THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

LISA VAUGHN,
Grievant,

v. **DOCKET NO. 2012-0121-BroED**

BROOKE COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed by Grievant, Lisa Vaughn, at level three of the grievance procedure, on July 29, 2011, contesting the termination of her employment by the Brooke County Board of Education. The statement of grievance reads:

> Respondent terminated and suspended Grievant without pay for insubordination and willful neglect of duty. Grievant asserts that she was not guilty of conduct constituting either of those charges. Grievant also contends the conduct with which she is charged, even if proven, is improvable. Grievant contends that she was terminated without evaluation or opportunity to improve. Grievant asserts a violation of W. Va. Code 18A-2-8 and 18A-2-12a.

The relief sought by Grievant is, "overturning of her suspension without pay and reinstatement with compensation for all lost wages and benefits, pecuniary and nonpecuniary, with interest."

A level three hearing was held before the undersigned Administrative Law Judge on March 20, 2012, in the Grievance Board's Westover office. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by David F. Cross, Esquire, Brooke County Chief Assistant

Prosecuting Attorney. This matter became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on April 30, 2012.

Synopsis

Grievant was terminated from her employment as an Aide after several incidents involving students which occurred on the special education bus to which she was assigned, and which placed the students at risk. The last incident occurred in the afternoon of the same day she met with her supervisors and was clearly told she was to double check to make sure the straps on the wheelchairs on the bus had been properly secured by the bus operator. Instead of following this directive, Grievant sat down on the front seat and began telling the bus operator about the meeting that morning, and a wheelchair tipped over with the student in it when the bus began moving. Respondent proved the charges of insubordination and willful neglect of duty. Grievant's claim of disparate treatment was not proven as the bus operator's responsibilities and actions were not similar to hers.

The following Findings of Fact are made based upon the record developed at level three.[1]

Findings of Fact

1. Grievant was employed by the Brooke County Board of Education ("BBOE") as a Transportation Aide, assisting special needs students on a special needs bus. She was an employee of BBOE for 13 years.

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[1] Through an oversight, Grievant's Exhibit Number 1 was not ordered admitted into evidence at the level three hearing after Respondent stated that there was no objection to the admission of that exhibit. Accordingly, Grievant's Exhibit Number 1 is now **ORDERED ADMITTED**.

2. During the Spring of 2011, Grievant was assigned to assist special needs students on Bus Number 66. The bus operator was Jack Kins. Mr. Kins has been a bus operator for 31 years.

3. Twice on May 5 and again on May 11, 2011, an autistic student on Mr. Kins' afternoon bus run, K.S.,[2] got out of his seat and walked to the back of the bus, approaching the emergency exit. Mr. Kins alerted Grievant to the situation on May 5, 2011, and Grievant took K.S. back to his seat. Grievant then returned to the front seat and did not watch K.S. After he went to the back of the bus a second time that day, Grievant sat with K.S., and told Mr. Kins they were going to have to get a harness for K.S. No harness was put in place for K.S. On May 11, 2011, Grievant again sat in front of K.S. When K.S. went to the back of the bus, another student on the bus, F.T., who is in the fourth grade and is low functioning, called out that K.S. was up. Grievant returned K.S. to his seat, sat down with him for awhile, but then returned to the front seat with her back to K.S.[3]

4. Student S.S. is autistic. S.S. had been riding a non-special education bus with non-special education students until an incident occurred where neither parent met him at the bus stop, and he wandered through his neighborhood after he was let off the bus, and was found by a neighbor behind a privacy fence. After this incident, although S.S. still rides a non-special education bus in the morning, because his mother is able to put him on the bus, S.S.'s Individual Education Plan ("IEP") was modified immediately to

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[2] It is the practice of the Grievance Board to refer to students by their initials only in decisions.

[3] This finding of fact is made primarily based on the video from the bus for May 5 and May 11, 2011, (Respondent's Exhibit Number 3) as reviewed by the undersigned. The testimony of the witnesses was not entirely consistent with the video.

require that he be delivered to his front door by a special education bus. Both Grievant and Mr. Kins were told that S.S. was to be delivered to his front door, but they were not told why. Neither Grievant nor Mr. Kins was provided with S.S.'s IEP.

5. On May 9, 10, 11, and 12, 2011, there was construction at 27th Street in Wellsburg, and the street was closed. Because of the construction, Mr. Kins could not take his normal route to deliver student S.S. to his home on 28th Street.

6. Ron Ujcich, BBOE's Transportation Director, had been made aware of the construction, and in a meeting with the bus operators, he told them certain streets would be closed, and they were to get the students on their buses as close to home as possible. Mr. Ujcich did not tell Mr. Kins that this did not apply to S.S., and Mr. Kins did not ask him what he should do with S.S.

7. When Mr. Kins could not follow his normal route to deliver S.S. to his home, he decided that the closest he could get the bus to S.S.'s home was three to four blocks away. Mr. Kins and Grievant did not believe S.S. needed to be on a special education bus, and they both decided that S.S. could walk the three to four blocks home, through the construction, by himself. On May 9, 10, 11, and 12, 2011, S.S. walked the three to four blocks home, crossing through the construction, without supervision. Mr. Kins did stay and watch S.S. until he got through the construction area.

8. Neither Grievant nor Mr. Kins made any effort on May 9 or any day thereafter to contact the Transportation Office or anyone else with BBOE to ask what they should do with S.S., nor did they attempt to contact S.S.'s mother, even though Grievant had a cell phone on the bus, and she had the mother's telephone number.

9. Grievant had been directed by Mr. Ujcich that she was not to exit the bus because of liability concerns. Although Mr. Ujcich had later learned that Aides were allowed to exit the bus and accompany students a short distance, the distance from the place the bus let S.S. off the bus on May 9, 10, 11, and 12, 2011, to his door exceeded the distance allowed.

10. On the morning of June 1, 2011, a meeting was held with Grievant to discuss the May 5 and 11 incidents involving K.S., and the incidents with letting S.S. walk home alone. Those attending the meeting were Grievant, Joyce Rea, BBOE Special Education Director, Mr. Ujcich, and Grievant's representative, Bev Sizemore. The incidents were discussed at this meeting, and those in attendance developed a plan to assure that the incidents were not repeated.

11. The plan developed at the June 1, 2011 meeting was that Grievant would sit near the special education students on the bus, and the autistic child who was inclined to move around would either be secured in his seat or sit with Grievant; Grievant would perform the duties of an Aide as outlined on the county's job description for an Aide, and would make the welfare of the students her top priority; Grievant would be responsible for securing wheelchairs on the bus, and would double check to make sure students were properly secured; and Grievant would use her cell phone to alert parents of situations encountered by the bus which would result in a delay or change in delivering the students to their homes.

12. A student in a wheelchair, M.M., rides the special education bus driven by Mr. Kins. Grievant would load the wheelchair onto the bus, and Mr. Kins would receive the wheelchair on the bus and strap the wheelchair in place, with the student remaining in the

wheelchair. Grievant and Mr. Kins allowed student F.T., to assist in strapping the wheelchair in place. Ms. Rea had not been aware that F.T. was being allowed to assist in this manner until she reviewed the bus tapes after the incident with S.S. At the June 1, 2011 meeting, Ms. Rea told Grievant that F.T. was not to be allowed to assist in strapping down the wheelchair.

13. On the afternoon of June 1, 2011, Mr. Kins was running late returning from an extra-curricular run. He called the Transportation Department to report the situation, and a decision was made that a substitute bus operator would meet Mr. Kins with the special education bus at Jefferson Primary School, and then Mr. Kins would begin his afternoon run at that point. Before meeting Mr. Kins, Grievant had already told F.T. that he was no longer allowed to assist in strapping down the wheelchair.

14. When Mr. Kins arrived at the rendevous point, he was running late. Grievant began to load the wheelchair on the bus and Mr. Kins arrived to receive the wheelchair and strap it in place. Student F.T. was in the vicinity of the wheelchair, but did not secure any of the straps because he had been told by Grievant not to do so. However, F.T did not tell Mr. Kins that he was not securing the straps he always secured, and Mr. Kins thought he had done so. Mr. Kins did not check to make sure the straps were secured as he normally does.

15. When Grievant got on the bus, rather than going to the wheelchair to make sure it was secured as Grievant had been told to do that morning, Grievant sat down in the front seat to tell Mr. Kins what had transpired during the meeting that morning, including informing him that F.T. was not to assist him in securing the wheelchair. Grievant sat on the front seat and talked to Mr. Kins for approximately two minutes, and during that time,

Mr. Kins began moving the bus.[4] The movement of the bus caused the unsecured wheelchair to tip over, and F.T. called out that M.M. had tipped over.

16. Grievant immediately went to check on the wheelchair student, and Mr. Kins pulled the bus off the road. Grievant asked the student if he was hurt, and he gave her a thumbs up, indicating that he was not hurt. This student is medically fragile, and has trouble communicating. Grievant secured the wheelchair, and Mr. Kins continued on his route.

17. Neither Grievant nor Mr. Kins reported the incident. Both Grievant and Mr. Kins were aware that they were supposed to report any incident, such as a wheelchair tipping over, after it occurred. Both Grievant and Mr. Kins were aware that M.M. was medically fragile.

18. Another Aide had assisted in loading the wheelchair onto the bus. That Aide saw the wheelchair tip as the bus pulled out, and she called her supervisor immediately to report the situation. After being notified, someone from the Transportation Department contacted Mr. Kins on the bus to ask if the student was okay. Mr. Kins' response was, "yeah, why?"

19. Superintendent Kathy Kidder-Wilkerson recommended to BBOE that Grievant's employment be suspended for the remainder of the school year, and that her contract be terminated at the end of the school year, for insubordination and wilful neglect

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[4] This finding is made based on the video from the bus for June 1, 2011, (Respondent's Exhibit Number 3). The video contradicts the testimony of Grievant and Mr. Kins that Grievant did not have time to go to the back of the bus and check the straps before the accident occurred.

of duty. BBOE accepted the Superintendent's recommendation, and Grievant's employment was terminated on July 25, 2011.

20. Mr. Kins was suspended for five to ten days without pay for his role in the incidents.

21. Ms. Kidder-Wilkerson believed that Grievant's punishment should be more severe than that imposed on Mr. Kins because she had primary responsibility for supervision of the students and making sure that the wheelchair was secured.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. *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 which is 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 proven is more probable than not. *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

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, 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. Va. 1067, 216 S.E.2d 554 (1975). WEST VIRGINIA 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 contendre to a felony charge." In the instant case, Respondent dismissed Grievant for unsatisfactory performance.

"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.[5] *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).

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[5] "It 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).

Insubordination has been defined as the "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). In order to establish insubordination, the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid. *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). *See Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *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).

"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). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. *See Day v. Morgan Co. Health Dep't*, Docket No. 07-CHD-121 (Dec. 14, 2007). "An employee's belief that management's decisions are incorrect or the result of incompetence, absent a threat to the employee's health and safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. *Vickers v. Bd. of Directors/W. Va. State College,* Docket No. 97-BOD-122B (Aug. 7, 1998). *See Parker v. W. Va. Dep't of Health and Human Resources*, Docket No. 97-

HHR-042B (Sept. 30, 1997)." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003).

Grievant made several arguments. Grievant argued she was not clearly advised of her responsibilities or procedures, and that neither suspension nor termination was appropriate because her conduct was correctable. She further argued that it was not her fault that the wheelchair tipped over, and that if any punishment was appropriate, she should not have received more severe treatment than Mr. Kins, and the fact that she did constituted disparate treatment.

There is no doubt that both Grievant and Mr. Kins were clearly advised that S.S. was to be delivered to his door, and that both were insubordinate when they chose to disregard the clear instruction that S.S. be delivered to his door, and allowed this child to walk through construction and without supervision three to four blocks to his home. Mr. Kins may have been somewhat confused by Mr. Ujcich's later direction to get the students as close to home as possible during the construction, but nothing prevented him from asking for clarification. While Grievant at one point indicated that it was Mr. Kins' decision, she acknowledged at the level three hearing that she agreed with Mr. Kins that S.S. was capable of walking home by himself, even though she had never looked at his IEP or inquired as to the reason for taking him to his door. It is clear that Grievant was a willing participant in encouraging this student to walk home. While there is no doubt that Grievant and Mr. Kins should have been provided with more information about S.S., neither Grievant nor Mr. Kins was competent to evaluate S.S.'s needs. Their conduct was inexcusable and put this child in danger.

Further, there is no doubt that Grievant was not monitoring all the children on the bus when K.S. was allowed to go to the back of the bus on Thursday, May 5, 2011, not once, but twice. Then, after becoming aware of this danger, Grievant took no action to make sure this did not occur again, and was again not monitoring the students when this occurred the following week. There is no question that Grievant knew she was supposed to be monitoring the students, and that she was aware that she needed to make sure K.S. stayed in his seat. The simple solution, absent placing the child in a harness, was for Grievant to seat herself behind or beside K.S. so she could be sure he did not move out of his seat. Instead, Grievant continued to sit in the front seat with her eyes forward, not watching K.S. at all. This constitutes willful neglect of duty.

It is also clear that Mr. Kins was negligent in his failure to properly secure the wheelchair on June 1, 2011, and that Grievant was insubordinate in her failure to make sure the wheelchair was secured. She had clearly been told just a few hours before, that she was to double check to make sure the wheelchair was secured. Instead of doing this immediately, which was what was required of her, she chose to sit down and tell Mr. Kins about the meeting that morning. Whether Grievant had time to get to the wheelchair before it tipped over is of no consequence here, because, the fact is that she did not make any effort to do so, choosing instead to sit down and talk to Mr. Kins rather than making sure first that the wheelchair had been secured as she had been directed to do. Respondent has proven the charges against Grievant, and that her conduct constitutes insubordination and willful neglect of duty.

Finally, Grievant alleged disparate treatment in the penalties imposed on her and on Mr. Kins.

> For an employee to prevail on a claim of disparate treatment [in discipline], he must establish that there is no rational basis for distinguishing specific penalties for the same or substantially similar misconduct. The misconduct brought into question must be similar or more serious than that with which the grievant is charged. *Clark v. Dept. of Navy,* 6 MSPB 24 (1981). The grievant must also show that the other employee's disciplinary record is similar to his own. *Clancy v. Dept. of Navy*, 6 MSPB 173 (1981). Finally, the grievant must establish that his position is similar to that of the other employee to whom he is compared with respect to the trust and responsibility expected of his position. *Rohn v. Dept. of Army*, 30 MSPR 157 (1986).
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> *McVicker v. Kanawha County Bd. of Educ.*, Docket No. 95-20-339 (Feb. 9, 1996).
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> [T]he burden is on the employer to come forward with a reason why a difference in treatment exists once the grievant identifies a disparity in the result for the same offense. *Drummer v. General Services Administration*, 22 MSPR 432 (1984). Only when the established misconduct is sufficiently egregious is the disparate treatment doctrine immaterial. In other words, if an employee's punishment is appropriate to the seriousness of the offense, an allegation of disparate treatment presents no basis for reversal. *Quander v. Dept. of Justice,* SF07528311002 (1984). An agency may impose valid sanctions that are different if its decision is based upon management's full consideration of all relevant factors. *Gilmore v. Dept. of Army*, 7 MSPB 155 (1981).
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> *McVicker, supra*.

Olson v. Kanawha County Bd. of Educ., Docket No. 02-20-380 (May 30, 2003).

While the undersigned is indeed somewhat miffed that Mr. Kins was not also dismissed from his employment, given his action with regard to S.S., Grievant's conduct as it relates to the incidents with K.S. and M.M. was not the same as that of Mr. Kins, nor was her responsibility for the safety of the students the same as that of Mr. Kins. With regard to K.S., it was Grievant who was to be monitoring the students, and she could have controlled the problem by first, watching the students on the bus, and second, sitting beside or behind K.S. Mr. Kins was driving the bus. Even after K.S. exhibited this

dangerous behavior twice, she still chose not to take any action to prevent further episodes. With regard to M.M., Grievant chose to disregard clear instructions given to her that morning, which placed a child in danger, while Mr. Kins was negligent in his failure to check to make sure the wheelchair straps were secured, not knowing that F.T. had been told he was not allowed to assist Mr. Kins. Grievant did not meet her burden of demonstrating disparate treatment.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

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, 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. Va. 1067, 216 S.E.2d 554 (1975).

3. WEST VIRGINIA 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 contendre to a felony charge."

4. Insubordination has been defined as the "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). In order to establish insubordination, the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid. *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). *See Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Riddle v. Bd. of Directors/So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989).

5. "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.[6] *Williams v. Cabell County Bd. of Educ.*, Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd.*

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[6] "It 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).

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).

6. Respondent demonstrated that Grievant was insubordinate.

7. For an employee to prevail on a claim of disparate treatment [in discipline], he must establish that there is no rational basis for distinguishing specific penalties for the same or substantially similar misconduct. The misconduct brought into question must be similar or more serious than that with which the grievant is charged. *Clark v. Dept. of Navy,* 6 MSPB 24 (1981). The grievant must also show that the other employee's disciplinary record is similar to his own. *Clancy v. Dept. of Navy,* 6 MSPB 173 (1981). Finally, the grievant must establish that his position is similar to that of the other employee to whom he is compared with respect to the trust and responsibility expected of his position. *Rohn v. Dept. of Army*, 30 MSPR 157 (1986).

McVicker v. Kanawha County Bd. of Educ., Docket No. 95-20-339 (Feb. 9, 1996).

Olson v. Kanawha County Bd. of Educ., Docket No. 02-20-380 (May 30, 2003).

8. Grievant did not prove her claim of disparate treatment.

Accordingly, this 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 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).

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BRENDA L. GOULD
Acting Deputy Chief
Administrative Law Judge

Date: June 6, 2012