

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MATTHEW GONZALES,
Grievant,

v.

Docket No. 2019-0671-CabED

CABELL COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Matthew Gonzales, Grievant, filed this grievance against his employer, Cabell County Board of Education, Respondent, protesting disciplinary action(s) against him. Grievant's contract of employment as a teacher for Cabell County was terminated. The grievance was filed on December 12, 2018, and the grievance statement provides:

[r]etaliation and reprisal against Grievant in violation of West Virginia Code and West Virginia Common Law. CCBOE terminated Grievant during an ongoing grievance against the CCBOE, citing reasons related to Grievant's ongoing grievance that remained unresolved.

To redress the alleged retaliation and reprisal, Grievant requests:

[r]einstatement and back pay for any loss of pay as a result of his termination, 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.¹ A level three hearing was held before the undersigned Administrative Law Judge on April 19, 2019, at the Grievance Board's Charleston office. Grievant appeared in person and by his attorney, Abraham J. Saad, Saad Dixon Law

¹ 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.

Office, PLLC. Respondent appeared by its Superintendent, Ryan Saxe, and by its attorneys Howard Seufer, Jr., Bowles Rice LLP, and Sherrone D. Hornbuckle. At the level three hearing (L-3), testimony was taken from seven witnesses: Ryan Saxe, Superintendent of Cabell County; Tim Hardesty, Assistant Superintendent of District Support and Employee Relations; Dan Gleason, Principal of Huntington High School; Travis Austin, Assistant Principal of Huntington High School; Joedy Cunningham, Executive Director of Secondary/Post-Secondary Schools; Lee Ann Porter, Assistant Principal of Huntington High School and Grievant.² Further, during the level three hearing of the instant grievance, the parties proposed and moved that the undersigned Administrative Law Judge accept that the record of the then ongoing grievance to which the Statement of Grievance refers. *Gonzales v. Cabell County Bd. of Educ.*, Docket No. 2018-1255-CabED, will be considered apart of the record of this grievance. Said request/motion is and was granted.³ After a series of mutually agreed extensions, authorization by the undersigned, both parties submitted Proposed Findings of Fact and Conclusions of Law, and this matter became mature for decision on or about July 26, 2019. This matter is ripe for decision.

² A total of 25 exhibits were admitted into evidence: two by stipulation of the parties (Stipulation Exhibits 1 and 2), sixteen that were introduced by the Board (Respondent's Exhibits 4, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 25), and seven that were introduced by Grievant (Grievant's Exhibits 4, 5, 6, 8, 9, 10 and 13).

³ The complete record of *Gonzales v. Cabell County Bd. of Educ.*, Docket No. 2018-1255-CabED (Sept 27, 2019) an independent but relevant grievance of the parties is incorporated into the instant grievance *Gonzales v. Cabell County Bd. of Educ.*, Docket No. 2019-0671-CabED.

Synopsis

Grievant filed this grievance protesting Respondent's suspension and termination of his employment from a 200-day teaching position within Cabell county. The instant grievance, while a separate and distinct grievance, it is uniquely coupled with *Gonzales v. Cabell County Bd. of Educ.*, Docket No. 2018-1255-CabED (Sept 27, 2019). Respondent contends that Grievant has caused them to unduly use resources and was overly difficult to manage to the point that termination of his employment is justified.

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, and must be exercised reasonably, not arbitrarily or capriciously. Additionally, in accordance with W. Va. Code § 18A-2-12a, Respondent is required to inform an employee of his or her deficiencies and afford said employee a reasonable period to improve. A key question is whether or not the conduct is correctable. Grievant's highlighted conduct is notable but debatable activity. Grievant's teaching contract was terminated within an extremely short time period after his demotion. Respondent failed to persuasively establish Grievant's conduct *post* demotion demonstrated lawful cause for termination of his employment as a full-time teacher.

This grievance matter was not a cut-and-dry disciplinary scenario; nevertheless, in the context of this matter, Respondent did not meet its burden demonstrating just cause which is recognized legally sufficient to warrant the dismissal of Grievant. This grievance is **GRANTED**.

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. He remained the Huntington Middle School Assistant Principal until April 2018, when he was suspended and demoted. Respondent demoted Grievant to a 200-day teaching position.

2. The suspension and termination of Grievant's employment from a 200-day teaching position is the issue being litigated by the instant grievance.

3. Two grievances previously brought by Grievant were pending at the Grievance Board when Grievant filed the instant protest.

a) The earliest of the two cases, *Gonzalez v. Cabell County Bd. of Educ.*, Docket No. 2018-0867-CabED, was instituted on January 11, 2018. Grievant, who was then an Assistant Principal at Huntington Middle School, challenges a memo issued to him by the Superintendent on December 15, 2017. The memo directed Grievant to cease certain unnecessary practices that allegedly created needless suspicion and distrust in the school community, undermining his effectiveness as an administrator. Further, it also admonished Grievant for ignoring or not responding to attempts by staff members to contact him for assistance. The memo warned Grievant that his failure to comply with the directives, or any effort to circumvent them, could result in disciplinary action affecting his contract of employment. When the January 11, 2018, grievance was denied by the Superintendent at level one of the grievance procedure, Grievant appealed to level two. At the second of two scheduled mediation sessions, the Administrative Law Judge entered an order on August 31, 2018, placing the matter in abeyance pending the outcome of a new grievance that the Grievant had filed with the Grievance Board on May 25, 2018.

b) The grievance, *Gonzales v. Cabell County Bd. of Educ.*, Docket No. 2018-1255-CabED, is the second of the two grievances that were pending when Grievant filed the instant case. This grievance is an appeal from Respondent's decision on May 22, 2018, to demote Grievant from the position of Assistant Principal to the job of Teacher. Respondent's demotion of Grievant to a 200-day teacher position was a result of the

Grievant's defiance of his superiors and willful neglect of duty, which jeopardized student safety and violated the Employee Code of Conduct. *See Stipulation Exhibit 1.* This grievance was ruled upon by this Board by decision dated September 27, 2019. Grievant's demotion to a teaching position was upheld.

4. At the beginning of the 2018-2019 school year, Grievant reported to work as a regular, full-time 200-day teacher, with the salary and all the benefits of a teacher. But because vacancies in teacher positions must be posted and filled under West Virginia Code § 18A-4-7a, Grievant could not simply be awarded a vacant regular teacher job to the exclusion of others who might apply. For that reason, he was to substitute every day for absent teachers throughout the county until he received a posted teacher vacancy for which he qualified.⁴ *L-3 Testimony Assistant Superintendent Hardesty; R Ex 16*

5. Grievant applied to several positions but was only able to obtain a long-term substitute position.

6. Initially, Grievant was assigned as a substitute Social Studies teacher at Barboursville Middle School. He worked in that assignment from August 13, 2018, through October 2, 2018. *L-3 Testimony Hardesty; R Ex 4*

7. On or about October 2, 2018, Assistant Superintendent Hardesty transferred Grievant to Huntington High School based upon a "need" at the recovery classroom where regular teacher Kaithyn Duncan was on maternity leave.

8. Assistant Superintendent Hardesty "notified" Huntington High School administration about Grievant prior to his arrival. The rationale and intent of this notification is disputed by the parties.

⁴ Grievant's teaching certification is in Social Studies.

9. Upon his arrival at Huntington High School, Grievant was assigned to the recovery classroom where he met with Victoria Garrett, a teacher who was temporarily teaching in that class for Ms. Duncan.

10. In a recovery class, students are provided with computer-based learning to recover class credits not obtained at earlier opportunities.

11. Huntington High School administration arranged for Ms. Garrett, the teacher Grievant was replacing in the Recovery Class, to train him prior to his first day in the classroom.

12. It was later discovered or revealed that Grievant and Ms. Garret had history.⁵

13. Arrangements were made for Jessica Jordan, Huntington High School's graduation coach, to conduct the training. When Grievant learned that Jessica Jordan was scheduled to train him, he requested that someone from the central office do the training. When administration explained to Grievant that this type of training was done at the school level, he asked for a male staff member to sit in on the training. This training was a simple requirement that anyone teaching in the Recovery Class must complete. Grievant eventually completed the training. *L-3 Testimony of Assistant Superintendent Hardesty and Principal Gleason; also see R Exs 11, 18, 19*

14. When Grievant arrived at Huntington High School, Grievant was asked to sign an Acceptable Use Policy Agreement stating that he would abide by the terms and

⁵ It is not totally clear but for some reason(s), it was recognized/accepted that Grievant and Ms. Garrett was not a good fit for recovery class training.

conditions of Cabell County Board of Education Policy 7540.03, “Staff Technology Acceptable Use and Safety.” The policy requires school staff to use technology in a safe and appropriate manner and corresponds with West Virginia Board of Education Policy 2460, “Educational Purpose and Acceptable Use of Electronic Resources, Technologies and the Internet.” All faculty members are required to comply with Policy 7540.03 and execute a written agreement regarding the same. *R Ex 17; G Ex 5*

15. There was some confusion and delay in Grievant’s review and signing of the presented acceptable use agreement, which resulted in school administration contacting Assistant Superintendent Hardesty. After Assistant Superintendent Hardesty began investigating the issue, it was determined that Grievant had already signed this agreement when he was assigned to Barboursville Middle School at the start of the school year.

16. Grievant held the Huntington High School Recovery Class assignment beginning on October 3 until October 30, 2018.

17. On October 5, 2018, the first day Grievant worked with students in the Recovery Class, school administration observed the classroom and noted that Grievant was not circulating among the students.⁶

18. Over the course of the next three weeks, Respondent submitted multiple “observations” regarding the conduct of Grievant. The rationale for the heightened scrutiny is open to speculation.

⁶ As students worked on their computers, Grievant was seated at the teacher’s computer desk reading Plato’s “Allegory of the Cave.” School administration asked if this book had anything to do with the class. Grievant admitted that it did not. Administration reminded him that he was not to engage in pleasure reading during class time. *L-3 Testimony Principal Gleason; R Ex 11*

19. By October 7, 2018 – less than a full week on the new assignment – Principal Gleason wrote an email to Assistant Superintendent Hardesty, Robert Archer and Assistant Principal Joedy Cunningham concerning Grievant. None of the issues were disciplinary issues.

20. On October 12, 2018, Grievant participated in a meeting regarding a student's Section 504 Accommodation Plan. At this meeting, Grievant, like the other participants, was directed to document participation in the meeting. Grievant wrote the name "Duncan," which is the last name of the Recovery Class teacher who was out on maternity leave. *L-3 Testimony Assistant Principal Porter; R Exs 12, 21 and 23*

21. Grievant was required to sign his name to acknowledge receiving a copy of the student's Section 504 accommodations. W.Va. Code § 18-20-2(f) specifically required that he do so. Grievant again wrote "Duncan." *L-3 Testimony Assistant Principal Porter; R Ex 12 and 22*

22. Pursuant to school administration follow-up on these items, Grievant eventually corrected this issue and signed his own name. The rationale for Grievant's original use of the Recovery Class teacher's name on the student's accommodation plan is disputed by the parties.

23. On October 24, 2018, students were not in school on this date, the faculty of Huntington High School had a scheduled Professional Learning/Faculty Senate Day. School administration prepared a Professional Learning/Faculty Senate schedule. Grievant was assigned to "Rotation 2." An Assistant Principal was the administrator designated to work with the Rotation 2 group. The schedule set forth four different training

sessions that each of the four rotation groups were to attend from 8:00 a.m. to 11:50 a.m. The specific times of the rotations were: 8:00 – 8:50 a.m.; 9:00 – 9:50 a.m.; 10:00 – 10:50 a.m.; 11:00 – 11:50 a.m. *L-3 Testimony of Assistant Principal Austin; R Exs 9, 20*

24. Assistant Principal Austin noticed that Grievant was not in attendance.

25. Grievant did not initially know about the training. Grievant had not received an email from the school administration with the training schedule. This was Respondent's oversight, no fault of Grievant.

26. Assistant Principal Austin sought out Grievant and inquired why he was not at the training. Assistant Principal Austin was under the mistaken belief that Grievant had been notified regarding the scheduled training.

27. Assistant Principal Austin informed Grievant that he had missed the first training session and that the second rotation was about to start.

28. Grievant did not immediately attend the training once informed of its existence by Assistant Principal Austin.⁷

29. At around 9:30 a.m. that morning, the Board's Executive Director Secondary/Post-Secondary Schools, Joedy Cunningham, was at Huntington High School. Assistant Principal Austin told Cunningham that Grievant had not reported to the second rotation. *L-3 Testimony; R Exs 14, 15*

30. Executive Director Cunningham then went to Grievant's classroom. He knocked on the door, which was shut, and waited for Grievant to answer. Grievant heard

⁷ The rationale for this is of discussion. Grievant had not been provided an email from school administration regarding (notice of) the training. Grievant was under the mistaken belief that he was entitled to legal time for an upcoming meeting.

the knocks but did not answer the door. The Executive Director knocked more than once. There being no response, he then used his master key to open the door. Director Cunningham found that Grievant was sitting in a student seat writing in a notebook, having ignored the repeated knocks on the door. *L-3 Testimony Austin and Cunningham; R Ex 15*

31. Director Cunningham explained to Grievant that Grievant needed to attend professional development. Grievant replied, he needed a “legal day.” The Executive Director contacted the central office and determined that Grievant had not requested a “legal day.” *L-3 Testimony Grievant, Austin and Cunningham; R Exs 14 15 and G Ex 9*

32. It was impressed upon Grievant that as a teacher at Huntington High School he should and was expected to attend the scheduled Professional Learning/Faculty Senate Day training.

33. Grievant did not refuse to attend the professional development program. He did question his entitlement to legal counsel and indicated a desire to exercise an option to prepare for an upcoming meeting. Grievant had a good faith, but misdirected, belief that he was entitled to prep-time and legal representation.⁸

34. The School Board’s only known policies on anything resembling “legal time” are its policies 3235 and 3236 on employee leave for jury duty and for court appearances, neither of which applied. *L-3 Testimony Hardesty; R Ex 25*

⁸ There was to be a meeting that afternoon (October 24) to discuss observations of Grievant’s classroom performance. Grievant had requested that his attorney be in attendance, but the meeting was not a grievance meeting for which an employee is guaranteed preparation time. See W.Va. Code § 6C-2-3(g) (1).

35. Grievant made a brief appearance at one of the training sessions. Upon Grievant's arrival at the training, the presenter was using an iPad as a camera scanning around the room. This made Grievant uncomfortable. Grievant did not complete the training.

36. Grievant had a conversation with the administration regarding the training. Director Cunningham and Grievant discussed Grievant's failure to attend the entire training session. The conversation(s) were frustrating for both parties.

37. Grievant held the Huntington High School Recovery Class assignment from approximately October 3 until October 30, 2018. During the course of those three weeks, Respondent maintained multiple "observations" of Grievant's work performance.

38. Grievant's attitude, demeanor and deeds were in review. There were both official and unofficial "observations" of Grievant's work performance. The level of scrutiny provided to Grievant was greater than what is experienced by an average teacher.

39. As a result of an October 24 or October 29 meeting with Grievant regarding observation of Grievant's job performance, school administrators did not formulate or implement an improvement plan to correct any identified deficiencies. See *W. Va. Code* §§ 18A-2-12, 18A-2-12A; *W.VA. CODE ST. R. § 126-142-1 et seq.*

40. On or about November 1, 2018, Grievant was suspended by Cabell County School Superintendent Ryan Saxe, who simultaneously recommended that the School Board terminate Grievant's contract.

41. As memorialized in a November 1, 2018 letter, *see Stipulated Exhibit 1* specifically, Respondent alleges that Grievant caused the agency to unnecessary use resources and was overly difficult in his time at Huntington High School for:

- 1) Not completing his Acceptable Use Policy quick enough;
- 2) For signing “Duncan” on the attendance of a meeting rather than his own name;
- 3) For allegedly reading Plato’s “Allegory of the Cave” during class time;
- 4) For not attending a training on a Professional Learning Day,

See R Ex 7, G Ex 1 and Stipulated Exhibit 1.

42. Cabell County Board of Education, Respondent, held a school board meeting on December 4, 2018.

43. At its meeting, Respondent, by motion made, seconded and adopted by unanimous vote, approved the recommendations to (1) ratify and approved Grievant’s unpaid suspension beginning October 30, 2018 through December 4, 2018 and (2) termination of Grievant’s contract effective December 5, 2018. *See G Ex 2, R Ex 8, Stipulated Exhibit 2.*

Discussion

As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 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, a party has not met its burden of proof. *Id.*

The instant grievance is regarding Grievant's termination from a teaching position within Cabell County. Cabell County Board of Education, Respondent, sanctioned Grievant with termination within approximately 75 days of his commencement of his newly assigned duties as a classroom teacher. Grievant had recently been demoted from an administrative position to a 200-day teaching position within Cabell County. The instant grievance, while a separate and distinct grievance, it is uniquely coupled with that of *Gonzales v. Cabell County Bd. of Educ.*, Docket No. 2018-1255-CabED (Sept 27, 2019).⁹

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

⁹ The issue and facts of Grievant's demotion was litigated, discussed and adjudicated in *Gonzales v. Cabell County Bd. of Educ.*, Docket No. 2018-1255-CabED (Sept 27, 2019). By request and motion of the parties *Gonzales v. Cabell County Bd. of Educ.*, Docket No. 2018-1255-CabED, will be considered a part of the record of this grievance.

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). Further it is recognized that 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.

Respondent has the burden of establishing lawful justification for its disciplinary action. The undersigned Administrative Law Judge is uniquely situated to adjudicate this grievance, evaluating the totality of the circumstances and the interactive reactions of relevant facts in that the undersigned heard the instant grievance and *Gonzales v. Cabell County Bd. of Educ.*, Docket No. 2018-1255-CabED (Sept 27, 2019). Grievant filed this grievance alleging Respondent's actions were improper, reprisal, excessive, and invalid claim(s). Grievant maintains Respondent fails to meet its burden of proof. Respondent maintains that Grievant was suspended and employment terminated because, despite the opportunity provided to him for success, he continued to exhibit defiant behavior and refused to cooperate with school administrators and others in the school, resulting in the administration having to devote extraordinary time and attention to get him to comply with

simple directives. Respondent asserts that Grievant is guilty of willful neglect of duties and insubordination.

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 willful; 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 curium). 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). Willful neglect of duty encompasses something more serious than "incompetence," which is another ground for teacher discipline. The term "willful" ordinarily imports a knowing and intentional act, as distinguished from a negligent act. *Crum v. Logan County Bd. of Educ.*, Docket No. 2015-1197-CONS (Oct. 19, 2015); *Bd. of Educ. of the County of Gilmer v. Chaddock*, 183 W.Va. 638, 640, 398 S.E.2d 120, 122 (1990).

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 reasonable conduct, 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.¹⁰ Credibility assessments herein were made from direct observations as well as review of the record.

Certain facts surrounding events, which led to Grievant's demotion and termination, were the subject of conflicting testimony. **But more often than not, in the circumstances of the instant matter, witnesses agree on the majority of the facts but disagree on the attitude, or motivation(s), interpretations and effect of identified conduct.**

¹⁰ 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.

Grievant is a man of few words but that does not limit the convictions of his belief. Grievant had reason to be suspicious of Respondent's motivations and prospective actions.¹¹ Grievant has suffered a form of character assassination. From a once respected and upwardly mobile career to demoted and discharged employee. Grievant is no master of communication. His ability to express himself through spoken word is dubious. While Respondent has the burden of proof, it would have served Grievant well to supply full explanations for ambiguous conduct. Grievant's testimony at the April 19, 2019 level three hearing was convoluted. Too much detail regarding insignificant information and not enough enlightenment regarding Grievant's actions and his thought process during pivotal events in discussion. It would have been extremely beneficial if Grievant was able to more readily clarify potential misgivings and conduct deemed actionable by Respondent. Grievant seemed to be trying, but his explanations leave a lot to be desired. A few of Grievant's clarifications seem plausible but the explanations for his actions also generate more questions than resolve issues in discussion. Grievant was repeatedly requested to identify and clarify inferences Respondent may be inaccurately attributing to his actions. Grievant did not maximize the opportunity to explain his conduct. Some facts, opinions, suspicions and rationale for Grievant's

¹¹ Grievant has been put through hell and high water, for more than 30 months. Unsubstantiated accusations against Grievant commenced after his disciplining of a teacher, Robert Alex Hogsett Jr., back in 2016. Hogsett openly admits he had a problem with Grievant. Hogsett reported allegations regarding 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. Much of Hogsett's actions are undisputed fact. He intentionally sought to highlight Grievant's conduct. NONE of the alleged charges of professional conduct contended by Hogsett were ever found to be collaborated as a legitimate malfeasance of Grievant. Nevertheless, the rumors, the investigations, and Grievant's idiosyncrasies created a perfect storm of turmoil for Grievant.

conduct are more plausible than others. At times Grievant contradicted his own testimony, regarding his understanding and motivation for his actions. This does not assist Grievant in clarifying potential misconceptions and alleged malfeasance. In assessing the trustworthiness of the information provided by Grievant, the undersigned is mindful of third-party interest, consistency of statements and the plausibility of the witness's information. Grievant is polite but his mannerisms do not readily establish an immediate connection between him and an authoritarian audience. Overall Grievant's testimony is valuable and not implausible with regard to ascertaining debatable conduct.

Ryan Saxe, Superintendent of Cabell County Schools, served as the representative for Cabell County throughout the level three hearing. He also testified at the hearing. The demeanor of this witness was professional and efficient. He knew what he was there to do and had no hesitation in providing the official position.¹² Superintendent Saxe's testimony provided the recognized bullet points of Respondent's position. It is not found that this witness provided much insight into individual incidents, but he was able to express Respondent's analysis of the events. Superintendent Saxe's testimony was plausible but not necessarily persuasive in establishing malfeasance by Grievant. Respondent was frustrated with Grievant's attitude and conduct. This was not the first level three grievance that Superintendent Saxe has testified regarding Grievant's conduct. However, Superintendent Saxe did not seem to readily acknowledge that Respondent's hands were not blame free with regard to some of the misunderstandings regarding Grievant's highlighted conduct. E.g., failure to

¹² Respondent perceived Grievant's conduct similar to the behavior he had exhibited the previous year. The actions which resulted in Grievant's suspension and demotion.

electronically notify Grievant of the training program, failure to timely recognize the misfeasance of teacher Robert “Alex” Hogsett Jr.¹³ It is recognized, by the undersigned, that Grievant may be emotionally and psychologically scarred due to some of the egregious events that has transpired in the last months. See record *Gonzales v. Cabell County Bd. of Educ.*, Docket No. 2018-1255-CabED (Sept 27, 2019). Superintendent Saxe’s testimony put forth complicated legal issues into the discussion and his opinion regarding Grievant. However, using the terms “insubordination” and “willful neglect of duty” does not establish the conduct as a *fait accompli*. Superintendent Saxe’s testimony was overly bias regarding Grievant’s disputed motivations. It is disingenuous for Respondent to assign intent to Grievant’s actions without evaluating the totality of the circumstances. The majority of the incidents that Superintendent Saxe reviewed in his November 1, 2018 document (*Stipulated Exhibit 1*) were events communicated to him by others and a significant number of the incidents cited transpired prior to Grievant’s demotion. Being a school administrator and being a classroom teacher is not the same. Superintendent Saxe’s testimony does “not” indicate to this fact finder that Grievant’s activities were viewed by Respondent’s agents in an impartial manner. This witness tends to present conclusions and information with clarity but fails to establish that Grievant’s conduct was reviewed with any sense of open-mindedness. If this witness’s

¹³ Physical Education teacher at Huntington Middle school Robert “Alex” Hogsett Jr. testified at the level three hearing of *Gonzales v. Cabell County Bd. of Educ.*, Docket No. 2018-1255-CabED (Sept 27, 2019). Teacher Hogsett took exception with Grievant and how he performed his duties as an assistant principal. In addition to sparking numerous criminal investigations against Grievant, Hogsett succeeded in negatively altering Grievant’s reputation and other’s perception of Grievant’s conduct. Grievant sought assistance from Respondent regarding some of Hogsett’s actions but at that time Respondent’s investigation of the matter was clumsy.

testimony is presented to establish insubordination on the part of Grievant, it is unpersuasive. If the testimony was an overview of past information coupled with Respondent's interpretation it was thorough.

Tim Hardesty, Assistant Superintendent of District Support and Employee Relations for Cabell County Schools testified at level three. Mr. Hardesty's demeanor and attitude toward the action were appropriate. This witness communicated information regarding Grievant's status as a full-time 200-day teacher, with the salary and benefits of a regular teacher. Subsequent to his demotion, Grievant could not simply be awarded a vacant regular teacher job to the exclusion of others who might apply. He was to substitute every day for absent teachers throughout the county until he received a posted teacher vacancy for which he qualified. As a portion of his responsibilities with employee relations, Assistant Superintendent Hardesty is made aware of human resources issues in Cabell County schools. Mr. Hardesty was made aware of "observations" regarding the conduct of Grievant. This witness accepted without questions other administrators' opinions regarding Grievant's conduct. He had little to no independent investigation data regarding the opinions provided. This witness professes no recollection of Grievant's unclarified medical condition.¹⁴ Assistant Superintendent Hardesty's testimony was credible.

Travis Austin, Assistant Principal at Huntington High School testified at the level

¹⁴ 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. See *Gonzales v. Cabell County Bd. of Educ.*, Docket No. 2018-1255-CabED (Sept 27, 2019).

three hearing of this matter. His testimony provides insight into some of the interactions which took place on October 24, 2018, the day of a scheduled Professional Learning/Faculty Senate Day. Mr. Austin's testimony did not establish that Grievant refused a direct order but does provide that Grievant didn't respond with the speed and interest that school administrators thought were appropriate. After Grievant had been made aware of the training, he did not immediately attend the sessions. Assistant Principal Austin's testimony does "not" generate a sense that there was associate support for Grievant. Assistant Principal Austin told Director Cunningham that Grievant had not reported to the second rotation. The level three testimony of Board's Executive Director Secondary/Post-Secondary Schools, Joedy Cunningham was both informative and enlightening. There are facts and shading throughout this entire saga. The actions of individuals, their intent and the manner of execution has bearing on situations. This witness's testimony may or may not have reverberating effects. His testimony spun to the left or to the right tends to have an effect on the allegation of insubordination. Director Cunningham impressed upon Grievant that as a teacher at Huntington High School he should and was expected to attend the scheduled Professional Learning/Faculty Senate Day training. This witness described a factual situation which the undersigned understands can be reasonably described as "passively disrespectful." Both Director Cunningham and Grievant, were attempting to communicate objectively with the other. Both were armed with incomplete and inexact information and assumptions. The firsthand recollections of Director Cunningham had the air of credibility. The testimony provided regarding the October 24, 2019, events seemed even keeled while the October

25, 2019 e-memo, introduced as Respondent's Exhibit 15 tends to have the heavy-handed weight of predisposition. Director Cunningham's awareness of Grievant and the parameters of the situation seems to have matured with time. The difference between up and down can sometimes be the perception point of the communicator. There exists degrees of mutual mistrust between Respondent and Grievant that fuels the miscommunication between them. The undersigned cannot ignore the numerous examples of finger pointing between the parties but must also properly analyze the cumulative effect. Within the totality of this grievance, both parties are quick to identify the worst in the other's motives. The worst-case scenario is not appropriate in every situation.

The testimony of Daniel Gleason, Principal of Huntington High School was typical. The information presented and reviewed was not necessarily controversial. Some facts which were agreed between the parties, in general, were discussed with more specificity. As previously noted, in the circumstances of the instant matter, witnesses agree on the majority of the facts but disagree on the attitude, or motivation(s), interpretations and effect of identified conduct. Grievant's performance as a teacher was under observation commencing on his first day at Huntington High School. See *Gleason L-3 Testimony*. There were observations of Grievant's teaching environment some official some incidental. Grievant's attitude, demeanor and deeds were in review. The level of scrutiny provided to Grievant was greater than that which is experienced by an average teacher. Further, it was clarified that G Ex 5 and R Ex 17, while both examples of "Staff Technology Acceptance Use and Safety Policy," it is understandable that the two

documents in the forms presented might not be immediately recognized as the same document. Grievant's hesitation to sign the form in October after having signed the form in August and the ensuing administrative confusion is further example of the parties drawing lines and preparing for conflict.

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 Respondent's disciplinary measure is not necessarily convoluted, but the totality of the circumstances with regard to the instant parties is as important as the independent events. Respondent maintains that Grievant did not, in his assignment at Huntington High School, demonstrate a positive attitude and a willingness to work for the best interests of students. Respondent avers that this is in contrast to the devoted administrator that the Superintendent had observed earlier in Grievant's career. Respondent maintains Grievant demonstrated obstinance throughout his assignment as a classroom teacher. Ultimately, Respondent asserts that Grievant is guilty of being insubordinate and willful negligence of duties.

Respondent avers that Grievant was insubordinate within the meaning of W. Va. Code § 18A-2-8 in refusing to sign the acceptable use agreement; refusing to be trained by Ms. Garrett when told that she had been hired to train him; intentionally signing another

employee's name to the 504 plan documents when he knew or should have known the law required his signature; and refusing to report to professional development when expressly directed by both the Assistant Principal and Executive Director to do so. See *Respondent's Proposed Findings of Fact 27, 28, 32-36*. Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. *Russell v. Kanawha County Bd. of Educ.*, Docket No. 2016-0447-KanED (Mar. 21, 2016). Respondent avers that Grievant *intentionally neglected his duty* while sitting at his computer desk reading Plato's "Allegory of the Cave" for reasons unrelated to his teaching responsibilities, instead of circulating among the Recovery Class students; Grievant signed someone else's name to the 504 plan documents when he knew or should have known the law required his personal signature; Grievant heard, but ignored, the Executive Director's knocks on the classroom door; and when he refused to join the rest of the faculty in attending professional development rotations. See *Respondent's Proposed Findings of Fact 27, 28, 32-36*.

Grievant has an unusual personality, perhaps a bit socially awkward. Had he looked and acted the same as those around him, it is likely that none of this would have ever seen the light of day. Nevertheless, Respondent must establish actionable conduct (post demotion) attributable to Grievant. Being different still is not, nor should it be, sufficient grounds to deprive a law abiding citizen the opportunity to pursue an honest living in the vocation of his or her choosing. Generally, a board of education acts arbitrarily and capriciously when it does not rely on criteria intended to be considered, explains or reaches a decision in a manner contrary to the evidence before it, or reaches

a decision that was so implausible that it cannot be ascribed to a difference of opinion. *Yokum v. W. Va. School for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996); See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985).

Pretext can be defined as a motive, cover for the real reason, false appearance, pretense for an action. See Black's Law Dictionary. A critical nexus of this case is whether the circumstances discussed are legitimate justification or pretext for disciplinary action. Grievant's every move was scrutinized, no matter what he did it was being analyzed. One employee or another of Respondent's was in review of Grievant's attitude, demeanor and deeds. Some employees were more impartial than others. Respondent demonstrated misconduct in the last grievance *Gonzales v. Cabell County Bd. of Educ.*, Docket No. 2018-1255-CabED (Sept 27, 2019). However, in this grievance Respondent's conduct tends to establish its own frustration with Grievant. Grievant may not be the perfect employee, but he should not be denied of his chosen career, without proper lawful justification.

West Virginia Board of Education ("WVBE") Policy 5310¹⁵ states that "monitoring and/or observation of employees *shall* be conducted openly" and that "[a]n employee whose performance evaluation is rated unsatisfactory *shall* be given an opportunity to correct the deficiencies." (Emphasis added.) An evaluation is properly conducted if it

¹⁵ WVBE Policy 5310 is the State Board's adopted "system for the evaluation of the employment performance of personnel, which system shall be applied uniformly by county boards in the evaluation of the employment performance of personnel employed by the board." See W. Va. Code § 18A-2-12(a)

is performed in an “open and honest” manner and is fair and professional. See W. Va. Code § 18A-2-12. See also, *Brown v. Wood County Bd. of Educ.*, Docket No. 54-86-262-1 (May 5, 1987), aff’d Kanawha County Cir. Ct., Civil Action No. 87-AA-43 (May 18, 1989), aff’d, in part, 184 W. Va. 205, 400 S.E.2d 213 (1990); *Wilt v. Flanigan*, 170 W. Va. 385, 294 S.E.2d 189 (1982).

“The Grievance Board will not intrude on the evaluations and Improvement Plans of employees unless there is evidence to demonstrate ‘such an arbitrary abuse on the part of a school official to show the primary purpose of the polic[ies] has been confounded.’ *Kinder v. Berkeley County Bd. of Educ.*, Docket No. 02-87-199 (June 16, 1988). See, *Higgins v. Randolph Bd. of Educ.*, 168 W. Va. 448, 286 S.E.2d 682 (1981); *Thomas v. Greenbrier Bd. of Educ.*, Docket No. 13-87-313-4 (Feb. 22, 1988); *Brown v. Wood County Bd. of Educ.*, Docket No. 54-86-262-1 (May 5, 1987), aff’d Kanawha County Cir. Ct., Civil Action No. 87-AA-43 (May 18, 1989), aff’d, in part, 184 W. Va. 205, 400 S.E.2d 213 (1990).” *Beckley v. Lincoln County Bd. of Educ.*, Docket No. 99-22-168 (Aug. 31, 1999).

This case has many lenses. Defining the focal points tends to make the discussion easier but arriving at the proper determination given the totality of this matter is no easy feat. Respondent in review of Grievant’s conduct tends to downplay its own role in various investigations and misinterpretations of facts. More than one individual employed by Respondent has manipulated and used information to generate ill-will and cast bad light on Grievant. The demeanor of Grievant is difficult to accurately describe, but it is safe to conclude he is suspicious of school administrators’ motivations and

actions. It is more than probable that Grievant does not readily trust administration. Respondent must, as Grievant has, share some responsibility for that burden.

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

The 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. W. VA. CODE §18A-2-12A(6) states in relevant part:

All school personnel are entitled to know how well they are fulfilling their responsibilities and should be offered the opportunity of open and honest evaluations of their performance on a regular basis and in accordance with the provisions of section twelve of this article. All school personnel are entitled to opportunities to improve their job performance prior to the termination or transfer of their services. Decisions concerning the promotion, demotion, transfer or termination of employment of school personnel, other than those for lack of need or governed by specific statutory provisions unrelated to performance, should be based upon the evaluations, and not upon factors extraneous thereto. All school personnel are entitled to due process in matters affecting their employment, transfer, demotion or promotion. . .

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* County boards of education have the burden of proof to show that conduct is not correctable. *Maxey v. McDowell County Bd. of Educ.*, 212 W.Va. 668, 575 S.E.2d 278 (2002).

Grievant’s attitude, demeanor and deeds were in review. The key question is whether or not Grievant’s conduct is correctable. If it is correctable, then it matters not whether it is termed willful neglect of duty, unsatisfactory performance or any one of the other statutory grounds for termination. Prior to termination for correctable conduct an employee must be given notice of deficiencies through evaluation and opportunity to improve. *Dalton v. Monongalia County Bd. of Educ.*, Docket No. 2010-1607-MonED (Nov. 23, 2010). See Syl. pt. 4, *Mason County Bd. of Educ. v. State Superintendent of Sch.*, 165 W. Va. 732, 274 S.E.2d 435 (1980), *Alderman v. Pocahontas County Bd. of Educ.*, 223 W. Va. 431, 444 675 S.E.2d 907, 921 (2009). “What is ‘correctable’ conduct does not lend itself to an exact definition but must . . . be understood to mean an offense or conduct which affects professional competency.” *Mason* 165 W. Va. at 739, 274 S.E.2d at 439.

The West Virginia Supreme Court of Appeals has found reversible error in the event an Administrative Law Judge does not assess whether a Grievant’s behavior was correctable. In addition, “[f]ailure by any board of education to follow the evaluation

procedure prohibits such board from discharging, demoting or transferring an employee for reasons having to do with prior misconduct or incompetency that has not been called to the attention of the employee through evaluation, and which is correctable.” *Maxey, supra*. The factor triggering the application of the evaluation procedure and correction period is correctable conduct. It is envisioned that where a teacher exhibits problematic behavior, the improvement plan is the appropriate tool if the conduct can be corrected. Only when these *legitimate efforts fail* is termination justified. *Id.*

As it pertains to Grievant’s performance as a full-time 200-day teacher, it is debated that Grievant was provided proper notice of deficiencies. Trust is not easily rebuilt. Grievant doesn’t have the ability to defy clear directives, nor does Respondent have the authority to misguide an employee and then unduly punish said employee for getting lost along the way.¹⁶ Respondent overwhelming labels Grievant’s conduct as unreasonable. It might also be interpreted as difficult, within the moment, but Grievant’s conduct is not necessarily unreasonable. Respondent’s suspicions regarding Grievant’s conduct and actions is not without some justification. Nevertheless, it is evident that Respondent has/had grown tired of Grievant. Respondent is of the opinion that Grievant is more trouble than he is worth. Respondent has demonstrated this opinion by its deed but has not established it as fact.

Respondent is required to inform an employee of his or her deficiencies and afford said employee a reasonable period to improve. Grievant had approximately 60 working

¹⁶ Grievant by counsel highlights that from 2006 to 2017, not only did Grievant receive no discipline, but Respondent promoted him as an administrator. Grievant did not suddenly forget to operate within the confines of applicable school law.

days from the commencement of 2018-19 school year until Respondent terminated his teaching contract. Grievant's highlighted conduct is notable but the undersigned is hard pressed to find that Grievant was provided opportunity to develop as a full-time 200-day teacher. Grievant did not maximize the opportunity to explain his conduct, however several of Grievant's explanations for his conduct are plausible.

Respondent argues that in contrast to the devoted administrator that the Superintendent had observed earlier in his career, Grievant did not, in his assignment at Huntington High School, demonstrate a positive attitude and a willingness to work for the best interests of students. Respondent is of the opinion that the prospects for his rehabilitation were not good. *L-3 Testimony Superintendent Saxe; Stipulation Exhibit 1*. The undersigned is not persuaded that Respondent's proposition is accurate. It is disingenuous for Respondent to claim to be without its share of blame for the state of mistrust between its various agents and Grievant. It is further disingenuous for Respondent to claim that it is providing Grievant opportunity to demonstrate reform, then refuse to provide adequate information and time for Grievant's development.

County boards of education have the burden of proof to show that conduct is not correctable. *Maxey v. McDowell County Bd. of Educ.*, 212 W.Va. 668, 575 S.E.2d 278 (2002). Respondent has not persuasively demonstrated that to be true with regard to Grievant. There were both official and unofficial observations of Grievant's work performance during the course of the three weeks Grievant held the Huntington High School Recovery Class assignment. There are identifiable procedure and policy for

observations and evaluation of a full-time teacher.¹⁷ See W.VA. CODE ST. R. § 126-142-1 et seq; e.g. WVBE Policy 5310 § 9. Concerning the procedure for the development of teacher improvement plans, Policy 5310 provides the following:

§126-142-10. Plans to Support Continuous Improvement.

10.1. Plans to Support Continuous Improvement -- A Plan to Support Continuous Improvement shall be developed by the evaluator and the educator when an educator's performance indicates an area of concern and/or is unsatisfactory in any area of the educator's responsibilities.

10.1.a. Focused Support Plan -- A proactive measure that supports individual improvement and professional growth. The focused support plan may commence only after a purposeful conversation between the educator and the evaluator, and when there is documented evidence indicating an area of concern based on one or more of the performance standards, and after a minimum of one (1) observation is complete for the educator. The focused support plan, and its implementation, is an improvement process between the educator and the evaluator. The Focused Support Plan spans at minimum nine (9) weeks and may commence at any time during the school year and may be repeated once per plan.

10.1.a.1. The Focused Support Plan must include the following essential components: (a) identified area of concern with reference to the standards to be addressed, (b) expectations for change, (c) nine (9) week timeline for implementation, and (d) resources for support.

* * *

§126-142-13. Evaluation Process for Teachers.

13.1. All teachers shall participate in an annual summative evaluation conference 1) on or before the teacher's final day in the classroom for the school year, OR 2) on or before June 15 of the school year (whichever occurs first). The evaluation is recorded in the online evaluation system.

13.2. The teacher's evaluator is responsible for monitoring performance and for preparing the evaluation.

13.3. The purpose of the evaluation is to set high standards of performance for

¹⁷ W. Va. Code §18A-2-12. *Performance evaluations of school personnel; professional personnel evaluation process*; (a) The state board shall adopt a written system for the evaluation of the employment performance of personnel, which system shall be applied uniformly by county boards. W.VA. CODE ST. R. § 126-142-1 et seq (WVBE Policy 5310) is the State Board's adopted system for the evaluation of the employment performance of personnel.

teachers, ensure high-quality instruction focused on increasing student achievement, encourage continuous growth and improvement through personal reflection and goal setting, and serve as a tool in developing coaching and mentoring programs for teachers.

13.4. Observations are to last the length of a lesson, but not less than thirty (30) minutes. Evaluators record data using the Observation form. Evaluators submit the Observation form electronically to teachers prior to the conference. Evaluators schedule and conduct a conference with teachers within ten (10) days of the observation. Teachers and evaluators exchange reflection and feedback and identify strategies and resources. They likewise review any additional evidence presented at the conference. Evidence accumulated as part of the observation is considered in the determination of the summative performance rating.

Specifically to teachers, Policy 5310 provides the following:

§126-142-14. Teacher Evaluation Standards and Elements.

14.1. West Virginia Professional Teaching Standards -- Teachers shall be evaluated based on their performance within the following five standards which determine eighty (80) percent of the summative evaluation rating:

14.1.a. Curriculum and Planning --

14.1.a.1. Element 1.1. -- The teacher demonstrates a deep and extensive knowledge of the subject matter.

14.1.a.2. Element 1.2. -- The teacher designs standards-driven instruction using state-approved curricula.

14.1.a.3. Element 1.3. -- The teacher uses a balanced assessment approach to guide student learning.

14.1.b. The Learner and the Learning Environment --

14.1.b.1. Element 2.1. -- The teacher understands and responds to the unique characteristics of learners.

14.1.b.2. Element 2.2. -- The teacher establishes and maintains a safe and appropriate learning environment.

14.1.b.3. Element 2.3. -- The teacher establishes and maintains a learner-centered culture.

14.1.c. Teaching --

14.1.c.1. Element 3.1. -- The teacher utilizes a variety of research-based instructional strategies.

14.1.c.2. Element 3.2. -- The teacher motivates and engages students in learning, problem solving and collaboration.

14.1.c.3. Element 3.3. -- The teacher adjusts instruction based on a variety of assessments and student responses.

14.1.d. Professional Responsibilities for Self-Renewal --

14.1.d.1. Element 4.1. -- The teacher engages in professional development for self-renewal that guides continuous examination and improvement of professional practice.

14.1.d.2. Element 4.2. -- The teacher actively engages in collaborative learning opportunities for self-renewal with colleagues.

14.1.e. Professional Responsibilities for School and Community --

14.1.e.1. Element 5.1. -- The teacher participates in school-wide collaborative efforts to support the success of all students.

14.1.e.2. Element 5.2. -- The teacher works with parents, guardians, families, and community entities to support student learning and well-being.

14.1.e.3. Element 5.3. -- The teacher promotes practices and policies that improve school environment and student learning.

14.2. Student Growth -- Teachers shall be evaluated based on demonstration of their students' success through multiple measures which determines twenty (20) percent of the summative evaluation rating. The educator evaluation recognizes the professional commitment and hard work necessary for West Virginia students to achieve at high levels. It recognizes student growth in a variety of classrooms across diverse social and academic contexts.

14.3. Professional Conduct -- Teachers shall be evaluated based on clear criteria for those competencies and habits of mind without which professional teaching simply cannot occur. The standard addresses Adhering to Policy and Procedure, Professional Attendance, Adhering to Schedule, and Respect. An unsatisfactory rating in any of these areas prompts a standard performance rating of unsatisfactory.

Evaluations must identify deficiencies and provide written recommendations for meeting performance criteria and characteristics. Any improvement plan shall be developed by the supervisor and teacher when a teacher's performance is unsatisfactory in any area of teacher responsibility. WVBE Policy 5310 Evaluations and subsequent Improvement Plans "are not viewed as disciplinary actions as the goal is to correct unsatisfactory performance, and improve the education received by the students." *Baker v. Fayette*

County Bd. of Educ., Docket No. 94-10-427 (Jan. 24, 1995).

The law is clear that a teacher may only be discharged for unsatisfactory performance where the system for evaluation is properly followed and where a valid improvement plan is implemented with the goal of correcting unsatisfactory conduct. Only when these *legitimate efforts fail* is termination justified. *Burns v. Lincoln County Bd. Of Educ.*, Docket No. 2013-1552-LinED (Oct. 15, 2014) To the extent that Grievant's performance was unsatisfactory, Respondent failed to prove that Grievant's conduct was not correctable. As a full-time teacher, Grievant was entitled to notice of his alleged deficiencies and an opportunity to improve. Respondent violated the provisions of W. Va. Code § 18A-2-12A and applicable WVBE policy when it failed to subject Grievant to an open and honest process and, once it identified unsatisfactory behavior failed to afford Grievant a meaningful opportunity to correct deficiencies.

When grounds for a school employee's dismissal include charges relating to conduct which is deemed correctable, the board of education must establish that it complied with the provisions of the WVDE Policy requiring it to inform the employee of his deficiencies and afford him a reasonable period to improve. *Mason County Bd. of Educ. v. State Supt. of Schools*, 165 W. Va. 732, 739, 274 S.E.2d 435, 439 (1980); *Maxey v. McDowell County Bd. of Educ.*, 212 W. Va. 668, 575 S.E.2d 278 (2002); *Burns v Lincoln County Bd. Of Educ.*, Docket No. 2013-1552-LinED (Oct. 15, 2014). Respondent has not met its burden of proof. Respondent has failed to establish by a preponderance lawful justification for its disciplinary action.¹⁸ Thus, this grievance is Granted.

¹⁸ There exists various degrees of mutual mistrust between Respondent and Grievant. Both parties tend to assign nefarious motives to the others actions. This is regrettable.

The following conclusions of law are deemed to be appropriate in this matter:

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. 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

Nevertheless, the parties also tend to find self-serving verification for preconceived notions. Given the determination that Grievant’s conduct was subject to protections of W. VA. CODE § 18A-2-12a, and various applicable school board policies, this fact finder has omitted the discussion of reprisal in the fact pattern of this matter. 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); *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994). “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.” *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994). See *Sloan v. Dep’t of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004). Such discussion has been deleted from this decision. It is determined such discussion would be more incendiary than productive.

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); also see *Maxey v. McDowell County Bd. of Educ.*, 212 W. Va. 668, 575 S.E.2d 278 (2002); Syl. Pt. 7, in part, *Alderman v. Pocahontas County Bd. of Educ.*, 223 W. Va. 431, 675 S.E.2d 907 (2009).

3. 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 willful; 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).

4. Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. *Russell v. Kanawha County Bd. of Educ.*, Docket No. 2016-0447-KanED (Mar. 21, 2016). Willful neglect of duty encompasses something more serious than "incompetence," which is another ground for teacher discipline. The term "willful" ordinarily imports a knowing and intentional act, as

distinguished from a negligent act. *Crum v. Logan County Bd. of Educ.*, Docket No. 2015-1197-CONS (Oct. 19, 2015).

5. W. VA. CODE §18A-2-12A(6) states in relevant part:

All school personnel are entitled to know how well they are fulfilling their responsibilities and should be offered the opportunity of open and honest evaluations of their performance on a regular basis and in accordance with the provisions of section twelve of this article. All school personnel are entitled to opportunities to improve their job performance prior to the termination or transfer of their services. Decisions concerning the promotion, demotion, transfer or termination of employment of school personnel, other than those for lack of need or governed by specific statutory provisions unrelated to performance, should be based upon the evaluations, and not upon factors extraneous thereto. All school personnel are entitled to due process in matters affecting their employment, transfer, demotion or promotion. . .

6. “[I]t is not the label that is applied to conduct that determines whether evaluation and opportunity to improve prior to termination are required. The key question is whether or not Grievant’s conduct is correctable. If it is correctable, then it matters not whether it is termed willful neglect of duty, unsatisfactory performance or any one of the other statutory grounds for termination. Prior to termination for correctable conduct an employee must be given notice of deficiencies through evaluation and opportunity to improve.” *Dalton v. Monongalia County Bd. of Educ.*, Docket No. 2010-1607-MonED (Nov. 23, 2010). See Syl. pt. 4, *Mason County Bd. of Educ. v. State Superintendent of Sch.*, 165 W. Va. 732, 274 S.E.2d 435 (1980), *Alderman v. Pocahontas County Bd. of Educ.*, 223 W. Va. 431, 444 675 S.E.2d 907, 921 (2009). “What is ‘correctable’ conduct does not lend itself to an exact definition but must . . . be understood to mean an offense or conduct which affects professional competency.” *Mason* 165 W. Va. at 739, 274 S.E.2d at 439.

7. 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. The Grievance Board has applied the following factors to assess a witnesses' 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, supra*.

9. When grounds for a school employee's dismissal include charges relating to conduct which is deemed correctable, the board of education must establish that it complied with the provisions of the WVDE Policy requiring it to inform the employee of his deficiencies and afford him a reasonable period to improve. *Mason County Bd. of Educ. v. State Supt. of Schools*, 165 W. Va. 732, 739, 274 S.E.2d 435, 439 (1980); See also *Maxey v. McDowell County Bd. of Educ.*, 212 W. Va. 668, 575 S.E.2d 278 (2002); *Burns v Lincoln County Bd. Of Educ.*, Docket No. 2013-1552-LinED (Oct. 15, 2014).

10. County boards of education have the burden of proof to show that conduct was not and is not correctable. *McMann v. Jefferson County Bd. of Educ.*, Docket No.

2009-1340-JefED (Oct. 21, 2009), *citing*, *Maxey v. McDowell County Bd. of Educ.*, 212 W.Va. 668, 575 S.E.2d 278 (2002).

11. Conduct is not considered correctable if “it directly and substantially affects the morals, safety, and health of the system in a permanent, non-correctable manner.” *Mason County Bd. of Educ. v. State Superintendent of Sch.*, 165 W. Va. 732, 739 (W. Va. 1980); *Trimboli v. Bd. of Educ. of the County of Wayne*, 163 W.Va. 1, 254 S.E.2d 561 (1979); and *Rogers v. Bd. of Educ.*, 125 W.Va. 579, 588, 25 S.E.2d 537 (1943).

12. The “[f]ailure by any board of education to follow the evaluation procedure in West Virginia Board of Education Policy ... prohibits such board from discharging, demoting or transferring an employee for reasons having to do with prior misconduct or incompetency that has not been called to the attention of the employee through evaluation, and which is correctable.” WVBE Policy “envisions that where a teacher exhibits problematic behavior, the improvement plan is the appropriate tool if the conduct can be corrected. Only when these legitimate efforts fail is termination justified.” *Burns v. Lincoln County Bd. Of Educ.*, Docket No. 2013-1552-LinED (Oct. 15, 2014) *citing* *Maxey v. McDowell County Bd. of Educ.*, 212 W.Va. 668, 575 S.E.2d 278 (2002).

13. Respondent violated the provisions of W. Va. § 18A-2-12A and applicable WVBE policy when it failed to subject Grievant to an open and honest process and, once it identified unsatisfactory behavior, when it failed to afford Grievant a meaningful opportunity to correct deficiencies.

14. To the extent that Grievant’s performance was unsatisfactory, Respondent failed to prove that Grievant’s conduct was not correctable. As a full-time teacher,

Grievant is entitled to an opportunity to improve. See W. Va. Code § 18A-2-12A; W.VA. CODE ST. R. § 126-142-1 et seq.

15. Respondent did not establish that Grievant's conduct was not and is not correctable.

Accordingly, this grievance is **GRANTED**, and Respondent is directed to reinstate Grievant to the position of full-time 200-day teacher within the Cabell County Board of Education, with an **AWARD** of back pay with applicable interest, seniority, and benefits.

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: December 18, 2019

Landon R. Brown
Administrative Law Judge