THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

WYATT L. GRAHAM,
Grievant,

v. **DOCKET NO. 2014-0901-WetED**

WETZEL COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

On January 23, 2014, Wyatt L. Graham ("Grievant") filed this grievance directly at Level Three of the grievance procedure, as authorized by W. Va. Code § 6C-2-4(a)(4), challenging a 30-day suspension issued by the Wetzel County Board of Education ("Respondent" or "WCBE"). A Level Three hearing was held on May 16, 2014, at the Robert C. Byrd Center in Pine Grove, West Virginia. Grievant was represented by David C. White, Esquire, with the Law Offices of Neiswonger and White, while Respondent was represented by Richard S. Boothby, Esquire, with Bowles Rice, LLP. This matter became mature for decision on July 7, 2014, upon receipt of the last of the parties' post-hearing arguments.

Synopsis

Grievant's employment as a Bus Operator was suspended on January 7, 2014, due to alleged willful neglect of duty. Grievant was alleged to have improperly changed a senior vocational student's assigned bus stop and then failed and refused to pick up the same student on his morning bus run as an act of insubordination and willful neglect of duty. The employer failed to establish by a preponderance of the credible evidence

of record that Grievant was insubordinate or engaged in willful neglect of duty in violation of W. Va. Code § 18A-2-8(a). Therefore, this grievance must be granted.

The following Findings of Fact are made based upon the record developed through the Level Three hearing.

Findings of Fact

1. Grievant is employed as a Bus Operator by Respondent Wetzel County Board of Education ("WCBE").

2. For the last eight years, Grievant has been assigned a special education bus route which transports students to various schools in Wetzel County.

3. Virginia Derby is employed by WCBE as a special education transportation aide assigned to the bus which Grievant operates for WCBE.

4. Brian Jones is WCBE's Director of Ancillary Services. Supervision of school transportation is included in Mr. Jones' job responsibilities.

5. Grievant's initial bus run each morning brings students to Valley High School in Pine Grove, West Virginia, and ends at Magnolia High School in New Martinsville, West Virginia.

6. In accordance with long-established WCBE policy, students who are not in special education status are eligible to ride on Grievant's bus, provided the bus is already covering a route where they can safely be picked up.

7. Students who attend morning classes at the Mid-Ohio Valley Technical Institute ("MOVTI"), a multi-county vocational school located in St. Marys, West Virginia,

are transported on Grievant's morning bus run to Magnolia High School, where they transfer to another WCBE school bus that takes them to MOVTI.

8. M. R.[1] is a senior enrolled at Valley High School in Pine Grove, West Virginia, and attends the morning session at MOVTI. At the beginning of the 2013-2014 school year, M. R. completed WCBE's standard form indicating that Valley High School would be the regular bus stop where he would be picked up on Grievant's morning bus run to Magnolia High School (for transfer to MOVTI). *See* G Ex 1.

9. After the beginning of the 2013-2014 school year, L. D., a special education student, changed his residence to live with a parent on Town Hill Road (shown on a map as County Road 20/14)[2] in Pine Grove. *See* R Ex 1.

10. Once Grievant became aware that L. D., who had been riding a different bus while living with a relative in Wileyville, West Virginia, had moved to Town Hill Road, Grievant adjusted his bus route to pick up this special education student.

11. The adjusted bus route left Valley High School, where MOVTI students are picked up, and turned right onto Lumberjack Road and across a bridge to pick up an unidentified special education student across from a local church. The route then proceeded left over Town Hill Road to pick up L. D., and then to West Virginia Route 20, where the bus turned left, and then stopped at Simon's Store to pick up two special education students. *See* R Ex 1.

[1] Consistent with the practice of this Grievance Board, the students involved in this matter will be identified only by their initials. *See*, *e.g.*, *Hurley v. Logan County Bd. of Educ*., Docket No. 97-23-394 (Dec. 11, 1997); *Edwards v. McDowell County Bd. of Educ*., Docket No. 93-33-118 (July 13, 1994); *Bailey v. Logan County Bd. of Educ*., Docket No. 93-23-383 (June 13, 1994).

[2] Also referred to at times as "Old Route 20," "Old Town Road," and "Old Town Hill Road." For simplification, this street will be referred to as "Town Hill Road."

12. Shortly after Grievant's bus run began crossing Town Hill Road to pick up L. D., M. R. asked Grievant if he could also be picked up at the same location, given that he was then living nearby, on the other side of the street from L. D.

13. Grievant complied with M. R.'s request and began picking M. R. up near the stop on Town Hill Road where he picked up L. D. Grievant did not obtain approval from WCBE's Director of Ancillary Services, Brian Jones, to change M. R.'s bus stop from Valley High School to Town Hill Road.

14. Later in the school year, L. D. stopped riding Grievant's bus. M. R. then became the only student Grievant's bus picked up on Town Hill Road.

15. Several days after L. D. stopped riding Grievant's bus, Grievant received notification that L. D. was no longer enrolled in school.

16. When Grievant began driving his current special education bus route eight years ago, he was instructed by Jay Yeager, who was his immediate supervisor and Mr. Jones' predecessor, that he was to pick up special education students at their residence, but only transport MOVTI students from Valley High School, or from any point on his route where he was required to pick up a special education student.

17. Based upon Mr. Yeager's guidance, Grievant determined that his authority to traverse Town Hill Road ceased when he no longer had any special education students to pick up on that street.

18. On Thursday morning, Grievant, in the presence of Ms. Derby, informed M. R. that he would no longer be picking M. R. up on Town Hill Road and M. R. would thereafter be picked up at Valley High School.

19. On the following morning, Friday, Grievant picked up MOVTI students at Valley High School as usual, and then proceeded right on Lumberjack Road, across the bridge to a local church where he picked up a special education student. Instead of proceeding down Town Hill Road, Grievant turned the bus around and proceeded back down Lumberjack Road, past Valley High School, and turned right onto West Virginia Route 20 to pick up students at the next bus stop, Simon's Store.

20. Rather than walking less than half a mile to Valley High School, M. R. was waiting at home that morning. He called another student on Grievant's bus to let him know that he was waiting for the bus to pick him up.

21. When Grievant turned the bus around to start back down Lumberjack Road, one or more of the students in the back of the bus told Grievant that M. R. was waiting for the bus at his residence. Grievant simply responded that his bus did not take that route any longer, or words to that effect. Grievant resumed driving the same route he had followed before L. D. became a passenger on his morning run.

22. M. R. did not have transportation to get to MOVTI that morning. As a result, he missed a field trip to Parkersburg to meet with individuals knowledgeable about welding, M. R.'s vocational focus. M. R. later walked less than one-half mile from his residence to Valley High School to attend his usual afternoon classes.

23. On December 13, 2013, Grievant was notified of the Superintendent's intention to recommend that Grievant be suspended for thirty days for willful neglect of duty and insubordination. *See* Admin Ex 1 to BOE HT.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Nicholson v. Logan County Bd. of Educ*., Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ*., Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ*., Docket No. 96-20-380 (Mar. 18, 1997). "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. W. Va. Dep't of Health & Human Resources*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

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 and capriciously. Syl., *DeVito v. Bd. of Educ*., 173 W. Va. 396, 317 S.E.2d 159 (1984); Syl. Pt. 1, *Beverlin v. Bd. of Educ*., 158 W. Va. 1067, 216 S.E.2d 554 (1975); *Lake v. Barbour County Bd. of Educ*., Docket No. 99-01-294 (Jan. 31, 2000); *Bell v. Kanawha County Bd. of Educ*., Docket No. 91-20-005 (Apr. 16, 1991). W. Va. Code § 18A-2-8(a) provides:

> Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of

duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge.

In this particular matter, WCBE has charged Grievant with insubordination and willful neglect of duty, based upon State Board of Education Policy 4336, the West Virginia School Bus Transportation and Procedures Manual, 126 C.S.R. 92 (2013) § 11.1.1, which prohibits changing the location of a bus stop without the written approval of the appropriate school district official. "Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. *Adkins v. Cabell County Bd. of Educ*., Docket No. 89-06-656 (May 23, 1990). This is a fairly heavy burden given that Respondent must not only prove that the acts it alleges did occur, but also that the reason for Grievant's neglect of duty was more than simple negligence." *Tolliver v. Monroe County Bd. of Educ*., Docket No. 01-31-493 (Dec. 26, 2001). In order to prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. *Stover v. Mason County Bd. of Educ*., Docket No. 95-26-078 (Sept. 25, 1995); *Hoover v. Lewis County Bd. of Educ*., Docket No. 92-21-427 (Feb. 24, 1994). *See Bd. of Educ. v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120 (1990). *See also Fox v. Bd. of Educ*., 160 W. Va. 668, 236 S.E.2d 243 (1977).

Grievant is also charged with insubordination. The West Virginia Supreme Court of Appeals has held 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.*, 212 W. Va. 209, 212, 569 S.E.2d

456, 459 (2002) (*per curiam*). The disobedience must be willful, meaning that "the motivation for the disobedience [was] contumaciousness or a defiance of, or contempt for authority." *Id*. at 213, 460. The general rule is that an employee must obey a supervisor's order when it is received, and thereafter take appropriate action to challenge the validity of the supervisor's order. *See Stover v. Mason County Bd. of Educ*., Docket No. 95-26-078 (Sept. 25, 1995). Thus, employees are expected to respect authority and do not have unfettered discretion to disobey or ignore clear instructions. *See Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). Moreover, insubordination may involve "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).

Although most of the facts surrounding Grievant's alleged misconduct are undisputed, certain facts pertinent to the resolution of this grievance were contested by the parties. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Young v. Div. of Natural Res*., Docket No. 2009-0540-DOC (Nov. 13, 2009); *Massey v. W. Va. Public Serv. Comm'n*, Docket No. 99-PSC-313 (Dec. 13, 1999); *Pine v. W. Va. Dep't of Health & Human Res*., Docket No. 95-HHR-066 (May 12, 1995). *See Harper v. Dep't of the Navy*, 33 M.S.P.R. 490 (1987). *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). Some factors to consider in assessing the credibility of a witness include the witness'

demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the fact finder should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the witness' information. *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth*., Docket No. 2009-0685-MAPS (Apr. 23, 2009); *Massey, supra*.

Some of the evidence on which Respondent relies to support the charges against Grievant consists of hearsay statements. An administrative law judge must determine what weight, if any, is to be given to hearsay evidence in a disciplinary proceeding. *Hamilton v. W. Va. Dep't of Health & Human Res*., Docket No. 2011-1785-DHHR (Sept. 6, 2012); *Miller v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ*., Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996). 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. *Simpson v. W. Va. Univ*.,

Docket No. 2011-1326-WVU (May 3, 2012); *Cale v. W. Va. Univ*., Docket No. 2011-1711-WVU (Mar. 22, 2012); *Sinsel v. Harrison County Bd. of Educ*., Docket No. 96-17-219 (Dec. 31, 1996). *See Vojas v. Office of Personnel Management*, 115 M.S.P.R. 502 (2011); *Borningkhof v. Dep't of Justice*, 5 M.S.P.R. 77 (1971).

The hearsay testimony included in this record is primarily related to various communications between and among certain students riding Grievant's school bus and Grievant on the morning of November 15, 2013. Not only did the student witnesses substantially corroborate the hearsay statements related by each of them, Grievant's testimony effectively affirmed these same conversations as related by the students and a Bus Aide, Virginia Derby.

Grievant testified regarding guidance he received from Jay Yeager, who was the Director of Transportation prior to his current supervisor, Mr. Jones. Grievant related how he had been instructed that his principal function was to transport special education students. Further, although the MOVTI students would ordinarily be picked up at Valley High School, Grievant was also expected to transport MOVTI students whenever they could be picked up on the same route he followed to transport special education passengers. Consistent with this guidance, once L. D. was assigned to his route as a special education passenger to be picked up on Town Hill Road, Grievant complied with M. R.'s request to be picked up on Town Hill Road, near L. D.'s residence. Grievant's testimony, which was elicited to explain his state of mind at the time of these events, was straightforward and consistent. Although Grievant had a motive to misrepresent the facts based upon his personal financial interest in the

outcome, his observed demeanor demonstrated sincerity without any suggestion of prevarication.

It is clear that Grievant has a duty to pick up those students who are waiting at their assigned bus stop locations at the appointed time. Grievant unilaterally authorized M. R. to catch his bus from a new location on Town Hill Road rather than the officially designated location at Valley High School, after Grievant began traversing Town Hill Road to pick up L. D., a special education student who relocated to a residence on that street. After receiving official notification that L. D. was no longer enrolled in school, Grievant determined that his authority to travel on Town Hill Road had ended because he no longer had any special education students residing on that street. Therefore, he orally advised M. R. that he would henceforth be picked up and transported from the previously authorized bus stop at Valley High School. Rather than clarify Grievant's instruction, M. R. assumed that this change would be effective on Monday of the following week, rather than the next school day. M. R. provided no logical explanation for this conclusion.

In any event, M. R. was not at his assigned bus stop at Valley High School the following morning. Instead, M. R. was on his front porch across the street from the residence of L. D., a special education student who was no longer enrolled in Wetzel County Schools, and was therefore ineligible for school bus transportation. One or more of M. R.'s classmates, who were already on board Grievant's bus, became aware that Grievant was waiting for the bus at his old stop, and vocally made Grievant aware of M. R.'s location. None of those classmates, however, were privy to Grievant's

conversation with M. R. the previous day, relaying instructions to resume catching the bus at Valley High School, his original bus stop. Grievant proceeded to pick up students on the remainder of his bus run, reverting to the route he had followed before L. D. was added to his route.

The issue to be decided here is whether Grievant's actions demonstrated an intent to violate or disregard clearly established policy for transporting students, given the totality of the circumstances presented. Although it would have been preferable for Grievant to consult with Mr. Jones about changing M. R.'s bus stop before proceeding to advise M. R. of the change, Grievant is charged with willful neglect of duty, not simple negligence or exercise of poor judgment. Had Grievant failed to notify M. R. that he would need to be picked up at Valley High School, the onus would be upon Grievant. However, Grievant informed M. R. that he would thereafter be picking him up at Valley High School. If it was not clear to M. R. when this change would take effect, it was incumbent upon M. R. to seek clarification from Grievant. Instead, M. R. concluded, for no apparent reason, that Grievant would not start implementing this change until Monday of the following week.

Grievant's testimony regarding his understanding of Policy 4336 and WCBE's expectations governing bus transportation was both credible and logical. Grievant recalled that his immediate supervisor several years ago, when Grievant began driving a special education route, told him that his principal duty was to transport special education students. These instructions appear consistent with the assignment of a transportation aide to Grievant's bus. Transportation aides are employed specifically to

assist special education students being transported to and from school. It was Grievant's understanding that he could pick up regular students, so long as those students were along the same bus route where the bus was already going to pick up a special education student.

Consistent with this understanding, Grievant began transporting M. R. from Town Hill Road near L. D.'s bus stop, to Magnolia High School, rather than from Valley High School to Magnolia High School (and thence to MOVTI on another bus). Grievant permitted M. R. to board the bus at this more convenient location in accordance with M. R.'s request, and he neither sought nor obtained permission from his supervisor to do so. Mr. Jones acknowledged that, although this was not consistent with the letter of Policy 4336, he did not believe this conduct was wrongful because it provided a benefit to the student.

Mr. Jones testified regarding a separate incident on an earlier occasion where Grievant was allegedly proposing to drop off some high school or MOVTI students at his last stop of the afternoon for special education students near Smithfield, rather than take the MOVTI students to the point where he picked them up that morning, apparently because a special education student he picked up at or beyond the more distant location was not riding the bus home. Mr. Jones properly intervened by communicating through Ms. Derby on a student's cell phone, relaying instructions to Grievant to take the students to the same bus stop where he picked them up. This incident was never documented, and there was no evidence that Mr. Jones followed up to counsel Grievant regarding his expectations concerning MOVTI students.

Given that this earlier incident was not alleged as part of the charges for which Grievant was suspended, neither Grievant nor any other witness made any effort to refute Mr. Jones' recollection of the event. However, had Grievant left these students as he was allegedly proposing to do, after being specifically instructed by Mr. Jones concerning his obligations in the circumstances, Grievant would then have been insubordinate, and WCBE would have had a more egregious action upon which to base a charge of willful neglect of duty.

This situation is different in that Grievant began picking M. R. up because he was passing in front of M. R.'s residence to collect a duly authorized special education passenger. Once that special education passenger was no longer in school, Grievant continued driving that same route, and picking up M. R., until he was properly notified that the special education student was no longer his responsibility. Then, believing that he was no longer authorized to drive over Town Hill Road, Grievant advised M. R. that he would thereafter be picked up at his original bus stop at Valley High School. It is difficult to imagine any circumstances where, had M. R. promptly returned to his previous bus stop, WCBE would have taken any disciplinary action against Grievant.

In any event, M. R. inexplicably decided that he was entitled to be picked up from Town Hill Road for one more day, and Grievant, despite having informed M. R. that he needed to return to his established bus stop at Valley High School, believed that he could no longer transit Town Hill Road when there was no special education student to pick up on that street.

WCBE contends that once Grievant was placed on notice that M. R. was waiting to be picked up at his residence, Grievant was obligated to defer to M. R.'s request, upon penalty of a 30-day suspension should he refuse. Logically, if M. R. called another MOVTI student who boarded Grievant's bus at Valley High School and asked him to notify Grievant that he had stayed with a friend the previous night up North Fork Road near the Robert C. Byrd Center where this grievance hearing was conducted, Grievant would be obligated to pick up M. R. at this new location, because "that is his job." While WCBE may have discretion to make such a policy determination and impose penalties for failure to follow such a policy, that is not the policy set forth in State Board Policy 4336, and Grievant's interpretation of that policy, based upon the supervisory guidance he had previously received, was both reasonable and logical in the circumstances presented. Grievant's testimony regarding his conduct in this particular matter was credible and sincere, as well as generally consistent with the facts presented through WCBE's witnesses. Therefore, WCBE failed to demonstrate that Grievant's conduct, in the totality of the circumstances presented, constituted willful neglect of duty.

As for the charge of being insubordinate by failing to comply with the Employee Code of Conduct, WCBE's case consists of little more than "we, as experienced school administrators, would not have acted in this manner, therefore Grievant must have necessarily engaged in immoral and unethical behavior, failed to maintain a high standard of conduct, and did not create a culture of caring through understanding and support." While the undersigned agrees that violations of the Employee Code of

Conduct may constitute insubordination in violation of W. Va. Code § 18A-2-8, any such violation must involve conduct which clearly contravenes some ascertainable standard of acceptable behavior rather than a broadly worded altruistic expression encouraging attainment of ideal pedagogical behavior. Grievant's conduct was not shown to represent a defiance of authority or a refusal to perform a clearly defined task.

Even an employee stomping on her evaluation in the presence of her immediate supervisor, the school principal, has been held to involve behavior that should be addressed through a plan of improvement for substandard performance, rather than disciplinary action for insubordination. *See Maxey v. McDowell County Bd. of Educ*., 212 W. Va. 668, 575 S.E.2d 278 (2002). Grievant's actions in this situation were based upon an honest and reasonable belief that he was doing exactly what his employer expected him to do, require M. R. to be picked up at his original approved bus stop, once the special education student who altered Grievant's bus route was no longer enrolled in school. *See Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995); *Sexton*, *supra*.

Given that WCBE failed to establish by a preponderance of the credible evidence of record that Grievant engaged in willful neglect of duty or was insubordinate, it is not necessary to determine whether a 30-day suspension was the appropriate penalty for these alleged offenses. *See Hudok v. Randolph County Bd. of Educ*., Docket No. 99-42-092 (May 6, 1999).

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. Because this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Nicholson v. Logan County Bd. of Educ*., Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ*., Docket No. 89-41-232 (Dec. 14, 1989).

2. The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in West Virginia Code § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. *See Maxey v. McDowell County Bd. of Educ*., 212 W. Va. 668, 575 S.E.2d 278 (2002); *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. W. Va. Code § 18A-2-8 provides that "[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."

4. "Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. *Adkins v. Cabell County Bd. of Educ*., Docket No. 89-06-656 (May 23, 1990). This is a fairly heavy burden, given that Respondent must not only prove that the acts it alleges did occur, but also that the reason for Grievant's neglect of duty was more than simple negligence."

Tolliver v. Monroe County Bd. of Educ., Docket No. 01-31-493 (Dec. 26, 2001). Willful neglect of duty "is conduct constituting a knowing and intentional act, rather than a negligent act. *Williams v. Cabell County Bd. of Educ*., Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ*., Docket No. 95-29-151 (Aug. 24, 1995); *Hoover v. Lewis County Bd. of Educ*., Docket No. 93-21-427 (Feb. 24, 1994). Willful neglect of duty encompasses something more serious than incompetence. *Bd. of Educ. v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120, 122 (1990); *Sinsel v. Harrison County Bd. of Educ*., Docket No. 96-17-219 (Dec. 31, 1996)." *Geho v. Marshall County Bd. of Educ*., Docket No. 2008-1395-MarED (Oct. 30, 2008)(footnote omitted).

5. Insubordination involves "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ*., Docket No. 26-89-004 (May 1, 1989).

6. In order to establish insubordination, the employer must demonstrate that the employee's failure to comply with a directive was sufficiently knowing and intentional as to constitute the defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995).

7. Generally, an employee must obey a supervisor's order and take appropriate action to challenge the validity of the supervisor's order. *Stover v. Mason County Bd. of Educ*., Docket No. 95-26-078 (Sept. 25, 1995). Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear

instructions. *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990).

8. An administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. *Hamilton v. W. Va. Dep't of Health & Human Res*., Docket No. 2011-1785-DHHR (Sept. 6, 2012); *Furr v. Dep't of Health & Human Res*., Docket No. 2011-0988-CONS (Dec. 7, 2011); *Kennedy v. Dep't of Health & Human Res*., Docket No. 2009-1443-DHHR (Mar. 11, 2010). *See Warner v. Dep't of Health & Human Res*., Docket No. 07-HHR-409 (Nov. 18, 2008).

9. 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. *Simpson v. W. Va. Univ*., Docket No. 2011-1326-WVU (May 3, 2012); *Cale v. W. Va. Univ*., Docket No. 2011-1711-WVU (Mar. 22, 2012); *Sinsel v. Harrison County Bd. of Educ*., Docket No. 96-17-219 (Dec. 31, 1996).

10. Hearsay evidence is admissible in the grievance procedure for public employees, but there is no requirement, statutory or otherwise, that it be afforded any

particular weight. *See Simpson*, *supra*; *Cook v. W. Va. Div. of Corrections*, Docket No. 96-CORR-037 (Oct. 31, 1997).

11. Respondent failed to establish by a preponderance of the evidence that Grievant's conduct constituted willful neglect of duty or insubordination.

Accordingly, this grievance is hereby **GRANTED**. The Wetzel County Board of Education is **ORDERED** to remove any reference to this thirty-day suspension from Grievant's personnel record, to pay back pay to Grievant for all pay lost during this suspension, to pay prejudgment simple interest on this back pay at the statutory rate currently set in W. Va. Code § 56-6-31, and to restore all benefits and seniority to which Grievant would have been entitled had he not suffered this suspension.

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 appealing party must also provide the Board with the civil action number so that the certified record can be

prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: July 9, 2014

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LEWIS G. BREWER
Administrative Law Judge