

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

R.S.¹,

Grievant,

v.

Docket No. 2020-0070-KanED

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, R.S., filed an expedited level three grievance against his employer, Kanawha County Board of Education, dated July 29, 2019. Grievant, by counsel, moved to amend his statement of grievance on September 26, 2019. There being no objection to Grievant's Motion to Amend, the same was granted by Order entered October 10, 2019.

The amended statement of grievance states as follows:

Grievant is regularly employed by Respondent as service personnel. Grievant was suspended without pay and thereafter terminated by Respondent for insubordination, without the opportunity to be heard by Respondent, all in violation of W. Va. Code §§ 18A-2-6, 18A-2-7 and 18A-2-8. The conduct of Respondent was arbitrary and capricious, and the disciplinary action taken was disproportionate to the alleged conduct. Respondent's actions against Grievant constituted reprisal and/or retaliation against Grievant, as well as harassment, discrimination, and favoritism, all in violation of W. Va. Code § 6C-2-2. Respondent's aforementioned conduct was in violation of Grievant's state and federal constitutional rights to due process, which are further protected by W. Va. Code § 18A-2-12a. Respondent's conduct is also in violation of Kanawha County School's Policy G25.

¹ In this decision, there will be some discussion of Grievant's health conditions. At the request of Grievant, by counsel, Grievant's name is being redacted to protect his privacy.

As relief sought, "Grievant seeks reinstatement to his position of employment, plus back pay, with interest, and any and all benefits lost."

The first day of a level three hearing was conducted on February 28, 2020, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia, office. On that day, Grievant appeared in person and by counsel, Scott Kaminski, Esquire, Kaminski Law, PLLC. Respondent, Kanawha County Board of Education, appeared by counsel, Lindsey D.C. McIntosh, Esquire, General Counsel, and by its representative, Terry Hollandsworth, Executive Director of Maintenance. The second and final day of the level three hearing was conducted on June 30, 2020, by this ALJ via Zoom video conferencing, at which time, Grievant and his counsel, Mr. Kaminski, appeared together from Mr. Kaminski's office. Respondent appeared by its representative, Mr. Hollandsworth, and by counsel, Ms. McIntosh, who appeared from separate locations. This matter became mature for consideration on August 18, 2020, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a carpenter and had been employed, although in different capacities, since in or about 2007. Respondent first suspended Grievant and subsequently terminated Grievant's employment contract for insubordination after two interactions with his intermediate supervisor. Grievant filed his grievance challenging the charge of insubordination and his suspension and dismissal asserting a number of claims including discrimination, harassment, and retaliation/reprisal. Respondent denies these claims and asserts that it was justified in terminating Grievant's employment contract. Respondent failed to meet its burden of

proving insubordination and failed to prove that the discipline imposed was justified. Accordingly, this grievance is GRANTED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. At the times relevant herein, Grievant was employed by Respondent as a carpenter, and had been so employed since in or about 2014 or 2015. However, Grievant began working for Respondent in or about 2007. He was initially hired as a bus operator, but he started working in the Maintenance Department in or about 2010. Grievant holds a Class A Commercial Driver's License (CDL). While working in the Maintenance Department, Grievant has held the following classifications: carpenter; mechanic; and, heavy equipment operator. Grievant was assigned to work at the Respondent's Crede facility where the Maintenance Department, the garage, and the warehouse are all located.

2. Terry Hollandsworth is employed by Respondent as its Executive Director of Maintenance. Mr. Hollandsworth is James Mize's direct supervisor. Mr. Hollandsworth has been Grievant's upper-level supervisor, or Grievant's supervisors' supervisor, since he began in the Maintenance Department. Such is when Grievant became employed in the Maintenance Department. Mr. Hollandsworth's office is at the Crede facility. Therefore, he is in regular contact with his employees, including Grievant, during working hours.

3. At the times relevant herein, Dr. Ronald Duerring was employed as the Superintendent of Kanawha County Schools. He did not testify at the level three hearing.

4. Carol Hamric is employed by Respondent as its Executive Director of Human Resources. Tabetha Gillespie is employed by Respondent in the human resources department, and works with service personnel, such as Grievant.

5. At the times relevant herein, James Mize was employed by Respondent as a Maintenance Supervisor; however, he has since retired. Mr. Mize supervised twenty-six employees in this position. Mr. Mize served as Grievant's direct supervisor from approximately 2015 until the time of Grievant's termination.

6. Jeff Gibson and Bill Hughart, and possibly others, had been Grievant's supervisors at different times prior to Mr. Mize.

7. Grievant has previously filed grievances against Respondent. In his past grievances, Grievant has addressed various subjects and events, including claims of harassment, retaliation, discrimination, non-selection for positions, and has also raised safety issues regarding equipment he has been required to use in the performance of his job duties.

8. Given his position as Executive Director of Maintenance, Mr. Hollandsworth has been aware of, and participated in, the grievances Grievant has filed since Grievant began working in the Maintenance Department.

9. Grievant was supposed to receive a yearly performance evaluation to be given by his immediate supervisor.² Documentation of the evaluation is customarily signed by the employee, his or her supervisor, and the supervisor's immediate supervisor.³

² See, Grievant's Exhibit 3, copies of various evaluations; Respondent's Exhibit 14, Grievant's April 22, 2018, evaluation.

³ See, testimony of James Mize.

10. At the level three hearing, Grievant presented as evidence his yearly performance evaluations for the years 2008, 2009, 2010, 2014, 2017, 2018, and 2019. In his 2008 performance evaluation, Grievant's then-supervisor, whose signature cannot be discerned, rated his performance "satisfactory" overall. In the years 2009, 2010, and 2014, three separate supervisors, one of whom was Mr. Hollandsworth, himself, rated Grievant's performance as "commendable." The evaluations for 2009, 2010, 2017, and 2018 note that Grievant is a "good worker," "hard worker," or "very good worker." There are no negative comments or ratings on any of these performance evaluations. None of the evaluations from 2008 to 2018 mention of any disciplinary actions, reprimands, or warnings given to Grievant.⁴

11. In the performance evaluations from 2008 to 2018, Grievant was rated as being "satisfactory" or "commendable," or "outstanding" in all of the following factors: attitude; compliance with rules; meeting schedules; acceptance of change; work judgments; follows instructions; public relations; and, employee relations. It is noted that in 2014, Mr. Hollandsworth rated Grievant as "outstanding" on the acceptance of change factor, and "commendable" on all the other factors mentioned above.⁵

12. From at least 2017 through 2019, Mr. Mize performed Grievant's yearly performance evaluations. Mr. Mize rated Grievant overall "Commendable" in 2017 and in 2018. However, in his April 22, 2019, evaluation, Mr. Mize evaluated Grievant as "Unsatisfactory."⁶

⁴ See, Grievant's Exhibit 3; Respondent's Exhibit 14, evaluations.

⁵ See, Grievant's Exhibit 3; Respondent's Exhibit 14, evaluations.

⁶ See, Grievant's Exhibit 3; Respondent's Exhibit 14, evaluations.

13. In his June 19, 2017, yearly performance evaluation, Mr. Mize rated Grievant as commendable or satisfactory on all the performance factors, and even noted that Grievant was “a hard worker; willing to learn new craft’s different areas,” and recommended Grievant’s continued employment.⁷

14. On May 20, 2018, Mr. Mize performed Grievant’s yearly performance evaluation. Mr. Mize rated Grievant as commendable or satisfactory on all the performance factors, and noted that Grievant was “a hard worker; willing to help wherever needed,” and recommended Grievant’s continued employment.⁸

15. The grievances Grievant has filed address various subjects and events, including claims of harassment, retaliation, discrimination, non-selection for positions, and have also raised safety issues regarding equipment he has been required to use in the performance of his job duties.

16. In August 2012, Grievant filed a grievance against Respondent which alleged continued harassment, bullying, physical and verbal assault at the hands of a coworker, and that his crew leader and immediate supervisor failed to take appropriate action once notified of the situation. Mr. Hollandsworth was the supervisor’s immediate supervisor at that time. By the time the matter reached level three, Respondent had separated Grievant and the coworker from working together, and Mr. Hollandsworth had disciplined the coworker for his actions.⁹

⁷ See, Grievant’s Exhibit 3; Respondent’s Exhibit 14, evaluations.

⁸ See, Grievant’s Exhibit 3, evaluations.

⁹ The details of such discipline are confidential as it involves another employee. No details of the discipline were discussed in that grievance hearing or in that published decision.

17. The Grievance Board concluded that Grievant successfully proved his harassment claims at level three, and this Grievance Board granted the grievance. In doing so, the Grievance Board ordered as follows: "Intervenor shall not engage in harassing behavior towards Grievant. Respondent shall continue its intervention to prevent further harassment of Grievant by whatever means Respondent deems appropriate."

18. In March 2013, while his 2012 grievance was pending, Respondent sent Grievant to a psychologist for a Fitness for Duty/Risk Assessment, that being a forensic psychological evaluation, after he was heard to say that he understood "why people go postal."¹⁰ It was during that time that he had been harassed by his co-worker as mentioned in Finding of Fact No. 17.¹¹

19. It is unknown whether Respondent required Grievant's former harassing coworker to see a psychologist for a Fitness for Duty/Risk Assessment after the coworker, in 2012, had told Grievant about his being an excellent marksman and that "if you hear the shot, it wasn't me, because I don't miss."¹²

20. On March 11, 2013, the psychologist's office faxed the completed "Forensic Psychological Evaluation, Fitness for Duty Risk Assessment dated March 6, 2013, to

¹⁰ It is unknown how many employees are subject to such an evaluation per year. However, Ms. Hamric testified that the evaluations cost \$2,500.00 each and that Respondent includes these costs in its yearly budget. Therefore, sending someone for such an evaluation is not an unusual occurrence.

¹¹ See, reported Grievance Board decision in that matter. Citation not provided to protect the identity of Grievant. However, both parties received that decision at the time it was issued, and they are aware of its contents and ruling.

¹² See, Respondent's Exhibit 15, placed under seal, March 6, 2013, psychologist report. See also, reported Grievance Board decision in that matter. Citation not provided to protect the identity of Grievant. However, both parties received that decision at the time it was issued, and they are aware of its contents and ruling.

Respondent. The psychologist found that Grievant “represent[ed] relatively low risk as a threat to the safety of others,” and concluded as follows:

It is appropriate for management to make it clear to him that remarks of the sort he made will be taken seriously, however, and that such remarks reflect the sufficiently poor judgment that are and will be taken as cause for alarm to warrant termination should there be a recurrence. It is further appropriate to express to him the expectation that if he feels his is experiencing “stress” at a level sufficient to provoke such remarks, it is incumbent on him to seek professional help. It is anticipated that he will continue to exhibit contentious behaviors that place blame on others and create levels of increased tension with co-workers. All negative and unacceptable behaviors should be defined for him and consequences for further occurrences spelled out. Standard disciplinary processes should apply, with the possible inclusions of supervised referral to Employee Assistance Program resources.¹³

21. A review of the report demonstrates that at his meeting with the psychologist, Grievant discussed the harassment from his co-worker he was having to endure.

22. By letter dated March 27, 2013, Dr. Duerring informed Grievant as follows:

The report on the Fitness for Duty/Risk Assessment conducted by [names redacted] concluded that you present a low risk as a threat to the safety of others. A copy was shared with you yesterday. I want you to clearly understand that you cannot make any comments to co-workers or others that could be construed as a threat of violence. This letter shall serve as a written reprimand for your inappropriate remarks and will be placed in your personnel file. Failure to comply with this directive will result in additional disciplinary action, up to and including termination of employment. If you are so stressed that you feel inclined to make inappropriate remarks, you need to seek professional help. The KCS Assistance Plan is available to you; a brochure describing the services is enclosed.

¹³ See, Respondent’s Exhibit 15, placed under seal, March 6, 2013, psychologist report.

I hope that you have learned from this incident and will henceforth conduct yourself in a professional and responsible manner in your interactions with all persons whom you come in contact with in the performance of your job. You may return to work on Monday, April 1st.

A copy of this letter was sent to Jim Withrow, then counsel for Respondent, Mr. Hollandsworth, Grievant's former representative, and Grievant's personnel file.¹⁴

23. It does not appear that Mr. Hollandsworth was provided a full copy of the psychologist's March 6, 2013, report. However, Ms. Hamric received it and provided him a copy of the conclusions paragraph as set forth above in Finding of Fact No. 19 above.¹⁵

24. Sometime following the issuance of the report, Grievant sought medical treatment as was recommended by the psychologist. He was diagnosed with medical conditions and his medical provider prescribed him medications to help those conditions.

25. Despite giving Grievant a brochure regarding its Employee Assistance Program, Respondent did not actively refer him for any such services. Further, none of Grievant's supervisors ever referred him to this program.

26. In January 2016, Grievant was issued a verbal warning from Mr. Hollandsworth for his conduct at the Respondent's main office while he was there attempting to receive information about another employee's seniority date. Ms. Hamric, Ms. Gillespie, and Jennifer Meadows, another Board office employee, complained to Mr. Hollandsworth that Grievant was "rude," raised his voice, appeared angry, "aggressive",

¹⁴ See, Respondent's Exhibit 16, March 27, 2013, letter.

¹⁵ See, Respondent's Exhibit 13, paragraph.

“pushy”, and “obnoxious.”¹⁶ It is unknown whether Mr. Hollandsworth talked to Grievant to get his response to these complaints.

27. In or about October 2017, while working on tile at Carver Career and Technical Education Center, Grievant and his supervisor, Mr. Mize, had a brief disagreement about whether Grievant should clean a heating unit he was required to move so that he could install the tile. Thereafter, Grievant agreed to do only the work he was assigned. Grievant was not disciplined for this incident. However, on October 2, 2017, Mr. Hollandsworth met with Grievant, his then-representative, Mr. Mize, and three other employees and “discussed that when your Supervisor tells you not to do something, do not argue with him. If you do not agree, then discuss in a calm manner. But, do not refuse to do what your Supervisor has told you.”¹⁷

28. Despite their long and troubled history and the disciplinary actions Grievant received in 2013 and 2016, these disciplinary actions are not mentioned in his any of Grievant’s evaluations from 2008, 2009, 2010, 2014, 2017, and 2018. Further, any behaviors or conduct identified in these disciplinary actions are not reflected in his ratings on any of the related performance factors. Instead, in each of these evaluations, Grievant was given good ratings with respect to his attitude, public relations, employee relations, acceptance of change, work judgments, compliance with the rules.

¹⁶ See, Respondent’s Exhibits 17, 18, and 20, statements/complaints from Ms. Hamric, Ms. Gillespie, and Ms. Meadows.

¹⁷ See, Respondent’s Exhibit 11, notation to Mr. Hollandsworth’s Outlook calendar. There is no way to tell from looking at this Exhibit when it was entered on Mr. Hollandsworth’s calendar. Meaning, it is unknown whether this notation was entered contemporaneously with the meeting, or at a later time.

29. Like any motor vehicle operator's license, a CDL may be revoked if the license holder violates transportation and safety laws. A CDL holder, like Grievant, is responsible for complying with such laws so as not to jeopardize his license.

30. Starting in or about 2017, while working as a heavy equipment operator, Grievant was routinely assigned to the "tile truck." This assignment required Grievant to drive to various Kanawha County schools and other Board facilities to perform tile work. During this time, Grievant raised safety concerns and made a number of complaints that the trucks he was assigned were unsafe. For example, Grievant reported that the brakes on his assigned truck did not work correctly.¹⁸ In response to at least one of such complaints, Mr. Hollandsworth told Grievant something to the effect of "take the truck and work, or go home."¹⁹

31. At another time, the rear end of Grievant's assigned truck caught fire while Grievant was driving and David Egnor was the passenger. After Grievant and Mr. Egnor returned to the Crede facility, they spoke to Mr. Hollandsworth about the truck catching fire. During this conversation, Grievant commented that the mechanics were idiots, to which Mr. Hollandsworth came around his desk, got into Grievant's personal space and, in a raised voice, said something to the effect of "don't talk about my employees like that." Mr. Hollandsworth then told Grievant and Mr. Egnor to leave his office, which they did.²⁰

32. From 2017 through January 2019, Grievant had taken his truck to the Maintenance garage mechanics a number of times to repair the truck, but the same safety problems continued to occur. During this time, Grievant continued to raise safety issues

¹⁸ See, Grievant's Exhibit 2, March 27, 2017, email from Ben Barkey.

¹⁹ See, testimony of Paul Townsend.

²⁰ See, testimony of Grievant; testimony of David Egnor.

as they were discovered, such as brake problems, problems with the wheels (including a loose wheel and wheel bearings needing to be replaced), blinkers not working, and a truck that did not have a valid state inspection sticker, which is required by state law. It is unclear why the truck had no state inspection sticker. It is unknown whether the inspection simply had not been done, or if it had not been done because the truck could not pass inspection. From the evidence presented, all the safety issues Grievant reported were valid and the vehicles required repair.

33. On March 27, 2017, Grievant's former representative, Ben Barkey, emailed Mr. Hollandsworth stating that "[Grievant] is concerned that the wheel on his work truck continues to come loose. He indicates he has had to have it in three times for the same problem. I know you will check into this and do what you can to see that everyone's vehicle is safe."²¹

34. By letter dated April 5, 2017, Mr. Barkey informed Mr. Hollandsworth as follows: "I am writing in regards to [Grievant's] work vehicle. He stopped by my office yesterday and indicated that his truck has had to have the wheel bearings reinstalled multiple times due to them being improperly installed in the first place. I wanted to make sure you are aware of this safety issue so that it can be addressed."²²

35. It is common for Maintenance employees to go directly to the mechanics about problems they may be having with their vehicles.²³

²¹ See, Grievant's Exhibit 2, March 27, 2017, email.

²² See, Grievant's Exhibit 2, April 5, 2017, letter.

²³ See, testimony of Terry Hollandsworth.

36. In the past, some of the garage mechanics bragged in front of at least one witness that they had let the air out of Grievant's work truck tires and had, occasionally, put grease under his door handles.²⁴

37. None of these mechanics were called to testify at the level three hearing.

38. After his numerous complaints about his brakes, someone finally took Grievant's assigned truck to a dealership for the problems Grievant had reported. The dealership determined that the mechanics at the school garage had put the brake adjusters on the truck backward, twice. The truck was repaired at the dealership.²⁵

39. In or about September 2018, Grievant had to have surgery and was off work for a couple of months thereafter. This was not a compensable, work-related injury.

40. In January 2019, Grievant was still experiencing safety issues with the vehicles he was assigned. He went to the garage to speak with the mechanics about the same and he wound up cursing about the vehicles to the mechanics. There was no fight or argument between Grievant and the mechanics. Grievant was not aware at that time that any of the mechanics were offended.

41. None of the mechanics were called to testify as witnesses at the level three hearing. Mr. Hollandsworth was not a witness to the interaction between Grievant and the mechanics.

42. Thereafter, at least some of those garage mechanics filed a grievance alleging that Grievant cursed at them and made "false allegations" against them, and, as relief, they asked that Grievant not be allowed in the garage and that if he needed

²⁴ See, testimony of Michael Clendenin.

²⁵ See, testimony of Terry Hollandsworth.

anything from the garage or the plumbers, he be required to go to his supervisor. One of the mechanics hand-delivered this grievance to Mr. Hollandsworth and they discussed the same. This is how Mr. Hollandsworth learned of the incident. It is unclear from the record whether Mr. Hollandsworth allowed Grievant to share his side of the story, or if he simply believed the second-hand account told to him by the mechanic.

43. Grievant admitted to using profanity and later apologized to one of the mechanics who happened to be a preacher.

44. The mechanics' grievance was quickly resolved by Mr. Hollandsworth by "barring" Grievant from the garage. It is noted that Mr. Hollandsworth testified that Grievant was totally barred from the garage, but the letter sent to Grievant referencing a meeting among Grievant, his representative, Mr. Mize, and Mr. Hollandsworth, stated, "[w]e decided that you would stay out of the Garage area unless under the direction of [Grievant's] Supervisor."²⁶ If you have any further issues with the vehicle assigned to you, work with and through your Supervisor to get it resolved."²⁷ Such was communicated to Grievant by letter dated January 15, 2019, and a revised letter dated January 17, 2019. Mr. Hollandsworth noted in these letters that Grievant's decision to apologize to the one mechanic was "commendable." Nowhere in these letters does it state that such was to serve as a written reprimand, or other discipline. Grievant was not disciplined for this incident with the mechanics.

45. It is undisputed that in or about February 2019, Grievant injured his knee at work and had to be off work for approximately eight weeks, during which he received

²⁶ See, testimony of Terry Hollandsworth.

²⁷ Respondent's Exhibits 9 and 10, January 15, 2019, and January 17, 2019, letters.

workers' compensation benefits. Grievant returned to work in or about March or early April 2019. When he returned, he was under certain medical restrictions because of his knee and he required assistance to perform his work. As such, Respondent had another worker "shadow" Grievant and assist him with his work. However, instead of adding the shadow to the two-man tile truck crew of Grievant and another worker, Mr. Mize took the second tile truck worker off the truck and assigned him to another position in the Maintenance Department. This left only Grievant and the shadow to do all the tile truck work. As such, Grievant's duties were not really lessened.²⁸

46. In or about early April 2019, one of Grievant's co-workers, Lisa Hoover, discovered that someone was tampering with the heating/air conditioning unit in her work area at the Crede facility. No one knew who had tampered with the unit.

47. Grievant and Ms. Hoover worked together and appeared to have a satisfactory working relationship at the time she testified at the level three hearing. However, Ms. Hoover acknowledged that when she first began working with Grievant she was afraid of him, but as she learned his personality and got used to him, she learned that sometimes all he needed was to get out what he needed to say.²⁹ Before she began working with Grievant at the Crede facility, Ms. Hoover had been called to testify in Grievant's level three grievance hearing in 2013 in his harassment claim because she had witnessed an incident that was related to that grievance.

48. While she did not recall this initially during her cross examination, Ms. Hoover filed a grievance against Respondent in 2017 alleging harassment, discrimination,

²⁸ See, lower level testimony of James Mize, pp. 133-137.

²⁹ See, testimony of Lisa Hoover, level three hearing.

and hostile work environment. In her statement of grievance she alleged that Grievant had made comments “that she only got her position because she is a woman and since she is a woman, she did not have to take the same test he took. . . .”³⁰ Pursuant to records of the Grievance Board, this grievance was dismissed from its docket in August 2018 as the parties did not take appropriate actions in response to a February 22, 2017, order. Ms. Hoover indicated during her testimony in the instant matter that the 2017 grievance had been resolved after a “couple of meetings.”

49. Sometime before April 5, 2019, Respondent had a camera installed in Ms. Hoover’s work area. Mr. Hollandsworth stated that it was an attempt to catch whoever was tampering with her heating/air conditioning unit. It is noted that at the time, Ms. Hoover had a grievance pending in which she alleged something about Mr. Hollandsworth locking her out of the restroom near her work area.³¹

50. On April 5, 2019, Grievant went to Mr. Hollandsworth’s office to speak to him about the camera that had been installed in Ms. Hoover’s work area because Grievant believed the placement of the camera was improper and constituted harassment toward Ms. Hoover. Grievant stood inside Mr. Hollandsworth’s office door and told Mr. Hollandsworth about his concerns. Mr. Hollandsworth said nothing in response to Grievant. He just looked at Grievant. Then, Mr. Hollandsworth stood up from his desk and proceeded to walk out his office door and go to the bathroom. In doing so, Mr. Hollandsworth and Grievant somehow touched briefly. Neither Grievant nor Mr.

³⁰ See, Respondent’s Exhibit 21, January 5, 2017, statement of grievance.

³¹ See, testimony of Grievant; testimony of Lisa Hoover; testimony of Terry Hollandsworth.

Hollandsworth raised their voices or argued. Security was not called, nor was law enforcement.³²

51. Mr. Hollandsworth noted the April 5, 2019, interaction on his Outlook calendar, stating “[t]oday, at approximately 2:00 p.m. [Grievant] entered my office with Tim Smith. [Grievant] asked me why I was putting a camera in her [Ms. Hoover] area, I just looked at him. He said that was harassment, I continued to just look; he leaned closer to my face until our bodies touched and our face (sic) was about six inches apart. He backed off and I walked away.”³³ The printed notation has no marking to indicate when it was entered on the Outlook calendar. Mr. Hollandsworth did not report the April 5, 2019, interaction with Grievant to anyone within the Kanawha County Schools’ administration at that time, and he did not issue Grievant any warning, reprimand, or other discipline for any of his actions during the same. Mr. Hollandsworth testified at the level three hearing that the took no action regarding the incident because he “let it slide.”

52. At the level three hearing, Mr. Hollandsworth testified that Tim Smith was present during the April 5, 2019, exchange with Grievant, but that Mr. Smith saw nothing because he had his back to them; he was “in the candy bowl.” However, Tim Smith was not called by either party as a witness at the level three hearing, nor was he called to testify at the lower school disciplinary hearing. It has not been suggested that Mr. Smith prepared a written statement regarding the incident, nor was one presented as evidence in this matter.

³² See, testimony of Grievant; testimony of Terry Hollandsworth.

³³ See, Respondent’s Exhibit 6, April 5, 2019, Outlook calendar notation.

53. On April 22, 2019, Mr. Mize gave Grievant his yearly performance evaluation. Mr. Mize rated Grievant satisfactory in eleven performance factors and unsatisfactory in nine. Further, Mr. Mize wrote on the evaluation that Grievant knew how to work the tile truck, but did not recommend that Grievant's employment continue. Mr. Mize noted "[y]ou need to improve your attitude[.] You are very argumentative[.] You need to complete work orders instead of questioning them[.]"³⁴ Overall, Mr. Mize rated Grievant as "unsatisfactory" and noted that he did not recommend Grievant's continued employment.

54. Grievant disagreed with Mr. Mize's April 22, 2019, evaluation and refused to sign the same.

55. After receiving his evaluation from Mr. Mize, Grievant went to speak with Mr. Hollandsworth, but found that he was busy with other employees. Grievant decided to speak with him about the evaluation later.

56. It is undisputed that on the evening of April 22, 2019, at 7:53 p.m., Grievant called Mr. Hollandsworth on his cell phone in response to the evaluation. Mr. Hollandsworth was at his home. The parties do not dispute that Grievant said to Mr. Hollandsworth, something to the effect of, "I know what you are trying to do." In response, Mr. Hollandsworth said nothing. Then they ended the call. It is further undisputed that Grievant did not yell at Mr. Hollandsworth, or otherwise raise his voice, or use profanity during this call. This telephone call was only 37 seconds long.

³⁴ See, Grievant's Exhibit 3; Respondent's Exhibit 14, performance evaluation dated April 22, 2019.

57. After his telephone call with Grievant on the evening of April 22, 2019, Mr. Hollandsworth called Dr. Duerring and they got on a conference call with Keith Vititoe, Director of Security. Mr. Hollandsworth asserted that Mr. Vititoe was on the call in that he was concerned for his own personal safety because of the call and the April 5, 2019, interaction with Grievant. Mr. Hollandsworth reported the call from Grievant, and asserted that Grievant had said, "I know what you are trying to do" to him in a threatening tone. Mr. Hollandsworth also reported that Grievant called him a "slimeball." At that time, Mr. Hollandsworth also reported the April 5, 2019, incident with Grievant regarding the camera, stating that Grievant got close enough to him to press his chest against him. Mr. Hollandsworth had not reported the April 5, 2019, incident to anyone until that time.

58. Based upon his conversation with Mr. Hollandsworth, Dr. Duerring made the decision to suspend Grievant for his conduct.

59. By letter dated, April 23, 2019, Dr. Duerring informed Grievant that he was being suspended without pay pending a school disciplinary hearing stating, in part, as follows:

I have been advised that around 8:00 p.m. on April 22, 2019, you called Terry Hollandsworth, the Executive Director of Maintenance and the supervisor of your supervisor, and spoke with him in an intimidating manner. It is reported that at one point you called him a "slime ball" and indicated that you "know what [he] was trying to do." This is not the first incident that you have had with Mr. Hollandsworth where you or your tone has been aggressive. On April 5, 2019, it is alleged that you came into Mr. Hollandsworth's office, got very close to him, and spoke to him in a threatening and aggressive manner. It is further reported and documented that you have recently been spoken too (sic) about several incidents of this same nature with employees who work with or around you.

Based upon the foregoing, you were notified this morning that you were being suspended pending a disciplinary hearing to

determine if further disciplinary action is appropriate. This suspension will be without pay in accordance with Kanawha County Schools policy G25 "Employee Misconduct; Local Procedures."³⁵

60. Grievant was also informed of his suspension in person while he was at work. Grievant has not been accused of any improper behavior at the time he was informed of his suspension. Nonetheless, Respondent had Mr. Vittoe and three sheriff's deputies present when Grievant was informed, and they escorted him off the property.

61. A school disciplinary hearing was held on May 22, 2019, before Anne B. Charnock, Hearing Examiner. On June 24, 2019, Hearing Examiner Charnock issued her Decision in which she ruled that the "[e]mployer properly suspended Employee without pay for insubordination. Employer may take any action regarding Employee, up to and including dismissal."³⁶

62. By letter dated July 10, 2019, Dr. Duerring informed Grievant that he had received the hearing examiner's *recommended* decision by the "independent hearing examiner" stating, "wherein she determined you were guilty of insubordination under W. Va. Code § 18A-2-8 and that you be dismissed from employment with Kanawha County School. I concur with the findings, conclusions and recommendations of the hearing examiner, and I intend to recommend to the Board of Education that you be dismissed from your employment."³⁷

³⁵ See, Respondent's Exhibit 4, April 23, 2019, letter. Policy G25 was not presented as evidence.

³⁶ The style of this decision reads, "Before the Superintendent of Kanawha County Schools, In Re: [Grievant], Employee." See, Respondent's Exhibit 2.

³⁷ See, Respondent's Exhibit 2, July 10, 2019, letter.

63. The hearing examiner's decision is not entitled "recommended decision," and she did not recommend any discipline in the same. Instead, Hearing Examiner Charnock titled her document as "Decision of the Hearing Examiner" and only stated in the final section of her Decision, "Ruling," that "[e]mployer properly suspended Employee without pay for insubordination. Employer may take any action regarding Employee, up to and including dismissal."³⁸

64. By letter dated, July 22, 2019, Dr. Duerring informed Grievant that as follows: "[p]lease be advised that at its meeting on July 18, 2019, the Kanawha County Board of Education adopted the following motion: *I move the Board to adopt the findings and conclusions of the hearing examiner and approve the Superintendent's recommendation for dismissal of [Grievant], and [Grievant] shall be, and is hereby, terminated from his employment with the Kanawha County Board of Education, effective immediately.*" (Emphasis in original).³⁹

65. At the time of the 2013 incident regarding Grievant's statement that he "understood why people go postal," neither security nor law enforcement was called. The same is true for the December 2015 interactions with Ms. Hamric, Ms. Gillespie, and Ms. Meadows, the 2017 disagreement with Mr. Mize, the January 2019 incident with the garage mechanics, the April 5, 2019 interaction with Mr. Hollandsworth in his office, and the April 22, 2019 evaluation discussion with Mr. Mize. Immediately following Grievant's telephone conversation with Mr. Hollandsworth on April 22, 2019, Mr. Hollandsworth called Dr. Duerring and Keith Vititoe, but he did not call law enforcement.

³⁸ See, Respondent's Exhibit 2, July 10, 2019, letter.

³⁹ See, Respondent's Exhibit 3, July 22, 2019, letter.

66. Kanawha County Schools has a progressive discipline policy.⁴⁰ However, neither party introduced it as evidence at the level three hearing. As such, it is unknown what this policy states.

67. It is undisputed that Grievant was never placed on any type of improvement plan while he was employed by Respondent. In fact, at the lower school disciplinary hearing, Mr. Hollandsworth testified that he disagreed with putting Grievant on an improvement plan.⁴¹ Grievant had also never been suspended before April 23, 2019.

68. It is undisputed that the April 22, 2019, evaluation was Grievant's first and only unsatisfactory performance evaluation he had ever received since he began employment with Respondent.

69. A comparison of Grievant's 2018 performance evaluation and his 2019 performance evaluation shows that in 2019, Grievant had improved his percentage of completed work orders and his percentage of on-time delivery. Further, Grievant met then exceeded his "goals" that had been set for the 2018-2019 school year.⁴²

70. Despite having the 2013 report from the psychologist discussing Grievant's mental health condition, and the recommendations of the psychologist, Ms. Hamric did not share information concerning the same with Mr. Hollandsworth or Mr. Mize to assist

⁴⁰ See, testimony of Terry Hollandsworth.

⁴¹ See, lower disciplinary hearing testimony of Terry Hollandsworth, pp. 53-54.

⁴² See, Grievant's Exhibit 3, evaluations. Pursuant to the 2018 evaluation, Grievant had 76% completed orders and 55% on-time delivery. For the next evaluation period, the 2018-2019 school year, Mr. Mize set Grievant's "goals" as 80% completed orders and 60% on-time delivery. The April 22, 2019, evaluation shows that Grievant had 82% completed orders and 60% on-time delivery. Therefore, Grievant improved his percentages and met and even exceeded the goals set for him for the 2018-2019 school year.

them in supervising Grievant. Ms. Hamric also did not ask for Grievant's consent to allow her to do the same.

71. Despite the incidents that transpired from the time of the 2013 evaluation until Grievant was suspended from employment on April 23, 2019, Respondent did not refer Grievant for any other psychological evaluation, and Grievant was never placed on any kind of plan of improvement.

72. Respondent's yearly performance evaluations contain sections in which an employee's attitude, employee relations, public relations, work judgments, acceptance of change, acceptance of responsibility, and whether the employee follows instructions can be rated. Despite the claims of Mr. Hollandsworth and Mr. Mize that Grievant's behavior and attitude were poor and only getting poorer, not one of Grievant's supervisors, including Mr. Hollandsworth in 2014 and Mr. Mize in 2017 and 2018, had rated Grievant as unsatisfactory in any of these behavioral performance factors until April 2019.

73. As of the time Mr. Mize reviewed Grievant's performance evaluation with him on April 22, 2019, Mr. Hollandsworth testified that there was no intention to terminate his employment contract that day. Mr. Hollandsworth also testified at level three that he was planning to place Grievant on an improvement plan following his evaluation, thereby giving Grievant time to improve his performance deemed unsatisfactory. However, such does not seem to agree with this thoughts on improvement plans as testified to during the lower school disciplinary hearing.

74. On Grievant's April 22, 2019, performance evaluation, the performance factors marked as "unsatisfactory" were as follows: compliance with rules; meeting schedules; acceptance of change; attitude; work judgments; follows instructions; public

relations; and, efficiency under stress. Further, in the “areas of improvement” sections, Mr. Mize noted, “you need to improve attitude[.] you are very argumentative[.] you need to complete work orders instead of questioning them.”

Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W. VA. CODE ST. R. § 156-1-3 (2018). “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Respondent asserts that it properly terminated Grievant’s employment for insubordination “for continuing to speak to and approach KCBOE employees in a hostile an (sic) aggressive manner despite having been repeated warned and disciplined for that same behavior.” Grievant argues that he was not insubordinate and that his dismissal was not justified. Grievant further asserts that his dismissal was arbitrary and capricious and constituted harassment, discrimination, and favoritism. Additionally, Grievant asserts that his dismissal was an act of reprisal and retaliation and that the same violated due process and Kanawha County Schools Policy G25.

WEST VIRGINIA CODE § 18A-2-8 states, in part, as follows:

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

(b) A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve [§ 18A-2-12] of this article. The changes shall be stated in writing served upon the employee within two days of presentation of the changes to the board. .

. .

W. VA. CODE § 18A-2-8(a)-(b). “The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. VA. CODE § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991). See *Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975).” *Graham v. Putnam County Bd. of Educ.*, Docket No. 99-40-206 (Sep. 30, 1999). However, “[i]t is not the label a county board of education attaches to the conduct of the employee . . . that is determinative. The critical inquiry is whether the board’s evidence is sufficient to substantiate that the employee actually engaged in the conduct.” *Allen v. Monroe County Bd. of Educ.*, Docket No. 90-31-021 (July 11, 1990); *Duruttia v. Mingo County Bd. of Educ.*, Docket No. 29-88-104 (Feb. 28, 1990).

Insubordination “at least includes, and perhaps requires, a willful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued by the school board or by an administrative superior. . . This, in effect, indicates that for there to be ‘insubordination,’ the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be willful; and (c) the order (or rule or regulation) must be reasonable and valid.” *Butts v. Higher Educ. Interim Governing Bd./Shepherd Coll.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). [F]or a refusal to obey to be “willful,” the motivation for the disobedience must be

contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order.” *Id.*, 212 W. Va. at 213, 569 S.E.2d at 460. This Grievance Board has previously recognized that insubordination “encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer.” *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988), *aff’d*, *Sexton v. Marshall University*, 182 W. Va. 294, 387 S.E.2d 529 (1989).

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

Further, the “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. See *Adkins v. W. Va. Dep’t of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (citing *In re Queen*, 196 W. Va. 442, 473

S.E.2d 483 (1996)). “While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer].” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

Many of the material facts of this matter are disputed. In situations where “the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required.” *Jones v. W. Va. Dep’t of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ 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. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Ms. Hamric testified at the level three hearing. She appeared calm and answered the questions asked of her. However, her demeanor during her testimony while Respondent's counsel questioned her differed from that during her questioning by

Grievant's counsel. She seemed more relaxed when Ms. McIntosh questioned her, but somewhat defensive when Mr. Kaminski questioned her. At times during Mr. Kaminski's questioning, she seemed irritated and snarky. The change was noticeable. Throughout her testimony, she demonstrated a very negative attitude toward Grievant, the grievances he has filed over the years, and the grievance process. When asked if she knew whether Grievant ever won a grievance, she seemed flippant, and it sounded like she started to answer, with a laugh, "probably," but she caught herself at "pro--" and then said that she did not know. She also discounted all the grievances he filed as "unrealistic" in an email she sent to Dr. Duerring on April 5, 2019, before Grievant's suspension and termination.⁴³ Mr. Kaminski asked her about the same at the beginning of her questioning and she reluctantly admitted that it was this Grievance Board that determines whether a grievance is "unrealistic." It appears that Ms. Hamric's negative attitude toward Grievant is, at least in part, tied to his filing of grievance actions before this Board.

Ms. Hamric's testimony was extremely troubling considering that Grievant prevailed in proving through the grievance procedure that he was being relentlessly harassed by a coworker, even physically assaulted by him, in 2012-2013, and his immediate supervisor was aware of it and did nothing to stop it. Moreover, such had occurred around the time Ms. Hamric referred Grievant for the psychological evaluation, and the report she received and reviewed stated that Grievant spoke to the psychologist about the specifics of the harassment. Additionally, in that April 5, 2019, email to Dr. Duerring she wrote, "[Grievant] has been problematic for years. As you can see from the Fit for Duty [from 2013], that it is probably that he will continue to have heated arguments

⁴³ See, Respondent's Exhibit 19, April 5, 2019, email to Dr. Duerring.

at the workplace. Going belly to belly or chest to chest with his Director at work is unacceptable behavior. Terry has tolerated many issues and unrealistic grievances from him.”⁴⁴ She then attached to this email a “copy and paste” of the conclusion paragraph from the 2013 psychological evaluation for Dr. Duerring’s convenience.

Ms. Hamric had, obviously, reviewed the psychological evaluation and it was readily available to her. Grievant’s medical conditions, both physical health and mental health, are discussed in that report. Despite having this knowledge, at no point after 2013, not even after the incident with Grievant at her office in late December 2015, did Ms. Hamric recommend that Grievant be sent for a second psychological evaluation, nor did she refer him to the Employee Assistance Program. Ms. Hamric also testified at the level three hearing that she felt threatened by Grievant during the December 2015 incident. Given Ms. Hamric’s extremely negative attitude toward Grievant, she is not a credible witness.

Grievant testified at the level three hearing. For the most part, Grievant appeared calm and personable. However, at times, he did seem to get angry when he was reflecting on certain things that had happened to him during his employment with Respondent. Grievant has an interest in this matter as he is seeking reinstatement to his job, and such could be a motive to be untruthful. During his direct examination with his counsel, Grievant appeared calm and answered the questions asked of him. He was not evasive. However, during his cross examination, he appeared to be evasive at times, and to get worked-up, or angry, when asked about some of the actions taken against him in the past and when talking about Mr. Hollandsworth. Grievant’s reluctance to answer

⁴⁴ See, Respondent’s Exhibit 19, April 5, 2019, email to Dr. Duerring.

counsel for Respondent's questions at times diminished his credibility some. It is expected that a grievant might get emotional, excited, or angry, when having to testify about difficult matters surrounding their grievances. However, overall, Grievant's emotions did not cross the line and negate his credibility. When asked if he used a raised voice or was loud when talking to Mr. Hollandsworth on April 5, 2019, Grievant answered, "not that I am aware of." This answer appeared to deflect responsibility or ownership of his behavior, which also hurt his credibility. Grievant appeared to have a good recollection of his actions and the events discussed in the grievance. He had some problems recalling dates and the specific years in which some of the events discussed occurred, but such can be explained by the passage of time. While Grievant's credibility was diminished some, he was overall, a credible witness.

Mr. Hollandsworth testified at the level three hearing. He appeared calm and professional. He was not disrespectful. He answered the questions asked of him, and he was not evasive. As Grievant is ultimately supervised by Mr. Hollandsworth, and Mr. Hollandsworth made the decision to contact Dr. Duerring that lead to Grievant's suspension and subsequent dismissal, he can be viewed as having an interest in this matter, which could be a motive to be untruthful.

His recollection of the events of 2019 appeared mostly good. However, his recollections of other events appeared to be lacking somewhat. When questioned by Respondent's counsel, he did not know things like whether Grievant had been told the proper way address issues with his vehicles, whether he had ever instructed Grievant on how to approach people, in general, when he has an issue, or whether he had ever told Grievant before January 2019, to get with his supervisor to put in work orders request to

get problems with his vehicles fixed. These questions deal with some of the more significant issues raised in this grievance and go directly to Respondent's assertions that it had tried to correct Grievant's behavioral issues for years to no avail. It seems reasonable that such things would be hard to forget. As such, Mr. Hollandsworth's inability to recall the answers to these questions is troubling. The passage of time could explain some of this given that Respondent has brought up incidents and events going back to 2013 in its case-in-chief. While Mr. Hollandsworth's credibility was diminished some, he was overall, a credible witness.⁴⁵

Based upon the evidence presented, as well as their tones, demeanors, and testimony during the level three hearing, it is clear that Mr. Hollandsworth and Grievant have a strained relationship and they have for quite some time. However, in this grievance this ALJ is to decide from the evidence presented whether Respondent proved the charge of insubordination, and whether the disciplinary action taken was justified. Respondent argues that the telephone call was culminating event, and it dismissed Grievant for threatening Mr. Hollandsworth during the same and for his conduct toward Mr. Hollandsworth on April 5, 2019. Some of what was said during the telephone call is disputed. Mr. Hollandsworth testified that Grievant used a threatening tone when he uttered the phrase, "I know what you are trying to do," and that he also called Mr. Hollandsworth a "slimeball." Grievant admits to making the call and to saying "I know what you are trying to do," but denies using a threatening tone and denies calling Mr.

⁴⁵ The testimony of all witnesses who testified at the level three hearing was considered in drafting this decision. Credibility assessments were performed for only those witnesses whose testimony raised significant disputes of fact and/or were the most relevant in deciding the outcome of this grievance.

Hollandsworth any sort of name. Grievant and Mr. Hollandsworth were the only witnesses to the phone conversation.

Respondent has presented no evidence to suggest that the mere act of Grievant calling Mr. Hollandsworth as he did on April 22, 2019, violated any kind of rule or policy. In fact, Mr. Hollandsworth had Grievant's name, home telephone number, and cell phone number stored as a contact in his phone. Such is evident from the screen shot Mr. Hollandsworth took on his phone.⁴⁶ Therefore, this ALJ cannot conclude that the telephone call itself was improper or misconduct. Grievant was admittedly upset about his evaluation when he called. However, Mr. Hollandsworth has not claimed that Grievant raised his voice or used profanity during this call. This really comes down to which person is more credible. Both have interests in this grievance which hurt their credibility. However, it does not make sense as to why this call, and Grievant's tone during the same, made Mr. Hollandsworth fear for his safety as he has claimed. He and Grievant have had disputes before and have, admittedly, used raised voices with one another in the past.⁴⁷ Mr. Hollandsworth did not even discipline Grievant for some of these. Mr. Hollandsworth claims that the call combined with the incident between them on April 5, 2019, a couple of weeks before, made him fear for his safety, then Grievant's call was the "last straw." Mr. Hollandsworth asserts that they had a physical altercation during the April 5, 2019, incident; Grievant denies such. Even with the facts of the April 5, 2019, incident in dispute, the evidence does not suggest that Mr. Hollandsworth felt threatened during it. He did not call security. He did not even report it to school administration, or attempt to

⁴⁶ See, Respondent's Exhibit 5, screen shot.

⁴⁷ See, testimony of Terry Hollandsworth; testimony of David Egnor.

impose any discipline on Grievant. When asked why he did none of these things, Mr. Hollandsworth testified at level three that he “let it slide.” If Grievant behaved as Mr. Hollandsworth claims, that Grievant got into his personal space and pressed his body against his own, and stared him down, it would only be reasonable for Mr. Hollandsworth to report it and to seek to impose discipline. He has disciplined Grievant for much less in the past. Further, based upon the evidence presented, Mr. Hollandsworth suspended Mike Koenig, a former maintenance employee, for three days after they had a heated argument.⁴⁸ The April 5, 2019, incident could not have been too out of control because the guy who was in Mr. Hollandsworth’s office “in the candy bowl,” who would have been the only other known witness to the same, purportedly did not even turn around when it was happening. Mr. Hollandsworth’s account of the events of April 5, 2019, and April 22, 2019, are not plausible. Accordingly, it is more likely that Mr. Hollandsworth did not fear for his safety after the April 22, 2019, the telephone call.

During the level three hearing, Mr. Hollandsworth testified that he normally does not see employees’ evaluations before they are reviewed with and signed by the employees, unless there is some reason for him to see it. Mr. Hollandsworth was aware of Grievant’s April 22, 2019, evaluation before it was given to Grievant earlier that day. He testified that the plan had been to put Grievant on an improvement plan as a result of his April 22, 2019, unsatisfactory performance evaluation, but he did not have the chance because the telephone call occurred and Grievant was suspended before they could do it. Mr. Hollandsworth also testified that there is a progressive discipline policy at Kanawha County School, and that it starts with a verbal warning, the written warning, plan of

⁴⁸ See, testimony of Mike Koenig.

improvement, etc., before terminating the employee. He further testified that before there is a plan of improvement, an employee performance evaluation has to be done and it must show unsatisfactory performance. However, the policy was not presented. As such, there is no way for this ALJ to assess whether Mr. Hollandsworth's understanding of the policy is correct, or as to whether there are any exceptions to using progressive discipline. Grievant had never been placed on an improvement plan or suspended before April 23, 2019.

Grievant's April 22, 2019, evaluation was his very first unsatisfactory evaluation. Despite Mr. Hollandsworth, Mr. Mize, Ms. Hamric, and Ms. Gillespie's testimony that Grievant exhibited poor behavior and was threatening for years prior to his dismissal, all his performance evaluations until the April 22, 2019, evaluation never indicated such and had been very good. The yearly performance evaluation forms contain sections in which an employee's attitude, employee relations, public relations, work judgments, acceptance of change, acceptance of responsibility, and whether the employee follows instructions. Grievant has been evaluated using these criteria for years and had always received ratings of satisfactory, or better. Not one of Grievant's supervisors, including Mr. Hollandsworth in 2014 and Mr. Mize in 2017 and 2018, had rated Grievant as unsatisfactory in any of these behavioral performance factors until April 2019. On the April 22, 2019, evaluation, the performance factors marked as "unsatisfactory" on this evaluation were: compliance with rules; meeting schedules; acceptance of change; attitude; work judgments; follows instructions; public relations; and, efficiency under stress. In the "areas of improvement" sections, Mr. Mize noted, "you need to improve

attitude[.] you are very argumentative[.] you need to complete work orders instead of questioning them.”

There was no evidence presented to suggest that Grievant’s performance declined from July 1, 2018, through April 22, 2019. Grievant had actually been off work for a substantial part of the school year with his surgery in September 2018 and his compensable, work-related injury in February 2019. He had only returned to work a few weeks before the April 5, 2019, incident. The only problem with Grievant documented in that year before April 2019 was the incident with the mechanics in January 2019, and nowhere in Mr. Hollandsworth’s January 15 and January 17, 2019, letters does it say that they served as written reprimands, verbal warnings, or other discipline being documented. Until April 22, 2019, it appears that it was a very unremarkable year.

A lot has been made of Grievant’s 2013 written reprimand and his verbal warning in January 2016 regarding his conduct at the board office with Ms. Hamric and her staff, but these happened years before the April 22, 2019 evaluation and telephone call. He has not received any other documented disciplinary action since that time, and none of these incidents were ever reflected in his performance evaluations and they apparently could have been. Further, while Ms. Hamric and Ms. Gillespie testified they felt threatened by Grievant during the December 2015 incident at their office, their written statements from December 2015 do not state that they ever felt threatened. Ms. Hamric stated that he was “rude to Tabetha,” and “[a]fter a thorough explanation to his questions, as he prompted the same questions from an earlier conversation, I informed him that the conversation was over. I requested that he leave my office. I stood up at my desk and

he stood in my doorway and stared me down. He appeared increasingly agitated.”⁴⁹ In her written statement from 2015, Ms. Gillespie never said she felt threatened either. In fact, it sounds like she took control of the situation and ordered Grievant around. She stated, in part, as follows:

On the afternoon of Tuesday, December 29, 2015, I was speaking to Kelly Denison in her office and looked up to see [Grievant] walking through the gate from the waiting area toward my office. I walked toward the gate to stop him before he could get to my office and asked [Grievant] if he was here to wish us a Happy New Year, to which he replied, “No, you know it’s never good news with me.” I asked [Grievant] the reason for his visit, and he told me he was here to get a hire date. I asked him if he meant his hire date, and he said. “No someone else’s.”

[Grievant] walked forward as if he was going to my office, and I told him he could stop right there, because I wasn’t giving him that information. When he asked why, I replied that it was none of his business and that I wouldn’t provide him with another employee’s hire date as I wouldn’t provide his hire date to another employee, [Grievant] asked me where he was going to get that information, and I told him that he was not getting it from me. . .”⁵⁰

At that point, I intervened and told [Grievant] that the two of us have had the same conversation numerous times so far as why . . . there was a change to the job description. I explained to him that I knew he had also spoken to Carol and Kim Olsen numerous times about the same question over and over. I reminded [Grievant] that the decision about the blueprint requirement was currently being considered, and until we receive the decision, “it is what it is” and that no changes were going to be made unless ruled otherwise. He was going to have to get used to the fact that the ability to read blueprints were now a part of the jobs.

⁴⁹ See, Respondent’s Exhibit 17, December 30, 2015, email from Ms. Hamric to Mr. Hollandsworth, Dr. Duerring, Thomas Williams, and James Withrow.

⁵⁰ Hiring dates of service personnel employees are commonly published on seniority lists available for anyone to review.

Carol told [Grievant] that this was a moot point, and none of us would be discussing with him again. We were all busy and had work to do, and all of us had spent adequate time discussing with him. I then asked if I could leave, since I was busy with another project, and with Carol's permission, I left the room.

My dealings with [Grievant] have always been unpleasant, and he has repeatedly shown himself to be argumentative and unwilling to listen or accept explanations to his questions, however, his behavior and manner on Tuesday appeared more agitated and aggressive than usual.⁵¹

While Ms. Meadows did not testify, her statement about the incident, which is solely hearsay, implies that Grievant was directed from office to office by those in the Human Resources Office, and that former counsel, James Withrow, actually gave him the information he was seeking before he left the building that day. She also does not mention feeling threatened by Grievant. Her statement reads as follows:

On December 29, 2015[,] [Grievant] entered the Human Resources office demanding to know a hire date for another service employee for Kanawha County Schools. I told him that he would need to see Tabetha Gillespie who handles service personnel issues. He then went to her and was sent back over to me. He stated that he had been sent all over this building and that I didn't know what I was doing. I then informed Carol Hamric that he was here. She proceeded to come out and speak with [Grievant]. Tabetha Gillespie also came over and spoke to him in Carol's office. He was very rude and obnoxious to Carol as well as me. He was very pushy and brazen. Carol then informed him that she was trying to obtain an answer pertaining to the confidentiality of the information he wanted. Ms. Hamric finally spoke to Mr. Withrow, who answered the question. [Grievant] was in and out of the offices several times yesterday [December 29, 2015], only here in HR but in other areas as well. Due to this behavior, I did not feel comfortable with [Grievant] in this office. I feel he has anger issues.

⁵¹ See, Respondent's Exhibit 20, written statement of Tabetha Gillespie.

Reading the accounts together, it is apparent that Grievant was repeatedly told he could not have information that he, apparently, could have been given, and that the Human Resources employees sent him to different offices instead of just giving him the information to start with. Ms. Hamric and Ms. Gillespie made it very clear to him that they were not willing to assist him and that they were not going to deal with him anymore. It is understandable why he appeared angry. Also, their statements also suggest that they already had a low opinion of Grievant when he arrived at the building that day and that factored into the way they treated him. Still, this incident happened nearly five years ago. Grievant was not suspended or fired from his job back then. In January 2016, Mr. Hollandsworth put in a protocol for Grievant to use when he needed to go to the Board office, which involved him calling ahead and such.⁵² This ALJ finds it hard to believe that if Grievant had really acted in a threatening manner toward the Human Resources employees, more than a verbal warning would have been issued to Grievant. It makes no sense that Mr. Hollandsworth and Dr. Duerring considered the same a factor, or the 2013 written reprimand when deciding to terminate his employment in 2019.

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. Respondent has labeled Grievant's conduct in his interactions with Mr. Hollandsworth on April 5, 2019, and during the phone call of April 22, 2019, as insubordination. Respondent asserts that the written reprimand in 2013, and the verbal warning in 2016, along with

⁵² See, Respondent's Exhibit 2, January 5, 2016, letter.

Grievant's conduct with the mechanics and its resolution (there was no discipline imposed) constitute its order to Grievant not to conduct himself as he did in April 2019. As stated above, insubordination is a willful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued by the school board or by an administrative superior. There may also be implied orders. However, Respondent has not met its burden of proving that Grievant was insubordinate on April 5, 2019, or on April 22, 2019. The evidence presented does not establish that it is more likely that Grievant invaded Mr. Hollandsworth's personal space and pressed his chest against Mr. Hollandsworth's and stared him down. Given Mr. Hollandsworth's past actions with respect to discipline, it is more likely had it had happened as he claims, he would have reported it, called security, and/or attempted to terminate Grievant's employment then. As for the April 22, 2019, telephone call, Respondent has not proved that is more likely that Grievant used a threatening tone during his call with Mr. Hollandsworth, or that he called Mr. Hollandsworth a slimeball. Both Grievant and Mr. Hollandsworth have interests in this grievance and both had issues with credibility. However, Mr. Hollandsworth's version of the events in question are not plausible given the evidence presented.

Respondent suspended, then terminated Grievant's employment contract for insubordination, as stated in the April 23, 2019, letter. As such, in this case, it is Respondent's burden to prove that charge against Grievant, and Respondent has failed to do that. Respondent did not prove by a preponderance of the evidence that Grievant did *anything* wrong on April 5, 2019, or on April 22, 2019. Correctible conduct would only

come into play if Respondent proved Grievant did something improper.⁵³ Respondent never alleged that Grievant's performance was unsatisfactory or that unsatisfactory

⁵³ The West Virginia Supreme Court of Appeals has held that "where the underlying complaints regarding a public school employee's conduct relate to his or her performance . . . the effect of West Virginia Board of Education Policy is to require an initial inquiry into whether that conduct is correctable." *Maxey v. McDowell County Bd. of Educ.*, 212 W. Va. 668, 575 S.E.2d 278 (2002). The provisions of Policy 5300 referred to by the Court have since been codified in WEST VIRGINIA CODE § 18A-2-12a and state the following:

(6) All school personnel are entitled to know how well they are fulfilling their responsibilities and should be offered the opportunity of open and honest evaluations of their performance on a regular basis and in accordance with the provisions of section twelve [§ 18A-2-12] of this article. All school personnel are entitled to opportunities to improve their job performance prior to 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

Id.

The Court discussed this provision of Policy 5300 in detail in the case of *Mason County Bd. of Educ. v. State Superintendent of Sch.*, 165 W. Va. 732, 274 S.E.2d 435 (1980) where it wrote:

Our holding in *Trimboli, supra*, requires that a dismissal of school personnel be based on a § 5300(6)(a) evaluation after the employee is afforded an improvement period. It states that a board must follow the § 5300(6)(a) 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, in view of the nature of the conduct examined in *Trimboli, supra*, and in *Rogers, supra*, be understood to mean an offense of conduct which affects professional competency.

performance was a reason for his suspension and dismissal. Respondent has only alleged insubordination as the basis of Grievant suspension and termination. Therefore, to the extent Respondent is arguing that it was right in terminating Grievant's contract because his conduct was not correctable on April 5, 2019, and April 22, 2019, Respondent's argument fails.

As Respondent has failed to meet its burden of proof in this matter, there is no need to address Grievant's claims and affirmative defenses of discrimination, favoritism, reprisal, retaliation, harassment, or mitigation. For the reasons set forth herein, this grievance is GRANTED.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichtler v. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Id at 739. Concerning what constitutes "correctable" conduct, the Court noted 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.* "A board must follow the § 5300(6)(a) procedures if the circumstances forming the basis for suspension or discharge are 'correctable.'" *Mason County Bd. of Educ., supra.*

2. WEST VIRGINIA CODE § 18A-2-8 sets out the reasons for which a public school employee may be dismissed or suspended and states, in part as follows:

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

(b) A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve [§ 18A-2-12] of this article. The charges shall be stated in writing served upon the employee within two days of presentation of the charges to the board. .

. .

3. “The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. VA. CODE § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991). See *Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975).” *Graham v. Putnam County Bd. of Educ.*, Docket No. 99-40-206 (Sep. 30, 1999).

4. Insubordination “at least includes, and perhaps requires, a willful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued by the school board or by an administrative superior. . . This, in effect, indicates that for there to be ‘insubordination,’ the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be willful; and (c) the order (or rule or regulation) must be reasonable and valid.” *Butts v. Higher Educ. Interim Governing Bd./Shepherd Coll.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). [F]or a refusal to obey to be “willful,” the motivation for the disobedience must

be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order.” *Id.*, 212 W. Va. at 213, 569 S.E.2d at 460. This Grievance Board has previously recognized that insubordination “encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer.” *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988), *aff’d*, *Sexton v. Marshall University*, 182 W. Va. 294, 387 S.E.2d 529 (1989).

5. In situations where “the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required.” *Jones v. W. Va. Dep’t of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ 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. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

6. “[W]here the underlying complaints regarding a teacher’s⁵⁴ conduct relate to his or her performance . . . the effect of West Virginia Board of Education Policy is to require an initial inquiry into whether that conduct is correctable.” *Maxey v. McDowell County Bd. of Educ.*, 212 W. Va. 668, 575 S.E.2d 278 (2002).

7. “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 [§ 18A-2-12] of this article. All school personnel are entitled to opportunities to improve their job performance prior to 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. . . . W. VA. CODE § 18A-2-12a.

8. Respondent failed to meet its burden of proving that Grievant’s actions constituted insubordination and failed to prove that the termination of his employment contract was justified.

Accordingly, the grievance is **GRANTED**.

Respondent is **ORDERED** to reinstate Grievant to his position as a Carpenter II, and to pay him back pay from the date of his suspension to the date he is reinstated, plus

⁵⁴ Although the Court’s discussion in *Maxey* referred to a teacher, the statutes in the case apply with equal force to all public school employees. See W. Va. Code §§ 18A-2-8 and 18A-2-12a.

statutory interest, less any appropriate off-set, and to restore all benefits lost, including seniority. Further, Respondent is **ORDERED** to remove all references to this suspension and dismissal from any and all personnel records maintained by Respondent, or its agents.

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: September 30, 2020.

Carrie H. LeFevre
Administrative Law Judge