letter dated August 28, 2017, Superintendent Basile informed Grievant that she would be recommending his termination to the Board for violations of the Employee Code of Conduct and West Virginia Department of Education Policy 2460 as a result of his communications with C.B.G. on Facebook. In this letter, Superintendent Basile informed Grievant that she would be making her recommendation to the Board at their meeting on September 5, 2017, and that he had the right to a hearing before the Board at this meeting and that he had the right to have representation at the hearing.

20. Grievant and his former counsel were granted a continuance of the September 5, 2017, hearing and the matter was rescheduled for September 19, 2017. The hearing was conducted on that date, and Grievant appeared in person and by counsel, Mr. Spradling. Respondent appeared by counsel, Mr. Long.[9]

21. Respondent approved Superintendent Basile's recommendation for termination of Grievant's employment on or about September 19, 2017.

22. During his employment with Respondent, Grievant has received a number of trainings and staff development courses through Monroe County Schools. Between August 2015 and March 2017, Grievant attended trainings in Employee Professionalism

[9] *See*, Respondent's Exhibit 18, September 19, 2017, Board Hearing Transcript.

and Social Media/Confidentiality. Such would have covered the Employee Code of Conduct.[10]

23. On August 14, 2017, and August 15, 2017, Grievant, along with other Monroe County Schools employees received training on social media. On one of those days, Grievant quietly asked Kim Lester, Technology Support Specialist at Monroe County Schools, if messages on Facebook could be seen by anyone or everyone.[11]

24. The only member of administration to testify in this matter was Superintendent Basile. C.B.G. was not called as a witness by either party, nor was any sworn statement from her presented as evidence.

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 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

Respondent asserts that its decision to suspend then terminate Grievant's employment was proper because Grievant violated provisions of its Employee Code of Conduct by posting inappropriate comments on Facebook in response to a student's

[10] *See*, Respondent's Exhibits 9 and 10, Grievant's Record of Staff Development; testimony of Superintendent Basile.
[11] *See*, testimony of Kim Lester, Technology Support Specialist for Monroe County Schools; Respondent's Exhibit 11, "Confidentiality Issues and Social Media Guidelines for School Employees," Power Point presentation screen print.

posts of photographs of herself.[12] Respondent argues that as Grievant had been trained on the Employee Code of Conduct, as well as the Monroe County Accepted Use of Technology Policy, and the use of social media, Grievant's communications with C.B.G. constitutes insubordination and immorality. Respondent did not charge Grievant with violations of the Monroe County Accepted Use of Technology Policy in his termination letter. As new charges cannot be added at level three, the ALJ will not consider the allegations that Grievant violated this policy. Grievant admits to making the posts at issue, but argues that he violated no policies or Code of Conduct because he did not know that the person to whom he made the comments was a student. Therefore, Grievant asserts that his suspension and dismissal were improper. Grievant also argues that as Respondent did not allege any of the grounds for dismissal in West Virginia Code § 18A-2-8, his dismissal was also improper.

The authority of a county board of education to suspend or terminate an employee's contract must be based on one or more of the causes listed in West Virginia Code § 18A-2-8 and must be exercised reasonably, not arbitrarily or capriciously. Syl. Pt. 2, *Parham v. Raleigh County Bd. of Educ.*, 192 W. Va. 540, 453 S.E.2d 374 (1994); Syl. Pt. 3, *Beverlin v. Bd. of Educ*., 158 W. Va. 1067, 216 S.E.2d 554 (1975)*; Bell v. Kanawha County Bd. of Educ*., Docket No. 91-20-005 (Apr. 16, 1991), ***aff'd,*** Kanawha Cnty. Cir. Ct. Civil Action No. 91-AA-110 (June 4, 1992).

WEST VIRGINIA CODE §18A-2-8 states, in part that,

[12] It is noted that Respondent charged Grievant with violating West Virginia Department of Education Policy 2460 in its termination letter. However, at level three, Respondent did not discuss WVED Policy 2460. Therefore, Respondent's claim that Grievant violated that WVED Policy 2460 is deemed abandoned and will not be discussed further herein.

> (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. . . .

W. VA. CODE § 18A-2-8(a). However, "[i]t is not the label a county board of education attaches to the conduct of the employee . . . that is determinative. The critical inquiry is whether the board's evidence is sufficient to substantiate that the employee actually engaged in the conduct." *Allen v. Monroe County Bd. of Educ.*, Docket No. 90-31-021 (July 11, 1990), ***aff'd,*** Kanawha Cnty. Cir. Ct. Civil Action No. 90-AA-134 (Oct. 13, 1992); *Duruttya v. Mingo County Bd. of Educ.*, Docket No. 29-88-104 (Feb. 28, 1990), ***aff'd,*** Kanawha Cnty. Cir. Ct. Civil Action No. 90-AA-72, ***aff'd, Duruttya v. Bd. of Educ.,*** 181 W. Va. 203, 382 S.E.2d 203 (1989).

An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), ***aff'd,*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

"'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res.,* Docket No. 93-HHR-322 (June 27, 1997), *aff'd,* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

In its August 28, 2017, dismissal letter, Superintendent Basile did not mention any of the causes for dismissal or suspension listed in West Virginia Code § 18A-2-8. Instead, Superintendent Basile charges Grievant with violations of the Employee Code of Conduct. The Monroe County Schools "Employee Code of Conduct" states, in part, as follows:

> **3.1 Employee Code of Conduct**
>
> All Monroe County school employees shall:
>
> 3.1.1 Exhibit professional behavior by showing positive examples of preparedness, communication, fairness, punctuality, attendance, language, and appearance . . .
>
> 3.1.3 Maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, violence, and free from bias and discrimination;
>
> 3.1.4 Create a culture of caring through understanding and support . . .

> 3.1.6 Demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior . . .
>
> 3.1.8 Comply with all Federal and West Virginia laws, policies, regulations and procedures.
>
> 3.2 All romantic relationships between students and employees are prohibited, regardless of the age of the student. Employees and students will not engage or attempt to engage in any nonprofessional social behavior with each other. Nonprofessional social behavior includes but is not limited to dating; any type of sexual activity, including electronic media; any touching of a sexual nature; hugging; kissing; hand holding or physical caressing; sexual flirtations, advances, or propositions; inappropriate remarks about an individual's body; sexually degrading words used toward an individual or to describe an individual; the display in the school or workplace of sexually suggestive actions, gestures, objects, graffiti, or pictures.[13]

It would certainly appear that if Grievant was aware that C.B.G. was a student, his comments on her Facebook posts would violate the Employee Code of Conduct as his posts demonstrate a lack of self-control, a lack of professionalism, and do not demonstrate a high standard of conduct. Moreover, the nature and tone of his posts to the C.B.G. explicitly violate section 3.2 of the Employee Code of Conduct as they demonstrate that Grievant engaged or attempted to engage with a student using unprofessional social behavior, they are of a sexual nature, flirtatious, and inappropriate. One post can certainly be viewed as a proposition.[14] Additionally, the nature and frequency of the posts possibly demonstrate harassment, which is also prohibited in

[13] *See*, Respondent's Exhibit 8, Dismissal Letter dated August 28, 2017; Respondent's Exhibit 6, "Employee Code of Conduct."
[14] *See*, Respondent's Exhibit 2.

Section 3.2.[15] Grievant had received training on the Employee Code of Conduct, professionalism, and the use of social media.[16]

Grievant argues that he did not know that C.B.G. was a student when he made the comments on Facebook. Respondent argues, that he knew who C.B.G. was, as well as that she was a student at the school where he was assigned to work. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *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 & Human Res.*, 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. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the administrative law judge should consider the following: 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

[15] *See*, Respondent's Exhibit 3.
[16] *See*, Respondent's Exhibits 9, 10, and 11.

information. *See Id.; Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Superintendent Basile testified at the level three hearing. She was one of two witnesses that Respondent called in its case-in-chief. Superintendent Basile appeared professional and knowledgeable. She was calm and demonstrated the proper demeanor during her testimony. She answered the questions asked of her and she was not evasive. It was Superintendent Basile's decision to recommend Grievant's suspension and termination. As such, this could be considered as bias or a motive to be untruthful in that she is effectively defending her decision. However, Superintendent Basile was credible. She testified that at the beginning of her August 16, 2017, meeting with Grievant when she first discussed this matter with him, he denied knowing that C.B.G. was a student; however, by the end of the meeting, he told her that he knew C.B.G. was a student when he made the comments. Superintendent Basile testified at the Board hearing on September 19, 2017, in addition to testifying at level three. Her testimony has remained consistent. She has not asserted any trouble remembering details or events.

Grievant testified at the level three hearing. At times during his testimony he appeared calm, and at others, he appeared somewhat agitated and defiant. As Grievant is seeking to be reinstated into his former position, he has an interest in the outcome of this matter and such is a motive to be untruthful. Grievant answered the questions asked of him, but gave confusing answers at times. At times, during his cross examination he appeared evasive. Grievant repeatedly claimed that he could not remember certain events or details explaining that he did not have a good memory. He testified that he has "short-term memory," explaining that he can better remember things from longer ago than

things that happened recently. Grievant also blamed his memory issues on medication, having dyslexia, and the passage of time. It would seem reasonable from his description of his short-term memory problems that passage of time would not be an issue.

Grievant testified that he did not know how Facebook worked, or how people became "friends," and that he did not know how many "friends" he had. He repeatedly testified that he was "illiterate" at Facebook. However, Grievant had two working accounts, numerous friends on both, and obviously knows how to post comments. Further, despite his claim of not knowing how people became friends on Facebook, Grievant was adamant that he and C.B.G. were not friends of Facebook. He also testified that he did not know how C.B.G.'s pictures showed up on his feed, and suggested that his wife was somehow to blame. There was absolutely no evidence to support this claim. Grievant also generally denied having made lewd comments on Facebook. However, Grievant made the following comments on a post that featured a drawing of a scantily clad woman standing beside a Ford emblem that said "Remember Guys, Sex with Ford Girl is Better Because a Chey Girl Will Break Down Before You're Able to Reach Your 'Destination'": "Looks like have to get busy;" Thats kind girl ive been looking for"; Wish my wife was like that"; "Even ford chick to boot"; "What a Woamen."

Grievant was not credible. He repeatedly deflected any blame to others even though he admits making the comments. In addition to blaming his wife for his termination, he appeared to try to blame C.B.G. stating that she was a "friend collector" who posted photos of herself to get attention. He also seemed to suggest that his son may have posted some of the other comments that were made from his account. However, none of those excuses matter. The fact is that Grievant, on his own volition,

made the comments to C.B.G.'s posts. Based upon the evidence presented, it appears more likely than not that Grievant knew who C.B.G. was and that she was a student when he posted his comments to her photos in June and July 2017. Therefore, Respondent has proved by a preponderance of the evidence that Grievant violated provisions of the Employee Code of Conduct by making the inappropriate comments on C.B.G.'s posts.

Now, the issue becomes whether Grievant's violation of these policies would be grounds for dismissal given that such are not specifically mentioned in West Virginia Code § 18A-2-8. Grievant argues that as none of the grounds listed in the statute were cited as the reason for his dismissal, the same was improper. Respondent argues that as Grievant had received the trainings on the Employee Code of Conduct, professionalism, and use of social media, a violation of the same would constitute insubordination citing the case of *Lancaster v. Ritchie County Board of Education*, No. 15-0554 (W. Va. Sup. Ct., May 23, 2016) (memorandum decision).

In *Lancaster*, a Board of Education terminated a bus operator for violations of the employee code of conduct, having engaged in inappropriate conversations with students that included name-calling and adult subject matter, along with safety concerns related to a lack of control of the students while the bus was in motion. Grievant had a history of receiving written warnings for similar conduct in the past. The Grievance Board granted the grievance finding that grievant's conduct did not constitute insubordination or willful neglect of duty, but that it was poor performance constituting correctable conduct. The circuit court reversed the Grievance Board's decision on appeal finding that the ALJ's decision was clearly wrong, and that the grievant's conduct did not constitute unsatisfactory performance and was not correctable. The circuit court found that despite

trainings and warnings in the past, grievant willfully engaged in prohibited behaviors. The Supreme Court affirmed the circuit court, thereby allowing for the termination of an employee who received proper training on the employee code of conduct for subsequently engaging in unprofessional behavior violating the same with and around students because such would constitute insubordination and/or willful neglect of duty. *See Id.*

The West Virginia Supreme Court of Appeals has held that, for there to be "'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be 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 curiam). The disobedience must be willful, meaning that "the motivation for the disobedience [was] contumaciousness or a defiance of, or contempt for authority." *Id.* at 213, 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).

Respondent asserts that Grievant's violations of the Employee Code of Conduct constituted insubordination given his documented trainings over the years. Grievant has not denied receiving the trainings on the Employee Code of Conduct. In fact, Grievant testified that he would not have made the comments had he known C.B.G. was a student. The ALJ has already concluded that Grievant knew who C.B.G. was and that she was a student when he made the comments on Facebook. Accordingly, Respondent has proved by a preponderance of the evidence that Grievant engaged in acts of

insubordination when he made the comments at issue on C.B.G.'s Facebook posts in June and July 2018, thereby justifying his termination from employment.

"Immorality is an imprecise word which means different things to different people, but in essence it also connotes conduct 'not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior.' Webster's New Twentieth Century Dictionary Unabridged 910 (2d ed. 1979)." *Golden v. Bd. of Educ.*, 169 W. Va. 63, 67, 285 S.E.2d 665, 668 (1981). Grievant's conduct toward C.B.G. on Facebook was entirely inappropriate. She was a minor and a student at a school where Grievant worked. She was also his children's babysitter. Grievant essentially cat-called C.B.G. online for everyone to see. Such does not conform with the accepted standard of proper sexual behavior. Accordingly, Respondent has proved that Grievant engaged in acts of immorality toward C.B.G. through his comments on her Facebook posts.

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), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996); *See Martin v. W. Va. [State] Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). Grievant presented no evidence to support a claim that the discipline he received was excessive or disproportionate to his offense. Grievant knowingly made sexualized comments to a student at the school to

which he was assigned. Termination of his employment was reasonable, and appropriate.

Lastly, Grievant asserts that the decision of the administrative law judge who heard his unemployment compensation claim should be binding on the Grievance Board. As discussed in *Maxey v. West Virginia Department of Health and Human Resources*, Docket No. 93-HHR-007 (Feb. 28, 1995), ***aff'd***, Wyoming Cnty. Cir. Ct. Docket No 95-C-110 (Mar. 4, 1997), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 971494 (Dec. 3, 1997), the findings made by an administrative law judge in an unemployment compensation proceeding are not binding on the Grievance Board and they do not have the effect of *res judicata*. However, any sworn testimony before another forum may certainly be used to impeach a witness testifying in a matter before the Grievance Board. Workforce West Virginia, the agency that deals with unemployment compensation claims, and the Grievance Board apply different laws and have different standards and procedures. Therefore, the findings made by an administrative law judge in an unemployment compensation proceeding are irrelevant to grievance actions. *See Id.*

For the reasons set forth herein, the grievance is DENIED.

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 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May

17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

2. The authority of a county board of education to suspend or terminate an employee's contract must be based on one or more of the causes listed in West Virginia Code § 18A-2-8and 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), ***aff'd,*** Kanawha Cnty. Cir. Ct. Civil Action No. 91-AA-110 (June 4, 1992).

3. "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)

4. "It is not the label a county board of education attaches to the conduct of the employee . . . that is determinative. The critical inquiry is whether the board's evidence is sufficient to substantiate that the employee actually engaged in the conduct." *Allen v. Monroe County Bd. of Educ.*, Docket No. 90-31-021 (July 11, 1990), ***aff'd,*** Kanawha Cnty. Cir. Ct. Civil Action No. 90-AA-134 (Oct. 13, 1992); *Duruttya v. Mingo County Bd. of Educ.*, Docket No. 29-88-104 (Feb. 28, 1990), ***aff'd,*** Kanawha Cnty. Cir. Ct. Civil Action No. 90-AA-72, ***aff'd, Duruttya v. Bd. of Educ.,*** 181 W. Va. 203, 382 S.E.2d 203 (1989).

5. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *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 & Human Res.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

6. 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. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the administrative law judge should consider the following: 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. *See Id.; Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

7. The West Virginia Supreme Court of Appeals has held that, for there to be "insubordination," the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be 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 curiam). The

disobedience must be willful, meaning that "the motivation for the disobedience [was] contumaciousness or a defiance of, or contempt for authority." *Id.* at 213, 460 (citation omitted).

8. "Immorality is an imprecise word which means different things to different people, but in essence it also connotes conduct 'not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior.' Webster's New Twentieth Century Dictionary Unabridged 910 (2d ed. 1979)." *Golden v. Bd. of Educ.*, 169 W. Va. 63, 67, 285 S.E.2d 665, 668 (1981).

9. An employee of a board of education who has received proper training on the employee code of conduct, and subsequently engages in unprofessional behavior violative of the same with and around students may be subject to dismissal for insubordination and/or willful neglect of duty. *See Lancaster v. Ritchie County Board of Education*, No. 15-0554 (W. Va. Sup. Ct., May 23, 2016) (memorandum decision).

10. The findings and conclusions made by an administrative law judge in an unemployment compensation proceeding are not binding on the Grievance Board and they do not have the effect of *res judicata*. *Maxey v. West Virginia Department of Health and Human Resources*, Docket No. 93-HHR-007 (Feb. 28, 1995), *aff'd*, Wyoming Cnty. Cir. Ct. Docket No 95-C-110 (Mar. 4, 1997), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 971494 (Dec. 3, 1997).

11. 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), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996). *See Martin v. W. Va. [State] Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

12. Respondent proved by a preponderance of the evidence that Grievant engaged in conduct constituting insubordination and immorality thereby justifying his suspension and dismissal.

13. Grievant failed to prove by a preponderance of the evidence that his suspension and subsequent dismissal was clearly excessive, or reflected an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action.

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 (2018).

DATE: November 29, 2018.

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Carrie H. LeFevre
Administrative Law Judge