THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ARTHUR EDWIN MCCALL,

Grievant,

v. **Docket No. 2015-0937-FayED**

FAYETTE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Arthur E. McCall, submitted a level one grievance dated February 26, 2015, against his employer, Respondent, Fayette County Board of Education stating as follows:

> [o]n February 15, 2015, Grievant was removed from his position as long term substitute principal at Meadow Bridge High School in violation of the provisions of Regulation 5300. He was not afforded due process of law prior to being terminated form the position, nor was he given any evaluation, suggestions for improvement or opportunity to improve prior to his termination. Grievant was terminated from the position because he exercised his right of free speech guaranteed under the US Constitution and the Constitution of the State of WV. The penalty imposed upon Grievant was disproportionate to his offense, if any.

As relief sought, Grievant seeks, "[a]ll relief available to Grievant."

A level one hearing was conducted on March 25, 2015. The grievance was denied at level one by a decision dated April 14, 2015. Grievant appealed to level two on April 17, 2015. A level two mediation was conducted on August 14, 2015. Grievant appealed to level three on August 18, 2015. The level three grievance hearing was commenced on January 6, 2016, at the Raleigh County Commission on Aging in Beckley, West Virginia, before the undersigned administrative law judge. At which time, Grievant

appeared in person and by counsel, Timothy R. Conaway, Esquire, Conaway & Conaway PLLC. Respondent, Fayette County Board of Education, appeared by counsel, Rebecca M. Tinder, Esquire, Bowles Rice, LLP. At the commencement of this hearing, Grievant, by counsel, orally moved the undersigned to compel certain discovery from Respondent.[1] Specifically, Grievant, by counsel, was seeking the compulsion of the names and contact information for each non-litigant substitute employee who had been suspended from only one, but not all, of the schools in the county, and detailed information about the nature of their infractions which resulted in suspensions. Respondent objected to the disclosure of this information citing the confidentiality of employee personnel records. However, without waiving this objection, Respondent provided Grievant a chart containing information regarding employees who had been similarly disciplined in the past, but no information regarding the identities of these employees was included thereon. Grievant expressed his dissatisfaction with the chart, and insisted upon having the identities of the other non-litigant employees. The parties were given the opportunity to brief the issue so as to provide the undersigned with their legal authorities for their respective positions. The undersigned set a briefing schedule to allow Grievant to submit a brief, Respondent to submit a response brief, and Grievant to submit a reply, and continued the hearing over

[1] Grievant's counsel argued that he was addressing the written Motion to Compel he filed with the Grievance Board on November 18, 2015, in which he alleged that Respondent had failed to answer his discovery requests. However, the undersigned was informed on or about December 4, 2015, that Respondent submitted discovery responses to Grievant's counsel on that day. Grievant filed no subsequent motion or pleading regarding the sufficiency of those December 2015 discovery responses. Further, Grievant did not request a hearing on his motion. Accordingly, the undersigned could only assume that the parties had resolved their dispute when Respondent provided the December 2015 discovery responses. Nonetheless, Grievant's counsel argued that his Motion to Compel still needed to be heard.

the objection of Respondent. The undersigned informed the parties that she wanted the matter reset for hearing in March 2016. Counsel for the parties were contacted via email on January 7, 2016, and given the following proposed dates for the level three hearing: March 14, 15, 16, 22, and 23, 2016. However, after many attempts to reschedule the hearing, the first date mutually agreeable date provided by the parties was June 14, 2016. As such, the Grievance Board set the hearing for June 14, 2016.

The parties timely submitted their briefs on the issue of whether Grievant was entitled to receive the disciplinary records of the non-litigant substitute employees. It is noted that despite his arguments at the January 6, 2016, hearing, Grievant argued in his briefs that, at least, in part, the evidence he sought regarding Respondent's past practice be excluded from evidence. Grievant provided no authority to support his other position that he was legally entitled to this information, and Respondent cited its policy requiring the confidentiality of employee personnel records, as well as other legal authority. The undersigned convened a telephonic hearing on June 10, 2016, to address the matter. After review of the briefs, and upon hearing the arguments of counsel, the undersigned denied Grievant's motion for the disclosure of the non-litigant employee disciplinary records, but noted that Grievant could likely ascertain at least some of the information he was seeking through reasonable investigation. Grievant's objections to the ruling were noted for the record.

The level three hearing was rescheduled to June 14, 2016, at which time the parties and their counsel appeared and the hearing was conducted through to its conclusion. This matter became mature for consideration on August 4, 2016, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a substitute principal at a county high school. During the time Grievant was serving as substitute principal, he wrote and caused to be published in two local newspapers an op-ed article criticizing a sitting board member in which he disclosed certain information about a student who had recently been through a disciplinary hearing. While Grievant did not disclose the student's name, he disclosed her school, her offense, and the nature of the discipline she received. Upon seeing the op-ed article, the county superintendent made the decision to remove Grievant from his substitute assignment because he had disclosed confidential student information in the op-ed. Grievant was removed from his position, and prohibited from substituting at the high school in the future, but was allowed to substitute at any other school in the county. His employment was not terminated. Grievant denied Respondent's claims and argued that he was removed from his position for exercising his Constitutional right to free speech, and raised numerous claims asserting that his removal was improper and unlawful. Respondent proved that Grievant engaged in an act of insubordination warranting discipline, and that his removal from the position was not arbitrary and capricious, or otherwise improper. Therefore, this 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, Edwin McCall, is employed by Respondent as a professional day-to-day substitute, and has been so employed since the 2011-2012 school year. Grievant had been a regular employee of Respondent until he retired on June 30, 2010. At the

time he retired, Grievant held the position of Assistant Principal/Athletic Coach of Meadow Bridge High School. Before holding that position, Grievant had been a teacher and athletic coach for Respondent. Grievant had been regularly employed by Respondent from the 1977-1978 school year until his retirement in 2010.

2. In or about October 2014, Grievant was contacted about serving as the substitute principal at Meadow Bridge High School.[2] Stacy White had been awarded the position of principal at Meadow Bridge High School for the 2014-2015 school year, but because she was a chemistry teacher at the school, she could not be released from her contract to begin as principal until her replacement was found. Accordingly, a substitute principal was needed until Ms. White could begin as principal. Several people had served as the substitute principal from the beginning of the school year until October 2014.

3. Grievant accepted the assignment to be the substitute principal at Meadow Bridge and began working in the assignment on or about October 22, 2014. Respondent had made it clear to Grievant that it wanted him to serve as substitute principal until a replacement for Ms. White's teaching position could be found. Both Respondent and Grievant understood that this substitute assignment could last until the end of the school year.

4. The substitute principal position that Grievant filled in October 2014, was not a posted position. This was a day-to-day substitute position, but Grievant was not

[2] At level one, Anna Kincaid-Cline, Director of Secondary Schools and Curriculum at Fayette County Schools, testified that she had contacted Grievant about this assignment. She did not testify at level three. At the level three hearing, Margaret Pennington, Director of Personnel at Fayette County Schools, indicated that she had contacted Grievant about the assignment. Grievant testified that both Director Kincaid-Cline and Ms. Pennington called him regarding the assignment.

called out every day given the understanding that he would be allowed to continue in the position until a replacement of Ms. White was found.

5. While serving as substitute principal at Meadow Bridge High School, Grievant had occasion to attend student disciplinary hearings before the Respondent Board. Grievant had been responsible for dealing with student discipline and attending such hearings when he had served as Assistant Principal before his 2010 retirement.

6. Grievant wrote an op-ed article that was published in The Fayette Tribune and The Raleigh Register-Herald on February 16, 2016, in which he criticized a sitting Board member, and called for the member's censure and removal in response to certain public comments the member had made. In this article, Grievant identified himself as the principal of Meadow Bridge High School, and also stated, in part, the following:

> [o]nly weeks before I sat before this very same board member and listened as he pontificated to a young lady who had made threats and violent acts against other students in my school about how wrong it was for her to threaten the safety of other students and that it would not be tolerated. She was expelled for the remainder of the school year. . . .[3]

7. Dr. Serena Starcher, Interim Superintendent of Fayette County Schools, saw the article written by Grievant in the morning hours of February 16, 2016, after she got to her office. Dr. Starcher had Director Kincaid-Cline to telephone Grievant, and inform him that, if he had written the article, he was not to report to work, following the school closings for inclement weather, as a substitute at Meadow Bridge High School.[4]

[3] *See*, Respondent's Exhibit 2, lower level proceeding.
[4] *See*, testimony of Dr. Serena Starcher, level three hearing.

8. Grievant did not identify the student by name in the op-ed article. Instead, he revealed her gender by the use of the pronoun "her," that she was expelled and the behavior that lead to the expulsion, and that she had been a student at Meadow Bridge.

9. Director Kincaid-Cline called Grievant and informed him that was not to report to work as a substitute at Meadow Bridge High School. Director Kincaid-Cline informed Grievant that he would be allowed to substitute at any other school in the county. During this conversation, Grievant indicated that this action was being taken against him for the comments he made in the article about the Board member. Director Kincaid-Cline explained to Grievant that this action was being taken because he had divulged the confidential information of the student in the article.[5]

10. In a letter dated February 19, 2015, Dr. Starcher explained in detail the reasons for her decision to remove Grievant from substituting at Meadow Bridge High School, stating, in part, as follows:

> [a]s you may recall from the executive session to which you eluded in your article, the parent/guardian of the female student requested a closed hearing. Therefore, no information from the executive session was permitted to be shared with the public. Instead of maintaining the privacy of the executive session and the student, you included the information in the aforementioned article which is a violation of the student's right to privacy as granted to students and their families via the *Family Educational Rights and Privacy Act* (FERPA).
>
> Your disclosure of information also violated West Virginia Board of Education (WVBE) Policy 4350: *Procedures for the Collection, Maintenance and Disclosure of Student Data*, and section 4.2.7 of WVBE Policy 5902: *Employee Code of Conduct* which states that all school employees 'comply with

[5] *See*, testimony of Anna Kincaid-Cline, level one hearing transcript.

> all Federal and West Virginia laws, policies, regulations, and procedures' . . . .[6]

11. By letter dated March 24, 2015, Dr. Starcher informed Grievant that she would be recommending that the State Superintendent of Schools ratify the action taken to remove Grievant from substituting at Meadow Bridge High School. This letter provided Grievant an opportunity to request a hearing prior to that action being taken.[7] Dr. Starcher involved the State Superintendent of Schools because the State had intervened into the operations of Fayette County Schools. Given such, the local members of the Board of Education had no authority over personnel matters in the county school system.

12. Grievant did not request a hearing in response to Dr. Starcher's March 24, 2015, letter. Instead, Grievant filed the instant grievance at level one, not directly to level three, and a level one hearing was conducted.

13. During the course of his employment with Respondent, Grievant has received training on the issues of confidentiality of student information and FERPA.

14. After February 16, 2015, Grievant was offered other substitute assignments in Fayette County, but he declined them until April 2015.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. W.VA. CODE ST. R. § 156-1-3 (2008); *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence of greater weight or more

[6] *See*, Respondent's Exhibit 3, level one hearing.
[7] *See*, Respondent's Exhibit 4, level one hearing.

convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.* Docket No. 96-20-380 (Mar. 18, 1997). "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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

In this matter, Respondent asserts that it properly removed Grievant from his substitute principal position at Meadow Bridge High School for violating FERPA[8], the Employee Code of Conduct, and WVBE Policy 4350 "Collection, Maintenance and Disclosure of Student Data," when he disclosed certain information about a student in an op-ed article he wrote and caused to be published in two local newspapers. Respondent argues that Grievant's actions constitute insubordination and willful neglect of duty. Grievant denies all of Respondent's claims, and alleges that he was improperly removed from his substitute principal assignment for exercising his First Amendment right of free speech.[9]

The first issue that must be addressed in this matter is the nature of the substitute assignment Grievant held at Meadow Bridge High School at the time of the events at issue in this grievance. Grievant asserts that he was a long-term substitute while serving

[8] Respondent did not identify any particular FERPA provision violated in its February 19, 2015, letter to Grievant.

[9] While Grievant appears to argue that he was removed from his substitute position because he criticized a sitting member of the Board of Education, he has not raised a claim of reprisal. Grievant does not address "reprisal" or the law regarding the same in his proposed Findings of Fact and Conclusions of Law. As such, any claim of reprisal is deemed abandoned, and will not be addressed in this decision.

as substitute principal. However, Respondent argues that Grievant was a day-to-day substitute, not a long-term substitute.

West Virginia Code § 18A-1-1(1)(l) states as follows:

> Long-term substitute means a substitute employee who fills a vacant position: that the county superintendent expects to extend for at least thirty consecutive days, and is either:
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> (A) Listed in the job posting as a long-term substitute position of over thirty days; or
>
> (B) Listed in a job posting as a regular, full-time position and:
>
> (i) Is not filled by a regular, full-time employee; and
>
> (ii) Is filled by a substitute employee.
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> For the purposes of section two, article sixteen, chapter five of this code, long-term substitute does not include a retired employee hired to fill the vacant position.

Id. West Virginia Code § 18A-2-3 states, in part, as follows:

> (a) The county superintendent, subject to approval of the county board, may employ and assign substitute teachers to any of the following duties:
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> > (1) Fill the temporary absence of any teacher or an unexpired school term made vacant by resignation, death, suspension or dismissal;
> >
> > (2) Fill a teaching position of a regular teacher on leave of absence; and
> >
> > (3) Perform the instructional services of any teacher who is authorized by law to be absent from class without loss of pay, providing the absence is approved by the board of education in accordance with the law.
> >
> > The substitute shall be a duly certified teacher.

Id. West Virginia Code § 18-1-1(g) states that "'[t]eacher' means a teacher, supervisor, principal, superintendent, public school librarian or any other person regularly employed for instructional purposes in a public school in this state." W. Va. Code § 18-1-1(g).

The evidence presented demonstrated that the substitute principal position at Meadow Bridge High School was not a posted job. Instead, the substitutes were being assigned the position until a replacement for Ms. White could be found. The position was going to be open indefinitely, but only long enough to find Ms. White's replacement. Grievant was contacted about taking the substitute position in or about October 2014, after several others had served as substitute principal. Grievant understood when he took the assignment, it could end at any time based upon the circumstances. Grievant was not called out every day to serve in the assignment because he had agreed to serve as the substitute principal until Ms. White could take the position. Based upon the statutory definition of "long-term substitute," Grievant was not working as a long-term substitute while assigned to be the substitute principal at Meadow Bridge High School from October 2014 to February 2015. Further, Grievant had no contract for the position and was serving only until such time until Ms. White's replacement could be found. Accordingly, Grievant held a day-to-day substitute assignment at the time of the events at issue in this grievance.

West Virginia Code § 18A-2-7(a) provides that "[t]he superintendent, subject only to approval of the board, shall have the authority to assign, transfer, promote, demote, or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter." W. VA. CODE § 18A-2-7(a). Further, 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. . . .

Id. Dismissal or suspension of an employee under West Virginia Code § 18A-2-8 "must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously." Syl. Pt. 3, in part, *Beverlin v. Bd. of Educ*., 158 W. Va. 1067, 216 S.E.2d 554 (1975); Syl. Pt. 4, in part, *Maxey v. McDowell County Board of Education*, 212 W. Va. 668, 575 S.E.2d 278 (2002); Syl. Pt. 7, in part, *Alderman v. Pocahontas County Bd. of Educ.,* 223 W. Va. 431, 675 S.E.2d 907 (2009).

Respondent removed Grievant from his substitute principal position, and prohibited Grievant from substituting in that particular school in the future, for disclosing certain information about a student in his op-ed article that was published in two newspapers. Respondent has subsequently claimed Grievant's actions constituted insubordination and willful neglect of duty. Respondent did not terminate Grievant's employment. Grievant is still employed by Respondent. While Respondent has characterized its actions as "removing" Grievant from his substitute assignment, such was essentially a suspension. However, Grievant was, apparently, not prohibited from substituting from any other school in the county.

Pursuant to WEST VIRGINIA CODE § 18A-2-8, Respondent has the authority to both suspend and terminate employees for insubordination. The question becomes whether Grievant's conduct amounts to insubordination and willful neglect of duty. In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's

failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *See Conner v. Barbour County Bd. of Educ.,* Docket No. 94-01-394 (Jan. 31, 1995). This Grievance Board has previously recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988) (*citing Weber v. Buncombe County Bd. of Educ*., 266 S.E.2d 42 (N.C. 1980)). "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). 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); *Duruttya v. Mingo County Bd. of Educ.*, Docket No. 29-88-104 (Feb. 28, 1990).

Respondent asserts that Grievant violated WVBE Policy 4350 Collection, Maintenance and Disclosure of Student Data, WVBE Policy 5902 Employee Code of Conduct, and FERPA by making the disclosures in his op-ed article, and that such constitutes insubordination and willful neglect of duty. At level three, Respondent specified that it was alleging that Grievant violated the Fayette County Schools FERPA Notice for Directory Information.[10] Grievant denies that he violated these policies and FERPA, and asserts that he was not properly trained on these policies or FERPA. Grievant further denies that he disclosed the confidential information of the student.

The undersigned must first determine whether Grievant violated the policies, regulations, and law, as alleged. WVBE Policy 4350, "Collection, Maintenance and Disclosure of Student Data," states, in part, as follows:

> 2.1 The purpose of these procedures is to set forth the conditions governing the protection of privacy and access of parents and students as it relates to the collection, maintenance, disclosure and destruction of education records by agencies and institutions under the general supervision of the West Virginia Board of Education.

W.VA. CODE ST. R. § 126-94-2 (2013).

[10] *See*, Respondent's Exhibits 3 and 5.

> 3.1.b. "Consent" means that (a) the parent has been fully informed of the information set out in this document in her or her native language or other mode of communication, unless it clearly is not feasible to do so, (b) the parent understands and agrees in writing to the carrying out of the activity for which consent is sought, and the consent sets forth that activity and lists the records (if any) which will be released and to whom, and (c) the parent understands that the granting of consent is voluntary on the part of the parent . . . .
>
> 3.1.f. "Disclosure" means permitting access or the release, transfer or other communication of education records of the student of the personally identifiable information contained therein, orally or in writing, or by electronic means, or by any means to any party. . . .
>
> 3.1.h. "Education records" means those records that are directly related to a student and are collected, maintained or disclosed by an educational agency or institution or by a party acting for the agency or institution. . . .
>
> 3.1.o. "Personally identifiable" means that the data or information includes, but is not limited to, (a) the name of a student, the student's parent, or other family member, (b) the address of the student or student's family, (c) a personal identifier such as the student's social security number, or student number, (d) a list of personal characteristics that would make the student's identity easily traceable, or (e) other information that would make the student's identity easily traceable. . .

W.VA. CODE ST. R. § 126-94-3 (2013).

Fayette County Schools FERPA Notice for Directory Information states, in part, as follows:

> **The Family Educational Rights and Privacy Act (FERPA), a Federal law, requires that Fayette County Schools, with certain exceptions, obtain your written consent prior to the disclosure of personally identifiable information from your child's education records**. However, Fayette County Schools may disclose appropriately designated "directory information" without written consent, unless you have advised the District to the contrary in accordance with District procedures. The primary purpose of directory information is

> to allow Fayette County Schools to include this type of information from your child's education records in certain school publications. . . .Directory information, which is information that is generally not considered harmful or an invasion of privacy if released, can also be disclosed to outside organizations without a parent's prior written consent. . . .[11] (emphasis added).

Further, "[a]n educational agency or institution shall obtain written consent of the parent of a student or the eligible student before disclosing personally identifiable information from the education records of a student, other than directory information, except as provided in Section 126-94-16." W.VA. CODE ST. R. § 126-94-15.1 (2013).

WVBE Policy 5902, "Employee Code of Conduct" states as follows:

> 4.2 All West Virginia school employees shall:
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> 4.2.1 exhibit professional behavior by showing positive examples of preparedness, communication, fairness, punctuality, attendance, language, and appearance. . . .
>
> 4.2.3 maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination. . . .
>
> 4.2.5 immediately intervene in any code of conduct violation, that has a negative impact on students, in a manner that preserves confidentiality and the dignity of each person.
>
> 4.2.6. demonstrate responsibility citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior.
>
> 4.2.7 comply with all Federal and West Virginia laws, policies, regulations and procedures.

W.VA. CODE ST. R. § 126-162-4 (2002).

[11] *See*, Respondent's Exhibit 3, Fayette County Schools FERPA Notice for Directory Information.

In his op-ed article, Grievant disclosed that a female student who had attended his school, Meadow Bridge High School, was recently expelled following a hearing in an executive session before the Board for making threats and violent acts against other students in the school.[12] Grievant did not disclose the name of the student, or anything else. The issue is whether what Grievant disclosed in the op-ed violated any of the policies Respondent cites. Respondent points to definition of "personally identifiable" referenced above, particularly, subsection (e) "other information that would make the student's identity easily traceable." Respondent's argument is that with the information given by Grievant in his op-ed, the student's identity was easily traceable, especially given the small size of the school and community. Respondent further asserted that the student was thereafter discussed on Facebook as a result of Grievant's disclosures. Grievant argues that what he wrote was not personally identifiable information about the student, and noted the ambiguity of the term "easily traceable."

The evidence presented did not establish that the student's name was disclosed in certain individuals' Facebook posts following the op-ed. The evidence suggested that individuals were commenting on Facebook about Grievant's removal from the substitute principal position for violating FERPA.[13] However, that is not the point. The definition of "personally identifiable" is broad and includes "other information that would make the student's identity easily traceable." While "easily traceable" is not defined within the policy or regulation, given the small school and community, it most likely would not be hard to trace the identity of the student from the information listed in the op-ed: a female who had

[12] *See*, Respondent's Exhibits 1 & 2, lower level proceeding.
[13] *See*, testimony of Dr. Serena Starcher; Grievant's Exhibit 2, copy of Facebook post.

made threats of violence against other students at the school who now no longer attends that school. It is logical that given such, one could discover her identity by simply asking people at the school if there had been any incidents involving a female student threatening others at school. Accordingly, the undersigned finds that the information about the student disclosed by Grievant in his op-ed falls within the definition of "personally identifiable" information; therefore, Grievant violated Policy 4350, Policy 5902, and, at least, the notice requirement in FERPA, as the parents of the student did not give their consent to the disclosure of said information.

The issue now becomes whether Grievant's violation of these policies and FERPA constitute insubordination or willful neglect of duty. Respondent asserts that Grievant was aware of the policies cited, had been trained on FERPA, personally identifiable information, and confidentiality of student information, and that he knew not to disclose the information about the student in his op-ed. Grievant denies being properly trained on FERPA and the other policies. Grievant acknowledges that he has received training on confidentiality and FERPA, but he contends that his training primarily dealt with written student records. Grievant, nonetheless, argues that what he said in his op-ed does not violate the confidentiality of the student. Grievant further asserts that FERPA is too legally complicated for a layman to understand.[14]

While there was no documentary evidence of the specific trainings Grievant received during his tenure before retiring, or since, the parties agree that Grievant received training on confidentiality issues and provisions of FERPA. While Grievant may not have received in depth training on FERPA, or the subtleties of "personally identifiable

[14] *See*, Grievant's Proposed Findings of Fact and Conclusions of Law, pp. 10-12.

information," the evidence presented demonstrates that Grievant was aware of WVBE Polices 5902 and 4350, and of his the duty to maintain the confidentiality of student information. Further, the evidence demonstrates that Grievant was familiar with the student disciplinary procedures because such was one of his duties before he retired, and while he was substitute principal. Additionally, as an administrator before his retirement, and while substituting as principal, Grievant was responsible for disseminating policies to school personnel. The FERPA Notice to parents had been in place for many years, and Grievant should have had occasion to at least review the same.[15] Respondent has proved that it was more likely than not that Grievant knew about the requirements of the policies at issue in this matter, and still discussed the details of a student disciplinary matter in his article. Grievant knew the importance of maintaining the confidentiality of student information. While Grievant did not disclose the name of the student, that does not matter. The policy is clear that personally identifiable information includes more than a student's proper name. The policy explicitly states that personally identifiable information includes "other information that would make the student's identity easily traceable." Despite this, Grievant wrote in detail about the student's disciplinary matter in his op-ed. This was not a mere accidental use of a personal pronoun that identified the student's gender. Grievant gave details about the student's infraction and punishment. Grievant wrote about the student's disciplinary matter to illustrate what he viewed as the hypocrisy of the board member. Grievant could have written his op-ed without ever mentioning his school, the student, the student's gender, the offense, or the expulsion. However, Grievant made a choice to write his article as he did to make a point.

[15] *See*, Respondent's Exhibit 5.

In doing so, Grievant ignored a basic principle of maintaining the confidentiality of the student. Grievant was aware of the policies, and, at least, had sufficient training and experience to know that he should not discuss a student's disciplinary matter in a public newspaper. Accordingly, the undersigned finds that Respondent proved by a preponderance of the evidence that Grievant committed an act of insubordination by disclosing the student's information in his op-ed. However, Respondent did not prove by a preponderance of the evidence that Grievant willfully neglected his duty because the evidence did not demonstrate that Grievant intentionally failed to perform a work-related responsibility, or that his failure was more than simple negligence.

Further, the undersigned cannot conclude that Respondent's decision to remove, or suspend, Grievant from his substitute position was arbitrary and capricious. "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." *Trimboli v. Dept. of Health & Human Res.,* Docket No. 93-HHR-322 (June 27, 1997). "Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable." *State ex rel. Eads v. Duncil*, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker,* 547 F. Supp. 670 (E.D. Va. 1982)). "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). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned administrative law judge cannot substitute her judgment for that of the employer. *Jordan v. Mason County Bd. of Educ*., Docket No. 99-26-080 (July 6, 1999); *Tickett v. Cabell County Bd. of Educ*., Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ*., Docket No. 97-06-150 (Oct. 31, 1997). Respondent removed Grievant from his substitute position at Meadow Bridge High School once it was determined that Grievant disclosed confidential information about a student in the op-ed. Respondent did not terminate Grievant's employment; Grievant was allowed to substitute anywhere else in the county. While the undersigned does not necessarily follow this logic as it is unknown if the student would be attending any other county school, the undersigned cannot find that taking Grievant out of his assignment was unreasonable. Respondent had the responsibility to address Grievant's infraction, and the undersigned cannot substitute her judgment for that of Respondent.

Grievant claims that he was removed from his substitute principal position for exercising his First Amendment right of free speech, citing the case of *Pickering v. Board of Education*, 391 U.S. 563, 88 St. Ct. 1731, 20 L.Ed.2d 811 (1968). Grievant has not raised a reprisal claim pursuant to West Virginia Code § 6C-2-2(o). Accordingly, reprisal will not be further discussed herein. The undersigned does not dispute that all United States citizens are granted the right of freedom of speech. However, the evidence presented does not demonstrate that Grievant was removed from his substituting position for any reason other than disclosing student information in his op-ed. Grievant was not disciplined for writing the op-ed; he was disciplined for discussing a student with enough detail that the student's identity could be easily traceable, and the student's parents had

not given consent. Based upon the evidence presented, it appears that had Grievant not included in his op-ed the information about the student, there would likely have been no problem. While the board member called Dr. Starcher the day the op-ed ran, such occurred after she had already made the decision to remove Grievant from his position. That call had no impact on Dr. Starcher's decision. Further, Grievant's disclosure of the student's information was improper in violation of the policies already discussed herein. Such warrants the discipline imposed. Again, it is noted that Grievant's employment was not terminated; he was removed from his substitute position and prohibited from subbing at that school in the future.

Grievant also presented a great deal evidence about what a good job he was doing as substitute principal at Meadow Bridge High School, and that he was implementing programs for the students that improved morale for the students and the staff. The undersigned does not doubt any of this, and Respondent has not alleged that Grievant's performance was poor. However, this does not matter. Grievant was removed from his position for disclosing a student's confidential information in violation of school policies, and such has been proved by a preponderance of the evidence. This was not an instance of unsatisfactory performance. Grievant was aware of the policies concerning maintaining the confidentiality of student information, but still chose to discuss the student's disciplinary matter in his op-ed. The fact that Grievant otherwise performed his job duties well is irrelevant. The Respondent has the authority to suspend an employee for insubordination, and that is what occurred in this matter.

Grievant also argues that he was entitled to an evaluation and opportunity to improve before being disciplined. Grievant's argument is without merit. Grievant's

conduct at issue constituted insubordination, pursuant to West Virginia Code § 18A-2-8; therefore, he was not entitled to an improvement plan before being disciplined. Again, there has been no allegation of unsatisfactory performance. Moreover, Grievant was not required to be evaluated because he was a substitute. As noted by Respondent, "[s]ubstitute teachers are implicitly excluded from the group of professional personnel for whom regular evaluations are required by state Board of Education Policy 5310, 126 C.S.R 142." *Maloney v. Monroe County Bd. of Educ.,* Docket No. 02-31-367 (Jan. 14, 2003). Grievant also takes issue with Respondent's reasoning for removing Grievant from Meadow Bridge, but not any other county school, because that is how it has handled situations like this in the past. Grievant argues that Respondent following its past practice amounts to following an unwritten policy, which would be unenforceable. This argument has no merit. The evidence demonstrated that Respondent chose to remove Grievant from teaching in the one school where he committed his infraction, but allowed him to substitute in any other school in the county, because that is what it had done in the past when there had been problems with substitutes. Respondent appears to have been trying to maintain consistency in how it dealt with problems, and was not following an unwritten policy. Respondent could have terminated Grievant's employment, but chose not to.

Grievant also argues that he was removed from his substitute position without being afforded due process. Grievant's claim is based upon the fact that Respondent did not discuss Grievant's understanding of the policies or the violation of the same before removing him from the position, and as Respondent did not grant him a hearing before removing him. Respondent was not required by law to take such actions, though. Grievant further argues that he had both a liberty and property interested in his substitute

position. However, Grievant had no such interests. Grievant was only a substitute principal, and was not regularly employed by Respondent. Grievant was also a day-to-day substitute, not a long term substitute. He understood when he accepted the assignment that it would end when a replacement for Ms. White was found, and that could be at any time. He had no guarantee of employment in that assignment for any set period of time. Further, no law or policy required Respondent to grant Grievant a hearing before initially removing him from his substitute position on February 16, 2015. Moreover, Grievant was removed from his position for insubordination. Grievant was given notice and the opportunity to request a hearing before the State Board of Education when his removal was being recommended for ratification, and he did not request one.[16] Instead, he filed this grievance at level one of the grievance process before the State Board of Education ratified his removal. He had the opportunity to dispute the allegations of policy violations and insubordination and to challenge his removal before the same was ratified by the State Board of Education, and he chose not to take it. Accordingly, the undersigned cannot find any violation of Grievant's due process. It is noted that Grievant made no claim for mitigation of the disciplinary action taken against him. Therefore, mitigation will not be further addressed herein. For the reasons set forth herein, the grievance is denied.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the

[16] *See*, March 24, 2015, letter, Respondent's Exhibit 4, lower level.

evidence. W.VA. CODE ST. R. § 156-1-3 (2008); *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989).

2. WEST VIRGINIA CODE §18A-2-8 sets out the reasons for which a public school employee may be suspended or dismissed and states, in part as follows:

> (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.

3. Dismissal or suspension of an employee under WEST VIRGINIA CODE section 18A-2-8 "must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously." Syl. Pt. 3, in part, *Beverlin v. Bd. of Educ*., 158 W. Va. 1067, 216 S.E.2d 554 (1975); Syl. Pt. 4, in part, *Maxey v. McDowell County Board of Education*, 212 W. Va. 668, 575 S.E.2d 278 (2002); Syl. Pt. 7, in part, *Alderman v. Pocahontas County Bd. of Educ.,* 223 W. Va. 431, 675 S.E.2d 907 (2009).

4. In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *See Conner v. Barbour County Bd. of Educ.,* Docket No. 94-01-394 (Jan. 31, 1995).

5. "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." *Trimboli v. Dept. of Health & Human*

Res., Docket No. 93-HHR-322 (June 27, 1997). "Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable." *State ex rel. Eads v. Duncil*, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker,* 547 F. Supp. 670 (E.D. Va. 1982)).

6. Respondent proved by a preponderance of the evidence that Grievant disclosed confidential and personally identifying information of a student in an op-ed he wrote and caused to be published in two local papers, and that the same constituted insubordination warranting discipline.

7. Respondent's decision to remove Grievant from the substitute principal assignment at Meadow Bridge High School was not arbitrary and capricious, or otherwise improper.

8. Grievant had no liberty or property interest in the substitute principal position at Meadow Bridge High School, was not denied due process when he was removed from the position, and was not entitled to an evaluation and opportunity to improve before being removed from the position.

Accordingly, the grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named.

However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

DATE: November 10, 2016.

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Carrie H. LeFevre
Administrative Law Judge