THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

R. KEVIN MOFFATT
Grievant,

v. **Docket No. 2019-0686-WebED**

WEBSTER COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

R. Kevin Moffatt, Grievant, is employed by Respondent, Webster County Board of Education ("Board") as a general maintenance worker. Mr. Moffatt filed an expedited grievance at level three[1] alleging:

> Grievant was suspended by Respondent, without pay, from November 16, 2018 to the end of the 2018-2019 school year. Respondent's action violated W. Va. Code § 18A-4-8. Respondent's action constitutes discrimination and favoritism, in violation of W. Va. Code § 6C-2-2. Respondent's action was arbitrary and capricious, unjustified and unreasonable.

As relief Mr. Moffatt seeks:

> [T]o be reinstated to his position of employment, with back pay and interest; restoration of all seniority lost as a result of the suspension; reimbursement for the cost of any alternative benefits Grievant was required to incur expense for as a result of the suspension.

A two-day[2] level three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board. Grievant personally appeared and was represented by George B. Morrone III, Esquire, WVSSPA. The Board appeared through

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[1] *See* W. VA. CODE § 6C-2-4(a)(4) allowing certain claims to be filed directly to level three.
[2] August 1, 2019 and October 25, 2019.

Scott Cochran, Superintendent of Schools, and was represented by Richard S. Boothby, Esquire, Bowles Rice, LLP. This matter became mature for consideration on December 18, 2019, upon receipt of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was given a long-term suspension without pay for punching his supervisor in the jaw/neck area, an act Grievant admits doing. Grievant argues that his actions were justified by his supervisor's abusive language and threats. Grievant also argues that he was acting in self-defense. Respondent proved that Grievant was guilty of insubordination because hitting his supervisor constituted a serious violation of the Board's Employee Code of Conduct. The evidence does not support a finding of self-defense. Given the totality of the circumstances and the ultimate action of the Board, further mitigation of the punishment was not warranted.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. R. Kevin Moffatt, Grievant, is employed by Respondent, Webster County Board of Education ("Board") as a school service worker in the general maintenance classification. He has been employed by the Board as a school service worker for roughly thirteen years.

2. Grievant has had satisfactory evaluations and is generally known as a hard worker. He is easy going, has a reputation for honesty, and is not known to be violent or swear.[3]

3. Several years ago, Grievant received a written reprimand for allegedly sitting and drinking coffee while he was on the clock. Grievant alleges he came in early and was drinking coffee prior to the start of his shift. Grievant did not contest the reprimand. Grievant has had no other discipline during his career.

4. Mike Bonnett is the Board's Director of Transportation, Facilities and CTE.[4] Mr. Bonnett has been employed in Webster County for roughly ten years: one as a principal, two as an assistant principal, and seven as a central office administrator.

5. The maintenance workers testified that Bonnett had used profanity with them and called them "stupid fuckers" on at least one occasion. On two prior occasions Mr. Bonnett lost his temper and swore at a subordinate.

6. A few years before the incident which gave rise to this action, Mr. Bonnett was serving as principal at Webster County High School. Mr. Bonnet was approached by the band and chorus teacher Johnathan Oates regarding the school schedule. After some discussion Bonnett told Oates to, "Get the fuck out of my office. If you don't like it, you can quit." Mr. Bonnett apologized to Mr. Oates the next day asked him to stay.

[3] Consistent testimony of the witnesses. Director Bonnett testified that he has never known Grievant to lie.

[4] This may not be Mr. Bonnett's complete title nor reflect all his responsibilities. Regarding this grievance only his duties as Director of Maintenance are relevant.

7. The Head Mechanic, Edgar Hall, was working in the bus garage when Director Bonnett came down the steps yelling at him profanely[5] for allegedly not jump starting a spare bus. The next day Director Bonnett came in the bus garage and told Mr. Hall not to worry about it.[6]

8. As Director of Facilities, Mr. Bonnett supervised two general maintenance workers; Grievant Moffatt and Larry Carpenter, as well as an HVAC Technician, Terry Green.

9. There is a maintenance garage and a bus garage about a quarter of a mile away from the Board's central office. The regular practice of the maintenance workers was to report to the central office first in the morning to pick up any work orders that had been issued. They would then proceed to whatever site the next job required.

10. The incident which gave rise to the discipline of Grievant took place on November 15, 2018. During the two weeks prior to that date, there were a couple of incidents where Grievant and Mr. Carpenter were working on projects that Director Bonnett either did not know about or were not in the order of priority he wanted.[7]

11. Prior to the incident, Grievant and Mr. Carpenter expressed their frustration to Mr. Hall (the head mechanic) alleging that Director Bonnett was pulling them from jobs and was cussing at them.

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[5] Mr. Hall testified the Director said "GD" and "MF" but his religion barred him from saying the actual words.

[6] Director Bonnett confirms that the confrontations occurred but denies using profanity in either situation.

[7] Grievant and Mr. Carpenter testified that Director Moffett often pulled them from some jobs and sent them to others without good reasons.

12. Director Bonnett told the maintenance workers that he was going to be more "hands on" in managing them and that they were to meet him at the maintenance garage on November 15, 2018 to get their assignments.

13. Mr. Carpenter and Grievant testified that Director Bonnett had not told them to meet him at the maintenance garage. On November 15, 2018, they got the van from the maintenance garage and reported to the central office loading dock as usual to get work orders.

14. Director Bonnett drove to the maintenance garage and found that the maintenance crew was not there. He drove his car to the Board's central office, up the access drive, and parked in front of the maintenance van blocking it from exiting the loading dock.

15. When his car came to a stop, Director Bonnett quickly got out and yelled at the workers, "What are you fuckers doing? I told you to meet me at the garage."

16. Grievant and Mr. Carpenter got out of the van and Grievant told Mr. Bonnett not to cuss them. Mr. Carpenter said that Bonnett told them to meet them at the central office and Director Bonnett called him a lying son of a bitch. Grievant again told Bonnett to quit cussing them.

17. Grievant and Director Bonnett continued to exchange words and, at some point, Director Bonnett told Grievant that he was going to "catch him out and kick his ass." Grievant took off his hat and glasses, handed them to Mr. Carpenter and said, "let's do it right now" while he walked toward Director Bonnett.

18. At some point in the exchange, Director Bonnett pushed Grievant[8] and Grievant hit him in the jaw/neck area. Director Bonnett told Grievant and Mr. Carpenter that they were going to be fired and got in his car to call the superintendent. The maintenance workers returned to the van.

19. Superintendent of Schools, Scott Cochran, came to the central office and told all three men to come to his office. He conducted individual interviews with Grievant Mr. Bonnett, and Mr. Carpenter.[9] Following the interviews, Superintendent Cochran told everyone to return to work until he decided what he was going to do.

20. Superintendent Cochran suspended Grievant without pay by letter dated November 16, 2018. The reason for the suspension was:

> You have admitted that on Thursday, November 15, 2018, you angrily and intentionally hit your supervisor, Mike Bonnett, in the head with your fist.[10]

Superintendent Cochran also informed Grievant that he would recommend the termination of Grievant's contract at the Board meeting on December 5, 2018.

21. The Board held a hearing regarding the superintendent's recommendation on December 12, 2018.

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[8] Grievant claims that Director Bonnett pushed him before Grievant hit him. Director Bonnett said he pushed Grievant away after he was hit. Mr. Carpenter said that they were pushing each other, he did not know who pushed first, and he did not see Grievant hit Director Bonnett. Mr. Carpenter said he did not hear any threats from Mr. Bonnett when he was initially interviewed but at the Board hearing he said the opposite.

[9] Personnel Director Brenda Knight sat in on all the interviews. Mr. Morrone, counsel for Grievant, was included in the interviews of Grievant and Mr. Carpenter by telephone.

[10] Respondent Exhibit 1 at the Board hearing.

22. At the conclusion of the hearing, the Board did not adopt the superintendent's recommendation. The Board voted to suspend Grievant without pay for the remainder of the 2018-2019 school year, roughly six months.

Discussion

As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018).

> . . . *See* [*Watkins v. McDowell County Bd. of Educ.,* 229 W.Va. 500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education,* 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). *See also Hovermale v. Berkeley Springs Moose Lodge,* 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

W. Va. Dep't of Trans., Div. of Highways v. Litten, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

The authority of a county board of education to suspend or terminate an employee's contract must be based on one or more of the causes listed in West Virginia Code § 18A-2-8 and must be exercised reasonably, not arbitrarily or capriciously. Syl. Pt. 2, *Parham v. Raleigh County Bd. of Educ.*, 192 W. Va. 540, 453 S.E.2d 374 (1994); Syl.

Pt. 3, *Beverlin v. Bd. of Educ*., 158 W. Va. 1067, 216 S.E.2d 554 (1975)*; Bell v. Kanawha County Bd. of Educ*., Docket No. 91-20-005 (Apr. 16, 1991). The causes are:

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

W. VA. CODE § 18A-2-8(a).

In this matter, Respondent suspended Grievant for insubordination for violating the Board's *Employee Code of Conduct*[11] by striking his supervisor in the jaw/neck. 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*.

Additionally, 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*

[11] Webster County Board *Policy* po4210 *Employee Code of Conduct.*

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). An employer can establish insubordination by demonstrating a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995). *Cited in Lehman v. Marshal County Bd. of Educ.* Docket No. 2011-1046-MarED (Aug. 9, 2011).

The case of *Lancaster v. Ritchie County Board of Education*, No. 15-0554 (W. Va. Sup. Ct., May 23, 2016) (memorandum decision), provides insight into the present case. In *Lancaster*, the board of education dismissed a bus driver for violation of the Employee Code of Conduct, improper discussions with student, and failure to follow regulations related to the operation of school buses. The Grievance Board granted the grievance, but that decision was overturned in the Circuit Court of Kanawha County.

"The circuit court found that despite trainings and warnings in the past, grievant willfully engaged in prohibited behaviors. The Supreme Court affirmed the circuit court, thereby allowing for the termination of an employee who received proper training on the employee code of conduct for subsequently engaging in unprofessional behavior violating the same with and around students because such would constitute insubordination and/or willful neglect of duty. *See Lancaster v. Ritchie County Board of Education*, No. 15-0554 (W. Va. Sup. Ct., May 23, 2016) (memorandum decision)." *Shamblin v. Mineral County Bd. of Educ.,* 2018-0458-MnrED (Nov. 29, 2018).

Board Policy po4210 provides the following:

Webster County service personnel employees shall:

A. exhibit professional behavior by showing positive examples of her preparedness, communication, fairness, punctuality, attendance, language, and appearance;
B. contribute, cooperate, and participate in creating an environment in which all employees/students are accepted in provided the opportunity to achieve at high levels in all areas of development;
C. maintain a safe and healthy environment, free of harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination;
D. create a culture of caring through understanding and support;
E. immediately intervene in any code of conduct violation, that has a negative impact on students, in a manner that preserves confidentiality and the dignity of each person;
F. demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior;
G. comply with all Federal, West Virginia, and Webster County laws, ordinances, policies, regulations, and procedures.

Grievant and all other Webster County Schools service personnel are provided with a copy of the *Employee Code of Conduct* and receive some training concerning its content. Respondent cited paragraphs "B," "D," and "F" as provisions of Policy po4210 which Grievant violated by striking his supervisor with a closed fist. Certainly, hitting one's supervisor in the head or neck would not maintain an environment that was "free of . . . violence," or "demonstrate responsible citizenship by maintaining . . . self-control, and moral/ethical behavior."

Grievant argues that he did not violate policy po4210 because he was acting in self-defense when he hit Director Bonnett. He argues that Mr. Bonnett threatened him and pushed him before Grievant hit him. Grievant cites *State v. Green,* 157 W.Va. 1031. 206 S.E.2d 293 (1974) for the proposition that the doctrine of self-defense justifies his

action because his supervisor's action created reasonable grounds to believe that he was in danger of physical harm. He testified that Director Bonnett was angry and aggressive when he got out of his car, cussed at him and threatened to "kick his ass" at some future time when Director Bonnet saw him away from work. Grievant specifically stated that Mr. Bonnett pushed him when he approached. Only then did Grievant push his supervisor and punch him.

Director Bonnett admitted that he was angry when the workers were not at the maintenance garage where he had directed them to meet him. However, he categorially denies that he cussed at Grievant and Mr. Carpenter or that he threatened either of them. He stated that he may have pushed Grievant away when Grievant punched him.

In Mr. Carpenter's initial statement, he agreed that Director Bonnett was angry and aggressive when he approached the employees and that he was cussing at them. He stated that he did not hear any threats nor see anyone shoving because he had turned to put Grievant's hat and glasses in the truck. He later testified that Mr. Bonnett did threaten both the employees and pushed Grievant. He said that the change in his version of the events was due to having more time to process his memories and sort out what he saw. All three men agree that Grievant took off his hat and glasses and approached Mr. Bonnett with the intent to fight.

In situations such as this, where the existence or nonexistence of certain material facts hinges on the credibility of conflicting witness testimony, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.,* Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.,* Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged

with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ*., Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp*., Docket No. 93-HHR-050 (Feb. 4, 1994).

The Grievance Board has applied the following factors to assess a witness's testimony: (1) demeanor; (2) opportunity or capacity to perceive and communicate; (3) reputation for honesty; (4) attitude toward the action; and (5) admission of untruthfulness. Additionally, the administrative law judge should consider (1) the presence or absence of bias, interest or motive; (2) the consistency of prior statements; (3) the existence or nonexistence of any fact testified to by the witness; and (4) the plausibility of the witness' information. *Yerrid v. Div. of Highways*, Docket No. 2009-1692-DOT (Mar. 26, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.,* Docket No. 2009-1583-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.,* Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999).

Director Bonnett's assertion that he never cussed at employees and that he did not threaten Grievant or Mr. Carpenter are not credible. He has a personal interest this testimony because such actions would be in violation of the *Employee Code of Conduct*. Additionally, his claims are not consistent with the facts. First employees who have no interest in this grievance credibly testified that Mr. Bonnett has a history of losing his temper and cussing at employees. More importantly, Grievant has a reputation, even with Mr. Bonnett, of being easy going, honest and not violent. It would be totally out of character for Grievant to decide to punch his supervisor if Mr. Bonnett had not done

something extraordinary to provoke such a reaction. The testimony that he was cussing and threatening the employees is far more consistent with Grievant's actions.

Mr. Carpenter's testimony completely lacks credibility. He told Mr. Bonnett immediately after the punch that he didn't see anything. When he was initially interviewed, he kept to that ruse and added that he heard no threats and did not see the punch or and pushing. He later testified that he did hear threats and saw pushing but remained unclear as to who was pushing who. The idea that when all this ruckus was happening, he would not hear or see any of the important acts is not credible. More likely he was attempting to avoid any chance that these actions would affect his employment as well as trying to be supportive of his coworker.

Grievant's testimony, on the other hand, rings true. He has a uncontested reputation for honesty. Additionally, he admitted that he punched his supervisor when he could have denied it, especially knowing that Mr. Carpenter intended to say he did not see it. His testimony fits with the remaining facts and his reactions as well as the actions of others.[12]

The remaining issue is whether Grievant was legally acting in self-defense when he struck his supervisor. Grievant cites the criminal case of *State v. Green*, 157 W. Va. 1031, 206 S.E.2d 923, (1974) as providing the definition for self-defense. In *Green*, the West Virginia Supreme Court of Appeals held that if competent evidence was introduced at trial indicating that "the accused believed, and had reasonable grounds to believe, that

[12] Superintendent Cochran testified that he only recommended discipline for Grievant because the only thing certain from all the interviews was that Grievant punched his supervisor. The stories leading up to that event varied widely. While he may have suspected other misconduct, he did not believe there was sufficient credible evidence to support other disciplinary action for others involved.

he was in danger of losing his life or suffering great bodily harm" the trial judge must give the jury an instruction of self-defense. In *Green* the defendant testified that she had her back against the wall of a bar and was being approached by a crowd who intended to beat her. She warned the crowd to leave her alone, but when they kept coming, she fired a pistol and killed a person who was roughly two feet away.

Applying the *Green* standard to the facts of the present case it becomes clear that Grievant was not acting in self-defense as that term is legally defined. Grievant testified that he took off his hat and glasses and approached Director Bonnett with the intent to fight when Mr. Bonnett told him he was going to catch him out and "kick his ass." Grievant stated that he was concerned that Director Bonnett might attack him at some future date when he was with his family and cause injury to one or more of them. Grievant's testimony was clear that, when Grievant prepared to fight and approached Mr. Bonnett with the intent to hit him, Mr. Bonnett had not made an overt act to attack him. Even if Mr. Bonnett pushed Grievant before Grievant punched him, Grievant was already the physical aggressor. Given Grievant's testimony alone he had no reasonable grounds to believe that he was in danger of receiving physical injury. His only concern was for some future act which might or might not have occurred and is far too speculative to meet the definition of self-defense set out in *Green*.

Respondent proved by a preponderance of the evidence that Grievant was guilty of insubordination by punching his supervisor in the jaw/neck. That action was clearly in violation of the Board's *Employee Code of Conduct*.

Grievant also argues that the punishment of roughly a six-month suspension was far too severe given the totality of the circumstances and Grievant's long and productive

service with the Board. “The argument that discipline is excessive given the facts of the situation is an affirmative defense, and [Grievant bears] the burden of demonstrating the penalty was clearly excessive or reflects an abuse of the agency's discretion or an inherent disproportion between the offense and the personnel action." *Hudson v. Dep't of Health and Human Res./Welch Cmty. Hosp.*, Docket No. 07-HHR-311 (March 21, 2008). "Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case-by-case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995); *Crites v. Dep’t of Health & Human Ser.*, Docket No. 2011-0216-DHHR (Nov. 16, 2011).

It is generally undisputed that Grievant is a valued employee with a reputation for hard work, dependability, and honesty. The only prior discipline he received was a letter of reprimand for a minor infraction under questionable circumstances. This does nothing to impact Grievant’s years of successful service with the Board. Unfortunately, that service does not shield Grievant from the serious consequences of violence in the workplace. Maintaining a safe workplace is paramount for an employer, especially for public schools where children are often present. Superintendent Cochran recommended that Grievant’s employment be terminated. The Board evidently took Grievant’s service and the circumstances into consideration and mitigated the punishment to a long suspension. Further mitigation is unwarranted.[13]

[13] Grievant also argued that he should not have been punished if Director Bonnett was not disciplined for his role in inciting the incident. While one might be sympathetic with that view given Director Bonnett’s behavior, Superintendent Cochran explained his

Accordingly, the Grievance is denied.

Conclusions of Law

1. As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

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

3. The causes are for suspension or dismissal are:

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

W. VA. CODE § 18A-2-8(a).\ 4. 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*

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reluctance to discipline others involved in the incident and ultimately Grievant's actions must be judged on their own merits.

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).

5. 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).

6. An employer can establish insubordination by demonstrating a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995). Cited in *Lehman v. Marshal County Bd. of Educ.* Docket No. 2011-1046-MarED (Aug. 9, 2011).

7. Respondent proved by a preponderance of the evidence that Grievant was guilty of insubordination by punching his supervisor in the jaw/neck. That action was clearly in violation of the Board's *Employee Code of Conduct*.

8. When a person believes, and had reasonable grounds to believe, that he was in danger of losing his life or suffering great bodily harm he is entitled to defend himself. *State v. Green*, 157 W. Va. 1031, 206 S.E.2d 923, (1974).

9. The evidence does not support a finding of self-defense as that concept is defined in law.

10. "Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record

and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case-by-case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995); *Crites v. Dep't of Health & Human Ser.*, Docket No. 2011-0216-DHHR (Nov. 16, 2011).

11. The Board evidently took Grievant's service and the circumstances into consideration and mitigated the punishment from the recommended dismissal to a long suspension. Further mitigation is unwarranted.

Accordingly, the grievance is **DENIED**

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2018).

DATE: JANUARY 31, 2020.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE