WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

STEPHEN ANTHONY CARSON
Grievant,

v. **Docket No. 2012-0633-KanED**

KANAWHA COUNTY BOARD OF EDUCATION,
Respondent.

D E C I S I O N

Grievant, Stephen Anthony Carson, filed the instant grievance against his employer the Kanawha County Board of Education ("KCBE"), Respondent on December 9, 2011, protesting the termination of his employment as a certified substitute teacher. Grievant seeks reinstatement. Grievant did not specify back pay on the original grievance form but it evident from subsequent documents filed that Grievant envisions recouping of lost compensation.

A hearing was held at level one on November 9, 2011, regarding whether disciplinary action should be recommended against Grievant, as a result of contested allegations of misconduct. The level one recommended decision of the Superintendent's designee was dated November 23, 2012. Thereafter, the Superintendent of Schools recommended that Grievant's employment be terminated and the Board of Education voted to approve the Superintendent's recommendation. By letter dated December 6, 2011, from Ronald E. Duerring, Kanawha County Superintendent of Schools, Grievant was advised of the action to terminate his employment effective December 5, 2011. Grievant appealed. A level three hearing was held before the undersigned Administrative Law Judge on February 27, 2012, in the Grievance Board's Charleston office. Grievant

appeared *pro se*, and Respondent was represented by James W. Withrow, General Counsel, Kanawha County Board of Education.

This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about March 19, 2012. This case became mature for decision on March 19, 2012, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals.

Synopsis

Allegations were made that during the course of a duty assignment as a substitute teacher with the Kanawha County Board of Education, Grievant had abandoned the teacher's assignment, thrown a notebook hitting a student, and called the students inappropriate names. Respondent terminated Grievant's employment. Grievant contends the termination should be overturned in that he is not culpable of the conduct alleged.

Respondent did not establish essential facts relevant to the offenses levied. Grievant did not leave students without a supervisor, nor did he throw a notebook at a student. Grievant may have used words or language which are not a positive motivating influence, students should not be called stupid. Nevertheless it is not established that Grievant's conduct is not correctable. Respondent did not prove the charges against Grievant. Respondent did not establish by a preponderance of the evidence conduct by Grievant which would justify termination of Grievant's employment.. The disciplinary action levied was excessive. Thus, this grievance is GRANTED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. With regard to the time period relevant to this matter, Grievant was employed by Respondent as a substitute teacher. Grievant holds a Short Term Substitute Permit pursuant to the provisions of Section 11.5 of West Virginia Board of Education Policy 5202.[1]

2. As the need arises, individuals authorized to perform as substitute teachers are contacted for duty assignments in Kanawha County schools. There is a call-out list and substitutes are contacted to receive assignments in accordance with individual availability.

3. As an individual authorized to perform as a substitute teacher, Grievant is called upon from time to time for duty assignments. Grievant had been working as a substitute teacher for an undisclosed number of months and had substituted at several schools in Kanawha County.

4. Prior to the subject event of this grievance on September 12, 2011, Grievant previously substituted at Cedar Grove Middle School. It was reported that Grievant used profanity in the presence of students. Grievant used the word "shit" or "bullshit" in the presence of students.[2] Grievant admitted this conduct and received an oral reprimand.

---

[1] Respondent highlights that Grievant is not a "certified educator."

[2] Reportedly Grievant, in a conversation with or toward a student, uttered the phrase, or one extremely similar to, "don't bullshit a bull-shitter." Grievant's use of objectionable language was reported by students to school administrative personnel the next day.

5. On September 19, 2011, Grievant was substituting at Cedar Grove Elementary School. Grievant was assigned to substitute in a fifth grade classroom.

6. As the day progressed, reportedly students became disruptive and unruly. Grievant reached a point where he determined the class was out of control.

7. At approximately 1:15 p.m., Grievant contacted the fourth grade teacher in the classroom next door, Danielle Burke. Grievant informed Ms. Burke that the class was unruly and taking advantage of him. He wasn't going to stand for it and he needed to be relieved. See Respondent Exhibit 3.

8. Grievant requested that Ms. Burke cover his class. An aide was available to supervise Ms. Burke's classroom.

9. Ms. Danielle Burke is a veteran teacher with five years of experience at Cedar Grove Elementary School.

10. After Grievant had departed, Ms. Burke inquired of the students what was going on. The students were talking and very excited. She had the students in this fifth grade class write down their response to her inquiry.[3] Later, a Title I teacher was able to take over the classroom until dismissal.

11. Grievant went to the office and spoke to the school secretary, Leslie Michaelson. Grievant was visibly shaking when he conversed with the school secretary.

---

[3] These documents were reviewed by Respondent's investigator and entered into evidence at the level one hearing. It is unclear what weight Respondent has attributed to to these documents as testimony and/or as proof of a fact. In determining the reliability of information, weight of the evidence is not determined by the sheer number of witnesses, but by the credibility of the information. The opportunity for knowledge, bias, foundation, information possessed, plausibility and manner of communicating all assist in ascertaining weight attributable to evidence. The documents are of interest and provide some perception of activity, however, their reliability has limitations.

12. Grievant communicated that the students of his assigned class were out of control. Grievant informed Ms. Michaelson that the children were acting in this manner because he was a substitute teacher. Ms. Michaelson was also made aware that Ms. Burke was with the students.

13. Grievant informed Ms. Michaelson that he needed to be excused.[4]

14. Ms. Michaelson responded, OK.

15. Ms. Michaelson, the school secretary, was the individual Grievant communicated with upon arrival at the school the morning of September 19, 2011.

16. In the past, there have been occasion where someone needed to leave early and the individual would tell Ms. Michaelson, they needed to leave, and Ms. Michaelson would later make the Principal aware of the situation. *See* Michaelson L-1 testimony. A school secretary does not posses the authority to excuse an employee from his or her duties.

17. Grievant left the building without speaking with the Principal or any other administrator.

18. Ms. Michaelson informed the School Principal of Grievant's departure.

19. A normal day of instructions at Cedar Grove concludes at 2:25 p.m.

20. A Title I teacher was able to take over Grievant's classroom from Ms. Burke and supervise the class until dismissal.

---

[4] Grievant informed Ms. Michaelson that the class was out of control, and used words to the effect that he needed to be relieved and/or excused. *See* testimony of Ms. Michaelson and Grievant.

21. On or about September 19, 2011, Respondent was contacted regarding the conduct of a substitute teacher at Cedar Grove Elementary Schools. A request was made by the Principal, Ms. Elaine Gayton, to prohibit the employee from providing substitute services at that school. Respondent investigated. A report was generated specifying reported allegations, interviews conducted, and perceived facts.

22. Information was received and/or perceived that mislead, the investigator and Respondent to incorrectly believe Grievant had intentionally caused a student to be struck by a notebook. Grievant did not throw a notebook at a student.

23. A notebook in the grasp of Grievant made physical contact with a student, KF,[5] positioned behind or beside Grievant. Grievant was attended to the instructional needs of another student. KF was positioning himself into his seat. KF was not injured, nor was Grievant aware, at that time, the contact transpired.

24. It is acknowledged, by agreement of the parties,[6] that as a substitute teacher at several other Kanawha County schools, Grievant performed his assignment properly, arrived well-groomed and punctually, and at no time did Grievant verbally or physically harm a child, and was no threat to the students entrusted in his care. Grievant would be welcome to return, as a substitute teacher, to those schools. Further, it was recognized that if there had been any problem with Grievant's performance, the Kanawha County

---

[5] Consistent with the Grievance Board's practice, this student and any other minor referenced will be referred to by initials in this decision.

[6] Jeff Kelly, Principal of St. Albans High School, testified to the information agreed to by the parties. Grievant had subpoenaed several other principals, vice-principals and teachers of schools he had had occasion to perform as a substitute teacher. It was agreed the duplication of testimony was not necessary or a prudent use of time. The parties stipulated to the information provided in this finding of fact as uncontested fact.

Board of Education would have been notified which never occurred; therefore, it should be noted, as established fact, that Grievant has performed prior substitution assignments responsibly and respectfully.

25. Pursuant to a October 18, 2011, letter signed by Kanawha County Superintendent Of Schools, Ronald E. Duerring, Grievant was advised that a hearing would be held on November 9, 2011, regarding whether disciplinary action is recommended as a result of certain allegations of misconduct. The document provided;

> Specifically, it is alleged that:
>
> 1. You abandoned your substitute assignment at Cedar Grove Elementary School on September 19, 2011.
> 2. You threw a notebook and it hit a student, KF, in the head.
> 3. You called students inappropriate names such as "stupid".

26. A hearing was held on the 9th of November, 2011, where testimony and exhibits were submitted for consideration. The hearing examiner made a recommendation to Superintendent Duerring. *See* Decision of Superintendent's designee dated November 23, 2011. Subsequently, Superintendent Duerring communicated with the Kanawha County Board of Education, Respondent.

27. Grievant was notified by a December 6, 2011, letter signed by Superintendent Duerring of the School Board's determination that his employment was terminated. The document states;"Please be advised that the Board of Education voted at its meeting last night to terminate your employment effective December 5, 2011." No other relevant information, other than the appeal paragraph, is evident on the document.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. This grievance does involve disciplinary action, Respondent has the burden of proving its case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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). In other words, "[t]he 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 Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

W. VA. CODE § 18A-2-7 provides that "[t]he superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter." W. VA. CODE §18A-2-8 identifies the types of conduct that can result in disciplinary action and provides, in pertinent part:

> 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. 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.

It is not necessary for a board of education to identify an employee's offenses by the exact terms utilized in W. VA. CODE § 18A-2-8, as long as the required written notice of charges specifically identifies the alleged acts of which the employee is accused. *Jordan v. Mason County Bd. of Educ.*, Docket No. 99-26-080 (July 6, 1999). KCBOE provided Grievant written notice of the charges. Referencing October 18, 2011 letter, see Finding of Fact (FOF) 28. Grievant was advised it was alleged he had: (a) abandoned his substitute assignment at Cedar Grove Elementary School on September 19, 2011; (b) thrown a notebook hitting a student; and (c) called students inappropriate names. Grievant denies the charges as levied and avers he should be permitted to return to gainful employment as a substitute.

Respondent maintains its disciplinary action with regard to Grievant should be upheld. Respondent proposes that Grievant's behavior violated recognized code of conduct. West Virginia State Board of Education Policy 5902, the relevant Employees' Code of Conduct is found at W. VA. CODE R. § 126-162-4. In pertinent part, this Code of Conduct provides, in part:

> 4.2 All West Virginia school employees shall:
>
> 4.2.1. exhibit professional behavior by showing positive examples of preparedness, communication, fairness, punctuality, attendance, language, and appearance.
>
> 4.2.2. contribute, cooperate, and participate in creating an environment in which all employees/students are accepted and are provided the opportunity to achieve at the highest levels in all areas of development.
>
> 4.2.3. maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination.
>
> 4.2.4. create a culture of caring through understanding and support.

4.2.5. immediately intervene in any code of conduct violation, that has a negative impact on students, in a manner that preserves confidentiality and the dignity of each person.

4.2.6. demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior.

4.2.7. comply with all Federal and West Virginia laws, policies, regulations and procedures.

Respondent avers in its proposals that Grievant was insubordinate when he failed to follow applicable Employee Code of Conduct. Respondent also directed this ALJ's attention to Kanawha County Schools Policy G75 which provides, in part: Employees are expected to report to work on time and remain as scheduled.

An employer can establish insubordination by demonstrating a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional 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). Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Education*, Docket No. 26-89-004 (May 1, 1989). In order to establish insubordination, the employer must not only demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, but that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Jones v. Mingo County Bd. of Education*, Docket No. 95-29-151 (Aug 24, 1995); *Conner v. Barbour County Bd. of Education*, Docket No. 94-01-394 (Jan. 31, 1995).

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. *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). 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).

Respondent contends that Grievant's actions on September 19, 2011, constitute insubordination and willful neglect of duty justifying termination of employment. This Administrative Law Judge is not persuaded. "[T]he factor which distinguishes willful neglect of duty and insubordination from unsatisfactory performance is that the employee knows [his] responsibilities, and is competent to perform them, but elects not to complete them. When an employee's performance is unacceptable because [he] does not know the standard to be met, or what is required to meet the standards, and [his] behavior can be corrected, the behavior is unsatisfactory performance. *Bierer v. Jefferson County Bd. of Educ.*, Docket No. 01-19-595 (May 17, 2002)." *Waggoner v. Cabell County Bd. of Educ.,* Docket No. 2008-1570-CabED (Oct. 31, 2008). Further, also see, *Monteith v. Board of Education of the County of Webster*, 180 W. Va. 31, 375 S.E.2d 209 (1988), a case wherein the W. Va. Supreme Court overturned a county board of education's suspension

of a teacher for leaving her class and leaving the school without proper permission. While the rationale for the respective grievants' departure are not similar, a correlation between the charges and offense alleged is thought to exist. A defense found to be relevant in the cited case, but not addressed by the parties of this grievance, is the prospect that Grievant's conduct is correctable.[7] Policies, Rules and Regulations of the West Virginia Board of Education provide, in part, that employees are entitled to the opportunity of improving his/her job performance, prior to termination. *E.g., See* W. VA. CODE § 18A-2-12a (b)(6).

Notwithstanding all other subject matter discussed, herein, it is relevant that the correctability of Grievant's conduct, as demonstrated on September 19, 2011, was not established by Respondent. Grievant's behavior is perceived correctable conduct and did not substantially affect the students, the school, or the school system in a permanent way. See *Monteith*, supra.

Grievant did not leave his assigned students without supervision, nor did he depart unannounced. Grievant testified that he went to the office and indicated to the school secretary he needed to be excused and she replied, "OK." The secretary testified that Grievant did not ask to be excused, but rather told her he was leaving. Her response of OK was merely a figure of speech, or an acknowledgment that she had heard the Grievant

---

[7] *Monteith* found that failure by any board of education to follow applicable procedure of West Virginia Board of Education Policy No. 5300(6)(a) prohibits such board from discharging, demoting or transferring an employee for reasons having to do with prior correctable misconduct or incompetency that has not been called to the attention of the employee. *See also*, *Trimboli v. Board of Education*, 163 W.Va. 1, 254 S.E.2d 561 (1979); Syl. Pt. 1, Powell v. Brown, 160 W.Va. 723, 238 S.E.2d 220 (1977). West Virginia Board of Education Policy No. 5300, 126 C.S.R. 141 § 2.6.a (referred as Policy 5300) is now codified at W. VA. CODE § 18A-2-12a.

speak. The semantics of this conversation is relevant but not decisive of the issue. It is fact that a school secretary does not posses the authority to excuse a teacher from his or her assigned duties, however it is recognized that Grievant in proceeding to the office, and communicating with Ms. Michaelson, did so with the belief he was informing school administration of the situation. As a substitute in Cedar Grove Elementary School, Grievant spoke with the same individual he had communicated with upon his arrival that morning.

Grievant departed without approval from an individual empowered to grant him official authorization to leave. His actions are not found to be prudent conduct. Prior to leaving the class and the school, it is readily apparent that Grievant could have and should have sought out assistance of school administration, or any other teacher to try to assist in regaining control of his classroom. Grievant did not exercise good judgement in his distress. It is unacceptable behavior for any employee to leave his or her position without adequate justification and without proper authorization, nevertheless the undersigned is not persuaded that Grievant was intentionally insubordinate. It is not established that Grievant's misconduct was performed with sufficient knowledge and intention as to constitute the defiance of authority inherent in a charge of insubordination.

Generally, "abandonment" includes both the intention to abandon and the external act by which the intention is carried into effect. *See Black's Law Dictionary*, 5th ed. It is debatable this is what Grievant did. Respondent highlights event. Grievant specifically denies the intent. Grievant is guilty of poor judgement. It is not established, that the actions of Grievant truly constituted abandonment. It would serve Grievant well to

familiarize himself with school procedure and professional standards prior to accepting duty assignments as a professional educator.[8]

It is apparent from the testimony of student "KF" both at the pre-disciplinary hearing and the Level III hearing that Grievant did not throw a binder as earlier reported. Rather a folder or notebook in the grasp of Grievant and KF made incidental contact. Student KF was returning to his set, and during the positioning and repositioning of both parties, student and teacher, contact transpired. It was not established Grievant was even aware that while attending to another student, KF, in close proximity beside or behind Grievant, came in contact with the notebook. Contact was not intentional. It was incidental contact, student KF was not injured. It is not apparent that this event is proper cause for termination of Grievant's employment.

Using objectionable language in the presence of students, calling them stupid, or even leaving them with the idea that they are perceived as such, does not exemplify the traits of an effective teacher which the State and County employee codes of conduct seeks. Grievant needs to be more aware of his responsibly to positively facilitate the development of the students in his charge. Grievant's behavior could very well be due to inexperience or failure to fully comprehend the ramifications of his role as a professional educator. Whether the conduct forming the basis of dismissal involves professional incompetency and whether it directly and substantially affects the system in a permanent, non-correctable manner is relevant. See *Mason County Board of Education v. State*

---

[8] As previously noted Grievant is not a certified educator, Grievant holds a Short Term Substitute Permit pursuant to the provisions of Section 11.5 of West Virginia Board of Education Policy 5202.

Superintendent of Schools, 165 W.Va. 732, 274 S.E.2d 435 (1980). Also see W. VA. CODE § 18A-2-12a (b)(6). Grievant's behavior is perceived to be correctable conduct. It is not established that Grievant's misconduct was intentional and inexcusable failure to perform a work-related responsibility. Credible evidence of record has not established that Grievant's limited use of controversial language rises to the level of good cause for dismissal.

County boards of education have substantial discretion in matters relating to hiring, assignment, transfer and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interest of the schools, and in a manner which is not arbitrary and capricious. *State ex rel. Melchiori v. Bd. of Educ.*, 188 W. Va. 575, 425 S.E.2d 251 (1992); *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).

In summary, it is undisputed that Grievant left the school without official authorization. This action is improper, yet the conduct is not necessarily synonymous with abandonment, which is what was alleged. Nor is it found that Grievant's conduct, in the circumstance of this grievance, constitutes insubordinate and willful neglect of duty. Events of record indicate Grievant needs additional training to become the educator envisioned by responsible school authorities however, the instant lapses in judgement tend to be correctable conduct.

Respondent has a recognized duty to educate and protect the students entrusted into its care, with that there is no doubt. Due diligence is a component of that duty. While it is best to err on the side of caution, with the health and welfare of children, Respondent's disciplinary action, given the facts of this grievance, was extreme. Respondent has failed

to establish just case for the termination of Grievant's employment. The undersigned, as the trier of fact, does not find that Respondent established the charges alleged or that Grievant misconduct, rises to the level of good cause for dismissal. Also see, *Monteith v. Board of Education of the County of Webster*, 180 W. Va. 31, 375 S.E.2d 209 (1988).

It is not established with any degree of certainty what substitute assignments Grievant would have performed, if any, if not for the instant disciplinary action. Thus, the amount of lost wages is not readily ascertainable. Such money damages, if awarded by this Administrative Law Judge, pursuant to the current record would be speculation and not grounded in established fact. Accordingly, no dollar amount of lost wages will be awarded by this decision.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by establishing the charges against an employee by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008).

2. Respondent did not demonstrate, by a preponderance of the evidence, that Grievant is culpable of the charges levied.

3. 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). 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).

4. An employee of a county board of education may be suspended or dismissed only 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. W. VA. CODE § 18A-2-8. "The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. VA. CODE §18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991). *See Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975)." *Graham v. Putnam County Bd. of Educ.*, Docket No. 99-40- 206 (Sep. 30, 1999).

5. The State Board of Education's Employee Code of Conduct at 126 C.S.R. 162 directs all West Virginia school employees to "exhibit professional behavior by showing positive examples"; "maintain a safe and healthy environment"; "demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior"; and "comply with all Federal and West Virginia laws, policies, regulations and procedures." Grievant's conduct was dubious, and not prudent behavior, however it is not established that said conduct is not correctable.

6. County boards of education have substantial discretion in matters relating hiring, assignment, transfer and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interest of the schools, and in a manner which is not arbitrary and capricious. *State ex rel. Melchiori v. Bd. of Educ.*, 188 W. Va. 575, 425 S.E.2d 251 (1992); *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).

7. Respondent did not demonstrate, by a preponderance of the evidence, that Grievant engaged in behavior constituting willful neglect of duty.

8. Respondent did not demonstrate, by a preponderance of the evidence, that Grievant engaged in behavior constituting insubordination.

9. Respondent's disciplinary actions of Grievant were excessive, arbitrary and capricious.

Accordingly, this grievance is **GRANTED**.

Respondent is **ORDERED** to reinstate Grievant to his prior position of employment, full-time certified Substitute Teacher employed by the Kanawha County Board of Education. No dollar amount of lost wages is awarded by this decision.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: July 31, 2012

Landon R. Brown
Administrative Law Judge