

# THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHRISTOPHER OWEN CUNNINGHAM,

Grievant,

v.

DOCKET NO. 2020-0771-CalED

CALHOUN COUNTY BOARD OF EDUCATION,

Respondent.

## DECISION

Grievant, Christopher Cunningham, is employed by the Respondent, Calhoun County Board of Education ("Board"), as a substitute teacher at the Calhoun County Middle/High School. Pursuant to W. VA. CODE § 6C-2-4(a)(4), Mr. Cunningham filed an expedited grievance to level three dated January 3, 2020, contesting a ten-day suspension without pay.<sup>1</sup> For relief he wants back pay, and the record of the discipline removed from all Board files.<sup>2</sup> A level three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board on November 20, 2020, via a video conference platform. Grievant appeared personally and was represented by Andrew J. Katz, Esquire, The Katz Working Families Law Firm LC. Respondent appeared in the person of Kelli Whytsell, Superintendent of Calhoun County Schools and was represented by Shannon Johnson, Calhoun County Prosecuting Attorney. This matter

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<sup>1</sup> Grievant attached a six-page statement to his grievance form which is incorporated into the record herein by reference.

<sup>2</sup> Grievant also seeks attorney fees. It is well established that the Grievance Board does not have the authority to award attorney fees. *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996). Consequently, that remedy will not be addressed herein.

became mature for decision on December 23, 2020, upon receipt of the last Proposed Findings of Fact and Conclusions of Law submitted by the parties.

### **Synopsis**

Grievant was suspended for ten days without pay for allegedly making a verbal threat to a student in a disciplinary situation. Respondent did not prove by a preponderance of the evidence that Grievant threatened the student. Rather, Grievant warned the student that he would have to restrain him if the student's aggressive behavior continued to escalate. Reasonable restraint would have been an appropriate reaction if the student's behavior had continued. Grievant's actions were an appropriate warning of potential consequences for bad behavior, not a threat. Additionally, any errors in judgement made by Grievant were related to his performance and lack of adequate training. Therefore, he was entitled to an opportunity to improve his performance prior to implementation of the penalties sent out in W. VA. CODE § 18A-2-8(a).

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. Grievant, Christopher Cunningham, is employed by Respondent, Calhoun County Board of Education ("Board") as a substitute teacher assigned to teach Art at Calhoun County Middle/High School ("CCM/HS").

2. Grievant is in the category of RESA<sup>3</sup> substitute teachers. These are individuals who do not hold a specific teacher degree or certification. Grievant has a degree in Art and Mathematics. To become a RESA substitute, one must complete a

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<sup>3</sup> Regional Education Service Agency.

series of e-learning courses through the West Virginia Department of Education. The course consists of a 30-day online program which lasts two to three hours a day. At the conclusion of the course, the individual receives a certificate authorizing them to serve as a substitute teacher. The course provides some information regarding classroom discipline but little to no training regarding how to deal with troubled students with chronic behavior issues.<sup>4</sup>

3. The Board has implemented a system-wide disciplinary program entitled “Love and Logic.” All regular teachers are trained in implementing this program. Grievant did not receive the “Love and Logic” training.

4. Grievant is assigned to an extended absence substitute teaching position in an Art class which is normally taught by his mother, a regular classroom teacher. His mother was recovering from an injury and was expected to be off work for at least thirty days or more.

5. On December 10, 2019, Grievant had been substituting in the Art class for eight consecutive days and was on hall duty between classes.<sup>5</sup>

6. While Grievant was conducting hall duty, an incident occurred involving Student “A”.<sup>6</sup> The incident was captured on the school’s videotape system. A composite of all the video footage was put together and admitted into evidence as Respondent

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<sup>4</sup> The Vice President of the Board testified that the Department of Education does a poor job in teaching substitutes how to handle problem students.

<sup>5</sup> During hall duty teachers stand in the hall between classes to monitor student behavior and ensure orderly progression of students from one class to the next.

<sup>6</sup> The letter “A” is used herein rather than the student’s name as is customary in Grievance Board decisions involving students who are minors.

Exhibit 1. The footage was compiled by Tyson Price, CCM/HS Curriculum and Technology Director.

7. The Art room, where Mr. Cunningham was substituting, is located next to the door from the stairway. While standing outside the classroom door, Grievant saw Student A barge through the doors leading from the stairs to the second floor. Student A slammed the stairwell door and nearly ran into Grievant as he was coming through the door. He was moving down the hall at a rapid pace. The hallway was crowded with students who were changing class. Student A is approximately the same size as Grievant if not a little taller.

8. Grievant told the student to be careful and the student replied “no.” Grievant told Student A to come back to talk with him. The student said “no” and continued down the hall. Grievant again directed the student to stop and the student again refused and continued walking.

9. In order to talk with the student, Grievant pursued him down one hall and then followed him into a second hallway. Grievant was concerned that Student A presented a danger to younger and smaller students because of the rapid and reckless way he was walking.

10. At one point, Grievant attempted to cut the student off. The student circled back, and Grievant became close with him as they circled. Grievant never tried grab or strike the student. While the student circled back, Grievant and Student A came close to

each other but Grievant made no physical contact. Grievant raised his arm to avoid contact with the student but did not move to strike him.<sup>7</sup>

11. The student continued down another hallway with Grievant following. At one point the student said Grievant was trying to sexually harass him. While moving through the hall they came near the classroom of the math teacher, Cathy Craddick, who was monitoring the hall from her classroom doorway. Because Student A would not stop, Grievant told him to get to the office, and the student talked back. Grievant was using a loud authoritative voice which was not inappropriate for a disciplinary situation.<sup>8</sup> When asked if Grievant's behavior was appropriate, Ms. Craddock found no problem with Grievant's tone, but noted that a more experienced teacher would not have followed Student A down the hallway.

12. The last time Grievant instructed Student A to go to the office, Student A turned and walked menacingly toward Grievant until he was within inches of Grievant's face and said in a loud tone "what are you going to do about it."

13. Grievant was concerned that he was about to be hit by Student A and told the student "Do not make me restrain you, I will put you on the ground."

14. Ms. Craddick stepped forward and gently placed her hand on Student A's shoulder and told him to stop. Student A turned away from Grievant and became less aggressive. Student A then proceeded toward the principal's office.

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<sup>7</sup> It was alleged by at least one administrator who reviewed the videotape that Grievant had raised his hand in a threatening manner to the student. Principal Stephenson continued to insist at the hearing that Grievant made physical contact with student's arm. These allegations were not supported by the video.

<sup>8</sup> Testimony of Cathy Craddick who is a well-respected and experienced teacher. Ms. Craddick was called to testify by Respondent and specifically stated that Grievant was not yelling.

15. Student A and six other students made complaints against Grievant to CCM/HS Assistant Principal, Gina Cano-Stump. Ms. Cano-Stump placed the students in a conference room and told them to write statements. They were not seated side-by-side but could easily walk around and talk with each other. Ms. Cano-Stump left the room to consult with CCM/HS Assistant Principal Jeremy Johnson. Consequently, no adult stayed in the room with the students while they wrote their statements. The secretary could observe them through a window while she worked but could not hear them.<sup>9</sup>

16. One student wrote that Grievant “yelled at [A] in a manner that was inappropriate and uncouth for a school setting.” The student wrote that Student A yelled back “what are you going to do about it.”

17. The five other students gave statements which were virtually identical. They alleged that Grievant grabbed Student A by the arm for no apparent reason and yelled at him. Student A started walking away and Grievant followed Student A down the hall and grabbed him by the arm again while yelling at him. They alleged Grievant told Student A he was going to knock him to the floor.<sup>10</sup>

18. Student A wrote that Grievant told him to come to him and Student A replied that he was going to get his stuff. Student A stated that Grievant tried to grab him and Student A yelled “don’t touch me.” Student A wrote that Grievant “got up in my face and yelled,” so he did the same thing back to Grievant. Student A did not say that Grievant touched him and did not say that he was frightened by Grievant at any time.

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<sup>9</sup> The secretary did not testify. It is not known whether she paid any attention to the students while they were writing their statements.

<sup>10</sup> The allegations made by the five students were totally unsupported by the video and appeared to be an agreed upon version of the events.

19. Ms. Cano-Stump called Superintendent Kelli Whytsell to report the situation. Superintendent Whytsell instructed Ms. Cano-Stump to conduct an investigation and give her a recommendation of action that evening. Ms. Cano-Stump also called Anita Stephenson, CCM/HS Principal, who was on sick leave, to report the incident to her.

20. Assistant Principals Cano-Stump, and Johnson, reviewed the statements and video with Michael Fitzpatrick COO of Administrative Services and Attendance Director. Assistant Principal Cano-Stump recommended that Grievant not be allowed to substitute anymore. In essence dismissing him from being a substitute teacher.

21. The next day December 11, 2019, Principal Stephenson interviewed the six students<sup>11</sup> and provided a letter to Superintendent Whytsell making the following findings:

All students indicated that Student A:

- Had created a loud banging sound with the stairway door outside the art room;
- Did not comply either time Grievant requested that Student A stop and talk with him, and that Student A continued to walk down the hall;

All students indicated that Grievant:

- Pursued A down the Hall and had a heated discussion;
- Told A to report to the principal's office;

Six students stated that:

- Grievant grabbed A by the forearm;
- When Grievant told A to go to the principal's office, A turned and stated, "What are you going to do about it?"

22. Principal Stephenson concluded the following:

My conclusion from the investigation is that [A] did slam a door. [A] did refuse to comply with Mr. Cunningham's request to speak with him which is an insubordinate behavior. Chris

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<sup>11</sup> At Grievant's request, three additional students who were in the hallway on December 10, 2019, were interviewed. No written statements were taken from these students and no summary of their statements were provided. Under such circumstances it may be inferred that the statements would have been supportive of Grievant's position and unsupportive of Respondent's case.

Cunningham did escalate the interaction by yelling at [A] and chasing him down the hallway. I conclude that Chris Cunningham did violate [A's] personal space escalating the situation. I find that Chris Cunningham made contact with [A's] forearm.

Principal Stephenson stated that she fully supported the recommendation made by the assistant principals. (Grievant Exhibit 1)

23. Contrary to the testimony of Principal Stephenson, none of the students interviewed, including Student A indicated in their statements that they feared for A's safety. Ms. Stephenson did not mention that in her report to Superintendent Whytsell and it is not reflected in the video. The video showed the students, including A, were smiling throughout the incident.<sup>12</sup>

24. The video taken of the incident did not have audio so the administrators who viewed had no personal knowledge of whether Grievant yelled or used an appropriate authoritative tone while addressing Student A.

25. Superintendent Whytsell provided Grievant with a letter of suspension dated December 10, 2019, suspending him with for 10 days beginning December 11, 2019, until January 6, 2020. The reason stated for the suspension were set out as follows:

It was alleged that you made inappropriate physical contact and verbally threatened a student. "Don't make me restrain you, I will put you on the ground" After an investigation conducted by school officials, it was determined that you made inappropriate physical contact and verbally threatened a student on December 10, 2019. That investigation, including video surveillance footage, teacher, and student statements, including your statement, confirms the serious nature of your misconduct. Please note that this incident has been reported to the Department of Health and Human Services and the WV State Police for investigation. This matter was investigated

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<sup>12</sup> Board Vice President Richard Kirby accurately noted that A had a "smirk" on his face as Grievant was trying to talk to him.



and each student in the group was interviewed and gave a written statement.

This document was drafted before Superintendent Whytsell spoke with Grievant.<sup>13</sup>

26. Superintendent Whytsell determined that Grievant's behavior violated State Board Policy 5902 (*Employee Code of Conduct*) by failing to meet the following expectations which state:

All West Virginia school employees shall:

- 4.2.1. exhibit professional behavior by showing positive examples of preparedness, communication, fairness, punctuality, attendance, language, and appearance
- 4.2.3. maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination.
- 4.2.4. create a culture of caring through understanding and support.
- 4.2.6. demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior.
- 4.2.7. comply with all Federal and West Virginia laws, policies, regulations and procedures.

27. Before Grievant was allowed to return from suspension he was additionally required to "receive professional development on how to handle student that have experienced trauma, FERPA and implementing IEP's as a sub." (Grievant Exhibit 3)

28. Superintendent Whytsell was not familiar with the training provided to Grievant regarding student discipline and did not know if Grievant had been provided training in the "Love and Logic" disciplinary program utilized in Calhoun County Schools.

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<sup>13</sup> (Grievant Exhibit 3) It is also unclear if Superintendent Whytsell had viewed the video prior to drafting this letter.

29. On December 16, 2019, the Board held a hearing and voted to uphold and adopt the Superintendent's recommendation.

30. Superintendent Whytsell notified Grievant of the Board action by letter dated December 17, 2019. In that letter, the reason for the suspension was changed and merely stated:

During a discipline incident with a student that refused to comply with your directions, it was alleged that you made a verbal threat to a student stating, "Don't make me restrain you; I will put you on the ground."

31. During the suspension period, Grievant met with COO for Student Services Jeannie Bennett and completed nine video training assignments related to student behavior and discipline. Ms. Bennett also discussed "Love and Logic" with Grievant and provided resources for him to review, as well as tips for classroom engagement. (Grievant Exhibit 4)

32. Grievant had not previously received any of that training. He found it very helpful. Had he had the training before the incident Grievant would have communicated with Student A differently by using a variety of communications and attempting to de-escalate the situation instead of repeating the command to stop.

### **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 reasons listed W. VA. CODE § 18A-2-8 for which a school public employee may be dismissed are set out as follows:

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, a finding of abuse by the Department of Health and Human Resources in accordance with §49-1-1 *et seq.* of this code, the conviction of a misdemeanor or a guilty plea or a plea of nolo contendere to a misdemeanor charge that has a rational nexus between the conduct and performance of the employee’s job, 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).

Superintendent Whytsell originally wrote that Grievant was suspended for making inappropriate physical contact with a student and verbally threatening him, which was the basis of her decision to suspend Grievant for ten days without pay. Following the hearing with the Board, the allegation of inappropriate physical contact was removed yet the punishment remained the same.

In her investigation report to Superintendent Whytsell, Principal Stephenson found that Student A slammed the stairway door, refused to comply with Grievant's requests, and was insubordinate.<sup>14</sup> She found the Grievant escalated the interaction by yelling at A and chasing him down the hallway, violated A's personal space, and made contact with his arm. She also testified that the students, including A, were frightened by Grievant's behavior. Since the video contained no audio, the conclusion that Grievant yelled at A was based upon the written and oral statements of students.

Conversely, Cathy Craddock, an experienced and respected teacher who personally witnessed the encounter, stated that Grievant did not yell at A but spoke to him in an authoritative voice which was not unusual or inappropriate. She did not indicate that Grievant threatened A. Her only negative comment regarding Grievant's action was that a more experienced teacher would not have followed A.

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*

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<sup>14</sup> Oddly, she testified that she did not believe that A received any punishment for his part in this interaction. She also left out the incident where A turned on Grievant in a threatening manner. As the school's chief administrator, she certainly would have known if the student was disciplined. This was just one example of the evasive nature of her testimony on cross examination.

*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).

A cursory examination of the students' statements show that they are not credible. First, they are nearly identical. They were allowed to sit in the same room and discuss their stories with no adult presence or supervision. Six of them stated that Grievant "grabbed" A by the arm twice. This statement was not consistent with the video, or the testimony of any of the adults who watched the video including the Board of Education. Specially revealing is the fact that Student A did not say that Grievant touched him.

Apparently, the students, including A, stated in their interviews that they were frightened by Grievant's behavior.<sup>15</sup> Yet none of them put that in their initial written statement and it was not supported by the video. On the video the students appeared to be curious and, in some cases smiling. None of them demonstrated any evidence of being afraid. Student A was smiling or "smirking" throughout the encounter. He showed no sign of fear. Rather he appeared to be amused by the situation until he turned and confronted Grievant.

The statement that Grievant yelled at A seem consistent with teenagers who always characterize any reprimand by an adult as "yelling" at them. It is obviously inaccurate hyperbole when viewed in light of the testimony of Cathey Craddock, an experienced teacher with no apparent bias and a very credible witness.

The testimony of Principal Stephenson lacks credibility as well. She is the only person who viewed the video who clings to the belief that Grievant made physical contact with A, in contradiction to the video evidence. She also mischaracterized A's demeanor on the video as frightened. She apparently did not check with Ms. Craddock to determine if Grievant did yell at the students. Rather she accepted their characterization of the incident even when it was apparent that they were embellishing their accounts with inaccurate information.<sup>16</sup>

The account of the incident given by Grievant was consistent with the video evidence. He stated that he did not make any contact with A and that he was not yelling at him. He admitted that he told A not to make him restrain A and that he would put him

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<sup>15</sup> Testimony of Principal Stephenson.

<sup>16</sup> The testimony of Assistant Principal Cano-Stump lacked credible for similar reasons.

on the ground. He also admitted that in retrospect, after he received training in effective discipline, he would have handled the situation differently. He was straight forward and candid when answering questions with no signs of evasion. Grievant also testified that when A turned toward him, got very close to him and said “What are you going to do about it” that he was concerned that A was going to strike him. His testimony was credible and consistent with the video evidence as well as the testimony of Ms. Craddock.

All the testimony notwithstanding, in the final analysis Grievant was only charged with making a verbal threat to Student A by saying, “Don’t make me restrain you; I will put you on the ground.” Grievant does not deny making this statement. Therefore, the issue is whether, under the circumstances, that statement constitutes a threat.

The video conclusively shows that while walking away from Grievant for some time, Student A suddenly turned and walked toward Grievant who then stopped. The student who is taller than Grievant got within inches of Grievant’s face and loudly said, “what are you going to do about it.” Grievant testified that he believed A was about to strike him. Given the circumstances, that concern was not unreasonable. That is when he made the statement in question.<sup>17</sup>

State Board of Education Policy 4373, *EXPECTED BEHAVIOR IN SAFE AND SUPPORTIVE SCHOOLS*, at section five addresses use of restraint by a school employee. That section states the following:

Restraint, reasonable force, may be used to prevent a student from hurting himself/herself or any other person or property. Behavior interventions and support practices must be

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<sup>17</sup> There are a number of things Grievant could have done in this situation including backing away from A. All the actions could have had positive or negative consequences in this volatile situation the result of other scenarios is merely speculation. The question here remains whether Grievant’s statement constituted a threat.

implemented in such a way as to protect the health and safety of the student and others.

W. VA. CODE ST. R. § 126.99.5

If Grievant reasonably believed that A was about to hurt him, Grievant was authorized by this policy to use reasonable force to restrain the student. Instead he informed the student of what could happen if A proceeded along his current course of action. Under these circumstances, Grievant's statement was a warning of appropriate potential consequences for bad behavior, not a threat.<sup>18</sup> It is noteworthy that the policy also states:

Any non-trained personnel called upon to use restraint in an emergency must receive training within 30 days following the use of restraint if the principal determines the situation is likely to reoccur.

W. VA. CODE ST. R. § 126.99.5. The policy contemplates that circumstances may arise when an employee must use restraint when they have not been trained in the accepted techniques, like Grievant. The remedy assigned is that the person who acted with reasonable force must receive training, not a suspension. Given the totality of the circumstances, Respondent did not prove by a preponderance of the evidence that Grievant verbally threatened Student A.

The evidence supports that Grievant may have made an error in judgement in following Student A down the hallway in the first place. Although not mentioned as a reason for discipline, that issue was raised repeatedly in testimony. Ms. Craddock testified

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<sup>18</sup> Grievant did not threaten A with bodily harm. In these circumstances, his statement is similar to telling the student he was going to be taken to the office or that he was going to be suspended. Such warnings are routinely characterized as threats by the students who receive them.



that a more experienced teacher would not have done that. Even if Respondent proved that Grievant made such an error, a ten-day suspension was not justified.

Grievant argues that his behavior was correctable, and he was entitled to an opportunity to correct that conduct before he was suspended. The provisions of State Board Policy 5300 have since been codified in W. VA. CODE § 18A-2-12a which states 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 of this article. All school personnel are entitled to opportunities to improve their job performance prior to the termination or transfer of their services. Decisions concerning the promotion, demotion, transfer or termination of employment of school personnel, other than those for lack of need or governed by specific statutory provisions unrelated to performance, should be based upon the evaluations, and not upon factors extraneous thereto. All school personnel are entitled to due process in matters affecting their employment, transfer, demotion or promotion.

The West Virginia Supreme Court of Appeals has made it clear that it is not the label given to the conduct that controls the application of W. VA. CODE § 18A-2-12a, but whether the conduct was related to Grievant's performance and is correctable. Accordingly, even when Respondent labels Grievant's conduct as "willful neglect of duty" or "insubordination" where the underlying complaints regarding an employee's conduct relate to his employment "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). 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 forming the basis of dismissal involves professional incompetency and whether it directly and substantially affects the morals, safety, and health of the system in a permanent, non-correctable manner.” *Mason County Bd. of Educ., supra*. See *Williams v. Lincoln County Bd. of Educ.*, Docket No. 2012-0669-LinED (Oct. 23, 2012). The Grievance Board has applied the concepts of correctable conduct to substitute teachers in at least three prior decisions, holding that before penalties provided in W. VA. CODE § 18A-2-8 may be applied the substitute is entitled to an opportunity improve if their conduct is correctable. See *McComas v. Mercer County Bd. of Educ.*, Docket No. 2014-1489-MerED (Oct. 24, 2014); *Carson v. Kanawha County Bd. of Educ.*, Docket No. 2012-0633-KanED (July 31, 2021) and *Ruddle v. Randolph County Bd. of Educ.*, Docket No. 2019-0534-RanED (Jan. 31, 2020).

In this case, Grievant did not have the necessary bad intent for his performance to be considered insubordination or willful neglect of duty. The hallmark of both allegations is intentional disobedience. The Supreme Court had stated that the disobedience must be willful, meaning that "the motivation for the disobedience [was] contumaciousness or a defiance of, or contempt for authority." *Butts v. Higher Educ. Interim Governing Bd./Shepherd Coll.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). Grievant did not have that motivation. He was merely attempting to deal with a student's misbehavior and insubordination.

If Grievant's efforts at discipline were misguided, that conduct was related to his performance and correctable. In fact, they were corrected. Grievant was required to participate in training related to discipline prior to returning as a substitute. Grievant completed all the required staff development and admitted that he learned new

techniques that would have been useful in avoiding the escalation of the incident herein. This was training that he did not receive in the limited RESA substitute training. Because any misconduct he may have committed was correctable. Grievant was entitled to an opportunity to improve his performance prior to being suspended.

Accordingly, the grievance is GRANTED.

### **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). *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).

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 reasons listed W. VA. CODE § 18A-2-8 for which a school public employee may be dismissed are set out as follows:

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, a finding of abuse by the Department of Health and Human Resources in accordance with §49-1-1 *et seq.* of this code, the conviction of a misdemeanor or a guilty plea or a plea of nolo contendere to a misdemeanor charge that has a rational nexus between the conduct and performance of the employee's job, 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. State Board of Education Policy 4373, *EXPECTED BEHAVIOR IN SAFE AND SUPPORTIVE SCHOOLS*, at section five addresses use of restraint by a school employee. That section states the following:

Restraint, reasonable force, may be used to prevent a student from hurting himself/herself or any other person or property. Behavior interventions and support practices must be implemented in such a way as to protect the health and safety of the student and others.

W. VA. CODE ST. R. § 126.99.5

5. Under these circumstances, Grievant's statement "Don't make me restrain you, I will take you to the ground" was a warning of appropriate potential consequences for bad behavior, not a threat. Respondent did not prove by a preponderance of the evidence that Grievant verbally threatened Student A.

6. The provisions of State Board Policy 5300 have since been codified in W. VA. CODE § 18A-2-12a which states 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 of this article. All school personnel are entitled to opportunities to improve their job performance prior to the termination or transfer of their services. Decisions concerning the promotion, demotion, transfer or termination of employment of school personnel, other than those for lack of need or governed by specific statutory provisions unrelated to

performance, should be based upon the evaluations, and not upon factors extraneous thereto. All school personnel are entitled to due process in matters affecting their employment, transfer, demotion or promotion.

7. It is not the label given to the conduct that controls the application of W. VA. CODE § 18A-2-12a, but whether the conduct was related to Grievant's performance and is correctable. Accordingly, even when Respondent labels Grievant's conduct as "willful neglect of duty" or "insubordination" where the underlying complaints regarding an employee's conduct relate to his employment "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).

8. 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 forming the basis of dismissal involves professional incompetency and whether it directly and substantially affects the morals, safety, and health of the system in a permanent, non-correctable manner." *Mason County Bd. of Educ.*, *supra*. See *Williams v. Lincoln County Bd. of Educ.*, Docket No. 2012-0669-LinED (Oct. 23, 2012).

9. The Grievance Board has applied the concepts of correctable conduct to substitute teachers in at least three prior decisions, holding that before penalties provided in W. VA. CODE § 18A-2-8 may be applied the substitute is entitled to an opportunity improve if their conduct is correctable. See *McComas v. Mercer County Bd. of Educ.*, Docket No. 2014-1489-MerED (Oct. 24, 2014); *Carson v. Kanawha County Bd. of Educ.*, Docket No. 2012-0633-KanED (July 31, 2021) and *Ruddle v. Randolph County Bd. of Educ.*, Docket No. 2019-0534-RanED (Jan. 31, 2020).

10. The hallmark of both allegations is intentional disobedience. The Supreme Court had stated that the disobedience must be willful, meaning that "the motivation for the disobedience [was] contumaciousness or a defiance of, or contempt for authority." *Butts v. Higher Educ. Interim Governing Bd./Shepherd Coll.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curium*). Grievant did not have that motivation.

11. Respondent did not prove by a preponderance of the evidence that Grievant intentionally violated policy or refused to follow specific instructions. Grievant's conduct was related to his performance and correctable.

12. Grievant was entitled to an opportunity to improve his performance prior to being suspended.

Accordingly, the grievance is GRANTED.

Respondent is ORDERED to pay Grievant back pay for all days he missed as a substitute teacher as a result of his suspension plus statutory interest from the time he was suspended until he receives the back pay, as well as remove all reference to the suspension from all files related to Grievant whether on paper or electronic.

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: FEBRUARY 4, 2021**

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**WILLIAM B. MCGINLEY  
ADMINISTRATIVE LAW JUDGE**