

**RAY MILLER,**

**Grievant,**

**v. DOCKET NO. 96-MCVTC-162**

**JAMES RUMSEY VOCATIONAL TECHNICAL CENTER,**

**Respondent.**

### **DECISION**

On April 24, 1996, Grievant, Ray Miller, submitted this grievance directly to Level IV, in accordance with W. Va. Code §18A-2-8, challenging his termination by Respondent, James Rumsey Vocational Technical Center. Grievant alleges that his termination is clearly wrong, and in violation of West Virginia law. As relief, Grievant seeks reinstatement, back pay, and attorney fees. On July 15, 1996, an evidentiary hearing was held in Respondent's board room in Martinsburg, West Virginia. On September 3, 1996, this case became mature upon receipt of the Level IV transcript.

The following facts are derived from the record created at the July 15, 1996, Level IV evidentiary hearing.

### **FINDINGS OF FACT**

1. Grievant was employed by Respondent as a secondary education Automotive Instructor from August, 1975, until his termination. LIV 211. [\(See footnote 1\)](#)
2. Grievant was terminated on April 19, 1996, because he did not complete the required documentation for ASE certification in four areas of instruction.
3. Respondent labeled Grievant's failure insubordination and willful neglect of duty. TH 151.
4. Grievant was given sufficient notice and time to complete and receive Automotive Service of

Excellence (ASE) certification through the National Automotive Technicians Education Foundation (NATEF). [\(See footnote 2\)](#) LIV 36.

5. Grievant learned that ASE certification was desired by the West Virginia Department of Education (DOE) at least as early as August 19, 1993. TH R Ex 1, and LIV 109.

6. Grievant received the following memorandum dated January 10, 1995, from Mr. Adam Sponaule, Division of Technical and Adult Education Services, DOE, to selected technical and adult education instructors, and automotive technology instructors. It states, in pertinent part:

It is very important that our automotive technology program in the state become Automotive Service of Excellence (ASE) certified. The ASE is recognized by the automotive industry nationally, therefore, students will have a competitive edge when applying for employment. Also, certification adds student credentialing, [sic] prestige and credibility to the program.

According to our records, twenty-seven schools out of the thirty-seven schools that offer automotive technology programs either are already ASE certified or in the process. I commend those schools that are already certified. I encourage those in the process to complete that initiative and challenge the other schools that have not started the certification process to do so immediately.

I believe it is important enough for all of our schools to become ASE certified that I am establishing a goal of July 1, 1996, for all automotive technology programs to be certified in order to continue to receive vocational education funding.

Our staff is very anxious and willing to assist in anyway possible in the certification process. If you have questions or need assistance, please contact Ralph Green at 558-6314.

TH R Ex 2, and LIV 109.

7. Grievant received the following revised memorandum dated January 25, 1995, from Mr. Sponaule that was sent to selected technical and adult education instructors, and automotive Technology instructors. This memo modified the fourth paragraph of the above memorandum as follows:

I believe it is important enough for all of our schools to become ASE certified in at least four (4) automotive areas that I am establishing a goal of July 1, 1996, for all automotive technology programs to be certified in order to continue to receive vocational education funding.

TH R Ex 3, and LIV 111.

8. On April 25, 1995, Grievant and Mr. Rinker, Grievant's immediate supervisor, attended a seminar entitled "NATEF PROGRAM CERTIFICATION" at the United Technical Center in Clarksburg. The memo announcing this seminar, provided the names and phone numbers of the following people, who would provide technical assistance during the certification process, at no cost: Ralph E. Green, Supervisor, Industrial and Technical Education, DOE; Mr. Meril H. Turnbeaugh, NATEF consultant; and John Hill, Coordinator, Industrial Education, DOE. TH R Ex 4, and LIV 112. At this seminar, Grievant received a document entitled "Procedures for Certification/Recertification, Process Overview." TH R Ex 21, and LIV 123.

9. On June 15, 1995, Respondent ordered the following materials to aid Grievant in receiving certification:

<u>Amt.</u>	<u>Ordered Description</u>	<u>Cost</u>
1	Auto Technology Instr. Set	\$321.00
1	Auto Technology - Student Set	\$ 73.00
1	Auto Technology - Workbook Set	\$ 78.00
1	Auto Mechanics CRT	\$ 31.75
2	Auto Tech Profile (1994 ASE)	\$ 20.00

TH R Ex 20.

Grievant received these materials in August, 1995. LIV 242.

10. On August 29, 1995, Grievant was sent the following letter from James C. Spears, Director, of JRTI:

This is just a reminder that the Division of Technical & Adult Education Services has established July 1, 1996 as the deadline for our high school automotive program to become ASE certified in at least four (4) automotive areas. Dr. Sponaule has stated that he will no longer

fund programs that do not become certified in at least four (4) areas.

I urge you to start immediately working toward ASE certification. There is a

tremendous amount of paper work involved with documenting your curriculum and lesson plans. Mr. Rinker worked with you last year on the ASE certification and will be assisting you this year. However, it is the teacher's responsibility to do the necessary documentation needed for this very important certification. Dr. Sponaugle has also volunteered his staff to assist in anyway possible in the certification process.

You are to be commended for the progress that has already taken place, such as the new tool cage.

TH R Ex 5.

11. On October 18, 1995, Grievant was sent a memorandum from John Hill, Coordinator, Industrial Education, DOE, which again offered Grievant assistance in receiving ASE certification in four automotive areas. TH R Ex 6, and LIV 114.

12. On October 23, 1995, Grievant was sent a letter from Mr. Spears. This letter stated:

Just another reminder that it is imperative that you not neglect your duty as an instructor and fail to do the necessary requirements needed to certify your automotive class by A.S.E. This certification will lend credence to your program and make it easier for your students to receive employment.

If you need assistance from Mr. Rinker or a state department representative, please do not hesitate to contact me.

TH R Ex 7.

13. By letter dated October 24, 1995, addressed to Grievant, Mr. Rinker memorialized the following:

This letter is to confirm our conversation of 24 August, 1995 and 23 October, 1995, regarding NATEF certification for the Secondary Auto Mechanics Program. In a memo from Dr. Adam Sponaugle dated January 10, 1995, it was noted that all Auto Mechanics programs in West Virginia would be certified by July 1, 1996, or lose funding for program operation. In order to accomplish this, several tasks must be completed. To meet the appropriate time lines for each of these tasks, I have outlined the following tasks and the acceptable time lines for each task.

TASK TO BE COMPLETED

DATE DUE

A. Identify the individual responsible	Nov. 3, 1995
--	--------------

for coordinating the program self-evaluation.

B. Select and submit a list of 3-4 persons                      Nov. 3, 1995  
to serve on the program self-evaluation  
committee.

C. Complete the program self evaluation                      Dec. 18, 1995

D. Submit the self-evaluation summary                      Dec. 18, 1995  
sheet along with supporting data to the  
NATEF office.

E. Submit to the NATEF office all                      Dec. 18, 1995  
necessary paperwork, i.e. Application  
for Certification, Self-evaluation  
summary sheet,     On-site evaluation team  
member list, Instructor Qualification Sheets.

As you work through each of these areas you will need to submit a copy to me for approval prior to submitting to the NATEF office.

Please remember that the State Department of Education has noted that technical assistance is available from the Department and from NATEF if needed, i.e. memos dated January 10, 1995, January 25, 1995, April 25, 1995 and October 18, 1995. I would recommend that you contact either or both for assistance or to answer any questions you may have.

I will also be available to assist you when requested and as time permits. Please contact me if I can be of assistance.

TH R Ex 8, and LIV 115.

14. By letter dated November 28, 1995, Mr. Rinker informed Director Spears that Grievant had completed items A and B, and was working on items C and E, as outlined in the above letter. [\(See footnote 3\)](#) TH R

Ex 9. Grievant failed to submit any further documentation to Mr. Rinker. TH 90.

15. By letter dated December 5, 1995, Grievant was informed by Director Spears that:

[g]iven the fact that I must meet certain deadlines as they relate to the employment of personnel, I must insist that you complete all of the tasks necessary and receive the NATEF certification by March 18, 1996. [\(See footnote 4\)](#)

TH R Ex 10.

16. By letter dated December 19, 1995, addressed to Grievant, Mr. Rinker memorialized the following: (1) that he was informed by Grievant that items C, D, and E, were not completed; (2) that Grievant stated that these items would be completed by January 2, 1996; and (3) assistance was available upon request. TH R Ex 11.

17. On December 26, 1995, Grievant was sent a memorandum from Ralph E. Green, Supervisor, Industrial and Technical Education, DOE, which again offered Grievant assistance in receiving ASE certification in four automotive areas. TH R Ex 12.

18. Grievant did not complete items C, D, and E, required for ASE certification by January 2, 1996, as Grievant assured Mr. Rinker on December 19, 1995. This was at least the second deadline Grievant failed to meet in the certification documentation process. 19. By letter dated January 4, 1996, Mr. Rinker requested that Director Spears allow a substitute teacher to cover for Grievant to allow him to work on the certification. TH R Ex 13. This request was granted, and Grievant was allowed one day of instructional time to work on certification, if he contacted Mr. Green or Mr. Hill to help him. TH R Ex 14. Grievant failed to take advantage of this "offer," and did not take one day to work on ASE certification. TH 141, and 150.

20. On February 5, 1996, Grievant was informed by letter from Director Spears that receiving ASE certification was "top priority." Grievant was also informed that failure to receive certification by March 18, 1996, would "force" Director Spears to recommend the termination of Grievant's teaching contract. TH R Ex 15.

21. By letter dated March 12, 1996, to Director Spears, Grievant requested more time to complete the certification process. In this letter Grievant also stated "I have contacted Mr. Green's office at the State Dept. (sic)[.] I have a tentative date set for sometime next week for Mr. Green to help me with my NATEF Evaluation." The following handwritten note is at the bottom of this letter "Talked to Secretary - Sue[.] Ralph [Green] back next Wed. 3-12-96[.] 3:40 pm[.] J[.] Spears[.] TH R Ex 16. This request was denied. TH R Ex 17.

22. Respondent's instructional day is seven hours, excluding lunch. Approximately four hours and twenty minutes is instructional time. Three and a half hours remain each day for planning and developing lesson plans or curriculum. LIV 125-126.

23. Grievant failed to indicate that he misunderstood, or was confused over, his assignment to secure ASE certification for the automotive program he taught.

24. One should allow three weeks to set up an ASE certification evaluation. TH 29, and LIV 49.

25. Students must be present during the site evaluation. TH 29, and LIV 49.

### **POSITIONS OF THE PARTIES**

Respondent asserts Grievant's teaching contract was terminated because of his

failure to perform his duties by willfully neglecting the same and insubordinate conduct in the face of 16 different letters and memoranda over a period of one and a half years directing that it was mandatory for [Grievant] to submit all necessary paperwork and evaluations for the secondary auto mechanics class to become certified by the national accrediting agency, NATEF, and his insubordination and willful neglect of his duties related there to [sic].

Grievant does not contest the fact that he did not complete the documentation process necessary to secure the appropriate certification for the automotive courses he teaches. Grievant alleges that his termination was improper because: (1) he was not placed on an improvement plan as mandated by State Board Policies 5300 ([See footnote 5](#)) and 5310 ([See footnote 6](#)); (2) that he was terminated for poor job performance, and regardless of the label Respondent uses, he was not insubordinate, and did not willfully neglect his duties; (3) that Director Spears "arbitrarily and capriciously moved up the deadline by 104 days, thus subjecting [Grievant] to a different standard than other teachers across the state;" and (4) he was denied access to Mr. Strawderman's ([See footnote 7](#)) certification manual.

### **DISCUSSION**

W. Va. Code §18A-2-8 provides, in pertinent part:

[n]otwithstanding 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. A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article.

Grievant's argument that Respondent should have placed him on an improvement plan is

misplaced. Provisions for improvement plans are found in W. Va. Code §18A-2-12. That Code section provides, in pertinent part:

[a] professional whose performance is deemed to be unsatisfactory shall be given notice of deficiencies. A remediation plan to correct deficiencies shall be developed by the employing county board of education and the professional. The professional shall be given a reasonable period of time for remediation of the deficiencies and shall receive a statement of the resources and assistance available for the purposes of correcting the deficiencies.

In this case, the problem is not a deficiency in Grievant's professional skills. Mr. Rinker testified that he believed Grievant was capable of completing the certification process. Grievant did not testify that he lacked the knowledge, skill or ability to complete properly the certification process. Grievant merely testified that he did not have enough time, and that the deadlines, and one day off with a substitute replacement were ridiculous. The problem is that Grievant failed to perform an assigned task, and the failure was willful.

The intended purpose of Policy 5300 evaluations is to encourage improvement of school personnel's skills which, in turn, will benefit the students. Hosaflook v. Nestor, 346 S.E.2d 798 (W.Va. 1986). Furthermore, "the factor triggering the application of the evaluation procedure and correction period is 'correctable' conduct. What is 'correctable' conduct does not lend itself to an exact definition but must, ... be understood to mean an offense or conduct which affects professional competency." Rovello v. Lewis County Bd. of Educ., 381 S.E.2d 237 (W.Va. 1989), citing Mason County Bd. of Educ. v. State Superintendent of Schools, 165 W.Va. 739, 274 S.E.2d 439. Therefore, W. Va. Code §18A-2-12 and State Board of Education Policies 5300 and 5310 do not apply.

Respondent labeled Grievant's failure, to complete his assigned task, insubordination and willful neglect of duty. However, it is not the label a county board of education attaches to the conduct of the employee in the termination notice 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. 90-31-201 (July 11, 1990); Duruttya v. Mingo County Bd. of Educ., Docket No. 29-88-104 (Feb. 28, 1990).

Insubordination is usually defined by this Grievance Board as "a deliberate, willful or intentional refusal or failure to comply with a reasonable order of a supervisor." Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990), citing Gill v. W. Va. Dept. of Commerce, Docket No. COMM-88-031 (Dec. 23, 1988). See, Thompson v. Logan County Bd. of



Educ., Docket No. 95- 23-127 (July 17, 1995). It has also been stated 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 University, Docket No. BOR2-88-029-4 (May 25, 1988), citing Weber v. Buncombe County Bd. of Educ., 266 S.E.2d 42(N.C. 1980). [\(See footnote 8\)](#) Furthermore, in order to establish insubordination, the employer must demonstrate that the employee's failure to comply with a directive was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995); Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

The Supreme Court of Appeals of West Virginia has "not made a precise definition of the term 'willful neglect of duty.' It encompasses something more serious than 'incompetence,' which is another ground for teacher discipline under W. Va. Code, 18A-2-8. The term 'willful' ordinarily imports a knowing and intentional act, as distinguished from a negligent act." Bd. of Educ. v. Chaddock, 398 S.E.2d 120 (W.Va. 1990). In Fox v. Bd. of Educ., 160 W. Va. 668, 672, 236 S.E.2d 243, 246 (1977), the Court stated:

[w]e do not attempt to formulate a comprehensive definition of 'willful neglect of duty' that would reasonably support a teacher's permanent dismissal. A continuing course of lesser infractions may well, when viewed in the aggregate, be sufficient. And we may envision a single act of malfeasance, whereby several consequences are generated, that merits a dismissal.

In this case, Grievant is without excuse. Grievant ordered materials from NATEF as early as February 20, 1985. TH R Ex 19. He was also aware, as early as 1993, that DOE desired automotive schools be certified by NATEF. TH R Ex 1.

Grievant was offered aid on several occasions, yet he failed to employ the help of others. At the Level IV hearing the following colloquy occurred:

Respondent's Counsel: Has Mr. Miller ever asked you for any assistance in terms of making state department personnel or NATEF personnel or yourself, anyone else available to assist him in the certification process?

Mr. Rinker: No, sir.

Q: Have you ever denied any requests that he'd made for assistance through the state or through the local James Rumsey Institute?

A: No, sir.

Q: Of course the documentation will speak for itself, but did you have any doubt at all in your mind as to whether or not Mr. Miller understood the necessity of having the program certified?

A: No, sir. I have no doubt that he was aware that it had to be certified for it to continue.

Q: Did he ever express any confusion on that subject at all to you?

A: No, sir.

Q: In doing the things that you've testified about were there any continuing education days that Mr. Miller could have used upon request to complete any work toward NATEF certification?

A: Yes, sir.

Q: Specifically was [sic] October 6, 1995, November 9, 1995, December 21, 1995, continuing education days?

A: I believe that's correct, yes, sir.

Q: Would he have been allowed to use those days if he would have requested it?

A: Yes, sir.

Q: Now, on any given day of instruction of Mr. Miller as a secondary instructor of the seven hours work days how much of it is actually spent in a.m. and p.m. instruction of the students?

A: A.m. instructional time started at five minutes of eight and ran until 10:12. P.m. instruction started at 12:00 and would run until 2:15 p.m.

Q: So there is two hours and 15 minutes of instruction in the afternoon and ...

A: Two hours after and 15 minutes in the morning.

Q: So a total of four hours and 30 minutes spent instructing the students? And does that mean the rest of the seven hours is left for planning time for whatever the instructor needs ...

A: Minus the 35 minute lunch period.

Q: Well, that's already counted in the seven and a half hour length of the day.

A: That's correct.

LIV TR 124-126.

In summary, Grievant had the ability, time, and resources to complete the certification process by the March 18, 1996, deadline. Thus, it is clear that Grievant's attitude toward his task was the reason for his failure. At the Level IV hearing, Director Spears testified:

Mr. Miller indicated to me on several occasions that he thought this was just a lot of paperwork that he didn't really want to do and that the State wasn't going to fire everybody in the state.

\* \* \*

The only thing I had to go on was the fact that Mr. Miller said that he was not going to do it [the certification documentation].

\* \* \*

. . . the only person I actually saw working on getting material together was Ray's girlfriend. I allowed her to come in and use the copier and then all that even stopped.

LIV 177, 188, and 188-189.

Grievant asserts that Director Spears acted arbitrarily and capriciously when he set a March 18, 1996, deadline, when DOE mandated ASE certification must be received by July 1, 1996, to be eligible for state funding. This argument is without merit. When Director Spears was asked why he made March 18, 1996, the deadline for Grievant, he testified:

The deadline for notifying teachers that their employment is going to change, be terminated, [or] change to whatever, for a continuing teacher contract I believe is April 1st. I wanted to make sure that we were complying with the deadline set up by the law.

LIV 175.

Moreover, Mr. Strawderman testified that one should allow three weeks to set up an evaluation, and that students must be present during the site evaluation. TH 29, and LIV 49. Students are present at the school until the end of May. LIV 175. Regardless, this was a management prerogative, and Grievant failed to cite any statute, policy, rule, or regulation which Respondent violated in this regard. See, Wayne v. Webster County Bd. of Educ., Docket No. 96-51-057 (Aug. 2, 1996); Phillips v. W. Va. Div. of Corrections, Docket No. 96-CORR-112 (June 19, 1996). Further, Grievant failed to offer an explanation for his assertion that certification could not be completed by the March 18, 1996, deadline.

Last, Grievant contends that he was denied access to Mr. Strawderman's certification manual. Again, Grievant failed to cite any statute, policy, rule, or regulation which Respondent violated in this regard. Grievant did not have any right to see Mr. Strawderman's manual. However, Mr. Strawderman did show his manual, in its entirety, to Grievant, and photocopied two pages of lesson plans for Grievant to use as a guide. LIV 99. Mr. Strawderman was concerned that if he loaned

Grievant his manual that Grievant would photocopy portions of it. [\(See footnote 9\)](#) Therefore, he only showed his manual to Grievant. Mr. Strawderman expressed the following concern:

There have been other states that have mandated the same thing. I was told Ohio was. When I was certified they had just come from three schools in Ohio and again, this was Meril Turnville (sic) who was the evaluator that came in here, he said that there were three schools that they went to in Ohio and what they found out happened, they were taking the book work from one school to the next and even took a tool box from one school to the next and they withdrew everything and failed them all, so if he was taking mine and directly taking it and not following it, not doing it do I think -- it would probably be a loss of my certification and his if he wasn't doing it.

(LIV 98).

Regardless, Grievant possessed examples and materials from the Carver Career Center, the University of Missouri, and NATEF. Grievant was also offered help from several sources, but failed to make a request for help until it was too late.

After considering the totality of the circumstances, and the evidence offered by the parties, Respondent proved by a preponderance of the evidence that Grievant was not only insubordinate, but also willfully neglected his duties by failing to complete the certification documentation process.

Even though Respondent proved that discipline in this case was proper, Grievant may offer evidence in hope of mitigating the punishment. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties imposed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1991).

Grievant has not offered sufficient evidence to warrant mitigation of the punishment in this case. While Grievant is a long-standing employee, only two evaluations were offered into evidence. (See, G Ex 2 and 3). The most recent evaluation of Grievant was marked unsatisfactory in one area. However, given the possibility of the loss of the secondary automotive program, and the importance of program certification to the school, as well as its students, Grievant failed to offer sufficient evidence which would mitigate the penalty in this case. Furthermore, Grievant failed to offer any evidence of the penalties imposed by Respondent against other employees guilty of similar offenses. [\(See footnote 10\)](#)

Finally, as discussed at length above, Grievant was fully aware of the certification deadline, as well as the consequences of failing to complete his assigned task. The impact of Grievant's failure to secure the appropriate certification on future funding of the automotive program was not certain at the time of the Level IV hearing. Prior memos from DOE stated that funding for the effected programs would be cut. Loss of funding would mean not only that Respondent would have an uncertified program, but possibly the loss of the program until alternative funding or certification was obtained.

Therefore, termination was not an abuse of discretion. Furthermore, Grievant did not take any responsibility for his failure. He merely tried to blame everyone else.

In addition to the foregoing findings of fact and narration, it is appropriate to make the following conclusions of law.

---

### **CONCLUSIONS OF LAW**

1. The employer must establish the charges in a disciplinary matter by a preponderance of the evidence. W. Va. Code § 18-29-6; Bierer v. Jefferson County Bd. of Educ., Docket No. 95-29-558 (Apr.8, 1996); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41- 232 (Dec. 14, 1989).

2. A county board of education must exercise its discretion in personnel matters in a manner which is not arbitrary or capricious. Lilly v. Summers County Bd. of Educ., Docket No. 90-45- 040 (Oct. 17, 1990), citing State ex rel. Hawkins v. Tyler County Bd. of Educ., 375 S.E.2d 911 (W.Va. 1981).

3. Insubordination and willful neglect of duty are among the causes listed in W. Va. Code §18A-2-8 for which an education employee may be disciplined. See, Beverlin v. Bd. of Educ., 158 W.Va. 1067, 216 S.E.2d 554 (1975).

4. The intended purpose of Policy 5300 evaluations is to encourage improvement of school personnel's skills which, in turn, will benefit the students. Hosaflook v. Nestor, 346 S.E.2d 798 (W.Va. 1986).

5. "The factor triggering the application of the evaluation procedure and correction period is 'correctable' conduct. What is 'correctable' conduct does not lend itself to an exact definition but must, ... be understood to mean an offense or conduct which affects professional competency." Rovello v. Lewis County Bd. of Educ., 381 S.E.2d 237 (W.Va 1989), citing Mason County Bd. of Educ. v. State Superintendent of Schools, 165 W.Va. 739, 274 S.E.2d 439.

6. Respondent proved by a preponderance of the evidence that Grievant was insubordinate and willfully neglected his duty when he failed to comply with the deadlines it established for completion of the certification documentation process. 7. Grievant did not establish a violation of W. Va. Code §18-2-12 or State Board of Education Policy 5300 or 5310.

8. The Grievance Board is empowered to fashion relief which is "deemed fair and equitable" in the circumstances of a particular case. W. Va. Code 18-29-5(b). The authority to mitigate the punishment imposed on a school employee is encompassed by the statute. Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994); Bell v. Kanawha County Bd. of Ed., Docket No. 91-20-005 (Apr. 16, 1991).

9. When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties imposed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved. Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1991).

10. In this case, Respondent's termination of Grievant was not such an excessive penalty as to be arbitrary or capricious. See, Nicholson, supra; Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994); Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991).

Accordingly, this grievance must be **DENIED**.

Any party may appeal this DECISION to the Circuit of Kanawha County or to the Circuit Court of Berkeley County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

DATED September 20, 1996 \_\_\_\_\_

JEFFREY N. WEATHERHOLT  
ADMINISTRATIVE LAW JUDGE

---

[Footnote: 1](#)

*Cites to the transcript from the Level IV hearing, and the termination hearing, held by Respondent on April 19, 1996, will be referred to as "LIV \_\_\_\_" and "TH \_\_\_\_" respectively, with the page number appearing in the blank. Likewise, Respondent's and Grievant's exhibits will be referred to as "R Ex \_\_\_\_" and "G Ex \_\_\_\_", with the exhibit number in the blank.*

---

[Footnote: 2](#)

*During Grievant's termination hearing, the Level IV hearing, and in exhibits, ASE certification was used interchangeably with NATEF certification.*

---

[Footnote: 3](#)

*The record is not clear whether Grievant completed items A and B by the November 3, 1995, deadline.*

---

[Footnote: 4](#)

*Grievant argued that "and complete NATEF certification" added a new requirement. However, Grievant failed to complete "all of the tasks necessary."*

---

[Footnote: 5](#)

*State Board Policy 5300 states, in pertinent part:*

*Every employee is entitled to know how well he/she is performing his/her job, and should be offered the opportunity of open and honest evaluation of his/her performance on a regular basis. Any decision concerning promotion, demotion, transfer or termination of employment should be based upon such evaluation, and not upon factors extraneous thereto. Every employee is entitled to the opportunity of improving his/her job performance, prior to the terminating or transferring of his/her services, and can only do so with the assistance of regular evaluation.*

---

[Footnote: 6](#)

*State Board Policy 5310 provides, in pertinent that:*

*An improvement plan shall be developed by the supervisor and employee when an employee's performance is unsatisfactory in any area of responsibility.*

---

[Footnote: 7](#)

*Mr. Strawderman is also an automotive instructor at James Rumsey Vocational Technical Center. He teaches adult courses, and received ASE certification in eight areas of instruction.*

---

[Footnote: 8](#)

*It should be further noted that Sexton was affirmed in part and reversed in part by the Kanawha County Circuit Court, Docket No. 88-AA-154. It was then appealed to the Supreme Court which reversed the Circuit Court's ruling. The cite to that Supreme Court case is Sexton v. Marshall University, 387 S.E.2d 529 (W.Va. 1989).*

---

[Footnote: 9](#)

*Mr. Strawderman related one example when his work was photocopied by Grievant, and submitted by Grievant as his own*



*during a DOE evaluation. LIV 64.*

---

[Footnote: 10](#)

*Grievant also introduced a letter to him from Mrs. Peggy Ann Talley, Faculty Senate Chair at JRTI, dated May 19, 1995, which congratulated him on a 4th place award that two of his students won at the 1995 State Ford AAA Auto Skill Competitions.*