THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

WILLIAM J. THORNTON,

Grievant,

v. **Docket No. 2021-2337-CONS**

MERCER COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, William J. Thornton, filed a level one grievance against his employer, Mercer County Board of Education, dated February 24, 2021, challenging a written reprimand asserting that he had permission for his actions and that his actions were misinterpreted and misunderstood. As relief sought, Grievant states, "Harassment stop. This will be the fourth hearing/mediation from insubordination to reprimand to memorandum." This grievance was assigned the docket number 2021-2246-MerED. Grievant filed a second level one grievance dated March 30, 2021, stating as follows: "Letter of memorandum and reprimand, false, unproven, and something all employees are doing. Brittany Reed Mike and Sue have this in an uncontrol (sic) way. Reporting to Ms. Terry supervisor." As relief sought, Grievant states "Repeated pattern I have sought to resolve issue." This grievance was assigned docket number 2021-2333-MerED. These two grievances were consolidated at level one and assigned docket number 2021-2337-CONS. Grievant filed an expedited level three grievance dated June 15, 2021, stating as follows: "Grievant is a regularly employed custodian. Respondent has suspended Grievant without pay and is being terminated. Respondent's actions of suspending and terminating Grievant are in violation of 18A-2-8. Respondent's actions

are based on retaliation for requesting a representative be present during possible disciplinary meetings. 6C-2-2 and 6C-2-3. Respondent's actions are based on perpetuating a hostile work environment." As relief sought, "Grievant seeks reinstatement, back pay, with interest, reinstatement and restoration of any and all seniority rights and other benefits; Cessation of hostile work environment, and any other relief that may be granted." This grievance was assigned docket number 2021-2520-MerED. By Order entered September 1, 2021, this grievance was consolidated with docket number 2021-2337-CONS. The parties agreed to waive the matters pending at level two for mediation to level three. This consolidated grievance then proceeded to level thee of the grievance procedure for hearing.

The first two consolidated grievances were denied. There is a level one decision, but it is undated. After the consolidation of the third grievance and the parties' agreement to waive, a level three hearing was conducted on January 27, 2022, via Zoom video conferencing, before the undersigned administrative law judge appearing from the Grievance Board's Charleston, West Virginia, office.[1] Grievant appeared in person via Zoom and by his representative, Gordon Simmons, West Virginia School Service Personnel Association (WVSSPA). Respondent, Mercer County Board of Education, appeared by counsel, Kermit J. Moore, Esquire, Brewster Morhaus, PLLC, and was represented by Mary Terry, Principal, both of whom appeared via Zoom from the office of the Mercer County Board of Education. This matter became mature for consideration on

[1] This grievance was originally scheduled to be heard on January 7, 2022. However, due to inclement weather and the cancellation of school, that hearing was continued and the matter was rescheduled for hearing on January 27, 2022.

February 28, 2022, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a custodian. Respondent issued Grievant two separate written reprimands for alleged violations of the Employee Code of Conduct and insubordination dated February 9, 2021, and March 18, 2021. Sometime later, Respondent issued Grievant three more written reprimands in May 2021 that pertained to his conduct toward the principal, failing to complete his assignments, and failing to follow the protocol for being late to work. Grievant did not specifically grieve those. It appears though, that Grievant was suspended without pay as a result of one, or more, of the May 2021 written reprimands, which he mentioned in his statement of grievance. Respondent subsequently terminated Grievant's employment contract for misconduct and insubordination. Grievant denies Respondent's allegations. Grievant raises harassment, reprisal, and hostile work environmental as defenses to the charges.

Respondent proved by a preponderance of the evidence that Grievant was insubordinate and that he violated the Employee Code of Conduct by his actions toward the school principal and his coworkers. Respondent failed to prove that Grievant violated Policy 3.2 which was the subject of the February 9, 2021, grievance. Respondent proved the charges against Grievant set forth in the March 18, 2021, written reprimand. Accordingly, the discipline imposed was justified. Grievant failed to prove that Respondent's actions in imposing discipline were the result of harassment, reprisal, or hostile work environment. Accordingly, the grievance is DENIED.

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

Findings of Fact

1. Grievant was employed by Respondent as a Custodian at Mountain Valley Elementary School. Grievant had been employed by Respondent since June 23, 1998. It is noted that on some of the documents received in this matter, Grievant's job title is listed as "Head Custodian."

2. At the times relevant herein, Dr. Debra Akers was the Superintendent of Mercer County Schools. As of the date of the level three hearing, Dr. Akers had retired from this position.

3. At the times relevant herein, Mary Terry was the Principal at Mountain Valley Elementary School. As of the date of the level three hearing, Ms. Terry had retired from her position. Principal Terry was Grievant's direct supervisor.

4. Grievant's job performance was evaluated yearly by his employer. Grievant's performance evaluations are varied. In some, he appears to have met, and even exceeded, expectations, but in others, he largely failed to meet expectations. It appears that his performance may have been related to where and with whom he was assigned to work. Ms. Terry evaluated Grievant's performance while he was at Mountain Valley Elementary School.[2]

5. On Friday, February 5, 2021, Grievant asked Amy Rickman, who taught fourth grade at that time, if he could bring a bag candy to her classroom for the students.

[2] *See*, Grievant's Exhibit 2, Performance Evaluations.

Ms. Rickman answered, “yeah, sure.” There is a dispute as to whether Grievant asked to bring the candy for a particular student or for that student and her classmates.

6. On February 9, 2021, when Ms. Rickman arrived at her classroom, there was a small bag of candy, containing about twenty pieces, or so, in her chair. Despite having told Grievant that he could bring the candy, Ms. Rickman began to think that something was not right about it. Thereafter, she informed the school counselor and Principal Terry that Grievant had brought the candy.[3]

7. On February 9, 2021, Principal Terry issued Grievant a written reprimand for bringing the bag of candy, stating as follows:

> Mr. Thornton had come by a teacher’s room on Friday, February 5, 2021, and asked if he could leave a bag of Kit Kats for one of her students. When she came to work this morning, she found a bag of Kit Kats in her chair. This kind of interaction is never appropriate. Upon speaking with the student, a similar incident had occurred last year at Ceres. Mr. Thornton had given her a box of donuts and a container of slime. Mr. Thornton has been required to review Policy G-24 “Employee Code of Conduct” yearly and has signed documentation to the effect.
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> Action taken due to the incident: According to Policy G-24 “Employee Code of Conduct,” this is inappropriate behavior between an employee and student. Therefore, Mr. Thornton will receive a written reprimand for his behavior. He will also receive a copy of the policy and the principal, Mary Terry, will review the policy with Mr. Thornton. Mr. Thornton has been provided this written reprimand. Any further behavior will result in a recommendation of additional disciplinary action.”

As noted at the bottom of page 2 of the written reprimand, Grievant refused to sign.[4]

[3] The name of the school counselor is unknown.

[4] *See*, Respondent’s Exhibit 1, February 9, 2021, Written Reprimand.

8. On March 18, 2021, Principal Terry issued Grievant another written reprimand which states as follows:

> Mr. Thornton had a verbal dispute with a teacher in front of the office. I went out and asked the aide (with student standing at the rear office door) and the teacher (in front of the main office door) to leave. I asked Mr. Thornton what the issue was. He responded that he was not talking to me and walked off. I consider Mr. Thornton's behavior insubordinate. He refused to respond to a question from his immediate supervisor.
>
> Action taken due to the incident: Mr. Thornton is currently on a Plan of Improvement for a similar incident on October 23, 2020, with a different employee and myself.[5] His improvement plan includes deficiencies in 1.6.1.0 Indicator-Has a good job attitude and is cooperative, 1.6.2.0 Indicator-Conduct (honesty, integrity, respectfulness, uses good judgment). Mr. Thornton's behavior continues to be an issue and is in direct violation of his current plan of improvement. He has received a Memorandum of Conference about insubordinate behavior occurring on October 23, 2020. As Mr. Thornton's direct supervisor, it is my responsibility to maintain the school environment. Anything that is disrupting the normal school day must be handled. I consider Mr. Thornton's refusal to discuss the matter insubordination. Mr. Thornton is receiving this written reprimand. A copy will be sent to Human Resources as well as to Rick Ball, Assistant Superintendent of Schools.

As noted at the bottom of page 2 of the written reprimand, Grievant refused to sign.[6]

9. The incident described in the March 18, 2021, written reprimand apparently occurred on March 17, 2021.[7]

10. The identities of the teacher, aide, and student involved in the March 17, 2021, incident are unknown. Neither were called to testify at the level three hearing.

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[5] This improvement plan was not presented as evidence at the level three hearing.
[6] *See*, Respondent's Exhibit 2, March 18, 2021, Written Reprimand.
[7] *See*, Respondent's Exhibit 3, Memorandum of Conference.

11. Principal Terry did not witness the entire March 17, 2021, incident first hand. Instead, she relied on the written statements of the teacher and the aide, as well as a video recording, which lacked audio, to make her decision to issue Grievant the written reprimand. No such video was introduced as evidence at level three. It does not appear that Grievant was asked to write a statement and he was not provided copies of the statements of the teacher and aide.

12. On that same day, March 18, 2021, Principal Terry, Assistant Superintendent Rick Ball, and Grievant met to discuss the incident that occurred on March 17, 2021, as reflected in the corresponding written reprimand. Grievant's WVSSPA representative, Alex Urban, Esq., attended this conference telephonically.

13. On March 29, 2021, Grievant was issued a Memorandum of Conference which lists eighteen enumerated paragraphs concerning the matters discussed at the conference on March 18, 2021, among Grievant, Mr. Urban, Principal Terry, and Assistant Superintendent Ball about the March 17, 2021, incident.[8] This document states that the teacher and the aide involved provided written statements about the incident, that there was a video recording of the same, and that two other female employees had complained about Grievant "throwing" them "kisses" and that there was video of that as well.

14. No written statements, video recordings, or complaints about "throwing kisses" were presented at the level three hearing. Further, there are no written reprimands or other documentation about "throwing kisses." The identities of those female employees are also unknown.

[8] The date on page one of this document is March 22, 2021. However, the signature on page two is dated March 29, 2021. This ALJ presumes that the document was presented to Grievant on March 29, 2021.

15. On May 5, 2021, Principal Terry issued Grievant another written reprimand. This one pertained to his being late (by fifteen minutes), not calling the office to inform someone that he was running late, and for failing to empty the lunch trash that same day. The written reprimand also states that when Principal Terry asked why Grievant was late, he replied "traffic," and went on to tell her that he did not have to call in to tell anyone he was running late, and that "you can call my lawyer and he'll tell you." In the "action taken" section of the document, Principal Terry states: "Mr. Thornton has not followed appropriate procedures when being delayed in the morning. He is also insubordinate in his response and behavior. He did not complete his assigned daily duties. I have reviewed this written reprimand with Mr. Thornton, and he has received a copy. I am also recommending disciplinary action by requesting he be suspended for 3 days without pay for continued insubordination." This written reprimand is not signed by either Grievant or Principal Terry, or another administrator.[9]

16. Principal Terry issued Grievant another written reprimand dated May 24, 2021, because Grievant refused to meet with her about his improvement plan because his lawyer was not present. In the "action taken" section of the document, Principal Terry states the following: "Mr. Thornton refused to meet with me to review his improvement plan. I consider this insubordination and I will request he receive 1 day of suspension without pay. Neither Principal Terry nor Grievant signed this document. Both signature lines are blank.[10]

[9] *See*, Respondent's Exhibit 4, May 5, 2021, "Written Reprimand."
[10] *See*, Respondent's Exhibit 5, May 24, 2021, "Written Reprimand."

17. Principal Terry was aware that Mr. Urban was Grievant's counsel, and she did not try to schedule a meeting with Grievant and his counsel for the purpose of going over his improvement plan.

18. Respondent terminated Grievant's employment in or about June 2021, and the same is not disputed by either party. However, Respondent presented no documentation pertaining to Grievant's dismissal at the level three hearing, and such is not otherwise part of the record of this grievance.

19. Respondent failed to present any correspondence it sent to Grievant about his dismissal at the level three hearing. Further, Respondent failed to present any records of the Mercer County Board of Education regarding Grievant's dismissal.

20. The teacher and aide mentioned in the March 18, 2021, written reprimand and Memorandum of Conference were not called as witnesses by either party at the level three hearing.

21. It is unknown whether Grievant was actually suspended without pay as Principal Terry had requested in the written reprimands, and if so, when.

22. Grievant had a habit of threatening to sue coworkers and other Mercer County Schools employees, including Principal Terry.

23. Grievant filed a slander suit against Amy Rickman in the Mercer County court system at some time before the level three hearing. As of the time of the level three hearing, the lawsuit had been dismissed. No other information is known about that legal action.

24. Respondent introduced no documentary evidence pertaining to Grievant's dismissal.

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 its decision to reprimand and suspend Grievant, and subsequently terminate his employment contract, was justified because of Grievant engaged in acts of insubordination in that he refused to follow directives from his supervisor, failed to comply with his plan of improvement, and violated provisions of the Employee Code of Conduct with his conduct with Principal Terry and other coworkers. Grievant denies Respondent's allegations, and asserts harassment, reprisal, and hostile work environment as defenses to the disciplinary action he grieves herein.

WEST VIRGINIA CODE §18A-2-8 states, in part, that,

> (a) Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, a finding of abuse by the Department of Health and Human Resources in accordance §49-1-1 et seq. of this code, the conviction of a misdemeanor or a guilty plea or a please 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. . .

> (b) A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to § 18A-2-12 of this code. The charges shall be stated in writing served upon the employee within two days of presentation of the charges 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. Ca. 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); *Duruttya v. Mingo County Bd. of Educ.*, Docket No. 29-88-104 (Feb. 28, 1990).

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 & 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).

While Respondent failed to produce any documentary evidence pertaining to Grievant's dismissal, neither party disputes that Grievant was dismissed from employment in or about June 2021, for insubordination and policy violations. Grievant denies being insubordinate and denies violating policy. 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 Univ.*, 182 W. Va. 294, 387 S.E.2d 529 (1989).

Mercer County Schools Policy G-24, Employee Code of Conduct states, in part, as follows:

> All Mercer County school employees shall:
>
> 3.1.1. Exhibit professional behavior by showing positive examples of preparedness, communication, fairness, punctuality, attendance, language, and . . .
>
> 3.1.1.f. Comply with all directives from immediate supervisor as well as those found in school policy. . .
>
> 3.1.7. Demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior. . .
>
> 3.2 . . . Employees and students will not engage or attempt to engage in any nonprofessional social behavior with each other. . . .

Respondent relied on the testimony of Principal Terry for the bulk of its case in chief. From the evidence presented, it is apparent that Grievant and Principal Terry have had a strained relationship for some time. Principal Terry was Grievant's direct supervisor. Grievant often refused to speak with her when she attempted to address an

issue, such as the argument Grievant had with the unnamed teacher and aide, and it was not simply because his representative was not present. Further, if Grievant did not wish to speak with Principal Terry unless his representative was present, he could have said so in a calm, respectful manner and made arrangements for his counsel to contact Principal Terry to arrange a time. Instead, Grievant would become defensive and angry and walk away making statements like he "did not have to speak with her and that his lawyer said so." However, Principal Terry's testimony, during which she stated that she did not know the identity of Grievant's lawyer, was disingenuous. Principal Terry had spoken to Mr. Urban about some other matters relating to Grievant. Grievant flatly refused to meet with Principal Terry about his improvement plan and when Principal Terry was trying to let him know that the time of a scheduled meeting had been changed. Whether the improvement plan was disciplinary or not, Grievant was allowed to have his representative present for such a meeting, and if he requested it, he should have received it. However, neither Grievant nor Principal Terry handled these situations correctly. Grievant just refused to meet with Principal Terry. Grievant was defiant toward Principal Terry and made statements like "I don't have to," "no," and "get a lawyer." Neither Grievant nor Principal Terry attempted to schedule the meeting to allow Grievant's attorney to be present. It is readily apparent that Grievant has been rude and argumentative with Principal Terry, and that he has raised his voice to her and threatened her, as well as other coworkers, with legal action.[11] This behavior is unacceptable and violates Policy G-24, Sections 3.1.1. and 3.1.7.

[11] *See*, testimony of Amy Rickman; testimony of Mary Terry.

Principal Terry did not personally witness the entirety of all the incidents cited as the bases for Grievant's discipline, such as the incident that occurred in the hallway between Grievant and the unnamed teacher and aide. That incident resulted in Grievant being issued another written reprimand. Therefore, some of Principal Terry's testimony was hearsay. Principal Terry testified that the aide came into her office and asked her to come out into the hallway asserting that Grievant was "acting crazy." Thereafter, Principal Terry went out into the hallway at which time she saw Grievant and the teacher, both of whom immediately stopped speaking. At that time, Principal Terry sent the teacher and the aide away, then asked Grievant what the problem was. Grievant replied something to the effect of "I am not talking to you," and then walked away.

"Hearsay includes any statement made outside the present proceeding which is offered as evidence of the truth of the matter asserted." BLACK'S LAW DICTIONARY 722 (6th ed. 1990). "Hearsay evidence is generally admissible in grievance proceedings. The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings." *Gunnells v. Logan County Bd. of Educ.,* Docket No. 97-23-055 (Dec. 9, 1997). The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other

information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *Id.*; *See Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-H-115 (June 8, 1990).

It is unknown why Respondent failed to call the teacher and the aide as witnesses at the level three hearing. There has been no assertion that either was unavailable. To the extent that Principal Terry testified as to what was said before she came into the hallway, it is hearsay and is entitled no weight. Principal Terry has asserted that the teacher and the aide completed written statements as to what happened in the hallway before she arrived, but those written statements were not presented as evidence in this matter. Also, Respondent failed to present the video from the hallway that Principal Terry testified she viewed and considered when making the decision to issue another written reprimand. Despite this, Grievant's actions toward Principal Terry are unacceptable.

As for the February 9, 2021, written reprimand issued because Grievant left candy for a student or the students of Ms. Rickman, no policy was presented to suggest that such actions were prohibited. Respondent cites Mercer County Schools Policy G-24, section 3.2 as the basis for the written reprimand imposed. That section of the policy deals with prohibited behavior between students and employees, such as inappropriate romantic relationships. The part of this policy specifically relied upon by Respondent states, "[e]mployees and students will not engage or attempt to engage in any

nonprofessional social behavior with each other."[12] The evidence presented does not prove by a preponderance of the evidence that any such prohibited activity occurred. It is undisputed that Ms. Rickman gave Grievant the permission to bring the candy. It is disputed whether the candy was intended for one student or the whole class. The evidence at level three demonstrated that aides, or staff, bringing treats for the students is, at least, fairly common. While Grievant was the custodian and not a teacher or aide, he still had permission to bring the candy. Respondent has the burden of proof. Respondent did not prove that Grievant brought the candy only for the one student or for some inappropriate reason in violation of the Employee Code of Conduct. Grievant alleged the candy was for the whole class; Respondent argues that it was for one particular child.

The bag of candy contained about twenty pieces and Grievant left it in the teacher's chair. It was not left on the one particular student's desk and the student's name was not attached to it in any way. It was only after Ms. Rickman saw the candy at her desk that she thought she needed to report it. Further, Respondent presented no evidence other than the testimony of Principal Terry to support its argument that Grievant had singled out a particular student and had brought her doughnuts and a can of slime during the previous school year. No written reprimand or other documentation of this other alleged incident was introduced at the level three hearing. Without more, Principal Terry's statements are mere allegations. Respondent had access to Grievant's personnel file and had the ability to call witnesses, but chose not to present any additional evidence on this issue.

[12] *See*, Respondent's Exhibit 9, "Employee Code of Conduct."

In his post-hearing submissions, Grievant appears to assert that his conduct as detailed herein was correctable, and as such, he was entitled to an improvement period instead of dismissal. Grievant presented his counselor, Kathy Wyrick, as a witness at level three, who asserted that Grievant could improve. Ms. Wyrick attempted to "mediate" the conflict between Grievant and Principal Terry. Ms. Wyrick used the Messenger application to contact Principal Terry. However, Principal Terry did not reply for many months. Ms. Wyrick did not attempt to call Principal Terry or follow up with her when her message went unanswered. Ms. Wyrick's comments alone do not make Grievant's actions correctible.

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:

> [o]ur 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.

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.*

In this case, Grievant's job performance was not the main reason he was issued written reprimands, suspended, and subsequently dismissed. It was Grievant's behavior and his conduct toward Principal Terry and his coworkers that caused the discipline to be imposed. Work performance was mentioned in some of the disciplinary documents, but his conduct was the main offense. Grievant's conduct toward Principal Terry and his coworkers never improved. If anything, Grievant's conduct and behavior became worse

over time. Grievant argues that he was disciplined for wanting his representative present for meetings with Principal Terry. As stated above, Grievant was not disciplined for asking for his attorney to be in attendance. He was disciplined for his conduct toward Principal Terry and his coworkers.

Given the evidence presented, Respondent has proved that Grievant was insubordinate and that he violated Mercer County Schools Policy G-24, Employee Code of Conduct repeatedly from March 2021 up to the date of his suspension without pay and the termination of his employment contract. Given Grievant's undisputed conduct toward his coworkers and Principal Terry, this ALJ cannot find that the disciplinary actions discussed herein were arbitrary and capricious, or otherwise unreasonable. Grievant's conduct was not correctible given the number and frequency of incidents. Grievant has failed to present sufficient evidence of the defenses he raised. Accordingly, this grievance is DENIED.

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." *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*.

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, a finding of abuse by the Department of Health and Human Resources in accordance §49-1-1 et seq. of this code, the conviction of a misdemeanor or a guilty plea or a please 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. . . .

Id.

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. Ca. 1067, 216 S.E.2d 554 (1975)." *Graham v. Putnam County Bd. of Educ.,* Docket No. 99-40-206 (Sep. 30, 1999).

4. 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).

5. 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.

6. 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). "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); *Duruttya v. Mingo County Bd. of Educ.*, Docket No. 29-88-104 (Feb. 28, 1990).

7. 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.

8. 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. *See Mason County Bd. of Educ. v. State Superintendent of Sch.,* 165 W. Va. 732, 274 S.E.2d 435 (1980).

9. 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.*

10. Grievant's conduct was not correctable because it did not relate to his competency as a custodian. Grievant's conduct directly and substantially affected the morals, safety, and health of the system in a permanent, non-correctable manner.

11. Respondent proved by a preponderance of the evidence that Grievant was insubordinate and that he violated the Employee Code of Conduct numerous times and that the disciplinary actions imposed on him were justified.

12. Respondent failed to prove by a preponderance of the evidence that the Grievant violated the Employee Code of Conduct as stated in the February 9, 2022, written reprimand.

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 (eff. July 7, 2018).

DATE: April 20, 2021.

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Carrie H. LeFevre
Administrative Law Judge