THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JOHN WILLIAMS,

Grievant,

v. **Docket No. 2022-0403-KanED**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, John Williams, was employed by Respondent, Kanawha County Board of Education. On November 12, 2021, Grievant filed this grievance against Respondent stating, "Grievant wrongly terminated. Grievant terminated without just cause and in violation of the anti-discrimination provision of the West Virginia Code as defined at Section 6C-2-2 (d). Additionally, Grievant was not given an adequate opportunity to improve, in violation of West Virginia Code Section 18A-2-12." For relief, Grievant seeks "[r]einstatement, with back pay and benefits, plus interest accrued on the same."

The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held on June 14, 2022, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by counsel, Andrew J. Katz, The Katz Working Families' Law Firm, LC. Respondent was represented by counsel, Lindsey McIntosh, General Counsel. This matter became mature for decision on August 2, 2022, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law ("PFFCL").[1]

[1] PFFCL were originally due to be submitted by the parties on July 18, 2022, by agreement of the parties. The deadline to submit PFFCL was extended to August 1, 2022, at the request of Grievant with no objection by Respondent.

Synopsis

Grievant was employed by Respondent as an Aide/Autism Mentor. Grievant's employment was terminated for willful neglect of duty and unsatisfactory performance for failure to follow Respondent's attendance policy. Respondent proved Grievant's conduct was willful, not correctable, and that it was justified in terminating Grievant's employment. Grievant failed to prove mitigation of the termination of his employment was warranted. 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. Grievant was employed by Respondent as an Aide/Autism Mentor at Ruffner Elementary School and had been so employed since October 2017.

2. Grievant's supervisor was Ruffner Elementary School Principal, Henry Nearman.

3. Grievant's work schedule was from 6:45 a.m. to 2:45 p.m.

4. Respondent's Employee Attendance Policy, G75, requires employees to "report to work on time . . . utilize the employee attendance reporting and substitute calling system and notify supervisory personnel in advance of expected absences from work as early as practicable," and to report "unscheduled absences to the immediate supervisor and utilize the employee attendance reporting and substitute calling system prior to the start of the work day." The policy further requires supervisors to have a conference with the employee after the sixth, seventh, and eighth unauthorized absences in a school year.

5. Respondent's "substitute calling system" is SmartFind Express. It is an automated telephone system that employees enter information by telephone to report their absences. The system also automatically calls out a substitute for the employee if the employee indicates a substitute is necessary.

6. Grievant's performance evaluations for the 2017 - 2018 through 2019 -2020 school years were all "Outstanding," although his attendance was rated "Commendable." In his last evaluation of that period on May 12, 2020, Grievant's "Observance of Work Hours" was rated as "Satisfactory."

7. When Grievant began the new school year in the fall of 2020, Grievant experienced personal issues and health issues that impacted his attendance at work.

8. On October 30, 2020, Grievant texted Principal Nearman almost an hour after his start time to state that he would be taking the day off. When Principal Nearman responded to question if Grievant had called in his absence to the system, Grievant failed to respond. Grievant had not called in his absence to the system.

9. After Grievant arrived to work late on three more occasions, Principal Nearman provided verbal counselling regarding attendance expectations.

10. After the counseling, Grievant continued to report late for work without notice and without entering his absence into SmartFind. On one occasion, Grievant was over an hour late and on another occasion Grievant was over two hours late.

11. Following the last attendance instance on December 10, 2020, Principal Nearman met with Grievant to counsel him regarding his behavior and issued an undated *Letter of Reprimand* detailing the above and informing Grievant that his behavior could "reflect in [his] evaluation and could lead to a plan of improvement." Principal Nearman

explained in the letter, “The goal of Ruffner Elementary is for all staff to arrive at their agreed upon time of arrival. This is excessive and with not following the protocol of entering your absence to receive a substitute, we had students less than supervised during this time.” Grievant indicated his understanding by his signature on the reprimand.

12. On December 15, 2020, Grievant again arrived two hours late without notification. Principal Nearman documented the same and informed Grievant that it would be reflected in Grievant’s evaluation. Grievant indicated his understanding by his signature on the letter.

13. At the same time, an automated letter had been generated from Respondent’s computer system reporting that Grievant had nine days of unauthorized absences. Although the system was supposed to generate letters after the sixth and seventh absences as well, it had not done so.

14. Also on December 15, 2020, Principal Nearman reviewed the letter with Grievant, stating that Grievant had “demonstrated good cause” for only some of the absences. The notification also proved a phone number for Respondent’s Employee Assistance Program that was available to assist in any personal problems contributing to the unauthorized absences. Grievant indicated his understanding by his signature on the letter.

15. Also on December 15, 2020, Principal Nearman issued Grievant’s performance evaluation rating his performance as “Unsatisfactory” in “Observance of Work Hours,” “Attendance,” “Safety Practices,” and “Work Judgments.” The remainder of the evaluation was mostly “Outstanding” with a few categories marked as

"Commendable" or "Satisfactory." In summary, Principal Nearman marked Grievant as both "Outstanding" and "Unsatisfactory."

16. Following the unsatisfactory performance evaluation, Grievant was again late on December 16, 2020, and December 17, 2020. On January 4, 2021, Grievant failed to report to work at all, failed to notify either Principal Nearman or the lead teacher, and failed to enter his absence in SmartFind.

17. On January 8, 2021, Principal Nearman issued a *Plan of Improvement*. The *Plan of Improvement* documented Grievant's unplanned absences and provided Principal Nearman's expectations. The *Plan* directed Grievant to arrive to work on time and to provide proper notification if he was unable to report to work on time. Specifically, Grievant was directed to report any inability to report to work on time by notifying Principal Nearman by email, text, or telephone; by notifying the lead teacher by email or phone; and by entering the absence in the SmartFind Express system. Grievant indicated his understanding by his signature on the improvement plan.

18. On March 19, 2021, Grievant successfully completed the improvement plan.

19. Although Grievant had some absences following the implementation of the improvement plan, Grievant correctly followed Respondent's policy in notifying Principal Nearman and entering the absence in SmartFind.

20. In the end of the school year evaluation on May 13, 2021, Grievant's performance was rated overall as "Satisfactory" and his attendance-related categories were both marked as "Outstanding."

21. For the 2021 – 2022 school year, employees were to report to work beginning August 3, 2021. During this week before students reported to school, employees were required to attend trainings and meetings and prepare the classrooms for the school year.

22. On August 3, 2021, employees were required to attend meetings in the morning and then report to their classrooms after lunch.

23. Grievant attended the morning meetings on August 3, 2021, but did not return to work following the lunch break. Grievant did not notify Principal Nearman or the lead teacher that he was leaving early or report his absence in SmartFind.

24. On August 4, 2021, Grievant failed to report to work, notify Principal Nearman or the lead teacher, or enter his absence in SmartFind.

25. On August 5, 2021, Grievant failed to report to work, notify Principal Nearman or the lead teacher, or enter his absence in SmartFind.

26. Principal Nearman was unaware that Grievant had failed to report to work until Grievant's assigned teacher notified Principal Nearman on the morning of August 5, 2021. Principal Nearman became concerned and texted Grievant, initiating the following conversation:[2]

> **Principal Nearman:** Everything ok? (8:13 a.m.)
>
> **Grievant:** Yes everything is fine. Is there mandatory meetings today? I haven't had a car (8:14 a.m.)
>
> **Principal Nearman:** Yes. (8:14 a.m.)
>
> **Grievant:** So if there is I'll have to get a ride (8:15 a.m.)
>
> **Principal Nearman:** That or take the day. (8:15 a.m.)

[2] The text messages are reproduced as written.

Grievant: I have it set up to get to get there Friday and all next week. I should have a car by Friday the 13th I'll take the day (8:16 a.m.)

Principal Nearman: Ok. Make sure you call it in. No sub required. (8:17 a.m.)

Grievant: Ok (8:17 a.m.)

Principal Nearman: And unless you were at cpi training yesterday you will have to do the same for yesterday. (8:20 a.m.)

Grievant: I am already trained in CPI but ok (8:21 a.m.)

Grievant: Trying to do it now (8:23 a.m.)

Principal Nearman: And I guess for the 2nd half of the day Tuesday. (11:12 a.m.)

Grievant: I did it (11:35 a.m.)

27. Grievant entered absences in SmartFind for August 5th but did not enter his absences for August 4th or the half day on August 3rd.

28. Although Grievant had stated in his texts to Principal Nearman that he had "set it up" to be at work on Friday, August 6th, and the next week, he also entered absences in SmartFind for August 6th and 9th, without notifying Principal Nearman or the lead teacher of the change.

29. In addition, Grievant failed to request a substitute for August 9th, even though August 9th was the first day of school for students.

30. Although Grievant stated in his SmartFind entry that he was talking August 6th and 9th off due to "family illness," Grievant admitted during his level three testimony that he took off because it was his birthday.

31. On August 9, 2021, Principal Nearman completed a performance evaluation rating Grievant as “Unsatisfactory” in “Observance of Work Hours” and “Attendance,” and as “Unsatisfactory” overall.

32. By letter dated August 10, 2021, Superintendent Thomas E. Williams, Jr., Ed.D., suspended Grievant with pay pending hearing. Superintendent Williams cited Grievant’s prior December 15, 2020 unsatisfactory evaluation and improvement plan, and the second unsatisfactory evaluation on August 9, 2021 for Grievant’s failure to properly report to work or notify the principal of his absence.

33. Respondent conducted an employee discipline hearing on September 13, 2021.

34. On September 20, 2021, Respondent’s hearing examiner recommended that Grievant’s employment be terminated, which recommendation was accepted by Superintendent Williams on October 6, 2021.

35. By letter dated October 25, 2021, Superintendent Williams notified Grievant that Respondent had voted to terminate Grievant’s employment.

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. W. Va. Dep't of Health & 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*.

The authority of a county board of education to terminate an employee 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). The causes are:

> 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.

W. VA. CODE § 18A-2-8(a). "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." W. VA. CODE § 18A-2-8(b).

Respondent terminated Grievant's employment for willful neglect of duty and unsatisfactory performance. Respondent asserts Grievant's unexcused absences and failure to report his absences properly per policy constituted willful neglect of duty because Grievant's behavior continued after his prior successful improvement plan was completed and that Grievant's behavior was not correctible for the same reason. Grievant asserts Respondent's termination of his employment was arbitrary and capricious, citing prior decisions of the Grievance Board and Respondent's alleged failure to give Grievant notice of his wrongdoing. Alternately, Grievant argues that his punishment should be mitigated due to his history of outstanding evaluations.

Willful neglect of duty "encompasses something more serious than 'incompetence,' which is another ground for teacher discipline . . . 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, 640, 398 S.E.2d 120, 122 (1990). The West Virginia Supreme Court of Appeals has declined to make a comprehensive definition of "willful neglect of duty," instead finding that "[a] continuing course of lesser infractions may well, when viewed in the aggregate, be sufficient." *Fox v. Bd. of Educ. of Doddridge County*, 160 W.Va. 668, 672, 236 S.E.2d 243, 246 (1977).

"'[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).

While it appears Grievant's attendance problems in the prior school year began during a difficult period in his life, it is clear that, at the time of his termination, Grievant knew the expectations regarding attendance and simply chose not to meet those expectations. Grievant was unequivocally notified of his deficiencies through the prior written reprimand, performance evaluation, and improvement plan. Grievant was clearly notified of his required attendance and how to properly report his absences in his performance improvement plan, which he successfully completed in March of 2021. Following the improvement plan, Grievant continued to be absent but complied with Respondent's policy by providing proper notification and entries in SmartFind.

When the new school year began on August 3, 2021, Grievant was aware of his work hours, the requirement to show up on time and stay for his shift, the requirement and procedure to notify Principal Nearman, and the requirement and procedure to report any absences in SmartFind. Instead, on August 3rd, Grievant decided he did not need to return after lunch because he believed his classroom was already ready. Grievant failed to properly notify anyone of his absence or report it in SmartFind. Grievant failed to show up for work at all the next day because he did not believe he needed to complete the training for that day, again failing to notify anyone or report his absence in the system. On August 5th, for the third time, Grievant again failed to show up, notify anyone, or report is absence in SmartFind. These failures were wilful. Grievant was not experiencing an emergency that prevented him from completing the required notification. Grievant's testimony clearly showed that he simply did not consider any of it important. Grievant testified that "everyone" just leaves after lunch, although he provided no further evidence this was so. He testified that he believed the classroom was already ready and that he did not need the training. These were contract days for which he would be paid. Grievant did not have the discretion to simply not work because he did not think it was necessary. Further, Grievant testified that he knew there would be consequences for his choices he just did not think he would actually get fired for it.

When Principal Nearman contacted him by text after two days of Grievant failing to report to work or notify anyone of his absence, Grievant said he was without a vehicle. Grievant said he would report to work on Friday and when Principal Nearman instructed him to report his absences in SmartFind, Grievant stated he did so but he had failed to report all of his absences. He then decided to take off Friday and Monday for his birthday,

again without notifying Principal Nearman as required and after he had already told Principal Nearman that he would be at work. Grievant falsely reported these absences as "family illness." All of the above proves that Grievant's behavior was intentional, which constitutes willful neglect of duty.

Even if Grievant's behavior constituted merely unsatisfactory performance, Respondent has proven that Grievant's behavior is not correctible. The West Virginia Supreme Court of Appeals has held that "where the underlying complaints regarding a teacher's[3] 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:

> 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 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….

W. VA. CODE § 18A-2-12a(6).

[3] 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.

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 (W. Va. 1980) where it wrote:

> Our holding in *Trimboli, supra,*[4] 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,*[5] 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.*

In this case, Respondent attempted to correct Grievant's behavior through disciplinary action, a performance evaluation, and an improvement plan, which Grievant successfully completed. "A review of past improvement plans and disciplinary action 'can establish an employee was on notice of his inappropriate behavior, and that a continuing pattern of behavior is present which has proven not correctable.' *Bierer v. Jefferson County Bd. of Educ.*, Docket No. 01-19-595 (May 17, 2002). *Byers v. Wood County Bd.*

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

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

of Educ., Docket No. 2013-2075-WooED (Oct. 31, 2013). To rule otherwise, 'would result in an endless cycle of employee improvement, relapse into old work habits, and the need for additional evaluations and plans of improvement.' *Dalton v. Monongalia County Bd. of Educ.*, Docket No. 2010-1607-MonED (Nov. 23, 2010), *aff'd*, Kanawha County Cir. Ct., Civil Action No. 11-AA-2 (May 12, 2011)." *Yoders v. Harrison County Bd. of Educ*., Docket No. 2016-0129-HarED (Jan. 15, 2016).

Grievant was clearly notified of his inappropriate behavior and Respondent's expectations, which Grievant demonstrated he understood in successfully completing his improvement plan. Yet, on the very first day of school, Grievant not only resumed his inappropriate behavior but escalated the same by leaving work without notice and then failing to report to work or notify anyone for two days. When Principal Nearman reached out to Grievant in concern, Grievant indicated no acceptance of responsibility for his inappropriate behavior. Instead, Grievant, yet again, failed to comply with the notice requirements and falsely reported that his absences were for "family illness." Grievant failed to request a substitute in the SmartFind system, which resulted in there being no coverage for Grievant's position on the hectic first day of school. Grievant's behavior is not correctable.

Grievant asserts that Respondent's decision to terminate his employment was arbitrary and capricious. 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).

Grievant asserts Respondent failed to follow policy regarding the 2020 written reprimand. As Grievant did not grieve the 2020 written reprimand, he cannot challenge it now. If an employee does not grieve specific disciplinary incidents, he cannot place the merits of such discipline in issue in a subsequent grievance proceeding. *Aglinsky v. Bd.*

of Trustees, Docket No. 97-BOT-256 (Oct. 27, 1997), *aff'd*, Mon. Co. Cir Ct. Docket No. 97-C-AP-96 (Dec. 7, 1999), *appeal refused*, W.Va. Sup Ct. App. Docket No. 001096 (July 6, 2000) (citing *Jones v. W. Va. Dept. of Health & Human Resources,* Docket No. 96-HHR-371 (Oct. 30, 1996); *Stamper v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-144 (Mar. 20, 1996); *Womack v. Dept. of Admin.*, Docket No. 93-ADMN-430 (Mar. 30, 1994)). In such cases, "all the information contained in the documentation of [a grievant's] prior discipline must be accepted as true. *See Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994)." *Id.*

The only question regarding the prior discipline relevant to the instant grievance was whether Grievant was given adequate notice and opportunity to improve, which he was, as discussed above. Grievant also cites two prior Grievance Board decisions, which he asserts shows that Respondent's actions were arbitrary and capricious: *Thomas v. Kanawha County Bd. of Educ.,* Docket No. 2018-1419-KanED (Dec. 19, 2018). *Davis v. Kanawha County Bd. of Educ*., Docket No. 2018-1418-KanED (Dec. 21, 2018).

Grievant argues that the *Thomas* case is similar to the instant case and that, in the *Thomas* case, the Grievance Board reversed the termination of the grievant's employment. *Thomas* is clearly distinguishable from the instant case. In *Thomas*, the grievant's behavior was not willful and he was not absent without notice, but rather had failed to provide doctors excuses. Unlike Grievant, the *Thomas* grievant was also legitimately confused about his employer's expectations because of his supervisor's contradictory statements and failure to clearly communicate expectations. Grievant argues that the *Thomas* and *Davis* cases show that Respondent acted in an arbitrary and capricious manner here because those employees were provided additional opportunities

to improve when Grievant was not. This is not proof of arbitrary or capricious decisionmaking because the circumstances of each case were different, as was the exact behavior at issue. The grievant's behavior in *Thomas* was different as explained above. The *Davis* grievant was an electrician who had difficulty timely completing work orders. It was not arbitrary for Respondent to provide different corrective action to an employee in a different position, with a different supervisor, with different job responsibilities, and regarding a different performance issue.

Grievant alternatively argues that his punishment should be mitigated. "[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was 'clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n,* Docket No. 89-SFC-145 (Aug. 8, 1989)." *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996).

"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 Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996); *Olsen v. Kanawha County Bd. of Educ.*, Docket No. 02-20-380 (May 30, 2003), *aff'd*,

Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994); *Cooper v. Raleigh County Bd. of Educ.*, Docket No. 2014-0028-RalED (Apr. 30, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

It is true Grievant had an excellent work history for two and a half years, which argues in favor of mitigation. However, Grievant's attendance issues were serious. The failure to report to work without notice or excuse is in itself grounds for termination of employment. Terminating Grievant's employment following his escalating attendance issues after prior discipline and a plan of improvement is not clearly disproportionate. Grievant cites only the two grievances as discussed above regarding alleged similar employees and Respondent terminated both of those employees. Importantly, as discussed above, Grievant was clearly informed of his deficiencies and his employer's expectations and simply chose to ignore them. In light of Grievant's prior excellent performance, Respondent could have chosen to impose lesser discipline, but it did not abuse its discretion in deciding to terminate Grievant's employment. Grievant has failed to prove mitigation of the termination of his employment is warranted.

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. W. Va. Dep't of Health & 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*.

2. The authority of a county board of education to terminate an employee 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). The causes are:

> 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.

W. VA. CODE § 18A-2-8(a).

3. "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." W. VA. CODE § 18A-2-8(b).

4. Willful neglect of duty "encompasses something more serious than 'incompetence,' which is another ground for teacher discipline . . . 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, 640, 398 S.E.2d 120, 122 (1990). The West Virginia Supreme Court of Appeals has declined to make a comprehensive definition of "willful neglect of duty," instead finding that "[a] continuing course of lesser infractions may well, when viewed in the aggregate, be sufficient." *Fox v. Bd. of Educ. of Doddridge County*, 160 W.Va. 668, 672, 236 S.E.2d 243, 246 (1977).

5. "'[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).

6. The West Virginia Supreme Court of Appeals has held that "where the underlying complaints regarding a teacher's[6] 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.

[6] 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.

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:

> 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 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….

W. VA. CODE § 18A-2-12a(6).

7. 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 (W. Va. 1980) where it wrote:

> Our holding in *Trimboli, supra,*[7] 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,*[8] be understood to mean an offense of conduct which affects professional competency.

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

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

Id at 739.

8. 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.*

9. "A review of past improvement plans and disciplinary action 'can establish an employee was on notice of his inappropriate behavior, and that a continuing pattern of behavior is present which has proven not correctable.' *Bierer v. Jefferson County Bd. of Educ.*, Docket No. 01-19-595 (May 17, 2002). *Byers v. Wood County Bd. of Educ.*, Docket No. 2013-2075-WooED (Oct. 31, 2013). To rule otherwise, 'would result in an endless cycle of employee improvement, relapse into old work habits, and the need for additional evaluations and plans of improvement.' *Dalton v. Monongalia County Bd. of Educ.*, Docket No. 2010-1607-MonED (Nov. 23, 2010), *aff'd*, Kanawha County Cir. Ct., Civil Action No. 11-AA-2 (May 12, 2011)." *Yoders v. Harrison County Bd. of Educ*., Docket No. 2016-0129-HarED (Jan. 15, 2016).

10. 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).

11. "'[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).

12. If an employee does not grieve specific disciplinary incidents, he cannot place the merits of such discipline in issue in a subsequent grievance proceeding. *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997), *aff'd*, Mon. Co. Cir Ct. Docket No. 97-C-AP-96 (Dec. 7, 1999), *appeal refused*, W.Va. Sup Ct. App. Docket No. 001096 (July 6, 2000) (citing *Jones v. W. Va. Dept. of Health & Human Resources,* Docket No. 96-HHR-371 (Oct. 30, 1996); *Stamper v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-144 (Mar. 20, 1996); *Womack v. Dept. of Admin.*, Docket

No. 93-ADMN-430 (Mar. 30, 1994)). In such cases, "all the information contained in the documentation of [a grievant's] prior discipline must be accepted as true. *See Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994)." *Id.*

13. Respondent proved Grievant's conduct was willful, not correctable, and that it was justified in terminating Grievant's employment.

14. "[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was 'clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n,* Docket No. 89-SFC-145 (Aug. 8, 1989)." *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996).

15. "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 Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996); *Olsen v. Kanawha County Bd. of Educ.*, Docket No. 02-20-380 (May 30, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004).

16. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994); *Cooper v. Raleigh County Bd. of Educ.*, Docket No. 2014-0028-RalED (Apr. 30, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

17. Grievant has failed to prove that mitigation of the termination of his employment is warranted.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Intermediate Court of Appeals.[9] Any such appeal must be filed within thirty (30) days of receipt of this decision. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the

[9] On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over "[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]" W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.

appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

DATE: September 14, 2022

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Billie Thacker Catlett
Chief Administrative Law Judge