

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

JAMES WADE MASSER,
Grievant,

v.

Docket No. 2018-1138-JefED

JEFFERSON COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, James Wade Masser, filed this action against his employer, Jefferson County Board of Education, on April 27, 2018. Grievant alleges that Respondent committed violations of state law and West Virginia State Department of Education Policy by improperly dismissing him from employment based upon his alleged failure to successfully complete a Corrective Action Plan. Grievant claims that he successfully completed the plan and “was not guilty of any conduct meriting termination.” Grievant seeks reinstatement to his position of employment and back pay, benefits, seniority, with interest.

A Level Three evidentiary hearing was conducted before the undersigned on December 3, 2018. The hearing was held at the Jefferson County Board of Education office, Charles Town, West Virginia, by agreement of the parties. Grievant appeared in person and by his counsel, John Everett Roush, American Federation of Teachers-WV, AFL-CIO. Respondent appeared by its counsel, Tracey B. Eberling, Steptoe & Johnson PLLC. This matter became mature for consideration upon receipt of the last of the parties’ fact/law proposals on January 18, 2018.

Synopsis

Grievant was employed as a physical education teacher for Respondent at the time of his termination. The record established that Grievant's unprofessional language and inappropriate conduct violated the Employee Code of Conduct and his refusal to refrain from its use constitutes unsatisfactory performance and/or insubordination. The record is undisputed that Grievant was provided warnings, training, and a Focused Support Plan and Corrective Action Plan. Nevertheless, Grievant continued to use profanity and exhibit the same pattern of inappropriate behavior. Accordingly, the grievance is denied.

The following Findings of Fact are based upon the record of the case.

Findings of Fact

1. Grievant had been employed with Jefferson County Schools for over fifteen years.
2. In 2003, Grievant was an Instructor at the Jefferson High School Ninth Grade Complex in Shenandoah Junction, West Virginia.
3. During that year, Grievant received a warning from administration for using inappropriate language in class.
4. In 2005, Grievant received another warning from administration for making inappropriate comments to students. Following an investigation, Superintendent Dr. Steven Nichols substantiated this conduct, recognizing it was not in the best interest of the school system. Dr. Nichols recommended to the Board of Education that Grievant serve a one-day suspension without pay as a consequence.

5. In 2008, Grievant was hired as a physical education teacher at Wildwood Middle School in Shenandoah Junction, West Virginia.

6. All Jefferson County staff receive annual training on the Employee Code of Conduct and the county's policy relating to sexual harassment and bullying. Grievant acknowledged receiving and signing a verification that he had received and read those policies annually.

7. Following a meeting with school administration on May 7, 2015, over concerns with Grievant's conduct, he was provided with a memorandum setting forth job expectations. This memorandum included timely submission of lesson plans, remaining on school premises while classes are in session, and arriving to work on time and stressing that the goal of making certain that all students are safe while in the school's care.

8. As part of the performance evaluation process for teachers, teachers are required to complete an annual self-reflection based on standards on or before October 1. On October 3, 2016, Grievant was advised that he had not submitted his self-reflection by the assigned due date and advised to inform the administration of the status.

9. On October 6, 2016, because of continued concerns, administration met with Grievant to review his daily job expectations and sent him a memorandum confirming expectations, including checking email messages, meeting deadlines, monitoring locker rooms, refraining from cell phone use during class time and adhering to the Jefferson County Employee Code of Conduct.

10. Two months later, on December 7, 2016, administration received a report from students that Grievant had a utensil that had a small knife in it and that he had

waived it in the air towards them. The administration requested that the tool be placed in Grievant's vehicle and directed him to report any problems with lockers to custodial staff.

11. One month later, administration received a report from a parent that Grievant made a highly inappropriate comment to their 6th grade daughter. This inappropriate comment was made during gym class on January 3, 2017, which upset the student. The record revealed that Grievant alleged commented, "You're probably going to get pregnant in 10th grade." Respondent's Exhibit No. 35.

12. School administration reported the matter to the district's Human Resources staff and an investigation was conducted. Three students confirmed that they heard Grievant make the comment and that the student was upset by it. The investigation concluded that Grievant had committed a violation of Jefferson County Policy Chapter 6, Section 2.15, prohibiting sexual harassment. The investigation concluded the following:

By any reasonable standard, the comments made by Mr. Masser are unacceptable and offensive to a sixth grader. Mr. Masser's behavior directly impacts the self-esteem and image of female students challenged with finding purposeful direction and guidance from leaders and advocates in their school setting. Mr. Masser's conduct is unprofessional and unbecoming of what is expected from a Jefferson County school employee.

13. On February 8, 2017, prior to the conclusion of the investigation, administration was notified of additional inappropriate comments made by Grievant to his students. One student indicated that Grievant called a group of students "bitches" and had told another student on multiple occasions "that he stayed back twice and that he was dumb." Respondent's Exhibit No. 2.

14. Upon conclusion of the investigation on February 9, 2017, Human Resources Officer Joseph Pettiford recommended that Grievant be terminated.

15. By letter of February 9, 2017, Superintendent Gibson informed Grievant that he was suspended with pay for the comments made to the male student on February 8, 2017.

16. Superintendent Gibson met with Grievant on February 20, 2017, and reviewed the facts established in the investigation of the Grievant's conduct. In her letter to Grievant of February 21, 2017, Superintendent Gibson noted that Grievant's student had reported the use of inappropriate language and comments characterized as sexual harassment. Dr. Gibson acknowledged that while a student witness statement corroborated the reports, an adult witness did not. Dr. Gibson further noted that Grievant's personnel file contained prior accusations of inappropriate comments and behavior to students but that he had not been placed on a Focused Support Plan to address his comments and behavior. In keeping with her responsibility to maintain a safe learning environment for students, she advised that a Focused Support Plan would be put in place. In addition, training regarding appropriate language and boundaries to use with middle school students and minimum monthly, unannounced observations would occur.

17. Grievant did not file a grievance to challenge being placed on a Focused Support Plan.

18. Grievant's Focused Support Plan began on March 13, 2017. The areas of concern included effective classroom management and demonstrating professional conduct. Grievant's expectations and goals included completing lesson plans by Monday of each week, demonstrating and practicing age appropriate student interactions with a

specific focus on appropriate language and boundaries, and effectively monitoring the locker room and gym so that students were always supervised.

19. On May 26, 2017, school administration received the report from the parent of a female student that Grievant commented to one of his students, “[I]f you want to stab someone you should stab your friend over there . . . but you would need a bigger pencil or pen to get through her,” in reference to her weight. Respondent’s Exhibit No. 8.

20. As a result of the investigation of the incident, Principal Brockway issued a letter of reprimand to Grievant citing two standards that Grievant failed to meet: creating an environment of respect and rapport and communicating with students in a way that maintains a positive and supportive classroom climate. She further noted that Grievant was currently on a Focused Support Plan and that while he had provided with training and feedback on correcting his behavior, he persisted in improper behavior towards students. As a result, Principal Brockway advised that Grievant would be placed on a Corrective Action Plan at the beginning of the following school year and that he should plan to meet with administration the week of August 14-18.

21. At the beginning of the following school year, Assistant Principal Joel Silver met with all of the physical education teachers and provided them with a memo outlining expectations. On September 12, 2017, the teachers were also given a written memo setting forth certain job-related expectations, including teacher presence while class is in session, cell phone use, and the need for the outside doors to the gym to remain closed.

22. Assistant Principals Jodi Brock and Joel Silver were tasked with meeting Grievant to develop the Corrective Action Plan. On October 16, 2017, Assistant Principal

Brock sent a letter to Grievant outlining his various failed instances to respond to administration's requests to meet with him to review and begin the Corrective Action Plan.

23. In light of his continuous failure to schedule a meeting regarding his Corrective Action Plan, Grievant was notified that his Corrective Action Plan would be effective on October 18, 2017, and a copy was sent to him.

24. Grievant did not file a grievance to challenge the determination that he had not successfully completed the Focused Support Plan and that he was being placed on a Corrective Action Plan.

25. Grievant's Corrective Action Plan included two particular areas of concern: failing to maintain a safe and appropriate learning environment and continuing to engage in inappropriate conversations with students.

26. Two months after Grievant's Corrective Action Plan was put in place, he made another curious comment to a group of students. It was alleged that he approached the group with an inhaler in hand and stated, "[I]f you take 20 squirts of this instead of the two it recommends, you'll get all shaky." Respondent's Exhibit No. 27.

27. Progress meetings on the Corrective Action Plan were held with Grievant and he was provided with documentation of concerns, including missing required staff meetings and professional development sessions, leaving the locker room unsupervised, and leaving his students unsupervised in class.

28. On March 14, 2018, a parent reported to Assistant Principal Brock that Grievant had taken their child's cell phone and not returned it. Assistant Principal Brock went to the gym to ask Grievant about this report, which if true, violated the school's policy on taking a student's phone. Assistant Principal Brock could not find Grievant in the gym

and she called into the boy's locker room and received no response. She later reviewed surveillance camera footage and observed that Grievant had left the building for nine minutes during his class period despite his claim that he had been in the bathroom. Assistant Principal Brock issued a written reprimand for leaving his class unattended in violation of his Corrective Action Plan.

29. Jefferson County Policy Chapter 6, Section 2.15.I. prohibits sexual harassment on Board property or at any school-sponsored event. The Policy provides that all reported instances of harassment will be promptly investigated and appropriate disciplinary action will be taken based upon the investigation results.

30. Chapter 6, Section 2.5.II.A. of the Policy defines sexual harassment to include:

Verbal abuse of a sexual nature, without regard to whether the verbal abuse specifically refers to sexual characteristics at whom the verbal abuse is directed;

Verbal or written comments about an individual's body;

Sexually degrading word(s) or actions used to intimidate, describe an individual or to refer to some aspect of the individual's behavior, appearance, attitude, or conduct . . .

31. The Employee Code of Conduct codified in the West Virginia Board of Education's Legislative Rule requires employees to:

4.2.1. exhibit professional behavior by showing positive examples of preparedness, communication, fairness, punctuality, attendance, language, and appearance.

4.2.2. contribute, cooperate, and participate in creating an environment in which all employees/students are accepted and are provided the opportunity to achieve at the highest levels in all areas of development.

4.2.3. maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination.

32. By letter of March 15, 2018, Superintendent Gibson notified Grievant that effective March 16, 2018, he was being placed on administrative leave without pay until further notice in light of an ongoing investigation into his conduct.

33. On March 29, 2018, a meeting was held with Grievant, his representative, administration, and Superintendent Gibson regarding Grievant's job performance under his Corrective Action Plan. Administration concluded that Grievant failed to make progress towards addressing his conduct and poor judgment. Superintendent Gibson informed Grievant she would request termination of his contract before the Board of Education during its April 23, 2018, meeting.

34. A hearing on the Superintendent's recommendation was held in executive session at the Board of Education's meeting on April 23, 2018. Grievant appeared and was represented by counsel. At the conclusion of the hearing, the Board of Education voted to approve Superintendent Gibson's recommendation to terminate Grievant's employment.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought

to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying determines the weight of the testimony.” *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). 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, the employer has not met its burden. *Id.*

WEST VIRGINIA CODE § 18A-2-7 provides that “[t]he superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter.” WEST VIRGINIA CODE § 18A-2-8 goes on to state, in part, that:

(a) Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge.

Dismissal of an employee under WEST VIRGINIA CODE § 18A-2-8 “must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously.” Syl. Pt. 3, in part, *Beverlin v. Board of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975); Syl. Pt. 4, in part, *Maxey v. McDowell County Board of Education*, 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).

The West Virginia Supreme Court of Appeals has found reversible error in the event an Administrative Law Judge does not assess whether Grievant's behavior was correctable pursuant to the State Board of Education Policy 5300.¹ *Maxey, supra*. In addition, "[f]ailure by any board of education to follow the evaluation procedure in West Virginia Board of Education Policy 5300 . . . 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." *Id.* "A board must follow the West Virginia Board of Education Policy 5300 . . . procedures if the circumstances forming the basis for suspension or discharge are correctable. The factor triggering the application of the evaluation procedure and correction period is correctable conduct. What is correctable conduct does not lend itself to an exact definition but must be understood to mean an offense or conduct which affects professional competency." *Id.* Policy 5300 "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." *Id.*

The record of this case demonstrates that Respondent afforded Grievant with the statutory protections outlined in WEST VIRGINIA CODE §§ 18A-2-8 and 18A-2-12a. The record also demonstrates that Respondent's decision to terminate Grievant's

¹That policy is now referred to as Policy 5310, 126 C.S.R. 142. It is worth noting that the legislature codified the specific improvement plan language from Policy 5300 in WEST VIRGINIA CODE § 18A-2-12a(b)(6).

employment was justified and supported by his repeated failure to alter his language, comments, and conduct. Since May of 2003, Grievant has been receiving warnings and reprimands for his inappropriate language and behavior in the course of his employment. In particular, Grievant is alleged to have waived a knife in front of students during class instruction; harassed a female student by stating she would “probably . . . get pregnant in 10th grade”; calling students “bitches,” “punks,” “stupid,” and “retards”; harassed a female student by indicating, in reference to her weight, that a “bigger pencil or pen” would be needed “to get through her.” Grievant has also left his class and the locker room unattended.

In *Neal v. Cabell County Bd. of Educ.*, Docket No. 2017-2157-CabED (Dec. 29, 2017), Grievant, a teacher and former basketball coach, used inappropriate language around and directed the same toward students. Prior to the Superintendent’s recommendation that Grievant be terminated, he was reprimanded and suspended for his conduct. However, no Focused Support Plan or Corrective Action Plan was put in place. Following his termination, Grievant claimed that the county board erred in failing to implement a plan of improvement for what he viewed as correctable conduct. The Grievance Board disagreed and found that Grievant’s continued use of profanity after he was “previously . . . warned about such conduct, constitute[d] insubordination.” *Id.* at 10. The Grievance Board went on to conclude that Grievant’s behavior was not correctable because his “use of profanity, despite prior disciplinary actions and counseling, was not professional incompetency . . . [but rather] insubordination,” and he was not entitled to an improvement plan. *Id.* at 13.

In the instant case, Grievant's unprofessional language and inappropriate conduct violates the Employee Code of Conduct and his refusal to refrain from its use constitutes unsatisfactory performance and/or insubordination as provided under § 18A-2-8a. The exact terms provided under § 18A-2-8 need not be cited by the board of education in identifying an employee's offenses; it is sufficient "as long as the required written notice of charges specifically identifies the alleged acts of which the employee is accused." *Risk v. Hancock County Bd. of Educ.*, Docket No. 07-15-048 (Oct. 3, 2007). The record is undisputed that Grievant was provided warnings, training, and a Focused Support Plan and Corrective Action Plan. Nevertheless, Grievant continued to use profanity and exhibit the same pattern of inappropriate behavior. By way of reprimands, suspensions, and placement on two improvement plans, Grievant was on notice of his inappropriate behavior and his continuing pattern of behavior has proven to not be correctable.

The undersigned recognizes that the Grievance Board has held that an employee is not entitled to an infinite number of improvement plans. Grievant had a number of opportunities to demonstrate his ability to meet County Policy and Code of Conduct standards and repeatedly failed to do so. In addition, per Policy 5310, his failure to make adequate progress under the Corrective Action Plan warrants the termination of his employment.

Respondent has met its preponderance of the evidence burden of proof in demonstrating that the decision to terminate Grievant's employment was justified after providing him warnings, suspending him on two separate occasions, and creating two improvement plans to address his continued refusal to correct his behavior. Grievant was

unable to demonstrate that Respondent's decision to terminate his employment was arbitrary and capricious.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989).

2. Dismissal of an employee under WEST VIRGINIA CODE § 18A-2-8 "must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously." Syl. Pt. 3, in part, *Beverlin v. Board of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975); Syl. Pt. 4, in part, *Maxey v. McDowell County Board of Education*, 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 "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002) (*per curiam*). See *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). "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the

refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts, supra*.

4. Respondent met its burden of proof by a preponderance of the evidence and demonstrated that Grievant's conduct was such that he may be disciplined, up to and including termination.

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 (eff. July 7, 2018).

Date: February 19, 2019

Ronald L. Reece
Administrative Law Judge