THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

WILBUR HINES,

Grievant,

v. **Docket No. 2019-0074-KanED**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Wilbur Hines, filed this expedited level three grievance against his employer, Kanawha County Board of Education, dated July 11, 2018, stating as follows: "[w]rongful termination from my position as bus driver at Kanawha County Board of Education." As relief sought, Grievant asks "[t]o be reinstated as a bus driver with Kanawha County Board of Education, together with back pay and lost seniority."

A level three hearing was conducted on September 4, 2018, before the undersigned administrative law judge at the Grievance Board's office in Charleston, West Virginia. Grievant appeared in person and by his representative, Rodman Stapler, West Virginia School Service Personnel Association. Respondent, Kanawha County Board of Education, appeared by counsel, James W. Withrow, Esquire. This matter became mature for consideration on October 10, 2018, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a bus operator. During a morning bus run, a ten-year-old student called Grievant "stupid," and in response, Grievant deliberately stopped the bus, confronted the student, screamed at him, and called the student "stupid,"

all of which was captured on the bus security camera. During this confrontation, Grievant also stuck his finger in the student's face to punctuate his comments. As a result, Grievant unintentionally made contact with the student's face and left a red mark on his cheek. Respondent terminated Grievant's employment as a result of his conduct toward the student. Grievant denied making contact with the student's face and leaving the mark. Grievant did not deny his other conduct during the incident. Respondent proved by a preponderance of the evidence that Grievant engaged in conduct constituting insubordination and willful neglect of duty thereby justifying his termination. Accordingly, the grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. At the times relevant herein, Grievant was employed by Respondent as a bus operator assigned to the St. Albans bus garage. Grievant had been so employed since 2015.

2. Johnna Jacobs is the Principal at Alban Elementary School. Brette Fraley is the Executive Director of Pupil Transportation. Keith Vititoe is the Kanawha County Schools Safety and Security Director.

3. During his morning bus run on April 26, 2018, Grievant engaged in a confrontation with a ten-year-old elementary school student, H.R.[1] over the student's failure to comply with Grievant's directive to sit down.

[1]The undersigned ALJ will follow the past practice of the West Virginia Supreme Court in cases involving underage individuals and will refer to the initials only of the involved

4. As seen on the video recording from one of the bus security cameras, H.R. entered the bus and sat down in the first seat right behind Grievant.[2] However, within seconds, the student promptly stood back up and said to Grievant "[w]ait!" "Hold—." Grievant interrupted the student directing him to "sit down." The student tried to reply, but the same is inaudible as Grievant interrupted him again by shouting something to the effect of, "[h]ey!" The student then said "[b]ut my mom wants me!" Grievant replied, "I said sit down." At that point, the student sat back down in the seat right behind Grievant and muttered under his breath, "[y]ou're stupid."

5. Upon hearing the student call him stupid, Grievant yelled, "[y]ou--!" and abruptly pulled the bus over and stopped it, removed his seat belt and stood up, turned around facing the students, particularly H.R., and yelled "[y]ou want to know what stupid is? You are!" As Grievant said the words "you are," he extended his arm very quickly by unbending his elbow, and with his index finger extended, pointing his finger in H.R.'s face, then quickly pulled his arm back.[3] When Grievant pointed his finger in H.R.'s face, Grievant's finger made contact with H.R. face, just under his left eye.[4]

6. During the confrontation, Grievant appeared very angry and his movements and body language reinforced the same. He appeared intimidating. He yelled, abruptly pulled the bus over and stopped it, he stood right in front of H.R. looking down at him,

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student. *See In the Matter of Jonathan P.,* 182 W.Va. 302, 303 n. 1, 387 S.E. 2d 537, 538 n. 1 (1989).

[2]*See*, Respondent's Exhibit 2, video recording at 8:16:32. It is noted that it is unknown whether the clock displaying the time on the video reflects the correct time these events occurred. Brette Farley testified that sometimes the clocks on the bus cameras get off track and display the incorrect time of day.

[3]*See*, Respondent's Exhibit 2, video recording at 8:16:00-8:17:00.

[4]*See*, Respondent's Exhibit 2, video recording at 8:16:51.

then punctuated his "you are!" with the quick extension of his arm and hand resulting in his finger making contact with H.R.'s cheek.

7. After yelling at H.R., Grievant stood there in front of H.R., who had remained seated, a few seconds before returning to his seat, and resuming the bus run.[5]

8. H.R. appeared stunned by Grievant's actions. H.R. did not visibly flinch, cry, or grab his face in response to Grievant's actions. H.R. remained seated quietly for the rest of the run. The whole bus of students became quiet during the confrontation, and remained quiet for several minutes after the bus run resumed.

9. After Grievant resumed the bus run, while looking in his rearview mirror, stated something to the effect of, "[y]ou are the one going to school. I'm not late." It is unclear why Grievant made this statement. It does not appear to be in response to any statement. Grievant made the statement in a loud tone of voice, but did not appear angry. It sounded more like an attempt to antagonize H.R.

10. The left side of H.R.'s face is turned away from the camera during the remaining part of the run. He briefly turned his head once, but the video quality prevents a clear view of the left side of his face. However, H.R. can be seen touching a spot on the left side of his face, just under his eye, with his finger. After he touches it, he removes his finger and looks at his finger tip.[6]

11. When the bus arrives at the school, H.R. is the first student off the bus. He has no interaction with Grievant as he walked past him.[7] At the level three hearing, this

[5]*See*, Respondent's Exhibit 2, video recording at 8:17:00-8:17:04.
[6]*See*, Respondent's Exhibit 2, video recording at 8:20:08.
[7]*See*, Respondent's Exhibit 2, video recording at 8:21:08.

is where counsel for Respondent stopped the video. The full video was not played at the level three hearing. The flash drive entered into evidence, Respondent's Exhibit 2, contains video from before H.R. entered the bus, also not played at the hearing, and footage after H.R. left the view of the camera when exiting the bus. Nonetheless, the entire video was made a part of the record at the hearing. A copy of the same was provided to Grievant's representative at the hearing, and had an opportunity to view the same before the hearing. The ALJ played the video in its entirety while reviewing the evidence in this matter. The ALJ discovered that at the 8:21:10 mark on the video, a child's voice can be heard yelling the following: "[i]f you ever put your hands on me again! You're retarded! You're retarded!"[8] The voice sounds emotional. This statement can be heard just as H.R. leaves the camera's view, while the rest of the students were exiting the bus. The viewer cannot see who made the statement. On the video, Grievant does not appear to react to the statement. No one has claimed that H.R. made this statement. No one has mentioned this statement being made at all.

12. It is noted that Grievant had not seen H.R.'s mother at his stop when H.R. asked Grievant to wait and said his mom wanted him. As such, Grievant did not allow H.R. to exit the bus, which is, according to Respondent, consistent with its policy. No videos from the bus were presented showing H.R.'s bus stop or his home, and no female adult can be seen in the video presented at the level three hearing.

13. When he got to school, H.R. went to Principal Jacobs' office. Principal Jacobs estimated that H.R. arrived at her office at approximately 8:40 a.m. She understood that H.R. came to her office straight from the bus. However, it is unknown

[8] *See*, Respondent's Exhibit 2, video recording at 8:21:10.

whether H.R. made any stops before getting to her office. Principal Jacobs did not see H.R. exit the bus.

14. When H.R. arrived at Principal Jacobs' office, he was upset, crying, and he had a red mark under his left eye. It was not a cut, and no blood was visible. It was a red abrasion. Principal Jacobs asked H.R. what had happened and he explained that he had called the bus driver "stupid," the bus driver called him "stupid," then the bus driver hit him in the face. Principal Jacobs then called the St. Albans Bus Garage to obtain a copy of the bus video. H.R. went on to class after he had calmed down.

15. When H.R. arrived at his class a little late that morning, his teacher, Nancy Michael, observed that H.R.'s eyes were watery and red, and that he had a red mark on his face. Ms. Michael described the mark as looking red and somewhat "raw" in the morning. Ms. Michael asked H.R. what had happened to his face, and he replied that the bus driver did it. Ms. Michael asked him if he wanted to put some ice on the abrasion and he said yes. Ms. Michael sent H.R. to the nurse to get ice. H.R. returned to class with the ice to apply to his face.

16. Sometime around 8:00 a.m. that morning, before H.R. arrived at school, his mother telephoned Ms. Michael to advise her that there was a personal family matter occurring that may have H.R. upset or worried. She explained to Ms. Michael that the family had been notified of the matter during the night before, and H.R. was aware of it before he left for school that day.

17. Principal Jacobs contacted Mr. Farley at around 10:00 a.m. that morning, and reported the incident to him. Principal Jacobs did not fill out an incident report or an injury report regarding H.R.

18. Mr. Farley obtained the video from the bus and reviewed the same. He then emailed Keith Vititoe and informed him of the incident involving Grievant and H.R. Mr. Farley provided Mr. Vititoe with a copy of the video from the bus. Mr. Vititoe reviewed the video and then drove to Alban Elementary School to speak with H.R.

19. When he arrived at Alban Elementary School, he spoke with Principal Jacobs, and asked to speak to H.R. Ms. Michael, then escorted H.R. to Principal Jacobs office to speak with Mr. Vititoe. Mr. Vititoe met with H.R. in the presence of Ms. Michael, and discussed what had occurred on the bus ride that morning. Mr. Vititoe also photographed H.R.'s face showing the red mark.[9]

20. Mr. Vititoe called H.R.'s mother that same day and informed her of the incident and that H.R. had an abrasion on his face. Mr. Vititoe also reported the incident to the police, but they declined to pursue any charges against Grievant.[10]

21. By the afternoon, the abrasion on H.R.'s face appeared dryer, or that it had scabbed over. There is no evidence of the abrasion bleeding, but it had changed in appearance over the course of the day.[11]

22. H.R. remained at school that day until around 2:00 p.m., after he had spoken to Mr. Vititoe. He was signed out of school early that day by his mother because there had been a death in his family.

23. Other than getting ice from the school nurse, there was no evidence presented to suggest that H.R. received any medical treatment for the abrasion at school on April 26, 2018, or thereafter.

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[9]*See*, Respondent's Exhibit 1, photograph.
[10]*See*, lower disciplinary proceeding testimony of Keith Vititoe; testimony of Brette Farley.
[11]*See*, testimony of Johnna Jacobs; testimony of Nancy Michael.

24. By letter dated April 30, 2018, Superintendent Ronald E. Duerring informed Grievant that he was suspended with pay for his actions on April 26, 2018, when he "approached the student, called the student stupid, pointed [his] finger in the student's face and made contact with the student's face. The student suffered a small laceration on his face. You have been suspended previously for making inappropriate statements to students."[12]

25. An employee disciplinary hearing was held for Grievant before Hearing Examiner Anne B. Charnock on May 15, 2018. Grievant was then represented by counsel, Joe Spradling, WVSSPA. By decision dated May 22, 2018, Hearing Examiner Charnock ruled that Grievant had "engaged in unsatisfactory performance when he used inappropriate language with a student and made physical contact with the student causing a laceration and swelling on the student's face. Kanawha County Schools may sanction Employee up to and including termination of employment."

26. The hearing examiner found in her recommended decision that the video recording from the bus was inconclusive as to whether Grievant made contact with H.R.'s face during the incident on the bus.

27. It is noted that the quality of the bus camera recording does not allow the viewer to see fine details on the faces of those on the bus. The viewer can identify people, and clearly view the incident, but the fine details of peoples' faces cannot be discerned.

28. No mark can be seen on H.R.'s face when he boarded the bus, and one cannot be seen when he exited. It is noted that the left side of H.R.'s face was consistently turned away from the bus camera during the bus run, and as he exited. There are brief

[12]*See*, Exhibit "HE No1," letter dated April 30, 2018, lower disciplinary hearing.

moments when he faced the camera, but the video quality is not good enough to show fine details.

29. By letter dated May 29, 2018, Superintendent Duerring informed Grievant that as follows:

> I am in receipt of the recommended decision by the independent hearing examiner, issued on May 22, 2018, wherein she determined that you were guilty of misconduct and recommended that you be subject to disciplinary action up to and including termination from your employment from Kanawha County Schools. A copy of the decision is included herein.
>
> I concur with the findings, conclusions, and recommendations of the hearing examiner and intend to recommend to the Board of Education that you be dismissed from your employment. Once the Board of Education acts on my recommendations, you will be advised of the Board's decision. In the interim, you will be suspended without pay, pending the recommendations to the Board.[13]

30. By letter dated July 10, 2018, Superintendent Duerring informed Grievant of the following:

> Please be advised that at its meeting on July 9, 2018, the Kanawha County Board of Education adopted the following motion:
>
> I move the Board adopt the findings and conclusions of the hearing examiner, approve the Superintendent's prior suspension of Wilbur Hines and further approve the Superintendent's recommendation for dismissal of Wilbur Hines, and Wilbur Hines shall be, and he is hereby, terminated from his employment with the Kanawha County Board of Education, effective immediately. . . .

31. Respondent had not charged Grievant with any specific offense at the time he was suspended. In his letter, Superintendent Duerring's describes the incident, but

[13]*See*, letter dated May 29, 2018, lower level record.

does not charge Grievant with any violation of WEST VIRGINIA CODE § 18A-2-8(a). Further, Dr. Duerring only refers to the allegations against Grievant and the cause for his termination as "misconduct." The hearing examiner from the school disciplinary hearing labeled Grievant's conduct as "unsatisfactory work performance," and that was not stated until she issued her recommended decision.

32. In or about March 2016, Grievant was disciplined for "the use of inappropriate language" on two separate occasions. Grievant and Respondent entered into a written agreement that Grievant would receive a twenty-two working-day suspension without pay for this misconduct.[14]

33. When asked during the level three hearing if he had any other disciplinary actions while employed by Respondent, Grievant explained that he had been "written up" on another occasion for leaving the bus while it was running when children were aboard. He further explained that a car had cut him off in traffic, so he stopped the bus so that he could confront the motorist, but the motorist drove away before he could do so. This is how Grievant came to leave the bus while it was running and students were aboard. It does not appear that Grievant was disciplined for stopping the bus in an attempt to engage in a potential road rage incident which could have placed the students on the bus at risk of harm.

34. Grievant was wearing gloves during the bus run at issue, and such can be readily seen on the bus camera video. However, it can also be seen that his gloves were fingerless. The gloves may have had a flap that could be flipped over to cover his fingers,

[14]*See,* KCS Exhibit No. 1, written agreement dated March 21, 2016, lower school disciplinary hearing record.

but if there were, such were folded back exposing his fingers. His fingers can be seen while he is driving the bus and during the confrontation with H.R.

35. Respondent introduced no Kanawha County Schools policies into evidence. Respondent also did not introduce any evidence of Grievant's training into evidence at the lower disciplinary hearing or at the level three hearing in this matter.

36. Neither H.R. nor his mother was called to testify at the level three hearing. No written statements from either H.R. or his mother were introduced into evidence in this matter.

Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), ***aff'd***, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

Respondent asserts that Grievant's actions during his confrontation with H.R., those being yelling at H.R., calling him "stupid," and making contact with H.R.'s face as Grievant stuck his extended finger in H.R.'s face leaving a red mark, on April 26, 2018, constitute misconduct in violation of WEST VIRGINIA CODE § 18A-2-8(a). Therefore, Respondent argues that Grievant's suspension and subsequent dismissal were justified. Grievant does not deny that he stopped the bus, turned around, screamed at H.R., stuck his finger in H.R.'s face, and called him "stupid." Grievant denies making contact with

H.R.'s face during the confrontation; therefore, Grievant denies causing the mark on H.R.'s face. Grievant asserts in proposed Findings of Fact and Conclusions of Law that H.R. had the mark on his face when he boarded the bus that morning.

The authority of a county board of education to suspend or terminate an employee's contract must be based on one or more of the causes listed in West Virginia Code § 18A-2-8 and must be exercised reasonably, not arbitrarily or capriciously. Syl. Pt. 2, *Parham v. Raleigh County Bd. of Educ.*, 192 W. Va. 540, 453 S.E.2d 374 (1994); Syl. Pt. 3, *Beverlin v. Bd. of Educ*., 158 W. Va. 1067, 216 S.E.2d 554 (1975)*; Bell v. Kanawha County Bd. of Educ*., Docket No. 91-20-005 (Apr. 16, 1991), ***aff'd,*** Kanawha Cnty. Cir. Ct. Civil Action No. 91-AA-110 (June 4, 1992).

WEST VIRGINIA CODE §18A-2-8 states, in part that,

> (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 [§ 18A-2-12] of this article. The changes shall be stated in writing served upon the employee within two days of presentation of the changes to the board. . . .

W. VA. CODE § 18A-2-8(a)-(b). However, "[i]t 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), ***aff'd,*** Kanawha Cnty. Cir. Ct. Civil Action No. 90-AA-134 (Oct. 13, 1992);

Duruttya v. Mingo County Bd. of Educ., Docket No. 29-88-104 (Feb. 28, 1990), ***aff'd,*** Kanawha Cnty. Cir. Ct. Civil Action No. 90-AA-72, ***aff'd, Duruttya v. Bd. of Educ.,*** 181 W. Va. 203, 382 S.E.2d 203 (1989).

An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), ***aff'd*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

"'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res.,* Docket No. 93-HHR-322 (June 27, 1997), ***aff'd*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998);

Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001), ***aff'd*** Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

While Respondent failed to charge Grievant with any particular ground in its letter dated April 30, 2018, Superintendent Duerring described what had occurred during the incident, and noted that Grievant had been previously suspended for making inappropriate statements to students.[15] The lower level hearing examiner found that Grievant's conduct constituted unsatisfactory performance. Superintendent Duerring adopted the hearing examiner's recommended decision and recommended Grievant's dismissal based upon the same. The Board then dismissed Grievant. Now, at level three, Respondent has argued that Grievant's conduct toward H.R. on April 26, 2018, as demonstrated by the video, is "either insubordination, willful neglect of duty, cruelty, or unsatisfactory job performance," and that such justified his dismissal. In its proposed Findings of Fact and Conclusions of Law, Respondent does not discuss the applicable law for any of those grounds. It is noted that there has been no evidence presented to suggest that this charge of unsatisfactory performance resulted from an employee performance evaluation, and Grievant was not offered an opportunity to improve. H.R. brought Grievant's conduct on April 26, 2018, to the Respondent's attention when he spoke to Principal Jacobs that morning.

As Grievant appears to have been dismissed for unsatisfactory performance, that ground will be discussed first. "The factor which distinguishes willful neglect of duty and

[15]*See*, Exhibit "HE No1," letter dated April 30, 2018, lower disciplinary hearing.

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).

The West Virginia Supreme Court of Appeals has held that "where the underlying complaints regarding a teacher's[16] 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 WEST VIRGINIA 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 [§ 18A-2-12] of this article. All school personnel are entitled to opportunities to improve their job performance prior to 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 . . . .

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

Id.

The Court discussed this provision of Policy 5300 in detail in the case of *Mason County Bd. of Educ. v. State Superintendent of Sch.,* 165 W. Va. 732, 274 S.E.2d 435 (1980) where it wrote:

> Our holding in *Trimboli, supra,*[17] requires that a dismissal of school personnel be based on a § 5300(6)(a) evaluation after the employee is 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,*[18] be understood to mean an offense of conduct which affects professional competency.

Id at 739. 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 followed but whether the conduct complained of involves professional incompetency and whether it directly and substantially affects the morals, safety, and health of the system in a permanent, non-correctable manner." *Id.*

"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.* However, the conduct at issue in this grievance has nothing to do with Grievant's technical performance of his job as a bus operator, or his professional competency. There has been no allegation that Grievant lacked required certification which would render him incompetent to hold the position of bus operator. Further, there has been no allegation

[17] *Trimboli v. Bd. of Educ. of the County of Wayne*, 163 W. Va. 1, 254 S.E.2d 561 (1979).
[18] *Rogers v. Bd. of Educ.,* 125 W. Va. 579, 588, 25 S.E.2d 537 (1943).

that Grievant was not operating the bus correctly or violating any safety regulations at the time of the incident captured on the bus camera recording. The issue in this case is whether Grievant engaged in *misconduct* during the incident with H.R. Unsatisfactory performance is not the same as misconduct.

Again, "[i]t is not the label a county board of education attaches to the conduct of the employee . . . that is determinative. . . ." *Allen v. Monroe County Bd. of Educ.*, Docket No. 90-31-021 (July 11, 1990), ***aff'd,*** Kanawha Cnty. Cir. Ct. Civil Action No. 90-AA-134 (Oct. 13, 1992); *Duruttya v. Mingo County Bd. of Educ.*, Docket No. 29-88-104 (Feb. 28, 1990), ***aff'd,*** Kanawha Cnty. Cir. Ct. Civil Action No. 90-AA-72, ***aff'd,*** *Duruttya v. Bd. of Educ.,* 181 W. Va. 203, 382 S.E.2d 203 (1989). Respondent has placed the wrong label on Grievant's conduct. Grievant's conduct is not "unsatisfactory performance" in the context of the statutory grounds for dismissal. As such, it does not matter that Respondent failed to follow the procedures for charging an employee with unsatisfactory performance as set forth in WEST VIRGINIA. CODE § 18A-2-8.

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.* at 213, 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).

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

Grievant denies making contact with H.R.'s face during the April 26, 2018, incident. In his proposed Findings of Fact and Conclusions of Law, Grievant asserts that H.R. had the mark on his face when he boarded the bus. However, during the level three hearing he testified that H.R. got the mark on his face after he exited the bus. Grievant also testified that he could not have made the mark because he was wearing leather gloves because he was driving. A review of the video establishes that Grievant was wearing gloves, but they were fingerless gloves. Such can be clearly seen on the recording.

From the video, it is hard to tell whether Grievant makes contact with H.R.'s face during the incident because Grievant's movement is so very fast. The hearing examiner found that the video was inconclusive on the issue. Mr. Farley testified that the video shows that Grievant made contact with H.R.'s face. The finger-in-the-face part of the incident took only a second. Grievant's elbow had been bent during the incident until that moment, and to stick his finger in H.R.'s face, he only had to unbend his elbow. He did that very fast, much like a quick jab or jerk. The tips of Grievants fingers were bare. After reviewing the video closely and pausing it at the second Grievant stuck his finger in H.R.'s face, the ALJ determines that there was contact between Grievant's finger/fingernail and H.R.'s face and the same was extremely fast. Given the same, it is more likely than not that the mark on H.R.'s face was caused by this contact. The evidence regarding the mark, or abrasion, is consistent with this. The skin was not cut. The abrasion was a distinctive straight, red mark just under H.R.'s left eye. It is consistent with a fingernail mark and it is horizontal, which would be consistent with the way Grievant unbent his elbow to move his hand with finger extended, toward the left side of H.R.'s face. However, the ALJ is not finding that Grievant deliberately made contact with H.R.'s face. Given how fast it happened and the way it occurred, it is more likely Grievant acted unintentionally, and he may not have even felt it.

Despite the unintentional nature of making contact with H.R.'s face, Grievant actions in confronting H.R. to start with were deliberate. Grievant was angry because H.R. did not sit down when he was told, he kept talking, then he uttered the word "stupid." It is clear from the video that the word "stupid" is what set Grievant off. He appeared volatile. Grievant deliberately pulled the bus off the road to deal with H.R.'s behavior.

Grievant left his seat and stood right in front of H.R., who was seated. Grievant was then in the position of looking down on H.R. Then he screamed at H.R., "[y]ou know who is stupid? You are!" Grievant stuck his extended finger right into H.R.'s face just as he said the words "you" and "are." Grievant put his arm down and stood in front of H.R. for a couple of seconds, looming over him, before returning to his seat, and getting his bus back on the road. Grievant then looked at H.R. in his rearview mirror and made a comment about them being late for school. It was a flippant remark and appeared to be an attempt to antagonize H.R. While it was not played at the hearing, after H.R. exited the bus, a voice can be heard saying something to the effect of "[i]f you ever put your hands on me again, you're retarded! You're retarded!" The person speaking cannot be seen at that point, but the voice sounds like a young male, and the voice sounds somewhat emotional. Given the timing of H.R. exiting the bus, he was the first off, and when the voice can be heard, along the very emotional incident, it is more likely than not that H.R. was the one who made these statements. The emotion is also consistent with Principal Jacobs' description of H.R. when he first arrived at her office crying.

All of Grievant's actions in initiating the confrontation were intentional. Grievant testified that he wanted H.R. to know how it felt to be called "stupid." The words he used, the yelling, and the intimidation were planned. Grievant's sticking his finger in H.R.'s face to make a point and to further intimidate H.R. was entirely intentional. It was no accident. However, the contact with H.R.'s face was unintentional. Given that Grievant had worked as a bus operator since 2015, he had received the required training, he had been suspended for twenty-two days in 2016 for using inappropriate language with students, it is entirely clear that Grievant knew better. Plain common sense would dictate that he

knew better. Grievant knew that he should not scream at a student. Grievant knew that he should not call a student "stupid." Grievant knew that he should not stick his finger in a student's face. That one action alone showed a disregard for H.R.'s safety. Grievant was angry and was venting his anger on H.R. Grievant appears to have issues controlling his anger and dealing with problems in a professional manner. Such as also demonstrated previously when he admittedly pulled the bus over, and left it while it was running, to confront another driver who had cut him off in traffic. Such endangered the students on the bus, as well as Grievant. During the incident on April 26, 2018, Grievant acted in defiance of known rules of conduct and appropriate behavior. Given all of this, the evidence presented demonstrates that Grievant engaged in acts of insubordination and willful neglect of duty when he confronted H.R., a ten-year-old student, during his morning bus run on April 26, 2018. Therefore, Respondent's termination of Grievant's employment was justified, and was not arbitrary and capricious.

For the reasons set forth herein, the grievance is DENIED.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), ***aff'd***, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

2. The authority of a county board of education to suspend or terminate an employee's contract must be based on one or more of the causes listed in West Virginia Code § 18A-2-8and must be exercised reasonably, not arbitrarily or capriciously. Syl. Pt. 2, *Parham v. Raleigh County Bd. of Educ.*, 192 W. Va. 540, 453 S.E.2d 374 (1994); Syl. Pt. 3, *Beverlin v. Bd. of Educ*., 158 W. Va. 1067, 216 S.E.2d 554 (1975)*; Bell v. Kanawha County Bd. of Educ*., Docket No. 91-20-005 (Apr. 16, 1991), ***aff'd,*** Kanawha Cnty. Cir. Ct. Civil Action No. 91-AA-110 (June 4, 1992).

3. WEST VIRGINIA CODE §18A-2-8 states, in part that,

> (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 [§ 18A-2-12] of this article. The changes shall be stated in writing served upon the employee within two days of presentation of the changes to the board. . . .

4. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017

(4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), ***aff'd*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

5. "'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res.,* Docket No. 93-HHR-322 (June 27, 1997), ***aff'd*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), ***aff'd*** Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

6. "The 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).

7. The West Virginia Supreme Court of Appeals has held that "where the underlying complaints regarding a teacher's[19] 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).

8. Respondent failed to prove by a preponderance of the evidence that Grievant engaged in unsatisfactory performance in the context of grounds for termination pursuant to WEST VIRGINIA CODE §18A-2-8.

9. "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), ***aff'd,*** Kanawha Cnty. Cir. Ct. Civil Action No. 90-AA-134 (Oct. 13, 1992); *Duruttya v. Mingo County Bd. of Educ.*, Docket No. 29-88-104 (Feb. 28, 1990), ***aff'd,*** Kanawha Cnty. Cir. Ct. Civil Action No. 90-AA-72, ***aff'd, Duruttya v. Bd. of Educ.,*** 181 W. Va. 203, 382 S.E.2d 203 (1989).

10. 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

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

disobedience must be willful, meaning that "the motivation for the disobedience [was] contumaciousness or a defiance of, or contempt for authority." *Id.* at 213, 460 (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).

11. "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 provide 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).

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

13. Respondent proved by a preponderance of the evidence that Grievant engaged in conduct constituting insubordination and willful neglect of duty during the incident that occurred on April 26, 2018, thereby justifying his suspension and dismissal.

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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: December 7, 2018.

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Carrie H. LeFevre
Administrative Law Judge