WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BRITTANI WILLIAMS,
Grievant,

v. **Docket No. 2012-0669-LinED**

LINCOLN COUNTY BOARD
OF EDUCATION,
Respondent.

DECISION

Brittani Williams, Grievant, is employed by the Lincoln County Board of Education ("Board") as a sign language interpreter. By letter dated November 30, 2011, Lincoln County Superintendent, Patricia Lucas, notified Grievant that she was going to recommend to the Board that Grievant be suspended for thirty days without pay. Grievant Williams requested a hearing before the Board and one was held on December 20, 2011. Grievant was notified by letter dated December 23, 2011, that the Board had voted to accept the superintendent's recommendation and suspend her accordingly. Ms. Williams filed a level three grievance form dated December 21, 2011.[1] The statement of grievance states:

> Respondent has suspended Grievant without pay. Grievant contends that (a) the charges were not established by a preponderance of the evidence; (b) Respondent failed to provide her with a final evaluation and written plan of improvement prior to the suspension; (c) Respondent has failed to discipline other employees guilty of the same misconduct; and (d) the past problems cited by Respondent have been substantially corrected in the

[1] Grievant exercised her right pursuant to W. VA. CODE § 6C-2-4(a)(4) to file an expedited grievance at level three to contest her suspension. Grievant attended the Board meeting on December 20, 2011, where the Board voted to accept the superintendent's recommendation to suspend her. She filed her grievance the next day, not waiting for the written notice from the superintendent sent on December 23.

current school year. Grievant cites W. VA. CODE §§ 18A-2-12a, 6C-2-2 & 18A-2-8.

As relief, Grievant seeks "compensation for lost wages and all benefits, pecuniary and non-pecuniary; interest on all sums of money to which she is entitled. And removal of all references to the suspension from her personnel record."

A level three hearing was held at the Charleston office of the West Virginia Public Employees Grievance Board on May 18, 2012. Grievant appeared at the hearing with her representative John E. Roush, Esquire, of the West Virginia School Service Personnel Association. Respondent was represented by Rebecca M. Tinder, Esquire, of Bowles Rice McDavid Graff & Love LLP. The parties submitted Proposed Findings of Fact and Conclusions of Law which were both received at the West Virginia Public Employees Grievance Board on June 19, 2012. This grievance became mature for decision on that date.

Synopsis

Grievant was suspended for thirty days without pay after two years of habitual tardiness, refusal to follow her assigned schedule, as well as manipulating her sign-in sheets and time reports to cover her tardiness. Grievant argues that she had corrected some of the conduct before she was suspended and that Respondent was required to give her an improvement plan before she was suspended.

Respondent demonstrated that Grievant's performance problems were reflected in regular evaluations and at least some of her behavior was not performance related and therefore not subject to an improvement plan. While the suspension appears to be longer than necessary it was not so disproportionate to the proven misconduct as to require mitigation.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant Williams is employed by the Board as a sign language interpreter.[2] She has been assigned to Guyan Valley Middle School ("School") for approximately seven years.

2. Employees at the School are required to report to work each day at or before 7:15 a.m. Employees are required to sign in at the school secretary's office upon arrival at the school and sign out immediately before leaving. Employees are required to list the time they sign in and out on the form beside their signature to document their timely arrival.

3. During the 2008-2009 school year, Kevin Prichard was the School Principal. On May 1, 2009, Principal Prichard met with Grievant and admonished her for not reporting to work on time and improperly documenting her arrival time on the sign-in sheet. Principal Prichard gave Grievant Williams written notice that her work schedule must be followed and instructed her that she was required to properly document her hours on her time sheet and her sign-in sheet.[3]

4. During the 2009-2010 school year, Grievant continued to arrive late and sign in and out at improper times. Grievant was assigned to a particular student and accompany him to his classes each day. Grievant was only accompanying the student

[2] This is a school service personnel position defined generally at W. VA. CODE § 18A-4-8(i)(15).

[3] This letter was part of an omnibus exhibit containing many documents regarding Grievant's performance that was introduced at the suspension hearing held before the Board of Education. Those documents will be cited herein as "Board's Exhibit 1."

to his core classes which was not consistent with her daily schedule and caused problem in the classes where the student did not have an interpreter to facilitate communication with his teachers.

5. Principal Prichard completed a Service Personnel evaluation of Grievant Williams. The evaluation related to the period of August 2008 through March 2009 and was based upon daily observations. Board's Exhibit 1. Grievant signed this document indicating that it had been shared with her.

6. The Observation/Evaluation document contains a total of twenty-six separate performance measures divided into three general categories: Work Habits; Performance; and Professional Development. The employee's performance is rated for each standard as "Meets Perf. Measures or "Does Not Meet Perf. Measures."[4] Grievant was rated as "Meeting Perf. Measures" for all but two standards. The measures that Grievant did not meet were: "Adheres to assigned work hours" and "Follows established attendance policy". In the "Comments" area on the form Principal Prichard noted, "Employee must sign in each day. Call Central Office when absent from work" and "Works well with staff and student." Board's Exhibit 1.

7. Principal Prichard completed a second Observation/Evaluation document related to Grievant's job performance based upon observations made on October 28, 2009, and January 14, 2010. Grievant was rated as "Meets Perf. Measures" for twenty-four measures but did not meet the two performance measures of "Performs duties as assigned by supervisor" and "Adheres to assigned work hours." In the "Comments"

[4] From the context of the document, it is apparent that the abbreviation "perf." is used in place of the word "performance."

area, Mr. Prichard reminded Grievant to follow her schedule as assigned and sign in according to her work schedule.

8. Principal Prichard documented three meetings that he held with Grievant in the fall of 2010. On September 2, 2010, he met with Grievant to remind her of the importance of arriving to work on time for her morning duty. On October 21, 2010, and again on November 8, 2010, Principal Prichard met with Grievant regarding her failure to accompany her assigned student to the student's related arts classes.[5] At the November meeting, Principal Prichard also advised Grievant that she continued to arrive late and that she had been seen on video arriving at work at a different time than the time which she recorded on the sign-in sheet. He explained to Grievant "that she could be fired for falsifying documents on her time sheet." Board's Exhibit 1.

9. Kevin Prichard became the Board's Attendance Director at the beginning of the 2010-2011 school year, and Jeremy Brunty became the Principal at Guyan Valley Middle School. Mr. Brunty had been an Assistant Principal at the School the previous year.

10. On January 7, 2011, Principal Brunty completed an Observation/Evaluation Form indicating that he had performed a formal observation of Grievant. On this occasion, Grievant was rated as "Meets Perf. Measures" for twenty-three measures but did not meet the three performance measures of, "Performs duties as assigned by supervisor," "Adheres to assigned work hours," and "Follows School/Board of Education policies and procedures." In the "Comments" area, Principal

[5] Grievant indicated that she was taking her planning period during this time. As an interpreter, Grievant was not entitled to a daily planning period. *See* W. VA. CODE § 18A-4-14(2).

Brunty noted among other things that Grievant was "Late for work constantly," did not attend her assigned student's related arts classes, did not cover her morning duty in the cafeteria because she was late for work and that she was not following the attendance policy."

11. In April 2011, Grievant Williams met with Principal Brunty and Patricia Lucas. At that time, Ms. Lucas was the Assistant Superintendent of Schools. She subsequently became the Superintendent.

12. During the April 2011 meeting, Grievant was admonished to sign in at the secretary's desk with the time she actually arrived at work rather than writing down the time she was supposed to arrive. It was once again advised that reporting a time other than her actual arrival time constituted falsifying her time sheet which could result in discipline. The participants also discussed Grievant's persistent tardiness and her failure to timely call the Central Office when she will be absent so that a substitute can be assigned for her position, as well as her consistent failure to attend the related arts classes with her assigned student as she had been instructed.[6]

13. Grievant signed in on the sign-in sheet on April 12, 2011, that she arrived at work at 8:40 a.m. On her time sheet for the week she reported that she arrived at 7:15 a.m. on that day. On April 15, 2011, Grievant noted on the sign-in sheet that she arrived at 8:20 a.m. but listed her arrival time for that day on her time sheet as 7:15 a.m.

[6] This meeting was documented in an undated memorandum prepared by Principal Brunty, addressed, "To whom it may concern," and included in the Board's Exhibit 1.

Principal Brunty changed the time sheets to reflect the actual time Grievant arrived on those days and initialed the time sheet where he made the changes. Board's Exhibit 1.[7]

14. Principal Brunty completed an Observation/Evaluation form dated June 1, 2011, reflecting Grievant's performance evaluation for the 2010-2011 school year. Grievant was rated as "Meets Perf. Measures" for eighteen measures but did not meet standards on eight performance measures. Those measures were:

- Performs duties as assigned by supervisor;
- Adheres to assigned work hours;
- Follows established attendance policy;
- Able to plan, organize and follow a work schedule;
- Performs work that meets quality and standard expectations;
- Accepts suggestions regarding duties and job performance by supervisor;
- Understands all phases of assigned duties; and,
- Follows School/Board of Education policies and procedures.

Principal Brunty's comments reflected that Grievant continued to be late for work but generally not as late as before. She did not accompany her assigned student to his related arts classes until she met with the Assistant Superintendent in April 2011, and that she did not perform her morning duty assignment because she was late on a regular basis. Respondent's Exhibit 1, level three hearing.

15. Neither Principal Prichard nor Principal Brunty placed Grievant on a Performance Improvement Plan ("PIP") to address her performance shortcomings.

16. Grievant did not contest her performance appraisals or attach any rebuttal information to them.

[7] This was an example of the problems that the principals were discussing with Grievant about her tardiness and time reporting for the last two years as reflected on her evaluations.

17. After the end of the 2010-2011 school year, Principal Brunty recommended that Grievant Williams' employment be suspended for the following reasons:

- Failure to show up to work on time, (three years of documentation and consulting with her on this matter);
- Failure to follow her student's schedule to all his classes, (three years of documentation and consulting with her on this matter);
- Falsifying sign-in sheets and payroll sheets, (written documentation, consultation with her on this matter);
- Insubordination – not complying with the requests of her supervisor on the above issues after having met with Brittany on multiple occasions.[8]

18. Mr. Brunty became the Special Education Director in August of 2011, and Jonah Adkins was employed as the Principal at Guyan Valley Middle School.

19. By letter dated November 30, 2011, Lincoln County Superintendent, Patricia Lucas, notified Grievant that she was going to recommend to the Board that Grievant be suspended for thirty days without pay. Grievant Williams requested a hearing before the Board and one was held on December 20, 2011. Grievant was notified by letter dated December 23, 2011, that the Board had voted to accept the superintendent's recommendation and suspend her for thirty days without pay.

20. On January 21, 2012, Principal Adkins placed Grievant on a Plan of Improvement to address the performance expectations that she adhere to her work schedule, and that she arrive to work on time. Grievant was expected to show improvement by April 1, 2012. Grievant's Exhibit 1, level three hearing.

21 Principal Adkins completed an Observation/Evaluation form related to Grievant's performance dated April 15, 2012. Grievant was rated as "Meets Perf. Measures" for all twenty-six measures. Principal Adkins noted that Grievant Williams

[8] Board's Exhibit 1.

had “met and achieved goals on [her] improvement plan” and [had] shown consistent improvement. Grievant’s Exhibit 1, level three hearing.

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 Rules 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); *Leichliter v. W. Va. Dep't of Health and Human Res*., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Respondent issued Grievant a thirty-day suspension for habitually reporting to work late, repeatedly failing to adhere to her assigned work schedule by not accompanying the student to whom she was assigned to all of his class, failing to place her name and time of arrival on a sign-in sheet on some occasions and placing a time other than her actual arrival time on the sign-in sheet on other occasions, and reporting different times on her weekly time sheets than those placed upon the daily sign-in sheet. Superintendent Lucas pointed out that Grievant had been instructed to follow the attendance policies and her assigned schedule several times over a period of two

years, yet she consistently failed to comply. Superintendent Lucas concluded that Grievant's actions constituted "at the least, willful neglect of duty and insubordination."[9] During the level three hearing, Superintendent Lucas also noted that Grievant was falsifying her time sheets and sign-in sheets by recording arrival times that were earlier than her actual arrival times.

Grievant argues that her problems with tardiness and her issue with following her assigned schedule were resolved by the beginning of the 2011-2012 school year, therefore, these problems should not serve as reasons for her suspension three months into that school year. Additionally, Grievant claims that the sign-in process was not consistently enforced and that mistakes occurred through sloppy bookkeeping rather than any intention on Grievant's part to cheat her employer on her time sheets. Finally, Grievant asserts that the accusations of tardiness, failure to follow her schedule and failure to strictly comply with the sign in process are all performance issues. Accordingly, she opines that Respondent violated W. VA. CODE §18-2-8 by failing to grant Grievant an opportunity to improve prior to suspending her for this conduct.

W. VA. CODE § 18A-2-8 sets out the reasons for which a school public employee may be dismissed and states in part:

> (a) Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge.
>
> (b) A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article. The charges shall be stated in writing served upon the employee within two days of presentation of the charges to the board.

[9] Board's Exhibit 1, November 30, 2011, suspension letter.

With regard to suspension of public school employees, the West Virginia Supreme Court of Appeals noted that the causes for suspension are the same as the causes for dismissal, set out in W. VA. CODE § 18A-2-8. Accordingly an employee's suspension must be based upon the causes found in that Code section. *See Totten v. Board of Educ. of County of Mingo*, 171 W. Va. 755, 301 S.E.2d 846 (1983). Additionally, boards of education must exercise the authority granted by this statute reasonably and not arbitrarily or capriciously. *Parham v. Raleigh County Bd. of Educ.*, 192 W. Va. 540, 453 S.E.2d 374 (1994).

One of the reasons cited for the suspension was that Grievant failed to accompany the student to whom she was assigned to his related arts classes.[10] The evidence indicates that during the time Mr. Prichard was principal at the School, and during much of the 2010-2011 school year, when Mr. Brunty was principal, this behavior was chronic. Grievant apparently believed she was entitled to a daily planning period during the school day and took this time as her planning period.[11] As Mr. Brunty pointed out in his evaluation of Grievant in June 2011, this practice ended in April 2011 when Grievant met with him and then Assistant Superintendent Lucas. Therefore, there is no justification for it to be a reason for her suspension seven months later. However, it is a relevant indicator of her overall unwillingness to comply with the directives of her supervisors.

---

[10] Related arts classes are electives that are not part of the required core curriculum. They could include among other courses, music, art or foreign language.

[11] As noted in Footnote 5 *supra,* Grievant was clearly not entitled to a daily planning period pursuant to W. VA. CODE § 18-4-14(2) because she was not a teacher. What is not clear is why it took two years and two principals to resolve this issue.

The additional reasons for the suspension were Grievant's consistent failure to show up for work on time, and Grievant's manipulation of the sign-in sheets and weekly time sheets to indicate that she was not tardy when she was. Grievant's inaccurate time reporting was caught on video cameras in the school which showed her arrival at different times than she reported on the sign-in sheet and discrepancies between the times Grievant reported on sign-in sheets and time reports for the same days. Additionally, Principal Adkins noted that these behaviors continued, in an admittedly diminished way, into the 2011-2012 school year. Accordingly, he placed Grievant on an improvement plan to address these issues in January 2012.

Superintendent Lucas stated in the November 30, 2011, suspension letter that Grievant's actions constituted "at least, willful neglect of duty and insubordination. The term "willful neglect of duty" encompasses something more serious than incompetence. The term "willful" ordinarily imports a knowing and intentional act, as distinguished from a negligent act. *Bd. of Educ. of the County of Gilmer v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120 (1990); *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 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).

Grievant gave a number of reasons for her inability to get to work on time ranging from illness, to traffic, to the fact that she was attending school in addition to working. It is unlikely that Grievant intended to be regularly late for work, but she clearly did not

take necessary steps to keep it from happening. The Supreme Court noted in *Chaddock* that, “a continuing course of lesser infractions may well, when viewed in the aggregate, be sufficient” to constitute willful neglect of duty. Such is the case here. Grievant’s failure, over a course of two years, to take sufficient steps to arrive at work on time, even after being warned of the consequences, was sufficient to constitute willful neglect of duty.

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./Shepherd Coll.*, 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.*, 212 W. Va. at 213, 569 S.E.2d at 460 (citation omitted). "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).

Once again, Grievant was repeatedly warned that she was expected to arrive at work on time and yet she continually failed to do so. However, the evidence does not support a finding that her actions were defiant. Rather, she would try to arrive on time for a while, fail, and try again. However, Grievant’s manipulation of her time reports and sign-in sheets were intentional and defiant attempts to cover her tardiness and those actions did constitute insubordination.

However, that is not the end of the inquiry. The West Virginia Supreme Court has held that "where the underlying complaints regarding a teacher's[12] conduct relate to his or her performance . . . the effect of West Virginia Board of Education Policy is to require an initial inquiry into whether that conduct is correctable. *Maxey v. McDowell County Bd. of Educ*., 212 W. Va. 668, 575 S.E.2d 278 (2002). The provisions of Policy 5300 referred to by the Court have since been codified in W. VA. CODE § 18A-2-12a and state the following:

> (6) All school personnel are entitled to know how well they are fulfilling their responsibilities and should be offered the opportunity of open and honest evaluations of their performance on a regular basis and in accordance with the provisions of section twelve of this article. All school personnel are entitled to opportunities to improve their job performance prior to the termination or transfer of their services. Decisions concerning the promotion, demotion, transfer or termination of employment of school personnel, other than those for lack of need or governed by specific statutory provisions unrelated to performance, should be based upon the evaluations, and not upon factors extraneous thereto. All school personnel are entitled to due process in matters affecting their employment, transfer, demotion or promotion. . .[13]

The Court discussed this provision of Policy 5300 in detail in *Mason County Bd. of Educ. v. State Superintendent of Sch*., 165 W. Va. 732, 739 (W. Va. 1980) where it wrote:

> Our holding in *Trimboli, supra*,[14] requires that a dismissal of school personnel be based on a § 5300(6)(a) evaluation after the employee is

---

[12] While the Court's discussion in *Maxey* referred to a teacher, the statutes and policies in the case apply with equal force to all public school employees. *See* W. VA. CODE §§ 18A-2-8 and 18A-2-12a.

[13] This is virtually the same language which was contained in West Virginia Board of Education Policy at 5300(6)(b).

[14] *Trimboli v. Bd. of Educ. of the County of Wayne*, 163 W.Va. 1, 254 S.E.2d 561 (1979).

> afforded an improvement period. It states that a board must follow the § 5300(6)(a) procedures if the circumstances forming the basis for suspension or discharge are "correctable." The factor triggering the application of the evaluation procedure and correction period is "correctable" conduct. What is "correctable" conduct does not lend itself to an exact definition but must, in view of the nature of the conduct examined in *Trimboli, supra*, and in *Rogers, supra*,[15] be understood to mean an offense or conduct which affects professional competency.

Concerning what constitutes "correctable" conduct the Court noted that "it is not the label given to conduct which determines whether § 5300(6)(a) procedures must be and whether it directly and substantially affects the morals, safety, and health of the system in a permanent, non-correctable manner." *Mason County Bd. of Educ., supra.*

Grievant argues that her conduct was related to her performance and pursuant to W. VA. CODE §18A-2-12a she could not be suspended for conduct that was not brought to her attention through evaluation and until she was given an opportunity to improve through an improvement plan as contemplated in W. VA. CODE §18A-2-12. This position is supported by the Supreme Court's ruling statement that "a board must follow the § 5300(6)(a) procedures if the circumstances forming the basis for **suspension or discharge** are 'correctable'.'' *Mason County Bd. of Educ., supra.* In this regard it does not matter that Superintendent Lucas characterized the conduct as "willful neglect of duty" and "insubordination". It is whether the conduct related to Grievant's performance which controls the application of W. VA. CODE § 18A-2-12a, but whether the conduct was related to Grievant's performance and is correctable. (Emphasis added) *Maxey, supra.*

Principals Prichard and Brunty independently testified that they did not put Grievant on an improvement plan because neither of them could suggest how Grievant

[15] *Rogers v. Bd. of Educ*., 125 W.Va. 579, 588, 25 S.E.2d 537 (1943).

could improve not showing up to work on time. One either allots sufficient time to get to work or she doesn't. However, whether an opportunity to improve is required does not depend upon the administrator's ability to recommend appropriate improvement strategies. The main question is whether the conduct is related to performance. To answer that question one need only look at Respondent's Observation/Evaluation forms. At least two of the performance standards relate to Grievant's habitual tardiness; "Adheres to assigned work hours" and "Follows established attendance policy". Consequently, Grievant's tardiness was related to her performance and correctable. Grievant was properly evaluated on these performance standards and it was brought to her attention by both principals that she was not meeting these standards. But she was never given a formal improvement plan as contemplated by W. VA. CODE § 18A-2-12, until after she was suspended.[16]

Ultimately, Grievant's tardiness was not the sole reason for her suspension. In her testimony, Superintendent Lucas stressed that the main reason for Grievant receiving a thirty-day suspension was her willful manipulation of her time reports and time sheets. This conduct goes to the employee's honesty and integrity. Superintendent Lucas noted that other service personnel had been dismissed from employment for submitting false time reports. Manipulating the time sheets was not

[16] Grievant was made aware of her tardiness and given many opportunities to improve that conduct before she was suspended. Because she was also suspended for conduct that was not performance related, it is not necessary to reach the issue of whether these opportunities to improve would have been sufficient without a formal improvement plan as contemplated by W. VA. CODE §§ 18-2-8,12 &12a, given the Supreme Court's consistent holding that "School personnel regulations and laws are to be strictly construed in favor of the employee." Syllabus Point 1, Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979).

performance-related conduct and it falls under the category of insubordination. Therefore, Grievant was specifically not covered by W. VA. CODE § 12A-2-12a and Respondent was not required to afford her an opportunity to improve before Grievant was disciplined for this conduct. Consequently, Grievant's suspension does not violate W. VA. CODE § 12A-2-12a.

Finally, Grievant argues that the discipline given to Grievant was too severe for the conduct she committed and should be reduced. "Whether to mitigate the punishment imposed by the employer, depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case-by-case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995) (citations omitted). The Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

Grievant was given clear instructions regarding the work rules she was violating and what the performance expectations were. She repeatedly violated those instructions over the course of two years. While her refusal to follow her schedule was resolved before she was suspended, it is relevant to demonstrate the overall disregard

for authority during the time in question. Superintendent Lucas and Assistant Superintendent Midkiff testified regarding the disciplinary history of Lincoln County Schools. Assistant Superintendent Mitkiff noted that a thirty-day suspension was uncommon. Most suspensions he was aware of ranged from two to ten days for minor infractions. However, both he and Ms. Lucas pointed out that service personnel had been dismissed from employment for falsifying their time sheets in a similar way as Grievant. They both concluded that, under the totality of the circumstances, a thirty-day suspension was appropriate.

For a first suspension thirty days seems heavy. However, given the length and nature of Grievant's misconduct, it was not so disproportionate as to indicate an abuse of discretion. Accordingly, the grievance is DENIED.

Conclusions of Law

1. 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 Rules 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. W. VA. CODE § 18A-2-8 sets out the reasons for which a public school employee may be dismissed and states in part:

> (a) Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge.
>
> (b) A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section

> twelve of this article. The charges shall be stated in writing served upon the employee within two days of presentation of the charges to the board.

3. The causes for suspension are the same as the causes for dismissal, set out in W. VA. CODE § 18A-2-8, accordingly an employee's suspension must be based upon the causes found in that Code section. *See Totten v. Board of Educ. of County of Mingo*, 171 W. Va. 755, 301 S.E.2d 846 (1983). Additionally, boards of education must exercise the authority granted by this statute reasonably and not arbitrarily or capriciously. *Parham v. Raleigh County Bd. of Educ.*, 192 W. Va. 540, 453 S.E.2d 374 (1994).

4. The term "willful neglect of duty" encompasses something more serious than incompetence. The term "willful" ordinarily imports a knowing and intentional act, as distinguished from a negligent act. *Bd. of Educ. of the County of Gilmer v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120 (1990); *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 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). A continuing course of lesser infractions may well, when viewed in the aggregate, be sufficient to constitute willful neglect of duty. *Chaddock, supra.*

5. Respondent proved by a preponderance of the evidence that Grievant's habitual tardiness when viewed in the aggregate, constituted willful neglect of duty.

6. For there to be "insubordination," the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be

willful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd./Shepherd Coll.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (per curiam). The disobedience must be willful, meaning that "the motivation for the disobedience [was] contumaciousness or a defiance of, or contempt for authority." *Id.*, 212 W. Va. at 213, 569 S.E.2d at 460 (citation omitted).

7. Respondent proved by a preponderance of the evidence that Grievant's failure to accurately report her arrival time on the sign-in sheets and time reports after being told to do so, constituted insubordination.

8. "Where the underlying complaints regarding a[n employee's] conduct relate to his or her performance . . . the effect of West Virginia Board of Education Policy is to require an initial inquiry into whether that conduct is correctable. *Maxey v. McDowell County Bd. of Educ*., 212 W. Va. 668, 575 S.E.2d 278 (2002).

9. "A dismissal of school personnel [must] be based on a § 5300(6)(a) evaluation after the employee is afforded an improvement period . . . a board must follow the § 5300(6)(a) procedures if the circumstances forming the basis for suspension or discharge are "correctable." The factor triggering the application of the evaluation procedure and correction period is "correctable" conduct. *Mason County Bd. of Educ. v. State Superintendent of Sch*., 165 W. Va. 732, 739 (W. Va. 1980).

10. What is "correctable" conduct does not lend itself to an exact definition but must . . . be understood to mean an offense or conduct which affects professional competency. *Mason County Bd. of Educ, supra* (citing *Trimboli v. Bd. of Educ. of the County of Wayne*, 163 W.Va. 1, 254 S.E.2d 561 (1979) and *Rogers v. Bd. of Educ*., 125 W.Va. 579, 588, 25 S.E.2d 537 (1943)). "It is not the label given to conduct which

determines whether § 5300(6)(a) procedures must be and whether it directly and substantially affects the morals, safety, and health of the system in a permanent, non-correctable manner." *Mason County Bd. of Educ., supra.*

11. West Virginia Board of Education Policy 5310 has been codified in W. VA. CODE §18A-2-12a which states in part:

> (6) All school personnel are entitled to know how well they are fulfilling their responsibilities and should be offered the opportunity of open and honest evaluations of their performance on a regular basis and in accordance with the provisions of section twelve of this article. All school personnel are entitled to opportunities to improve their job performance prior to the termination or transfer of their services. Decisions concerning the promotion, demotion, transfer or termination of employment of school personnel, other than those for lack of need or governed by specific statutory provisions unrelated to performance, should be based upon the evaluations, and not upon factors extraneous thereto. All school personnel are entitled to due process in matters affecting their employment, transfer, demotion or promotion. . .

12. Grievant's consistent tardiness was correctable conduct related to her employment. Grievant's failure to properly record her time on the sign-in sheet was not performance related and correctable conduct. Therefore, Respondent's failure to provide Grievant with an improvement plan prior to her suspension did not violate W. VA. CODE §§ 18A-2-8 or 12a.

13. Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation. *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

14. Given the totality of the circumstances, the discipline given to Grievant was not so disproportionate to her misconduct as to amount to an abuse of discretion.

Accordingly, the grievance is DENIED.

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

DATE: OCTOBER 23, 2012

_____
WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE