

# **WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**MATTHEW GONZALES,**  
**Grievant,**

**v.**

**Docket No. 2018-1255-CabED**

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

## **DECISION**

Matthew Gonzales, Grievant filed this grievance against his employer the Cabell County Board of Education, Respondent protesting the disciplinary action(s) against him.

The original grievance was filed on May 25, 2018, and the grievance statement provides:

Reprisal and unsubstantiated claims against Grievant in violation of West Virginia Code and West Virginia Common Law CCBOE removed Grievant as Assistant Principal formally demoting and suspending him and forcing him to reapply for teaching positions within the county. CCBOE disciplined Grievant in addition to his demotion.

The relief sought states:

Grievant seeks reinstatement as Administrator specifically his Assistant Principal position and back pay for any loss of pay as a result of his demotion and suspension, and removal of all disciplinary actions from his record related to this incident.

As authorized by W. VA. CODE § 6C-2-4(a)(4), this grievance was filed directly to level three of the grievance process.<sup>1</sup> A level three hearing was held before the undersigned Administrative Law Judge on September 21, 2018, December 10 and 11, 2018, and February 5, 2019, at the Grievance Board's Charleston office. Grievant

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<sup>1</sup> W. VA. CODE § 6C-2-4(a)(4), provides that an employee may proceed directly to level three of the grievance process upon agreement of the parties, or when the grievant has been discharged, suspended without pay, demoted or reclassified resulting in a loss of compensation or benefits.

appeared in person and by his attorney, Abraham J. Saad, Saad Dixon Law Offices, PLLC. Respondent appeared by its Superintendent, Ryan Saxe, and by its attorney Howard Seuffer, Jr., Bowles Rice LLP. Over the due course of four days of this level three hearing, testimony was taken from approximately fourteen (14) different witnesses: Ryan Saxe, Superintendent of Cabell County Schools; Tim Hardesty, Assistant Superintendent of District Support and Employee Relations; James Paxton, Principal of Huntington Middle School; David Tackett, Service Personnel Manager, formerly Administrative Assistant over Secondary Schools; Cathy Hosaflook, Substitute Principal of Huntington Middle School; Grievant; Mary Campbell, Cabell County Administrator; Kelly Adams, former Secretary, Huntington Middle School; Officer Ronald Miller, School Resource Officer; and several current or former teachers: Robert "Alex" Hogsett Jr., Jeff Jones, Cam Hale, Christopher Jackson, Johnathon Jefferson. Further, while a few exhibits are duplicate documents there were more than thirty (30) exhibits admitted into evidence. At or near the conclusion of the level three hearing, the parties were invited to submit written proposed fact/law proposals. After a series of mutually agreed extensions, authorization by the undersigned Administrative Law Judge, both parties submitted Proposed Findings of Fact and Conclusions of Law and this matter became mature for decision on July 26, 2019. This matter is now ripe for decision.<sup>2</sup>

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<sup>2</sup> Grievant has more than one pending grievance before this Grievance Board against Respondent. The undersigned ALJ is aware that there tends to be an intertwined aspect among the grievances. To the degree relevant the instant matter (2018-1255-CabED) will be analyzed independently. Whereas grievance 2019-0671-CabED specifically incorporates the instant grievance 2018-1255-CabED in its entirety as part of its record.

### **Synopsis**

Grievant worked as the Assistant Principal of Huntington Middle School until Respondent suspended and demoted him to a 200-day teaching position within Cabell County. Grievant filed this grievance alleging Respondent's actions were reprisal and unsubstantiated claim of malfeasance in violation of West Virginia Code and West Virginia common law. Grievant avers that Respondent fails to meet its burden of proof on the demotion.

Grievant was repeatedly made aware of Respondent's expectations regarding his administrative position. Grievant was either unwilling or unable to perform the duties as reasonably required. A board of education's decision to terminate an employee's administrative contract and place him or her in a teaching position is a disciplinary demotion, pursuant to W. Va. Code § 18A-2-8. This grievance matter was not a straight forward, cut-and-dry, disciplinary scenario; nevertheless, Grievant was aware and responsible for his own actions. Respondent established by a preponderance of the evidence that Grievant's actions were deliberate and intentional to the degree that the conduct constituted insubordination and/or willful neglect of duty.

Respondent's demotion of Grievant to a 200-day teacher position was not excessive in that termination was a distinct disciplinary option available and contemplated. Mitigation of the demotion is not found to be suitable in the circumstance of this matter. This grievance is denied.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

### **Findings of Fact**

1. Matthew Gonzales, Grievant, served as a Cabell County Board of Education employee from 2006 to 2018. During Grievant's tenure as a Cabell County Board of Education employee, Grievant was promoted from teacher to administrator. Grievant worked as the Assistant Principal of Huntington Middle School from the fall of 2014 until the spring of 2018.

2. During Grievant's tenure from 2006 to 2014, as a Cabell County Board of Education employee, prior to his promotion, Grievant had no discipline or complaints filed against him.

3. Approximately 600 students attend Huntington Middle School, which consists of grades sixth through eighth.

4. James ("Jim") Paxton is the school's principal and he has served in this position for four years. During the 2017-2018 school year, Grievant and Joe Thacker were the two assistant principals assigned to Huntington Middle School.

5. In late 2016, Grievant had a dispute with a teacher, Robert Alex Hogsett, Jr. (herein after "Hogsett") concerning the discipline of a student.<sup>3</sup> For one reason or another, Physical Educational Teacher Hogsett took exception with Grievant and how he performed his duties as an assistant principal.

6. Hogsett was of the opinion that Grievant was not correctly performing his duties as assistant principal. The dispute was not timely resolved and the divide between the two festered. There were some emails exchanged where Hogsett indicates

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<sup>3</sup> In 2016, Grievant as the Assistant Principal of Huntington Middle School, disciplined Hogsett prior to Ryan Saxe becoming Superintendent.

in the course of things, that he is going to do whatever he needs to resolve matters. At some point Hogsett threatened Grievant and indicated he would go as far up the chain, as needed. G Ex 7

7. Shortly thereafter, Hogsett filed a complaint against Grievant, alleging potential mistreatment of students by Grievant, some pretty serious allegations even inferring potentially sexual abuse. Child Protective Services (CPS) investigated Grievant.

8. On or about November 7, 2016, Grievant received a letter from CPS/DHHR indicating that the allegations were unsubstantiated. G Ex 5

9. On or about July 1, 2017, Cabell County Board of Education hired Ryan Saxe as its new Superintendent.

10. Shortly after becoming the Cabell County Superintendent, Ryan Saxe received an email from Hogsett, pertaining to Grievant. The email stated something to the effect: "if you're the man you say you are and going to be, you will do something about Gonzales." L-3 testimony.

11. At the start of the school year in August 2017, Hogsett followed Grievant around taking pictures of Grievant. Hogsett followed Grievant claiming there was *potential* misconduct. Grievant made a formal complaint regarding Hogsett for following Grievant around and attempting to record and/or take pictures of him. At the time of the complaint, Grievant was unaware of all or the depth of the activities Hogsett had performed.

12. Hogsett surreptitiously retrieved copies of Grievant's personnel file(s) from Principal Paxton's office. Hogsett made copies of Grievant's personnel file material and

delivered it – directly or indirectly – to other parties including but not necessarily limited to Superintendent Saxe.

### September 2017 Investigation

13. In September 2017, a State Police investigation ensued against Grievant. See “Report of Criminal Investigation” R Ex 27/G Ex 19. The investigation was performed by one or more officers with the West Virginia State Police following complaints made about Grievant to the Superintendent.<sup>4</sup> See R Ex 24; G Ex 19. It was alleged that Grievant was engaged in suspicious behavior with students.

14. The investigation included interviewing several students (minors) and Grievant’s co-workers, teachers of the school ,as well as copies of documents from Grievant’s personnel file dating as far back as 2007 (ten years hence).

15. The September 2017 investigation found that Grievant had not engaged in any illegal misconduct, but concerns were noted by various teachers and personnel at the school. Ultimately, the investigation concluded that Grievant committed no misconduct and no criminal wrongdoing.<sup>5</sup>

16. Rumors regarding Grievant’s alleged conduct became widespread.

17. Corporal Marlene Moore of the West Virginia State Police interviewed several minors – each of which denied any inappropriate conduct on the part of Grievant. Further, multiple interviewees, including teachers, acknowledged that Grievant was socially awkward. G Ex 19 at pp. 5 and 7 of 8

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<sup>4</sup> Both Mr. Saxe and Mr. Hogsett claim to have initiated the State Police investigation in September of 2017.

<sup>5</sup> Neither Cpl. Moore nor Trooper Roach “found any inappropriate touching or behavior from the suspect to any student whose name has been brought up throughout the investigation ... “Based upon the above stated facts the undersigned officer finds this case to be unfounded.” See G Ex 19 at page 7 of 8.

18. Grievant's mannerisms are perceived by many to be different. Grievant's vibe is not viewed by others as standard interactive socialization. This perception does not assist Grievant when accusations of abnormal behavior are levied.

19. Multiple teachers stated that the Grievant repeatedly closed his door and covered the window on the door while students were in his office. Likewise, multiple teachers stated that Grievant was often difficult to locate and that he was not available and/or would not help when the teachers needed assistance. Although the State Police report did not find any criminal wrongdoing, multiple teachers believed Grievant's actions were inappropriate. R Ex 24/G Ex 19

20. Hogsett reported Grievant to Child Protective Services (CPS) in response to information Hogsett had received from a student regarding Grievant. .

21. Hogsett reported Grievant, then the assistant principal at Huntington Middle School, to law enforcement, Child Protective Services, the FBI, and to the Cabell County Board of Education administration.

22. In addition to sparking a criminal investigation against Grievant, Hogsett admitted he created a faculty survey addressing Grievant and his handling of discipline at Huntington Middle School. Hogsett had issues with Grievant's response to student misconduct and Grievant's alleged failure to respond to discipline issues in the gym. There is history between Hogsett and Grievant.

23. Grievant was not truly aware of administrations action regarding his complaint regarding Hogsett's conduct. Respondent instigated an investigation.

24. On December 5, 2017, Superintendent Saxe summoned Principal Paxton and Grievant to the central office to address concerns. Grievant was unaware of the nature of this meeting.

25. The meeting held on December 5, 2017, was to discuss concerns noted during the September 2017 investigation. Superintendent Saxe, Assistant Superintendent Kelly Watts,<sup>6</sup> Principal Paxton and Grievant attended this meeting.

26. At the December 5, 2017 meeting, Superintendent Saxe addressed alleged wrongdoing on the part of Grievant, Grievant's behavior and how it is being perceived was discussed.

27. On or about December 11, 2017, Principal Paxton received a complaint from Adam Culver and Amanda Hogsett – the wife of teacher Hogsett. See L3 Transcript Volume I at p. 252 (Sept. 21, 2018). It was Paxton's understanding that Grievant did nothing wrong but that he had created the perception of wrongdoing. *Id* at 252-254

28. A letter dated December 15, 2017, was sent to Grievant summarizing the matters discussed at the December 5, 2017 meeting. R Ex 3 This letter was sent via certified mail and hand delivery. Pursuant to this letter, Superintendent Saxe "directed" Grievant to follow certain conditions of his employment.<sup>7</sup>

29. Grievant initially refused to accept the hand-delivered letter and a subsequent meeting was held on December 20, 2017, to provide Grievant with the letter.

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<sup>6</sup> Kelly Watts is Respondent's Assistant Superintendent for Leadership and Curriculum. Ms. Watts was briefly involved in this matter in December 2017 because Tim Hardesty had not yet assumed the duties and responsibilities of the Assistant Superintendent for District Support and Employee Relations position.

<sup>7</sup> Grievant filed a grievance concerning the December 15, 2017 letter, and the matter was placed in abeyance.



At this meeting, Superintendent Saxe gave Grievant the December 15, 2017 letter, and informed Grievant about issues that had been brought to his attention.

30. The discussion at the December 20, 2017 meeting, and the contents of the December 15, 2017 letter, focused on Grievant's actions and the Superintendent's concerns that Grievant's actions were inviting allegations of impropriety, creating a negative perception, disrupting the workday, and impacting Grievant's leadership effectiveness.

31. The issues outlined in the December 15, 2017 letter, were addressed with Grievant. These issues and allegations outlined in the letter were as follows:

- You have locked your door with students in your office.
- You have shut the door and turned lights off with the window of your door covered. (Some allegations include the belief students have been in your office during this time).
- You have been in your office with the door locked, lights out, door window covered and not responded to repeated attempts to get in touch with you by phone, radio, and knocking at the door for an extended period of time.
- You have had students sign documents or sign a statement to not discuss what has occurred in your meeting with them.
- Students have expressed to school staff members that you have made them feel uncomfortable.
- Going into the pockets of students to retrieve a cell phone.

R Ex 3, attached 12/15/17 letter, pp. 1.

32. David Tackett, then Administrative Assistant of Secondary Schools, and Principal Paxton met with Grievant in early January 2018. The meeting lasted approximately an hour. The justification for the meeting with Grievant tends to vary, but among the rational was because Principal Paxton had received complaints that Grievant was not processing and responding to discipline referrals, was not responding to radio calls, and was generally unavailable.

33. Administrative Assistant Tackett wanted to make sure Grievant understood the expectations set forth in the December 15, 2017 letter. Administrative Assistant Tackett reviewed the December 15, 2017 letter “line by line” with Grievant and provided further guidance to Grievant regarding Superintendent Saxe’s expectations.

34. The following topics were discussed at this January 2018 meeting, which lasted about an hour and provided Grievant a chance to discuss his questions and concerns:

a. Grievant believed Superintendent Saxe’s December 15, 2017 letter was unclear, he was not comfortable with it, and he wanted clarification. *Level Three Tr. Vol. I: 236*

b. Grievant did not want to be alone with students in the gym during morning gym duty. *Id.* at 237. Grievant believed he could not be in the gym with students because several of the gym doors were locked. *Level Three Tr. Vol. II: 25-26.* Administrative Assistant Tackett explained to Grievant that being in his office behind a locked door with one student was a completely different situation than Grievant being in a gym with 400 to 500 students with several gym doors locked. *Id.* Administrative Assistant Tackett also explained to Grievant that he had discussed this specific directive with Superintendent Saxe and that Superintendent Saxe did not intend for this directive to apply to the gym. *Id.* at 27-28. Grievant requested that Superintendent Saxe issue another letter setting forth this exception. Administrative Assistant Tackett stated it was not reasonable to even ask Superintendent Saxe to write a second letter. As a solution to Grievant’s concerns, Administrative Assistant Tackett told him to unlock the gym doors. *Id.* at 28-29.

c. Grievant did not want to use his office. Grievant informed Administrative Assistant Tackett and Principal Paxton that something was wrong with his computer, which resulted in him having to conduct his business elsewhere. *Level Three Tr. Vol. II: 23.* Grievant’s computer was later fixed. *Id.* at 91-92.

35. Following the early January 2018 meeting(s) with Administrative Assistant Tackett and Principal Paxton, Grievant did not start using his office to the satisfaction of Respondent’s Administrative Personnel.

36. A meeting was held with Grievant on January 29, 2018. Grievant, his WVEA representative Ben Barkey, Superintendent Saxe, Assistant Superintendent Hardesty, and attorney Howard Seufer attended this meeting.

37. A specific concern discussed at the January 29, 2018 meeting was Grievant's failure to respond to a request from the school secretary, Ms. Kelly Adams,<sup>8</sup> about a possible student fight on January 23, 2018.<sup>9</sup>

38. Assistant principals at Huntington Middle School are provided with hand-held radios, or walkie-talkies, to respond to calls from other staff members needing assistance with student misconduct. Respondent expects its middle school assistant principals to promptly respond to concerns raised by staff regarding student conduct.

39. On January 30, 2018, Superintendent Saxe wrote a disciplinary correspondence to Grievant alleging: (1) Grievant was not using his assigned office and that he is to use his assigned office and comply with the December 15, 2017 memo; and alleging that (2) Grievant failed to act on January 23, 2018 for an incident between two students. R Ex 3 Superintendent Saxe provided that the letter was a formal reprimand.

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<sup>8</sup> During the 2017-2018 school year, Ms. Adams served as the Finance Secretary at Huntington Middle School. She currently works for Respondent as the Finance Secretary at Barboursville Middle School. She has been employed with Respondent for three years. L-3 testimony

<sup>9</sup> Secretary Adams, under the direction of Assistant Principal Thacker, informed Grievant that two students were attempting to fight in a teacher's classroom, and that the teacher needed assistance. *Level Three Tr.* Vol. II: 262-263. Grievant was in the office and had just finished the morning announcement. Grievant responded, "[o]kay" and Secretary Adams assumed Grievant was going to report to the classroom. Twenty to thirty minutes later, a teacher informed Secretary Adams that Grievant never showed up to address the matter. *Level Three Tr.* Vol. II: 263-264. Principal Paxton received a text from the school stating "there is a possible fight. We can't get in touch with Mr. Gonzales at this time." *Id.* at 258-259. It was later determined that this incident was not actually a fight, Respondent highlights the role of an assistant principal is to assess the degree of threat that student conduct may present. *Id.* at 259, 277.

40. Grievant's office and the sixth-grade hallway are located on the third floor of Huntington Middle School. In January 2018, Grievant was working from other areas in the school and carrying his work documents with him. Grievant began using the conference room in the main office to conduct his work.

41. Superintendent Saxe made it clear at the January 29, 2018 meeting, that his directive in the December 15, 2017 letter to not be in the office with the lights out or window covered, did not mean Grievant was not to use his office. The follow-up January 30, 2018 letter of reprimand specifically set forth:

At no time have I directed you to abandon your office space or stop using it. Nor have I condoned carrying all your work-related papers around with you all day long. To the contrary, at our prior meeting, and in the December 15 memo, I directed you to use your office and other rooms in specific ways that avoid needless suspicion and distrust in the school community, and that do not detract from your effectiveness as an assistant principal or the mission of the school. R Ex 3

42. During the January 29, 2018 meeting, Grievant admitted that he did not investigate or immediately respond to the January 23, 2018 report from the sixth-grade teacher. In the January 30, 2018 letter, Superintendent Saxe clearly informed Grievant that he had "no more important duty as an assistant principal at Huntington Middle School than to help keep students and staff safe from harm."

43. A discussion took place at the January 29, 2018 meeting, about concerns with Grievant's swiftness in dealing with discipline issues and the need to respond timely to such matters. It was the Superintendent's expectation that Grievant maintain a presence in his office and on the sixth-grade hall. An administrator's presence helps cut down on student issues.

44. Grievant and Principal Paxton tended to arrive at a mutually acceptable resolution to situations. Principal Paxton was able to empathize with Grievant.

45. In March of 2018, Principal Paxton took some time off due to the illness of his father. Principal Paxton was absent for almost all of March 2018.

46. While Principal Paxton was absent, two substitute administrators, Cathy Hosaflook and Mary Campbell, served as the school's principal. Substitute Principal Hosaflook first served in Principal Paxton's absence, followed by Substitute Principal Campbell.<sup>10</sup>

47. Principal Paxton had contacted Substitute Principal Hosaflook and asked her to sub for him. Substitute Principal Hosaflook inquired of Principal Paxton if there was anything that he wanted her to do. Principal Paxton indicated that there was not and told her if she saw anything to go ahead and correct it.

48. Substitute Principal Hosaflook served as the school's principal several weeks on and off beginning in March 2018. Throughout Hosaflook's time as principal, Ms. Hosaflook made multiple complaints against Grievant. See R Ex 14, 15, and 16.

49. Pursuant to W. Va. Code § 18A-1-1(c)(2), a "principal" is a professional educator who . . . has responsibility for the supervision, management and control of a school." Further, the "principal's major area of responsibility is the general supervision of all the schools and all school activities involving students, teachers and other school personnel." *Id.* The job description for an assistant principal specifically lists "perform

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<sup>10</sup> Mary Campbell served as the building principal for a week following Substitute Principal Hosaflook's work at the school. Ms. Campbell's first day in this position is perceived to be Tuesday, March 27, 2018.

other duties and responsibilities as assigned by the principal” as one of Grievant’s responsibilities. G Ex 10, pp. 3.

50. During the 2017-2018 school year, Principal Paxton allowed Grievant to leave an hour during one of the schools scheduled lunch periods.<sup>11</sup> Grievant was expected to sign out when he left and sign back in when he returned from lunch.

51. The first three days Substitute Principal Hosaflook served as the school’s principal were on Wednesday, March 7, Thursday, March 8, and Friday, March 9, 2018. During this time period a teacher, Robert “Alex” Hogsett, Jr. reported to Substitute Principal Hosaflook that Grievant was leaving at lunch. Further, Hogsett believed Grievant was falsifying the sign-in and out sheet.

52. Hogsett pointed out to Substitute Principal Hosaflook how Grievant was signing out using different symbols and alleged that Grievant was signing in and out at the same time and not returning to school at the appropriate time.

53. Substitute Principal Hosaflook spoke to Administrative Assistant Tackett and Principal Paxton to confirm that Grievant had permission to leave the school at lunch.

54. Principal Paxton informed Substitute Principal Hosaflook that Grievant could leave after sixth grade lunch, but only for an hour.

55. It is believed, and found to be more probable than not, that Grievant has an unclarified medical condition which is controlled or managed by daily maintenance. Grievant’s maintenance procedure is more readily accomplished in a private setting. Grievant and Principal Paxton seemingly arrived at Grievant leaving school grounds for

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<sup>11</sup> Principal Paxton had established a lunch schedule with three different times: sixth-grade from 11:00 to 11:30; seventh-grade from 11:30 to 12:00; and eighth-grade from 12:00 to 12:30. Generally, assistant principals are expected to be in the lunchroom as much as possible to monitor student behavior.

a short period rather than Grievant administering his medical treatment in his office space, which had become the subject of much speculation.

56. Substitute Principal Hosaflook shared her concerns with Administrative Assistant Tackett and Assistant Superintendent Hardesty about Grievant leaving at lunch and not returning within an hour as directed. R Ex 15

57. One day in March, Substitute Principal Hosaflook needed to speak with Grievant. A seventh-grade teacher had reported to Substitute Principal Hosaflook that several seventh-grade students were skipping class. Grievant was the assistant principal assigned to work with this group of seventh-grade teachers.

58. Substitute Principal Hosaflook tried to contact Grievant on the radio to address this concern and Grievant did not answer. She also went to his office, but he was not there. While she was in his office, Substitute Principal Hosaflook left Grievant a note directing him to see her as soon as he got the note. R Ex 15

59. Because Substitute Principal Hosaflook could not locate Grievant, she directed Assistant Principal Thacker to help locate the students that were skipping class. Grievant did not report to Substitute Principal Hosaflook until 1:30 p.m.

60. Substitute Principal Hosaflook met with Grievant and informed him that he was only supposed to be gone for an hour. Substitute Principal Hosaflook informed Grievant she expected him to let her know when he got back to the building and to make sure to sign in. R Ex 15

61. Substitute Principal Hosaflook left that meeting believing Grievant would comply with her directive. L-3 testimony

### Failure to Report to Gym Duty

62. Each morning, Huntington Middle School students are required to report to the school's gym until teachers report for duty. Administrators are required to supervise students in the gym prior to the teachers reporting for duty. Principal Paxton expected both assistant principals to arrive at the gym at 7:00 a.m. to supervise students. The assistant principals are expected to maintain a presence inside the gym and control student behavior.

63. Substitute Principal Hosaflook spoke to Principal Paxton about his expectations for gym duty and he informed her of the established procedures. Students generally remain in the gym for 10 to 15 minutes prior to being released to the teachers. Typically, there is a large population of around 400 students by the time teachers come on duty. Students are assigned to sit in certain sections in the gym based on grade level, and the assistant principals are assigned to monitor the students in the gym.

64. On Monday, March 12, 2018 at approximately 7:10 a.m., Substitute Principal Hosaflook followed several students into the gym. She wanted to make sure Jeff Jones, Assistant Principal Thacker's substitute,<sup>12</sup> was in the gym, but noted that neither assistant principal was in the gym.

65. Substitute Principal Hosaflook had the school secretary do an "all call" for Grievant and Substitute Assistant Principal Jones to come to the gym.

66. Substitute Assistant Principal Jones reported to the gym and Substitute Principal Hosaflook explained to him Assistant Principal Thacker's duties during morning

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<sup>12</sup> Jeff Jones served as a Substitute Assistant Principal beginning the week of March 12, 2018 while Assistant Principal Thacker was out on medical leave.



gym duty and provided an overview of what to expect regarding student behavior. R Ex 15

67. Grievant did not immediately respond to the call from the school secretary to report to the gym for duty. Grievant eventually reported to the gym and stood by the gym doors. R Ex 15

68. Grievant's excuse for reporting to the gym late was that he was having a discussion with a teacher, Jonathon Jefferson.<sup>13</sup>

69. Substitute Principal Hosaflook spoke to teacher Jefferson about the conversation he had with Grievant. Mr. Jefferson told Substitute Principal Hosaflook that he and Grievant had passed in the hallway and exchanged greetings, but did not have a lengthy conversation. L-3 testimony

70. Grievant's further explanation for not entering the gym on March 12, 2018, was that the Superintendent's December 15, 2017 directive prohibited him from being alone with students. *Level Three Tr. Vol. I: 67-68.*

71. Administrative Assistant Tackett addressed Grievant standing at the gym door and not entering the gym to supervise students. Administrative Assistant Tackett told Grievant on or around January 10 or 11, 2018 that Superintendent Saxe's letter did not apply to supervising students in the gym, and suggested that he unlock the gym doors if this was an issue for Grievant.

72. Superintendent's December 15, 2017 letter contains no directives prohibiting Grievant from entering the gym to monitor students. R Ex 3

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<sup>13</sup> Jonathon Jefferson is a Special Education Teacher at Huntington Middle School. He has taught at the school for eight years.

### Failure to Monitor Students During the March 14, 2018 Student Walkout

73. A student walkout occurred at Huntington Middle School on March 14, 2018, to protest gun violence following the shooting in Parkland, Florida. The walkout was semi-scheduled and lasted approximately seventeen minutes.

74. Substitute Principal Hosaflook learned about the student walkout on the morning of the event and she created a plan to address the situation. During the walkout students were to report to the school's fenced courtyard. Substitute Principal Hosaflook directed certain teachers and the counselor to stand by doors around the courtyard to make sure students did not try to leave. She instructed the teachers to direct the students to the courtyard when it was time for the walkout.

75. Substitute Principal Hosaflook provided specific instructions to the two assistant principals, Grievant and Jeff Jones, to help keep students safe during the walkout. Substitute Principal Hosaflook expected both assistant principals to report to the courtyard and monitor students.

76. Substitute Principal Hosaflook spoke to Substitute Assistant Principal Jones first about her expectations during the walkout. She wanted Substitute Assistant Principal Jones to be outside on the courtyard ten minutes before the walkout began. Substitute Principal Hosaflook wanted the perimeter of the courtyard checked and concern given to make sure no outsider was next to the fence.

77. Substitute Principal Hosaflook did not want anyone outside of the school trying to associate with the students.

78. Unrelated to the walkout there had been an outside threat against a student the day before. This situation involved an Instagram threat against a female student at the school and Grievant was aware of this issue.

79. In addition to the potential outsider influence, it had snowed the morning of the walkout. Safety concerns existed with the walkout as middle-school age students engage in horse playing and other activity while in the courtyard.

80. After providing direction to Substitute Assistant Principal Jones regarding the walkout, Substitute Principal Hosaflook saw Grievant, and directed him to be outside in the courtyard.

81. Grievant did not inform Substitute Principal Hosaflook that there was anything that would have prevented him from complying with her directives regarding the student walkout.

82. Grievant proclaims he was addressing concerns regard the outside threat, which included communicating with the school resource officer.

83. Substitute Assistant Principal Jones was the only other adult present when Substitute Principal Hosaflook arrived at the courtyard. *Level Three Tr.* Vol. II: 128.

84. Substitute Principal Hosaflook observed Grievant walking down the hallway toward the courtyard with students. After most of the students had come down the hallway and entered the courtyard, Substitute Principal Hosaflook told Grievant, "Mr. Gonzales, I need for you to go outside."

85. Substitute Principal Hosaflook directed Grievant to go outside and supervise student.

86. Substitute Principal Hosaflook then went outside to address student behavior. When she turned around she noted that Grievant was still at the door and not outside. While in the courtyard two different staff members, Cam Hale and Chris Jackson, witnessed Substitute Principal Hosaflook direct Grievant to supervise students.

87. Substitute Principal Hosaflook walked a few misbehaving students to the door of the courtyard. *Level Three Tr. Vol. II: 129-130*. As she was doing this, she noted that Grievant was still standing at the door. Substitute Principal Hosaflook again informed Grievant that he was needed in the courtyard.

88. Chris Jackson, a teacher, observed Substitute Principal Hosaflook tell Grievant that he [Mr. Jackson] should stand by the door in order for Grievant to help monitor students outside in the courtyard. *Level Three Tr. Vol. II: 296; Ex. 18*.

89. Teacher Jackson believed Substitute Principal Hosaflook gave Grievant a “direct instruction” to go out to the courtyard considering the situation with the walkout. *Level Three Tr. Vol. II: 296*.

90. Substitute Principal Hosaflook instructed Grievant on approximately three different occasions during the actual walkout to report outside to the courtyard. *Level Three Tr. Vol. II: 131*. These instructions were in addition to the directives she had given to both assistant principals during the morning of the walkout.

91. Substitute Assistant Principal Jones never saw Grievant out by the fence or in the courtyard supervising students during the walkout. L-3 Testimony

92. Cam Hale never observed Grievant outside. *Level Three Tr. Vol. II: 285*

93. Substitute Principal Hosaflook never saw Grievant out by the fence or in the courtyard supervising students during the walkout.

94. Substitute Principal Hosaflook was upset regarding Grievant's failure to follow a directive regarding student safety and spoke to Administrative Assistant Tackett and Assistant Superintendent Hardesty regarding her concerns.

95. Superintendent Saxe was concerned that the school principal gave an assistant principal a directive and the assistant principal did not follow the directive. The Superintendent was also concerned that other staff members had witnessed the incident.

96. As a result of these concerns, Administrative Assistant Tackett instructed Substitute Principal Hosaflook to prepare a complete chronology of the walkout incident. On March 16, 2018, Substitute Principal Hosaflook emailed Administrative Assistant Tackett and Assistant Superintendent Hardesty her observations of Grievant's conduct during the walkout.

97. Assistant Superintendent Hardesty investigated Grievant's actions during the walkout. During the investigation, Grievant told Assistant Superintendent Hardesty that the reason he did not follow through the principal's instructions was because he had to get a report to the school resource officer ("SRO").

98. Officer Ron Miller<sup>14</sup> was the SRO assigned to work at Huntington Middle School during the 2017-2018 school year. Officer Miller credibly testified at the Level Three hearing that he and Grievant had been looking into an issue, but that it did not prohibit Grievant from supervising students in the walkout. Officer Miller reported to the courtyard and supervised students during the walkout.

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<sup>14</sup> Officer Miller has been employed with the Cabell County Sherriff's Office for 18 years and had served as an SRO for 2 years. *Level Three Tr.* Vol. III: 137-38

99. Assistant Superintendent Hardesty's investigation found that Grievant failed to supervise students after receiving directives from Substitute Principal Hosaflook to supervise students in the courtyard during the walkout.

100. After Administrative Assistant Tackett learned the results of the investigation, he contacted Superintendent Saxe and recommended Grievant be fired as result of his insubordination regarding a student safety matter.

#### Failing to Report to Cafeteria Duty

101. Grievant failed to report to his assigned cafeteria duty on March 23, 2018. This was a concern of Substitute Principal Hosaflook's because Grievant had failed to report to his lunch duty the previous week<sup>15</sup> and Substitute Principal Hosaflook had spoken to him about making sure he came to lunch duty. Substitute Principal Hosaflook checked the sign in sheet to see if Grievant had signed back in. R Ex 16 Grievant had not signed back in. *Id.*

102. Substitute Principal Hosaflook attempted to call Grievant on his radio, but he did not respond. R Ex 16

103. Around 1:15 p.m. on March 23, Substitute Principal Hosaflook observed Grievant coming down the hall toward the office. Grievant was coming to the office to get his mail, and Substitute Principal Hosaflook asked for him to come to her office. While in the principal's office, Substitute Principal Hosaflook asked Grievant why he did not

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<sup>15</sup> During the previous week, which would have been March 12-16, 2018, Grievant had missed a lunch duty. *Level Three Tr.* Vol. II: 148-149. Grievant informed Substitute Principal Hosaflook that he missed his lunch duty because he was meeting with the counselor to go over accreditation matters. Substitute Principal Hosaflook had discussed with Grievant the importance of supervision and being at his assigned duty. Substitute Principal believed the accreditation matters could have been addressed at another time during the day and that Grievant was using this as an excuse.

come down to lunch duty, and Grievant responded that he was on the phone with legal counsel. During the discussion, Substitute Principal Hosaflook reminded Grievant that he was supposed to be on his lunch duty, and that they had discussed this same concern when he missed his lunch duty the week before. Grievant responded that he could use the cameras in the lunchroom to monitor students from his office. *Level Three Tr.* Vol. I: 78-79; Vol. II: 147; R Ex 16

104. Grievant's office is on the third floor and it would take him minutes to reach the cafeteria. This was unacceptable if something happened in the lunchroom and direct action was needed in the lunchroom quickly.

105. Without being excused, and in the middle of the conversation, Grievant walked out of the principal's office. Substitute Principal Hosaflook testified that Grievant was talking as he went out the door and appeared agitated. *Level Three Tr.* Vol. II: 147; R Ex 16

106. Secretary Adams observed Grievant tell Substitute Principal Hosaflook that if she has anything else that she needed to say to him, that she could talk to him with a representative present.<sup>16</sup> *Level Three Tr.* Vol. II: 268:

107. In early April 2018, Assistant Superintendent Hardesty visited the school to meet with Grievant. Assistant Superintendent Hardesty attempted to locate Grievant by using the radio and Grievant never responded to his radio calls.

108. While Jeff Jones substituted for Assistant Principal Thacker, beginning in mid-March 2018, he attempted to contact Grievant on his radio four or five times, but

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<sup>16</sup> Substitute Principal Hosaflook testified that Grievant returned to her office and told her if she ever wanted a conversation like this again to let him know so he can have legal counsel. *L-3 testimony*, see also R Ex 16.

Grievant did not respond. After these attempts, Substitute Assistant Principal Jones stopped trying to reach Grievant on his radio.

109. Grievant's explanation for these types of miscommunications was that he could not be reached on the radio because the device did not work when he was on the third floor.

110. During his investigation, Assistant Superintendent Hardesty tested the radios on the third floor by personally visiting various classrooms, Grievant's office, and communicating with the school secretary over the radio. The radios worked when Assistant Superintendent Hardesty tested them on the third floor. *Id.*

111. Principal Paxton is aware and explained that there are areas in the school where it is difficult to hear and static may obliterate audio of the person trying to contact the administrator on the radio. However, the school administrator can tell if someone is trying to contact them on the radio and can walk to an area of the school to determine who is calling on the radio and what is needed.

112. Substitute Principal Hosaflook testified that she was assigned a radio to use while she worked as the school's principal. She never experienced any technical issues or any issues with coverage or range with her radio.

113. In one of the meetings with Grievant and Substitute Principal Hosaflook, Administrative Assistant Tackett told Grievant that Respondent continued to have concerns with his failure to respond to radio calls and that this issue had been previously addressed. Grievant indicated that he had turned his radio down because he was in the classroom. When Substitute Principal Hosaflook addressed her concerns regarding his failure to respond to radio calls, Grievant's tone and demeanor when responding to



Substitute Principal Hosaflook tended to demonstrate his frustration much more than respect for the position and authority of a principal.

114. Administrative Assistant Tackett addressed Grievant's tone and demeanor with Grievant and reminded him that when Principal Paxton was out of the building, Substitute Principal Hosaflook was his boss and that he had to do what she told him to do.

115. Prior to working in the building, Mary Campbell, who followed Substitute Principal Hosaflook as the substitute principal, met with Substitute Principal Hosaflook on Monday, March 26, 2018. During this conference, Substitute Principal Hosaflook shared with Substitute Principal Campbell the concerns she had noted with Grievant at the walkout and Grievant not going out to supervise students and time sheets for staff to sign in and out. Substitute Principal Campbell was also made aware that the assistant principals could leave an hour for lunch.

116. Substitute Principal Campbell testified that she tried to obtain Grievant's assistance on a matter in which a teacher needed assistance. When she went to his office to look for him Substitute Principal Campbell observed Grievant through the window at his office door sitting at his desk. Ms. Campbell knocked twice and Grievant did not respond even though she could see Grievant in his office.

117. While Grievant was allowed one hour to leave campus to attend medical needs, there were concerns that he was gone for longer than an hour.

118. A meeting was held on April 10, 2018, to discuss concerns raised since the last meeting; to provide Grievant with an opportunity to respond to his failure to adhere to the lunch schedule, his refusal to report to gym duty on March 12, 2018, his refusal to

monitor students outside during the student walkout, his failure to report to cafeteria duty on March 23, 2018 and to discuss what was perceived as his disrespectful tone to his immediate supervisor.

119. Among other information, at this meeting, Grievant informed Superintendent Saxe and Assistant Superintendent Hardesty that he did not need to be in the lunchroom and could monitor students in the lunchroom from his office on the third floor. *Level Three Tr. Vol. I: 57-58.* All Huntington Middle School administrators have access to the school's cameras from their offices. *Id.* at 206. Grievant explained that he could use the cameras in the lunchroom and view the monitors set up in his office. *Level Three Tr. Vol. I: 57-58.*

120. Grievant's use of cameras to monitor student behavior caused Respondent to further question how Grievant could safely and effectively monitor students from two floors away. *Level Three Tr. Vol. I: 78-79.* The investigation into this issue revealed that one of the cameras in the lunchroom did not work. *Level Three Tr. Vol. I: 78-79.* The one camera that worked only covered a section of the lunchroom. *Id.* at 205.

121. Following this meeting, Grievant was placed on administrative leave with pay to allow for Assistant Superintendent Hardesty to conduct an investigation and interview additional school-based witnesses.

122. After concluding his investigation, Assistant Superintendent Hardesty discussed his findings with Superintendent Saxe.

123. Assistant Superintendent Hardesty found that the Grievant failed to report to lunch duty, failed to follow Substitute Principal Hosaflook's directive to go outside during the student walkout, failed to report to lunch duty and instead monitored students

from a video (one of the cameras for which did not completely work), and that Grievant had openly disobeyed Substitute Principal Hosaflook's directives—such that other school personnel witnessed it.

124. Administrative Assistant Tackett recommended the termination of Grievant's employment.

125. Superintendent and Assistant Superintendent Hardesty were concerned with Grievant's failure to take student safety seriously as evidenced by his failure to respond to calls, his unavailability to staff, and his insubordination to the building principal regarding matters relating to student safety.

126. Superintendent and Assistant Superintendent Hardesty believed a demotion was warranted because Grievant's actions could not be tolerated as an administrator. Specifically, the Superintendent testified why he believed that demotion, rather than termination, was reasonable.

127. Superintendent Saxe, who was aware that Grievant had been successful as a classroom teacher, was of the opinion that all of the issues of concern were issues of Grievant performing in his role as an assistant principal. In looking back at his previous evaluations and his previous work record, the last place that Grievant was successful was a classroom teacher. Superintendent Saxe choose not to terminate Grievant's employment based upon what was perceived to be insubordination and failure to perform as an administrator. Superintendent Saxe was of the opinion that the best course of action was to put Grievant back to where he was last successful. *Level Three Tr.* Vol. III: 60.

128. On May 14, 2018, Superintendent Saxe provided Grievant with notice of his recommended discipline. R Ex 3 This letter included Superintendent Saxe's

recommendation that the Cabell County Board of Education (“Board”) ratify Grievant’s paid leave, which began on April 10, 2018 and ended on May 13, 2018, ratify his unpaid suspension, which began on May 14, 2018 and continued to the end of the 2017-2018 school year, and demote Grievant to a 200-day teaching position for the 2018-2019 school year.

129. On May 14, 2018, Respondent demoted Grievant. The May 14, 2018 correspondence provided the following reasons for the suspension and demotion of Grievant:

- 1) Grievant’s refusal to enter the gymnasium to monitor students;
- 2) Grievant’s continued failure to respond to radio calls or promptly respond to radio calls;
- 3) Grievant’s late report to the gym duty on March 12, 2018;
- 4) Not signing out or back into the school during the working day, and not letting the admin/office staff know when he was back in the building;
- 5) Grievant’s March 14, refusing three times to go to the courtyard during the student walk-out when Substitute Principal Hosaflook directed him to do so;
- 6) On March 23, 2018, for failing to report to cafeteria duty;
- 7) For not sitting and listen to Ms. Hosaflook on March 23, 2018.

R EX 3

130. The May 14, 2018 letter also provided Grievant with an opportunity for a hearing on May 22, 2018 before the Board. If Grievant wished to be heard, he was required to provide written notice to that effect to Superintendent Saxe by noon on May 17, 2018.<sup>17</sup>

131. Assistant Superintendent Hardesty was responsible for ensuring that Grievant’s notice of the charges and recommended discipline were sent via certified mail. Assistant Superintendent Hardesty mailed this letter to the address provided by Grievant.

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<sup>17</sup> Respondent set the deadline because it had to publish the agenda for the board meeting three days in advance of the meeting as required by the State’s open meeting laws.

Additionally, Assistant Superintendent Hardesty contacted Ben Barkey, Grievant's WVEA representative, on May 14, 2018, and informed him of Superintendent's recommended actions regarding Grievant.

132. Assistant Superintendent Hardesty emailed Grievant's WVEA representative a copy of the May 14, 2018 letter to Grievant on May 15, 2018. R Ex 7 Mr. Barkey also received a copy of the May 14, 2018 letter in the mail.

133. The May 14, 2018 letter was available for Grievant to pick up at the United States Post Office in Barboursville, West Virginia on May 16, 2018 at 8:30 a.m. R Ex. 8. Grievant did not request, in writing, a hearing before the Board by noon on May 17, 2018.

134. Respondent proceeded with the May 22, 2018 meeting.<sup>18</sup> Neither Grievant nor his then representative, Barkey, appeared at the meeting.

135. At this meeting, the Cabell County Board of Education made a decision regarding the recommendations set forth in Superintendent Saxe's May 14, 2018 letter.<sup>19</sup>

136. The Cabell Board of Education, Respondent voted unanimously to ratify Grievant's paid suspension, suspension without pay, and demotion to a 200-day teaching position. R Ex 11

137. Superintendent Saxe provided Grievant with a letter dated May 23, 2018 informing him of the Cabell County Board of Education's decision. R Ex 29 As provided in the Superintendent's May 14, 2018 letter, during the 2018-2019 school year, Grievant was demoted and works as a regular, full-time teacher.

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<sup>18</sup> Grievant's WVEA representative, sent an email to Superintendent Saxe on May 18, 2018 at 10:47 a.m. requesting that the Board meeting scheduled for May 22, 2018 be postponed.

<sup>19</sup> At the May 22 meeting, it was determined that Grievant had received sufficient notice when his representative was notified of Superintendent Saxe's May 14, 2018 letter.

138. Grievant worked daily in substitute assignments pending placement into a permanent position. Grievant received the same salary and benefits as all 200-day employees.

139. The salary and benefits of 200-day employees is less than that of an Assistant Principal.

### **Discussion**

In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018).

. . . 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). In other words, [t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. *Leichliter v. W. Va. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Cabell County Board of Education, Respondent, sanctioned Grievant. Grievant request he be reinstated as an Assistant Principal and receive back pay for the loss of pay (receiving the difference between his teacher contract and assistant principal contract). Grievant filed this grievance alleging Respondent's actions were reprisal and unsubstantiated claim of malfeasance in violation of West Virginia Code and West Virginia common law. Grievant maintains Respondent fails to meet its burden of proof on the demotion.

WEST VIRGINIA CODE § 18A-2-8 provides that "[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." The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991). See *Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975).

Respondent argued at the Level Three hearing that Grievant's conduct constituted insubordination and willful neglect of duty. In the instant case, the proper focus is whether the charge of misconduct has been proven, not the label attached to such conduct. *Bradley v. Cabell County Bd. of Educ.* Docket No. 99-06-150 (Sept. 9, 1996); *Willis v. Jefferson County Bd. of Educ.*, Docket No.96-19-230 (Oct. 28, 1998); *Russell v. Kanawha County Bd. of Educ.*, Docket No. 9-20-415 (Jan. 24, 1991). A board of

education's decision to terminate an employee's administrative contract and place him or her in a teaching position is a disciplinary demotion, pursuant to W. Va. Code §18A-2-8. *Williams v. Cabell County Bd. of Educ.*, Docket No. 95-06-25 (Oct. 31, 1996), *aff'd*, Kanawha County Circuit Court Civil Action No. 96-AA-161 (Sept. 8, 1999), *appeal refused*, W. Va. Sup. Ct. of Appeals 5-0, Case No. 001117 (June 21, 2000). Respondent is of the position that Grievant's explanation that one or more employees were harassing him is of little to no consequence regarding his insubordination and willful neglect of duty because the actions taken by Respondent were independent of the offensive employee(s) actions.

### **CREDIBILITY**

In reaching a decision in one or more of the issues associated with the parties, herein, certain facts in dispute must be addressed, including a determination of conduct and reasonable effects of misconduct, if established, in the circumstances of this case. 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. Dept. of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dept. of Health & Human Resources*, 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). It is deemed prudent to address the reliability and due weight that is most readily applicable to the witnesses, who testified and provided information in



the course of this grievance. The undersigned Administrative Law Judge had an opportunity to observe the demeanor of the witnesses, and to assess their words and actions during their testimony.<sup>20</sup> Credibility assessments herein were made from direct observations as well as review of the record.

The testimony of all witnesses was provided direct attention and assessed with the identified factors in consideration. See footnote below. The credibility assessment of witness Robert “Alex” Hogsett Jr. is not to be taken lightly. This witness is the Physical Education teacher at Huntington Middle school, but more relevant to the instant issues, he was an initial catalyst of several events which effected Grievant’s employment. This witness acted in a deliberate and vindictive manner to create hardship for Grievant. The witness is of the opinion he was doing what needed to be done “allegedly protecting children” who were interacting with Grievant. Witness Hogsett openly admits he had a problem with Grievant. He intentionally sought to spotlight Grievant’s conduct. This is not speculation or debatable opinion, it is fact.

P.E. Teacher, Hogsett testified at the instant L3 hearing. His testimony was jaw droppingly candid. See Level Three Tr. Vol. II, pgs145-201. Hogsett was not pleased with how Grievant performed his duties as the Assistant Principle at Huntington Middle

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<sup>20</sup> 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's information. See *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1994). The testimony of all witnesses was provided direct attention and assessed with the identified factors in consideration.

School. He was of the opinion that Grievant was a threat to students.<sup>21</sup> Hogsett reported Grievant to law enforcement, Child Protective Services, the FBI, and to the Cabell County Board of Education administration. Yet, NONE of the alleged charges of professional conduct were ever found to be (collaborated) a legitimate malfeasance of Grievant. Nevertheless, the rumors, the investigations, and Grievant's idiosyncrasies created a perfect storm of turmoil for Grievant.

Grievant's counsel highlights, underlines, and bolds the concept that without Hogsett's initial complaints and without the subsequent unwarranted investigations, Grievant would not have been disciplined (placed on improvement plan/demoted). Grievant's point regarding Hogsett's action being a primary antagonist for the untold misery Grievant has had to suffer through, in the last two to three years, is not without its share of truth. This unequivocal fact is not lost on the undersigned. There is no doubt, and it is not disputed, that Hogsett and Grievant had history.<sup>22</sup> Hogsett's perception of righteous actions is askew. Amazingly this witness acknowledges several of his deliberate deeds. He openly admitted and took credit for several events targeting Grievant. L-3 testimony It is found that Hogsett acted in a deliberate and deceitful

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<sup>21</sup> Hogsett inferred allegations of professional transgression by Grievant including sexual misconduct, e.g., inferences that Grievant among other vague allegations was abusing student(s) in his office.

<sup>22</sup> Grievant had a dispute with a teacher, Robert Alex Hogsett, Jr. concerning the discipline of a student. Hogsett threatened Grievant via email that he would "go as far up the chain" as he needed. See G Ex 7. Following this email, an "anonymous" report was made to the FBI and CPS alleging inappropriate conduct and/or sexual misconduct against Grievant. Allegedly it claimed that Grievant was abusing students in his office. Ultimately Grievant received a letter from CPS/DHHR indicating that the allegations were unsubstantiated. See G Ex 5.

manner to create hardship for Grievant. It is not established that Hogsett's actions can be attributed as *per se* Respondent's conduct.

Hogsett manipulated and used information to generate ill-will and cast bad light on Grievant's actions. At some point the question becomes how much, if any, is Grievant still responsible for actions that were independent of Hogsett's rebel rousing. At times, Grievant didn't do himself any favors, in irritating the powers that be. Some of his conduct was harmless but given the distrust sewed, it was truly unwise for Grievant to antagonize school authorities. The rumors, the various investigations and Grievant's mannerisms created a perfect storm.<sup>23</sup>

The undersigned ALJ observed Grievant during his testimony and to a degree throughout the duration of the hearing process. The plausibility of Grievant testimony is a variable of this complex equation. Grievant's attitude, demeanor and deeds were in review. It is hard if not impossible to place a numerated figure on the value of Grievant's testimony, but it is safe to say his credibility and the plausibility of his explanations were not consistent. Grievant's testimony is a 'horn of plenty.' The demeanor of Grievant is difficult to accurately describe. Grievant is not an overly verbal individual, meaning he doesn't provide long involved responses to questions. Grievant attempted to provide

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<sup>23</sup> It is unclear if Hogsett was disciplined and issued a reprimand letter setting forth Superintendent Saxe's expectations regarding his behavior moving forward "prior" to his testimony at L-3. At the time of Grievant's complaint, Assistant Superintendent Hardesty contacted an outside investigator to investigate Grievant's harassment allegations. *Level Three Tr.* Vol. I: 114. Hogsett was interviewed by the outside investigator. Further, during the investigation, Assistant Superintendent Hardesty and Superintendent Saxe met with Hogsett to provide him with an opportunity to respond to the Grievant's allegations against him. During this meeting, Hogsett did not tell Superintendent Saxe or Assistant Superintendent Hardesty that he had taken Grievant's file from Principal Paxton's office.

thoughtful responses but it is not clear that Grievant truly understands the benefits of a full explanation. Grievant is polite and manurable but his inflection and tone tends to be without much temperament. Grievant's mannerisms are not necessarily off tempo but he does not naturally tend to endear himself. It is conceivable that some early accusations stem from others trying to characterize Grievant's mannerisms.

In assessing the trustworthiness of the information provided by Grievant, the undersigned was mindful of third party interest, consistency of statements and the plausibility of the witness's information. This finder of fact is of the belief that Grievant was providing a wide variety of information. Some facts, opinions, suspicions and rationale for his conduct are more plausible than others. Yet, the demeanor of Grievant demonstrated appropriate respect and cooperation with the instant grievance process.

Grievant's credibility is called into question regarding his explanation for misfeasance. Grievant's credibility is diminished by his repeated inability to rationally apply the (behavior modifications) restrictions Respondent placed on him to real world application.<sup>24</sup> Grievant was the victim of Hogsett's persecution; nevertheless, Grievant did little to defuse his deteriorating employment situation. Grievant was specifically instructed to perform identified duties and cease doing activities which were disrupting the workday, and impacting Grievant's leadership effectiveness. Grievant should have been able to process these directives. Grievant, to the date of the L-3 hearing, professes to misunderstand the application of one or more directives. This is concerning.

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<sup>24</sup> It was explained to Grievant that being in his office behind a locked door with one student was a completely different situation than Grievant being in a gym with 400 students with several gym doors locked.

Grievant attempted to provide thoughtful responses. Grievant has an unusual personality, he has been described by some as socially awkward. (Citing Grievant's PFOF/COL document.) Grievant was suspicious of Respondent's actions. Grievant was concerned about motivations of some of Respondent's agents but this does not relieve him of the obligation to effectively do his job, as lawfully directed. Grievant made a number of unwise, less than prudent decisions in the course of the highlighted fact pattern. Grievant's actions were inviting allegations of impropriety, creating a negative perception, disrupting the workday, and impacting Grievant's leadership effectiveness.

David Tackett, Service Personnel Manager, formerly Administrative Assistant over Secretary Schools, testified at the Level Three hearing regarding his role and activities during the time relevant to this grievance. This witness was attempting to rationally resolve issues as they were developing. Reasonably minded individual(s) witnessed his attempt to have Grievant comprehend Respondent's directive(s). Witness Tackett testified in a credible manner. The information he provided had the presence of truthfulness. Additionally, the witness provided the facts with what is perceived to be the absence of bias, a non-prejudicial manner. The information demonstrated an attempt to resolve growing issues without labeling. Issues spiral nevertheless.

Cathy Hosaflook during the absence of Principal Paxton was the Substitute Principal for Huntington Middle School. Ms. Hosaflook has the reputation for being a professional, a no-nonsense old school by the book leader. Someone who can get the job done. See Tackett testimony. Soon after Substitute Principal Hosaflook started at Huntington Middle School, the actions of Grievant were highlighted by teacher Hogsett,

(Grievant's antagonist). Substitute Principal Hosaflook wanted Grievant to explain his actions more than Grievant was willing to provide (medical explanation was inferred). Grievant was not required to provide protected information but he was reminded that while Principal Paxton was away Substitute Principal Hosaflook was his boss and he needed to comply with her directives. See Tackett testimony. The credibility of Substitute Principal Hosaflook's testimony is not truly impeached by unbalanced facts but the weight this ALJ gives to some isolated examples of alleged miscommunication is prudently measured. Ms. Hosaflook testified that no one influenced her opinion of Grievant; however, she never admitted or acknowledged that she gave statements to the State Police concerning Grievant months prior.<sup>25</sup> She did admit, however, that Hogsett provided her the information about the sign-in and sign-out sheets at the school. Overall, Substitute Principal Hosaflook's testimony is credible, but colored to some degree by her sense of nonsense obedience. Nevertheless, Substitute Principal Hosaflook, who was so empowered, provided Grievant with clear directives, which he did not complete, as was reasonably expected on one or more occasions.

Principal Paxton and Grievant tended to arrive at a mutually acceptable resolution to situations. Principal Paxton seemed genuinely concerned for Grievant and sympathetic to Grievant's plight. Principal Paxton testified that there are areas in the school where it is difficult to hear and static may obliterate audio of the person trying to

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<sup>25</sup> Ms. Hosaflook claimed that she did not speak to anyone concerning Grievant prior to her stint as substitute principal in March of 2018; however, she was engaged in a prior investigation against Grievant and spoke to the West Virginia State Police about the conduct of Grievant. This was the September 2017 State Police investigation that found the allegations against Grievant were "unfounded." See R Ex 24/G Ex 19.

contact the administrator on the radio. Grievant may have had a champion in Principal Paxton but his ability to protect Grievant from himself and administrative authorities was only so encompassing. Principal Paxton was able to communicate with school administrators, other teachers and Grievant on numerous occasions and establish mutually acceptable resolutions.

### **MERITS**

WEST VIRGINIA CODE § 18A-2-8 provides that “[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.” Respondent bears the burden of demonstrating that the disciplinary action taken was justified. The rationale for the disciplinary measure is not necessarily convoluted, but to some degree, this matter does envelop a chicken and an egg dilemma. It is Grievant’s position that every observation or discipline that resulted from Substitute Principal Hosaflook or teacher Hogsett’s conduct should be discarded and not considered. The undersigned is not willing to go that far but does recognize the contention being highlighted. The totality of the circumstances with regard to the instant parties is as important as the independent events.

Respondent avers that Grievant’s conduct was deliberate and intentional behavior which constituted insubordination and willful neglect of duty.

An employer can establish insubordination by demonstrating a policy or directive that applied to the employee was in existence at the time of the violation, and the employee’s failure to comply was sufficiently knowing and intentional to constitute the

defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995). Insubordination has been defined as the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors/So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). In order to establish insubordination, the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid. *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). See *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Riddle v. Bd. of Directors/So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989).

Employees are expected to respect authority and do not have unfettered discretion to disobey or ignore clear instructions. See *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). Moreover, insubordination may involve "more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988).

There is no question that specific directives and a policy applied to Grievant and were in existence during the second half of the 2017-2018 school year. Further, Superintendent Saxe, Administrative Assistant Tackett and Substitute Principal Hosaflook specifically meet with and reasonably explained their expectations for Grievant:



(1) Assistant principals are expected to maintain a presence inside the gym and control student behavior. (2) Grievant was to be amenable to communication from staff and assist when called upon; (3) Grievant was to follow the directives of those authorized to direct his actions and (4) he was to cease activity creating a perception of improper activity and impacting negatively on Grievant's effectiveness.

To the degree Hogsett succeeded in effecting the course of events is not overlooked.<sup>26</sup> However, Grievant is as much a catalyst as a principle victim with a number of identifiable events.<sup>27</sup> Without Grievant's independent conduct, the events for which Grievant is being disciplined would not have transpired. Grievant neglected to perform recognized duties jeopardizing the safety of the school environment. Grievant's inability to comply with the directives from Superintendent Saxe or Substitute Principal Hosaflook is not established to be directly related to Hogsett's harassment.

"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). This is a fairly heavy burden, given that Respondent must not only prove that the acts it alleges did occur, but also that the reason

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<sup>26</sup> Hogsett testified that he was responsible for initiating the September 2017 investigation into Grievant. Hogsett admitted to going into Principal Paxton's office and taking a file on Grievant. He further admitted that he took photocopies of Grievant's file and provided them to law enforcement. Hogsett also admitted to speaking to law enforcement officers regarding his concerns with Grievant.

<sup>27</sup> E.g., Substitute Principal Hosaflook instructed Grievant on approximately three different occasions during the actual walkout to report outside to the courtyard. *Level Three Tr.* Vol. II: 131. These instructions were in addition to the directives she had given to both assistant principals during the morning of the walkout. Grievant determined it reasonable to perform alternative activity. This could be viewed as a defiant, willful action directly compromising the safety of school children he has been entrusted.

for Grievant's neglect of duty was more than simple negligence." *Tolliver v. Monroe County Bd. of Educ.*, Docket No. 01-31-493 (Dec. 26, 2001). Willful neglect of duty "is conduct constituting a knowing and intentional act, rather than a negligent act."<sup>28</sup> *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 encompasses something more serious than incompetence. *Bd. of Educ. v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120, 122 (1990); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996)." *Geho v. Marshall County Bd. of Educ.*, Docket No. 2008-1395-MarED (Oct. 30, 2008).

Grievant was suspicious of Respondent's actions. Grievant was concerned about others ulterior motives and that forces were somehow out to get him. This is logical but not proper justification for his failure or refusal to obey reasonable orders of a superior entitled to give such order. Employees are expected to respect authority and do not have unfettered discretion to disobey or ignore clear instructions. See *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990).

The undersigned ALJ contemplated this grievance with due regard to individual events and collective effects in consideration.<sup>29</sup> NONETHELESS, it is revealing that

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<sup>28</sup> "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); *Duruttia v. Mingo County Bd. of Educ.*, Docket No. 29-88-104 (Feb. 28, 1990).

<sup>29</sup> "To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment." *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998). See *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Corley, et al., v. Workforce West Virginia*, Docket No. 06-BEP-079 (Nov. 30, 2006).

Grievant does not, or cannot, distinguish the difference between being alone in a locked office with one student and being in a gymnasium with 200 students. This was repeatedly presented to Grievant. Grievant's failure to comply with the directives from Superintendent Saxe and his immediate supervisor were sufficiently knowing and intentional to constitute insubordination. He had received written notice of the rules and expectations, had met with administrators from the central office regarding the same, was aware of them, and chose not to follow them.

Grievant was made aware of Respondent's expectations regarding responding to radio calls and generally being available to school staff. R Ex 3, attached 12/15/18 letter, pp. 2. Collaborating witnesses testified that in the school setting it is important to be able to quickly locate school administrators in order to help diffuse situations because things can escalate quickly with students. In spring 2018, there continued to be issues with Grievant failing to promptly respond, or to respond at all, to radio calls. Teachers and office personnel did know not where Grievant was on many occasions. This is problematic. Grievant, was represented by either a WVEA representative or legal counsel during this extensive process. Grievant was or should have been acutely aware of Respondent's expectations.

Pursuant to W. Va. Code § 18A-1-1(c)(2), a "principal" is a professional educator who . . . has responsibility for the supervision, management and control of a school." Further, the "principal's major area of responsibility is the general supervision of all the schools and all school activities involving students, teachers and other school personnel." *Id.* The job description for an assistant principal specifically lists "perform other duties

and responsibilities as assigned by the principal” as one of Grievant’s responsibilities. G Ex 10, p. 3

Incidents involving another employee who have allegedly been non-compliant, does not alter Grievant’s behavior or support that he should be held unaccountable for his actions. Respondent established Grievant violated directives from administration and failed to comply with the same when he intentionally and repeatedly refused to enter the gymnasium to monitor students; refused and/or failed to respond to radio calls; refused to go into the courtyard, after being directed to do so, during the student walkout; and failed to properly report to cafeteria duty. See finding of fact, *supra*.

The West Virginia Supreme Court of Appeals has held that where the underlying complaints regarding an employee’s conduct relate to his or her performance, West Virginia Board of Education Policy 5300 requires an initial inquiry into whether that conduct is correctable. *Maxey v. McDowell County Bd. of Educ.*, 212 W. Va. 668, 575 S.E.2d 278 (2002). The provisions of Policy 5300 have since been codified in W. Va. Code § 18A-2-12a. Concerning what constitutes “correctable” conduct, the Court noted in *Mason County Bd. of Educ. v. State Superintendent of Sch.*, 165 W. Va. 732 (W. Va. 1980) that “it is not the label given to conduct which determines whether § 5300(6)(a) procedures must be followed but whether the conduct complained of involves professional incompetency and whether it directly and substantially affects the morals, safety, and health of the system in a permanent, non-correctable manner.” *Id.* Grievant’s actions imperiled the safety of the school environment. Grievant is not entitled to an improvement plan or another opportunity to show whether he will follow rules that are

designed to ensure the safety of school children. Where a school employee's insubordinate and willfully negligent acts directly compromise the safety of school children he has been entrusted, such actions are not correctable within the meaning of the State Board policy that entitles an employee to an improvement plan before her contract of employment is suspended or terminated. *Blankenship v. McDowell County Bd. Of Educ.*, Docket No. 2016-0772-McDED (Aug. 15, 2016); *Kinder v. Kanawha County Bd. of Educ.*, Docket No. 2015-0421-KanED (Aug. 31, 2015); *Jarrell v. Jackson County Bd. of Educ.*, Docket No. 04-18-204 (Oct. 27, 2004).

Respondent suspended and demoted Grievant, (suspension during period of investigation prior to Board action). The May 14, 2018 correspondence provided the following reasons for the suspension and demotion of Grievant:

- 1) Grievant's refusal to enter the gymnasium to monitor students;
- 2) Grievant's continued failure to respond to radio calls or promptly respond to radio calls;
- 3) Grievant's late report to the gym duty on March 12, 2018;
- 4) Not signing out or back into the school during the working day, and not letting the admin/office staff know when he was back in the building;
- 5) Grievant's March 14, refusing three times to go to the courtyard during the student walk-out when Substitute Principal Hosaflook directed him to do so;
- 6) On March 23, 2018, for failing to report to cafeteria duty;
- 7) For not sitting and listening to Ms. Hosaflook on March 23, 2018.

R EX 3

Grievant alleges retaliation as a motive for Respondent's conduct.<sup>30</sup> WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a

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<sup>30</sup> The undersigned will approach this allegation with due diligence, while noting Grievant did not provide much detail identifying which specific actions should be recognized as unlawful but an over encompassing allegation of retaliation attributed to Respondent's disciplinary actions.

grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.” To demonstrate a *prima facie* case of reprisal the Grievant must establish by a preponderance of the evidence the following elements:

- (1) that he engaged in protected activity (i.e., filing a grievance);
- (2) that he was subsequently treated in an adverse manner by the employer or an agent;
- (3) that the employer’s official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
- (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

*Cook v. Div. of Natural Res.*, Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.*, Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also *Frank’s Shoe Store v. W. Va. Human Rights Comm’n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

It is arguable that Grievant has a *prima facie* case for retaliation in that: (1) “he engaged in a protected activity,” (filed a grievance regarding disciplinary action/employment condition); (2) he was treated adversely (excessive review of his work, unruly harassment by co-worker; overly scrutinized daily activity); (3) the employer had actual knowledge of the protected activity (supervisor was involved with prior and current disciplinary action). Accordingly, all that is left is a causal connection. The Supreme Court has held: An inference can be drawn that Respondent’s actions were the result of a retaliatory motive if the adverse action occurred within a short time period of the adverse action. *Frank’s Shoe Store v. W. Va. Human Rights Comm’n*, 179 W. Va. 53, 365 S.E.2d

251 (1986). Thus, a causal connection ‘might’ be inferred that Grievant has met all four elements of retaliation and made a *prima facie* case. It is also possible that Grievant is an employee who despite being given numerous opportunities to rectify conduct creating a negative perception and disrupting the workday, was unable or unwilling to achieve an acceptable standard of proficiency.

If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id.* See *Mace v. Pizza Hut, Inc.*, 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm’n*, 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.*, Docket No. 89-26-56 (Sept. 29, 1989). “Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive.”<sup>31</sup> *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994). See *Sloan v. Dept. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

Respondent maintains the actions of its duly authorized agents were reasonable and lawful. Respondent highlights a distinction between its actions and that of Robert Alex Hogsett, Jr.<sup>32</sup> Respondent establishes independent conduct of Grievant which

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<sup>31</sup> “[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a ‘significant,’ ‘substantial’ or ‘motivating’ factor in the adverse personnel action.” *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994).

<sup>32</sup> Robert Alex Hogsett, Jr. is a teacher at Huntington Middle School, who, at a prior relevant time was operating without Respondent’s knowledge or sanction determined Grievant was not properly performing his duties and took it upon himself to persecute Grievant, allegedly

warrant disciplinary action. Respondent provided a preponderance of evidence which established Grievant was on notice regarding his performance. Grievant's insubordinate and willfully actions directly compromise the safety of the students at Huntington Middle School. The undersigned is persuaded that Respondent had legitimate reasons for its actions. Grievant failed to meet reasonable performance expectations. Grievant more than once failed to responsibly follow specific instructions to perform identified duties and cease doing activities which were disrupting the school setting. Grievant failed to conduct his workplace activities as a prudent school administrator. The decision to suspend and demote Grievant's employment is permissible in the circumstances of this case. The undersigned finds that Respondent offered persuasive legitimate, non-retaliatory reasons for its action to discipline Grievant. The reasons offered by Respondent for its disciplinary actions were not merely a pretext for a retaliatory motive.

### **MITIGATION**

In assessing the penalty imposed, "[w]hether 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)(citations omitted). The Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly

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for the good of the children. Once the breathe of Hogsett's actions were sufficiently discovered by responsible agents of Respondent disciplinary action was present to Hogsett.



disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

Considerable deference is afforded the county board's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation. The undersigned Administrative Law Judge is uniquely aware that Respondent considered a multitude of disciplinary actions. Administrative Assistant Tackett contacted Superintendent Saxe and recommended Grievant be fired as result of his insubordination regarding a student safety matter. Demotion with a pay cut is far less severe than termination. Termination of employment for insubordination is not unprecedented.

Superintendent Saxe and Assistant Superintendent Hardesty believed a demotion to a teaching position was warranted because Grievant's actions could not be tolerated as an administrator. Superintendent Saxe, who was aware that Grievant had been successful as a classroom teacher, was of the opinion that all of the issues of concern were issues of Grievant performing in his role as an assistant principal. Superintendent Saxe choose not to recommend termination of Grievant's employment despite Grievant's insubordination.<sup>33</sup> Grievant was demoted to a teaching position. He was provided with

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<sup>33</sup> Where a school employee's insubordinate and willfully negligent acts directly compromise the safety of school children he has been entrusted, such actions are not correctable within the meaning of the State Board policy that entitles an employee to an improvement plan before her contract of employment is suspended or terminated. *Blankenship v. McDowell County Bd. Of Educ.*, Docket No. 2016-0772-McDED (Aug. 15, 2016); *Kinder v. Kanawha County Bd. of Educ.*, Docket No. 2015-0421-KanED (Aug. 31, 2015); *Jarrell v. Jackson County Bd. of Educ.*, Docket No. 04-18-204 (Oct. 27, 2004).

progressive discipline and to a larger degree another opportunity to prove himself. Given the facts of this case, the undersigned cannot find that Respondent's chosen course of action was excessive.

Respondent established by a preponderance of the evidence that Grievant's actions were deliberate and intentional to the degree that the conduct constituted insubordination and/or willful neglect of duty. Superintendent Saxe was of the opinion that the best course of action was to put Grievant back to where he was last successful. The undersigned, as the trier of fact, is of the opinion that the depth of actions described in this circumstance of this grievance is not easily communicated. It is a balance of a variety of facts, factors, and applicable codes of conduct, nevertheless it is not found that Respondent's disciplinary action of demotion warrants mitigation. Grievant failed to establish this demotion was an excessive disciplinary measure. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation (citations omitted).

The following conclusions of law are appropriate in this matter:

### **Conclusions of Law**

1. In disciplinary matters, the employer bears the burden to prove by a preponderance of the evidence that the disciplinary action taken was justified. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 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. W. Va.*

*Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. WEST VIRGINIA CODE § 18A-2-8 provides that “[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.” The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991). See *Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975).

3. Employees are expected to respect authority and do not have unfettered discretion to disobey or ignore clear instructions. See *Reynolds v. Kanawha-Charleston Health Dep’t*, Docket No. 90-H-128 (Aug. 8, 1990). Moreover, insubordination may involve “more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer.” *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988).

4. In order to establish insubordination, a county board must demonstrate a policy or directive applied to the employee, was in existence at the time of the violation and that the employee’s failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Domingues v. Fayette County Bd. of Educ.*, Docket No. 04-10-341 (Jan. 28, 2005).

5. “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). This is a fairly heavy burden, given that Respondent must not only prove that the acts it alleges did occur, but also that the reason for Grievant’s neglect of duty was more than simple negligence.” *Tolliver v. Monroe County Bd. of Educ.*, Docket No. 01-31-493 (Dec. 26, 2001). Willful neglect of duty “is conduct constituting a knowing and intentional act, rather than a negligent act. *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 encompasses something more serious than incompetence. *Bd. of Educ. v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120, 122 (1990); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996).” *Geho v. Marshall County Bd. of Educ.*, Docket No. 2008-1395-MarED (Oct. 30, 2008)(footnote omitted).

6. Further, “[t]he factor which distinguishes willful neglect of duty and insubordination from unsatisfactory performance is that the employee knows [his] responsibilities, and is competent to perform them, but elects not to complete them. When an employee’s performance is unacceptable because [he] does not know the standard to be met, or what is required to meet the standards, and [her] behavior can be corrected, the behavior is unsatisfactory performance. *Bierer v. Jefferson County Bd. of Educ.*, Docket No. 01-19-595 (May 17, 2002).” *Waggoner v. Cabell County Bd. of Educ.*, Docket No. 2008-1570-CabED (Oct. 31, 2008).

7. 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 Resources*, 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).

8. Respondent established sufficient evidence of record to meet its burden of proof for the issuance of disciplinary action. Respondent offered legitimate, non-retaliatory reasons for its actions.

9. Respondent established by a preponderance of the evidence that Grievant's actions were deliberate and intentional to the degree that the conduct constituted insubordination and willful neglect of duty.

10. Where a school employee's insubordinate and willfully negligent acts directly compromise the safety of school children he has been entrusted, such actions are not correctable within the meaning of the State Board policy that entitles an employee to an improvement plan before her contract of employment is suspended or terminated. *Blankenship v. McDowell County Bd. Of Educ.*, Docket No. 2016-0772-McDED (Aug. 15, 2016); *Kinder v. Kanawha County Bd. of Educ.*, Docket No. 2015-0421-KanED (Aug. 31, 2015); *Jarrell v. Jackson County Bd. of Educ.*, Docket No. 04-18-204 (Oct. 27, 2004).

11. "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3 (2008).

12. 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 agency discretion or an inherent disproportion between the offense and the personnel action.'" *Connor v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995); *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

13. Grievant failed to meet his burden of demonstrating the penalty was clearly excessive or reflects an inherent disproportion between the offense and the personnel action.

14. In assessing the penalty imposed, "[w]hether 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)(citations omitted). The Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion.

Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

Accordingly, this 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 (2018).

**Date: September 27, 2019**

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**Landon R. Brown**  
**Administrative Law Judge**