THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

WILLIAM COURTS,

Grievant,

v. **Docket No. 2017-1369-KanED**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, William Courts, filed this expedited level three grievance against his employer, Kanawha County Board of Education, dated December 8, 2016, stating as follows: "Grievant was suspended and terminated from his position as an Autism Mentor/Aide. Grievant asserts that he was not guilty of any misconduct. Grievant also contends that he was entitled to notice of any deficiencies and an opportunity to improve prior to suspension and termination. Grievant alleges a violation of W. Va. Code 18A-2-8 & 18A-2-12a." As relief sought, "Grievant seeks reinstatement to his position as an Autism Mentor/Aide with compensation for lost wages and benefits, pecuniary and nonpecuniary, with interest. Grievant also seeks expungement from his records of any documentation referencing [his] suspension and termination."

A level three hearing was conducted on March 9, 2017, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person and by counsel, John Everett Roush, Esquire, West Virginia School Service Personnel Association. Respondent, Kanawha County Board of Education, appeared by counsel, James W. Withrow, Esq., General Counsel. This matter

became mature for consideration on April 24, 2017, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as an Autism Mentor/Aide. Grievant was suspended then terminated for insubordination and willful neglect of duty in the treatment of the students in his charge as alleged by two high school student interns, or observers. Grievant disputes these charges, and argues that alleged misconduct did not occur. There is an additional claim that Grievant used an improper restraint technique, but Respondent met with Grievant soon after the incident, and discussed the same. Grievant was not disciplined for his actions, and it appears to have been treated like correctable conduct. Respondent failed to prove its claims by a preponderance of the evidence, and failed to justify Grievant's suspension and dismissal. Accordingly, the grievance is GRANTED.

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

Findings of Fact

1. At all times relevant herein, Grievant was employed by Respondent, as an Autism Mentor/Aide at Dunbar Primary School assigned to preschool. Grievant had been regularly employed by Respondent for over two years. Prior to that, Grievant was a substitute for two years.

2. Michelle Adams is the Principal at Dunbar Primary School. She began working at Dunbar Primary School on September 19, 2016.

3. Jennifer Spencer is the Principal at Dunbar Intermediate School. Sabrina Rohmiller is a Special Education Specialist ("SES") at Dunbar Intermediate School. They do not work with Grievant on a daily basis, but knew Grievant at the time in question.

4. At the times relevant herein, R. B.[1] and M. M. were student observers, or interns, from the early childhood education program at Ben Franklin Career Center who were assigned to Dunbar Primary School. R. B. was a senior in high school. At the time R. B. testified at the level three hearing, she was eighteen years old.[2] M. M. graduated from high school in the spring of 2016. She was at Ben Franklin post-graduate doing clinicals during the 2016-2017 school year. She finished her clinicals at Dunbar Primary School during the first semester of the 2016-2017 school year; however, she would not receive her certificate until the end of the school year at graduation. At the time M. M. testified at the level three hearing, she was nineteen years old, and the school year was not over.[3]

5. Melissa Turner is an Autism Mentor/Aide at Dunbar Primary School. At the beginning of the 2016-2017 school year, Ms. Turner was assigned as a floating aide between the classrooms of teachers Shellie Clark and Kim Moore, but was "everywhere," in and out of classrooms all day.[4] However, Ms. Turner spent more time in Ms. Clark's classroom than the others. Ms. Turner estimated that she worked with Grievant about 50% of her time, but such was hard to quantify because her schedule changes.[5]

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[1] It is the practice of the Grievance Board to refer to students by their initials.
[2] *See*, testimony of R. B., level three hearing.
[3] *See*, testimony of M. M., level three hearing.
[4] *See*, testimony of Melissa Turner, level three hearing.
[5] *See*, testimony of Melissa Turner, level three hearing.

6. During the 2016-2017 school year, Grievant was assigned to work in the classroom of Shellie Clark, a teacher, at Dunbar Primary School. Upon information and belief, Ms. Clark was the teacher in an "autism classroom."[6] R. B. was assigned to observe in Ms. Clark's autism classroom during the time at issue. However, R. B. has mistakenly described this as a preschool classroom with some autistic students.[7]

7. On September 12, 2016, Jeanie Ingraham, an Autism Mentor/Aide, and teacher Kim Moore were trying to transport a student from Ms. Moore's classroom to the gym. At that time, the student was fighting against them and screaming.[8] The student had also been seen biting, or attempting to bite, himself, and at times trying to throw himself onto the floor.[9] Ms. Ingraham and/or Ms. Moore asked Grievant to help transport the student given the student's behavior and his size.[10] Grievant began to help them and took Ms. Moore's place. Ms. Ingraham and Ms. Moore had the student restrained, hands-on, with his arms extended, when Grievant became involved, but Ms. Moore did not have the student fully under control.[11] In the hallway outside the classrooms Ms. Ingraham and Grievant continued to use the same hands-on physical restraint in order to transport the

[6] *See*, testimony of R. B., level three hearing.
[7] *See*, R. B. testimony, lower disciplinary hearing and level three hearing; testimony of Michelle Adams, lower disciplinary hearing, pg. 87-89.
[8] It is noted that in the lower disciplinary hearing decision, the hearing examiner referred to the child as "having a meltdown." The testimony at level three clarified the student's actual behavior. *See*, testimony of Melissa Turner; testimony of Grievant.
[9] *See*, testimony of Melissa Turner, level three hearing.
[10] *See*, testimony of Grievant lower disciplinary hearing and level three hearing; testimony of Melissa Turner, level three hearing. It is unclear whether one or the both of them asked Grievant for help. It is not disputed that he was asked to help and relieved Kim Moore, and took her place transporting the child. Therefore, the teacher had been attempting to do the exact same action as Grievant, but she was not strong enough to get the child restrained and under control.
[11] *See*, Grievant's testimony, level three hearing, lower disciplinary hearing.

child to the gym. This is where the video recording captured this part of the transport. Principal Spencer, Melissa Turner, and teacher Shellie Clark were present in the hallway when this incident occurred and watched the same. Principal Spencer even accompanied Ms. Ingraham, Grievant, and the student to the gym, and stayed there for some time following the transport to assist. At no time did anyone in the hallway, including Principal Spencer, try to intervene in the situation, stop the transport, correct Ms. Ingraham or Grievant's technique, or instruct Ms. Ingraham or Grievant to stop what they were doing.

8. After returning to Dunbar Intermediate School, Principal Spencer consulted with SES Sabrina Rohmiller to ask her if the technique Grievant and Ms. Ingraham used was proper. Upon hearing the description of the technique from Principal Spencer, SES Rohmiller concluded that such was improper. SES Rohmiller was not present at Dunbar Primary when the incident occurred.[12] She based her assessment entirely on Principal Spencer's account.

9. On September 13, 2016, Principal Spencer and SES Rohmiller met with Grievant at Dunbar Primary School in the teacher's lounge regarding the technique he used in moving the child on the day before.[13] They informed Grievant that the technique he used was improper. Principal Spencer and Grievant dispute whether Grievant agreed with that assessment. Upon information and belief, Principal Spencer and SES Rohmiller met with Ms. Ingraham as well. However, nothing is known about that conversation. Upon information and belief, Principal Spencer did not impose or recommend discipline

[12] *See*, testimony of Jennifer Spencer, level three hearing; testimony of Sabrina Rohmiller, level three hearing.

[13] Principal Spencer testified that she had limited experience with Autism before taking the position at Dunbar Intermediate School.

upon Grievant for his conduct on September 12, 2016.[14] Further, Grievant is not known to have been placed on any kind of improvement plan.

10. Sometime after September 14, 2016, but prior to September 20, 2016, R. B., reported to Martha Hewitt, her teacher at Ben Franklin, that on September 13, 2016, while in Shellie Clark's class at Dunbar Primary School, she witnessed a student who was having a tantrum, meaning screaming, hitting things, and throwing things, throw a "dollhouse," or "toy," half-way across the classroom. Thereafter, she reported that she saw Grievant grab the student by the arm, pull the student to where the toy had landed, put the student on the floor, held the student down, and yelled at the student to pick up the toy. R. B. reported that the child was not injured during the incident, and no one has claimed otherwise.[15] Additionally, R. B. reported to Ms. Hewitt that on September 14, 2016, she witnessed Grievant call another teacher "thunder cunt" in front of their students.[16]

11. R. B. claimed that she did not report the events of September 13, 2016, to Shellie Clark, the teacher in whose class the incident occurred.[17] Instead, she told Ms. Hewitt within "a week or two" or "within the next week." Further, R. B. only decided to report these things to Ms. Hewitt when she learned that M. M. had made a report.[18]

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[14] *See*, testimony of Jennifer Spencer, level three hearing; testimony of Sabrina Rohmiller, level three hearing.
[15] *See*, testimony of R. B. at level three. It is noted that R. B. used the term dollhouse at the level three hearing, and "toy" in other statements.
[16] *See*, R. B. testimony, lower disciplinary hearing transcript, pg. 41-44. It is further noted that this case is the first and only time the Administrative Law Judge has ever heard this particular profane phrase.
[17] *See*, R. B. testimony level three hearing.
[18] *See*, testimony of R. B., lower disciplinary hearing transcript, pg. 41.

However, it is noted that at the lower disciplinary hearing, R. B. testified that she told Shellie Clark about the incident.[19]

12. R. B. had received no instruction or training in crisis prevention, crisis response, or restraint of a child before doing her observations at Dunbar Primary. She had received some training in correcting behavior through redirection.[20]

13. At some point, R. B. prepared a written statement about the two incidents she reported to Ms. Hewitt. Such was admitted as an exhibit at the lower disciplinary hearing.[21] However, R. B. was not asked about her written statement at the level three hearing. Further, R. B. was not asked any questions during the level three hearing about her allegation that Grievant called a teacher "thunder cunt" in front of their students.

14. M. M. was assigned to Gloria Richardson's preschool classroom at Dunbar Primary School in September 2016. Sometime prior to September 19, 2016, M. M. reported to Ms. Hewitt that on or about September 14, 2016, she saw Grievant "forcefully" grab a student by the wrist and pull the student away from a gate or fence at the playground and pull the student back to the playground area.

15. Upon information and belief, M. M. reported the September 14, 2016, incident to Ms. Richardson, but it is unclear from the evidence as to when. M. M. testified at the lower disciplinary hearing that she also reported the incident to the student's mother, who was a "parent-teacher" at the time, and wrote out a statement about it for the her.[22] Further, M. M. testified that she reported the incident to Principal Adams.[23]

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[19] *See*, R. B. testimony lower disciplinary hearing transcript, pg. 38-39.
[20] *See*, R. B. testimony level three hearing, pg. 75.
[21] *See*, Respondent's Exhibit 4, lower disciplinary hearing.
[22] *See*, testimony of M. M., lower disciplinary hearing.
[23] *See*, testimony of M. M., level three hearing.

16. M. M. prepared a handwritten statement and such was presented as an exhibit at the lower disciplinary hearing. The statement begins with "Shellie:" before describing what M. M. claimed to have seen Grievant do on the playground on September 14, 2016.[24] M. M. was asked little about this written statement at the level three hearing, but testified about it somewhat at the lower disciplinary hearing. It is unknown when this statement was written, why "Shellie" was involved, to whom the statement was given, or who, if anyone, requested it.

17. M. M. and R. B. had some discussion about the incidents involving Grievant that they reported, but it is unclear from the evidence as to when such occurred and what was discussed.

18. In or about November 2016, Ms. Hewitt transferred R. B. out of Dunbar Primary School to R. B.'s grandmother's daycare center to continue her observing for the program.[25] When asked why Ms. Hewitt suggested she transfer from Dunbar Primary, R. B. testified that she was transferred so as to avoid parents asking her questions about the incidents.[26] M. M. was not transferred out of Dunbar Primary School, and completed the early childhood education program observing there.[27] Principal Adams denied knowing why R. B. was transferred, and testified that such had been Ms. Hewitt's decision.[28]

19. Student interns R. B. and M. M. were the only people who claim to have witnessed the incidents they reported in September 2016. No other teachers or aides

[24] *See*, Respondent's Exhibit 5, lower disciplinary hearing.
[25] *See*, testimony of Principal Michelle Adams, level three hearing.
[26] *See*, testimony of R. B., level three hearing.
[27] *See*, testimony of M. M., level three hearing.
[28] *See*, testimony of Michelle Adams, level three hearing.

reported observing the same. Further, there are no video recordings of the incidents they claimed to have witnessed on September 13, 2016, and September 14, 2016. A portion of the September 12, 2016, hallway transport with Ms. Ingraham was captured on video. However, Principal Spencer addressed that matter with Grievant in a meeting on September 13, 2016, and he was not disciplined for such.

20. On September 19, 2016, Shellie Clark informed Principal Adams of the allegations R. B. and M. M. made against Grievant. Thereafter, Principal Adams instructed Ms. Clark to send the students to her on September 20, 2016.[29] M. M. was absent on September 20, but R. B. appeared and provided the written statements each had purportedly prepared. Principal Adams characterized these statements as being prepared by R. B. and M. M. while they were with Ms. Hewitt.[30] This was Principal Adams's second day on the job. Principal Adams telephoned Grievant on September 20, 2016, and informed him that he was suspended.[31]

21. Principal Adams had first met Grievant briefly on September 19, 2016, her first day on the job, but not about the allegations of misconduct. She next spoke to him when she telephoned him to inform him of his suspension. Principal Adams had never observed Grievant performing his duties or evaluated his performance.[32]

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[29] *See*, testimony of Michelle Adams, lower disciplinary hearing, pg. 82.
[30] *See*, testimony of Michelle Adams, lower disciplinary hearing, pg. 82-83. It is noted, however, that R. B. testified at the lower disciplinary hearing that she drafted her statement in Ms. Good's room. *See*, R. B. testimony, lower disciplinary hearing, pg. 46. Ms. Good has not otherwise been mentioned in this case.
[31] *See*, testimony of Michelle Adams, lower disciplinary hearing, pg. 84; level three hearing testimony.
[32] *See*, testimony of Michelle Adams, lower disciplinary hearing, pg. 84; level three hearing testimony.

22. Upon information and belief, Grievant was not placed on any plan of improvement following the meeting with Principal Spencer and SES Rohmiller on September 13, 2016.

23. By letter dated September 21, 2016, Grievant was suspended without pay pending "further review and hearing." This letter references the incidents alleged to have occurred on September 12, 2016, September 13, 2016, and September 14, 2016. In this letter, Grievant is accused of "dragging" a student to the gym on September 12, 2016. However, a review of the video clearly shows that the student was not dragged, but was restrained by Grievant and another Autism Mentor and walked to the gym.[33]

24. The matter was referred to Anne Werum Lambright, hearing examiner, for a disciplinary hearing, which was held on October 17, 2016. The hearing examiner issued a Recommended Decision dated November 9, 2016, wherein the hearing examiner recommended that the Superintendent "find that the employee's behavior constituted insubordination and willful neglect of duty under W. Va. Code § 18A-2-8 and that employee William Courts be dismissed from employment with Kanawha County Schools."[34]

25. By letter dated November 17, 2016, Superintendent Duerring provided a copy of the Recommended Decision to Grievant, and informed him that "[a]fter I have had the opportunity to review and consider this decision, I will advise you of my

[33] *See*, Respondent's Exhibit 1, lower disciplinary hearing record. *See,* Respondent's Exhibit 5, level three hearing, video recording on jump drive.
[34] *See*, lower disciplinary hearing record.

recommendation to the Board of Education. In the interim, you will be suspended without pay, pending a recommendation to the Board."[35]

26. By letter dated December 6, 2016, Superintendent Duerring informed Grievant that "at its meeting on December 5, 2016, the Kanawha County Board of Education adopted the following motion: I move the Board adopt the findings and conclusions of the hearing examiner, approve the Superintendent's prior suspension of William Courts and further approve the Superintendent's recommendation for dismissal of William Courts, and William Courts shall be, and he is hereby, terminated from his employment with the Kanawha County Board of Education, effective immediately."[36]

27. Grievant had good evaluations while employed by the Kanawha County Board of Education. On his December 8, 2015, evaluation, he received an rating of "Commendable."[37] On his May 23, 2016, evaluation, Grievant received a "Satisfactory Rating."

28. Shellie Clark was not called by either party to testify at either the disciplinary hearing before the hearing examiner, or at the level three hearing. Ms. Clark was in the hallway on September 12, 2016, and witnessed Ms. Ingraham and Grievant transport the student to the gym. However, the student was not a member of Ms. Clark's class.

29. Gloria Richardson is a preschool teacher at Dunbar Primary School. M. M. was assigned to her class at the beginning of the 2016-2017 school year. Ms. Richardson

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[35] *See*, lower disciplinary hearing record. This letter was not marked as an exhibit, but is included in the packet with the transcript, recommended decision, and marked exhibits.
[36] *See*, lower disciplinary hearing record. This letter was not marked as an exhibit, but is included in the packet with the transcript, recommended decision, and marked exhibits.
[37] *See*, Grievant's Exhibit 1, lower disciplinary hearing; Grievant's Exhibit 1, level three hearing.

has at one time been a close friend of Shellie Clark. However, their friendship reportedly soured at some time prior to Christmas 2016, and at the time of the level three hearing, Ms. Richardson reported having little contact with her.[38]

30. Martha Hewitt was not called to testify at either the disciplinary hearing before the hearing examiner, or at the level three hearing.

31. Kim Moore was not called to testify at either the level three hearing or the lower disciplinary hearing.

32. Jeanie Ingraham was not called to testify at either the level three hearing or the lower disciplinary hearing.

33. Shellie Clark and Grievant did not get along well. There was noticeable tension between the two of them. However, the specific causes of this tension and hard feelings are largely subject to debate and speculation.[39] At all relevant times herein, Grievant was actively attempting to secure a different position so that he could move from his assignment in Ms. Clark's class.[40] Grievant feared that if he remained in her class at Dunbar Primary, he might lose his job. Grievant was unable to get another position before his suspension and subsequent dismissal.

[38] *See*, testimony of Gloria Richardson, level three hearing.
[39] *See*, testimony of Gloria Richardson at level three; testimony of Hillary Gibson at level three; testimony of Melissa Turner at level three; testimony of Sheryl Decker at level three; and, testimony of Grievant at level three.
[40] *See*, level three testimonies of Grievant, Melissa Turner, Hillary Gibson, and Sheryl Decker.

34. Shellie Clark showed R. B. her students' IEPs while she was assigned to her class as a student observer.[41] Ms. Clark would not show those to Grievant who was a full-time, regularly employed Autism Mentor/Aide assigned to work with those children.[42]

35. None of the students involved in the incidents discussed herein were injured in any way, and no one has claimed otherwise.

36. The parent-teacher mentioned by M. M. during her testimony was not named during the proceeding, and she was not called as a witness in either hearing in this matter.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W.VA. CODE ST. R. § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health,* Docket No. H-88-005 (Dec. 6, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.,* Docket No. 96-20-380 (Mar. 18, 1997). "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.*

[41] *See*, testimony of R. B., level three hearing.
[42] *See*, testimony of Grievant, level three hearing.

Respondent asserts that Grievant has engaged in conduct constituting insubordination and willful neglect of duty warranting his suspension and dismissal. Specifically, Respondent charged Grievant with "grabbing a student by the arm and 'yanking' him to the ground," then holding that student down on the ground, grabbing another student by the arm and jerking her away from a fence on a playground, and referring to another employee as a "thunder cunt" in the presence of students.[43] Grievant denies engaging in any acts of misconduct alleged by Respondent. Grievant asserts that the allegations made against him are entirely false, and are the result of co-workers conspiring to have him removed from his position at Dunbar Primary. Further, Grievant asserts in his proposed Findings of Fact and Conclusions of Law that, "[i]f it is instead a real or perceived problem with the way he performs his duties, that should be addressed by the evaluation and plan of improvement process."

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

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

W. VA. CODE § 18A-2-8(a).

[43] *See*, Suspension letter, September 21, 2016, Respondent (KCS) Exhibit 1, lower level.

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

Further, an 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 the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995). *See Martin v. W. Va. [State] Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

The West Virginia Supreme Court of Appeals has held that, for there to be "insubordination," the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be willful; and, (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd./Shepherd Coll.,* 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (per curiam). The disobedience must be willful, meaning that "the motivation for the disobedience [was] contumaciousness or a defiance of, or contempt for authority." *Id.* at 213, 460 (citation omitted). "Employees are expected to respect authority and do not have the unfettered

discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't,* Docket No. 90-H-128 (Aug. 8, 1990).

"Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. *Adkins v. Cabell County Bd. of Educ.*, Docket No. 89-06-656 (May 23, 1990). This is a fairly heavy burden, given that Respondent must not only provide that the acts it alleges did occur, but also that the reason for Grievant's neglect of duty was more than simple negligence." *Tolliver v. Monroe County Bd. of Educ.*, Docket No. 01-31-493 (Dec. 26, 2001). Willful neglect of duty "is conduct constituting a knowing and intentional act, rather than a negligent act. *Williams v. Cabell County Bd. of Educ.*, Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ.*, Docket No. 95-29-151 (Aug. 24, 1995); *Hoover v. Lewis County Bd. of Educ.*, Docket No. 93-21-427 (Feb. 24, 1994). Willful neglect of duty encompasses something more serious than incompetence. *Bd. of Educ. v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120, 122 (1990); *Sinsel v. Harrison County Bd. of Educ*., Docket No. 96-17-219 (Dec. 31, 1996)." *Geho v. Marshall County Bd. of Educ.*, Docket No. 2008-1395-MarED (Oct. 30, 2008). 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).

Further, "[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).

Grievant has been charged with engaging in several instances of misconduct occurring on the following dates: September 12, 2016; September 13, 2016; and, September 14, 2016, and that the same amounts to insubordination and willful neglect of duty. However, it is noted that Principal Spencer addressed the incident that occurred on September 12, 2016, in a meeting with Grievant on September 13, 2016, and that Grievant was not disciplined for his conduct thereafter. Moreover, Grievant and Respondent dispute whether the technique Grievant used in transporting the child on September 12, 2016, was correct. Nonetheless, it appears that but for R. B.'s and M. M.'s allegations of misconduct occurring on September 13, 2016, and September 14, 2016, Respondent would not have imposed the discipline at issue upon Grievant. Therefore, the true issue in this case is whether Grievant engaged in the behavior alleged to have occurred on these dates, and if so, whether such constituted insubordination and willful neglect of duty. Accordingly, the undersigned will address the allegations of misconduct occurring on September 13, 2016, and September 14, 2016, first.

R. B. asserts that on September 13, 2016, she witnessed Grievant grab a student by the arm, drag him across the room, put the student on the floor and hold him there for some time, and yell at him to pick up a toy he had thrown. Grievant denies that this event

occurred. R. B. also alleged that on September 14, 2016, Grievant called an unidentified teacher "thunder cunt" in front of the students while she and Melissa Turner were present. R. B. has claimed that Grievant called the teacher by this vulgar name after the teacher had walked past them, and that when R. B. admonished him because the students were present, he laughed and said it again. Grievant denies this ever happening.

As Respondent correctly points out in its proposed Findings of Fact and Conclusions of Law, this case hinges almost entirely on the credibility of the witnesses. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995)*; Perdue v. Dep't of Health & Human Res.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and, 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the administrative law judge should consider the following: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and, 4) the plausibility of the witness's

information. *See Id.; Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Grievant is obviously interested in this matter as he is seeking to be reinstated into his position as an Autism Mentor/Aide, thereby giving him a motive to be untruthful. Grievant's demeanor at the level three hearing was appropriate. He answered the questions asked of him, and did not appear evasive. In fact, Grievant appeared to like to talk, and to want to tell his side of the story in detail. Grievant appeared mostly calm, but appeared a bit emotional at times. Such is understandable given the circumstances. While Grievant claimed that his voice was naturally loud, he did not seem loud during the level three hearing. His tone and volume were appropriate. Grievant is a tall man, and is larger than average; however, he did not seem imposing or intimidating at the hearing. It is noted, however, that Grievant was seated during the hearing, and his interactions with everyone else present were very limited given the nature of the proceeding. Further, Grievant is not known to have made any inconsistent statements regarding the incidents alleged.

Grievant has denied all of the accusations made against him by R. B. and M. M., and has asserted that Ms. Clark and those close to her, including R. B. and M. M., were trying to get him removed from Dunbar Primary, and his suspension and dismissal resulted from their actions. With respect to the allegation that he forcefully pulled a student away from a fence, Grievant has testified that he does not recall that occurring. However, Grievant testified that he was familiar with the particular student, that said student was an eloper, and that it was not uncommon for him, and other Autism Mentors, to actively keep that student and others away from the fence as a safety measure.

Grievant denied forcefully removing any student from the fence. As for the allegations made by R. B., Grievant denies that such ever occurred. Grievant denied the entire classroom incident described by R. B., and denied ever using the phrase "thunder cunt." Respondent appears to argue that Grievant lacks credibility because he argues that Ms. Clark and her friends set him up. Grievant's argument alone does not diminish his credibility. To the contrary, Grievant was a credible witness. While it is hard to believe that in this day and age that such a clique would exist, let alone work to get another employee in trouble, such cannot be summarily dismissed as too far-fetched. Also, it is to be remembered that Respondent has the burden of proof in this case.

Respondent also claims that Grievant made up story that Gloria Richardson came into the teacher's lounge during his September 13, 2016, meeting, and that Grievant turned in a false report to CPS after his suspension on September 20, 2016, alleging that Ms. Clark abused children in her class. First, the claim that Ms. Richardson came into the teacher's lounge while Grievant was meeting with Principal Spencer is in dispute. Secondly, such has nothing to do with the decision to suspend and dismiss grievant or the allegations made by R. B. and M. M. It is irrelevant to the issue to be decided, and does not go to Grievant's credibility. Further, the report to Child Protective Service was anonymous and Grievant has denied making it. Also, this has nothing to do with the decision to suspend or dismiss Grievant, or the allegations made by R. B. and M. M. which are at issue in this matter. While Respondent may believe that Grievant made the report, such was not a factor in the decision to suspend and dismiss Grievant, and it is irrelevant. Further, it does not go to Grievant's credibility.

R. B. was a high school senior assigned to Shellie Clark's class. At the time she testified at the level three hearing, R. B. was eighteen-years-old, and had not yet graduated from high school.[44] R. B.'s demeanor at the level three hearing was appropriate, and she did not appear evasive. However, R. B. appeared somewhat uncomfortable, which is understandable. As R. B. was assigned to observe in Shellie Clark's class, Ms. Clark was responsible for evaluating R. B. at the end of every nine weeks, and such impacted her grade in her program at Ben Franklin.[45] This relationship could provide R. B. a motive to be untruthful. Also, this relationship could place R. B. in the position of wanting to please Ms. Clark, and it was common knowledge that Ms. Clark and Grievant did not get along well. Upon review of the transcript of R. B.'s testimony during the disciplinary hearing on October 17, 2016, as compared to her level three testimony, the Administrative Law Judge notes some inconsistencies. Some of the inconsistencies can be explained by passage of time. The disciplinary hearing was conducted about a month after the two alleged incidents. The level three hearing was a little more than five months following the two alleged incidents. However, not all of the inconsistencies can be so easily explained. At the disciplinary hearing, R. B. testified that during the incident with the student on September 13, five or six other students had been present in the classroom when it occurred.[46] At level three, R. B. testified that no other students were present, and that only she, Grievant, and the student involved in the incident were present. R. B. consistently testified that Ms. Clark was not present in the

[44] It is noted that at R. B.'s mother appeared with her when she testified at the lower disciplinary hearing.
[45] *See*, testimony of R. B., lower disciplinary hearing, pg. 55.
[46] *See*, lower disciplinary hearing transcript, pg. 49.

classroom at the time. R. B. testified at the disciplinary hearing that she reported the incident to Shellie Clark,[47] but at level three, she testified that she only reported it to Ms. Hewitt. Further, R. B. testified at the disciplinary hearing that Grievant held the student down on the floor for a "minute or two," but testified that it was "fifteen seconds" during the level three hearing. Also, R. B. testified at level three that the student went down to the floor on his face, but that the student was not injured whatsoever. The Administrative Law Judge found no reference to the child going to the floor on his face during R. B.'s lower disciplinary hearing testimony. Additionally, R. B. varied her testimony in some respect as to when she reported the incident to Ms. Hewitt. At the disciplinary hearing, R. B. testified that she reported it to Ms. Hewitt within "a week or two" after the incident, but testified that she reported it "within the next week" at level three. Most significantly, at level three, R. B. testified that she did not think that Grievant's actions in putting the student on the floor and holding him there were "intentional." Such was never said or implied at the disciplinary hearing, or in her written statement, and the incident she described at that time was certainly intentional and aggressive.

R. B. offered no testimony about the September 14 profanity incident at the level three hearing, but testified about it during the disciplinary hearing before the hearing examiner. It is noted that R. B. did not appear comfortable saying the vulgar word during that hearing, but acknowledged that the word in question was "the c-word." Further, the record reflects that, at some point, R. B. prepared a type-written statement regarding this allegation, and the same was offered at the disciplinary hearing. This statement was not sworn, is not dated or signed, and it is unclear as to how the statement came to be, who,

[47] *See*, lower disciplinary hearing transcript, pg. 39.

if anyone, asked for it, and to whom it was given. However, in this written statement and in her disciplinary testimony, R. B. notes that Melissa Turner, an Autism Mentor/Aide was present when Grievant made the comment.

As stated previously, R. B. and Grievant were assigned to the same classroom with the same students and teacher, three days each week for a few hours each day. Even though the school year had started a few weeks before, at the time of the alleged incidents, R. B. knew who Grievant was, knew his name, and was familiar with him. Again, they worked in the same class frequently. Despite this, in her written statement setting forth the two allegations, R. B. refers to Grievant as "your assistant teacher" in describing the September 13, 2016, incident. However, just below that on the same piece of paper, R. B. refers to Grievant as "the African American man" when describing the September 14, 2016, incident. The undersigned was offered no explanation as to why R. B. did not simply refer to Grievant by his name. The fact that R. B. went out of her way to describe Grievant by his race and a generic title instead of using his name is troubling. The written statement would suggest that R. B. did not know the Grievant; however, such is not true. Also, it suggests that perhaps she was trying to make him appear less personable or even imposing. Further, by calling Grievant "your assistant teacher" it suggests that this statement was being given, or directed, to Shellie Clark.

M. M. asserts that on September 13, 2016, she witnessed Grievant grab another student by the wrist, jerk or pull the student away from a chain-link fence on the playground, and pull the student by the wrist back across the playground. M. M. has testified that the child was not injured during this incident. M. M. was a student at Ben Franklin studying early childhood education. She was nineteen years old when she

testified at the level three hearing, and had graduated from high school in Kanawha County in the spring of 2016. She, like R. B., was observing at Dunbar Primary in September 2016. She was assigned to the classroom of Gloria Richardson. She was not assigned to the classroom in which Grievant worked, but would see him with students at school and on the playground. She knew who Grievant was at the times at issue.

M. M. testified at the lower disciplinary hearing in October 17, 2016, and at the level three hearing. At the beginning of her testimony during the level three hearing, M. M. appeared nervous. While that is understandable, during her direct examination by counsel for Respondent, she began to cry. She was not being asked any inappropriate questions, or being treated harshly in any way. At that time, she appeared quite nervous, and even explained that she just gets "really nervous," but refused a break because she wanted "to get this over with." It is certainly plausible that M. M. was frightened by the process, and such stressed her enough to cause her to cry. Further, this could be a factor of her age. M. M. tried to answer the questions asked of her, and she did not appear evasive. However, some of her testimony appeared inconsistent with her testimony at the disciplinary hearing, as well as that of R. B, and was, at times, confusing.

At the disciplinary hearing, M. M. testified that the child was standing at the gate in the fence with her arm wrapped around a pole and her hand in the fence when Grievant forcefully grabbed the student by the arm and pulled her back over to the playground. She also said that he grabbed the student by the wrist.[48] At the level three hearing, there was no mention of the pole or gate, but such could be explained by how she was questioned. At level three, M. M. testified that the student had her hands through the

[48] *See*, M. M. lower disciplinary hearing transcript, pg. 69-73.

chain-link fence, and that Grievant grabbed her by the wrist and walked her "fastly" across the playground. M. M. testified that the way Grievant grabbed the student's arm is what bothered her, and that it was too forceful. M. M. also indicated in her testimony at the disciplinary hearing that Melissa Turner and another unknown woman were on the playground when this incident took place.[49]

M. M.'s testimony regarding how she reported the matter appeared inconsistent, and confusing. At level three, M. M. first testified that she first reported the incident to Ms. Hewitt at Ben Franklin on the exact day it happened, and that Ms. Hewitt told her to report it to someone at Dunbar Primary. M. M. later varied this to the exact day or the next day. At the disciplinary hearing before ever mentioning Ms. Hewitt, she testified that she told Gloria Richardson and the mother of the student involved, explaining that the mother had been a "parent-teacher" at the school.[50] She also testified at the disciplinary hearing that she did a written statement about the incident for the student's mother.[51] At level three, M. M. did not mention the student's mother or doing the written statement for her. At the disciplinary hearing and at level three, M. M. testified that she and R. B. talked to Ms. Hewitt at the same time about the incidents.[52] However, it was not clear if M. M. was indicating that she spoke to Ms. Hewitt about the incident more than once, or without R. B. present. It was also unclear from R. B.'s testimony as to whether she and M. M. talked to Ms. Hewitt together. R. B. testified at both hearings that she reported to Ms. Hewitt much later than a day of the incident. However, she testified at the disciplinary

[49] *See*, M. M. lower disciplinary hearing transcript pg. 78-79.
[50] It is noted that Ms. Richardson testified at level three that she had seen Grievant do nothing improper, but told M. M. that if she had seen something, she needed to report it.
[51] *See*, M. M. lower disciplinary hearing testimony transcript, pg. 76.
[52] *See*, testimony of M. M., disciplinary hearing transcript, pg. 75-76.

hearing that M. M. speaking up about what she allegedly saw made her speak up as well. M. M. also testified at the level three hearing that she and R. B. discussed the incidents a few times, but not "really in depth." From M. M.'s testimony, it could not be determined when these conversations with R. B. were supposed to have happened. Additionally, M. M. testified that after speaking with Ms. Hewitt, she reported it to Principal Adams, which does not appear in her disciplinary hearing testimony. It is not clear from R. B.'s testimony at either proceeding whether she spoke to Ms. Adams.

Lastly, M. M.'s written statement was presented at the disciplinary hearing. It is noted that it is handwritten and says "to Shellie" at the top.[53] Such is believed to be Shellie Clark, and not the mother of the student as she had testified at the disciplinary hearing. The statement is not sworn, or dated or signed, and it is unclear from the record to why this was written, who requested it, and to whom it was given. Further, it is noted that M. M. was not assigned to Shellie Clark; R. B. was assigned to Ms. Clark. M. M. was assigned to Gloria Richardson, whose name is not mentioned in the statement. R. B.'s written statement also implies that it was being directed to Shellie Clark, as noted previously. In M. M.'s written statement, even though she admitted during her testimony that she was acquainted with Grievant, she saw him around school, and knew who he was, she refers to him only as "the African American man." In this written statement, she also says that Grievant "jerked" the student "by the arm and jerked her back over to the playground." There was nothing about the pole, the wrist, pulling the student, or walking

[53] *See*, Respondent's lower disciplinary hearing Exhibit 5.

her “fastly” across the playground. It does not appear that M. M. used the word “jerked” in her testimony at either hearing.[54]

Melissa Turner testified that she had not witnessed Grievant make derogatory comments about coworkers, and specifically denied ever hearing him call anyone “thunder cunt.” Therefore, her testimony contradicts that of R. B. Ms. Turner was a trained professional, not an interning student. She had worked with Grievant for some time, and testified that she had never witnessed Grievant be too rough with students. Ms. Turner testified that she had been on the playground with Grievant, as M. M. had testified, but did not see him do anything improper. She testified that she had no knowledge of Grievant forcefully removing a child from the playground fence, or treating any child too forcefully. Ms. Turner was also a witness to the September 12, 2016, incident in the hallway, and testified that she saw Grievant do nothing improper in transporting the child.

Ms. Turner’s demeanor was appropriate and she answered the questions asked of her. She did not appear evasive, but she had some trouble remembering her exact schedule during the 2016-2017 school year. She testified that there had been changes made to her schedule during the year, and such was causing her memory issues. Such is plausible, and may also be explained by the passage of time as she was testifying nearly six months after the events at issue. While Ms. Turner had some issues with remembering where she was assigned on September 12, 2016, her testimony about the details of the incident, what happened, and who was present was thorough and consistent with other witness testimony. No one disputes that Ms. Turner was in the hallway and witnessed the incident. While Ms. Turner had some minor trouble remembering her exact

[54] *See*, Respondent’s lower level Exhibit 5.

assignments on particular dates, her testimony was credible. Ms. Turner did not testify at the disciplinary hearing, and is not known to have made any inconsistent statements. However, Ms. Turner appears to have worked closely with Grievant, and such could give her motive to be more favorable to him in her testimony. Nonetheless, Ms. Turner was credible, and her testimony was consistent and plausible.

M. M. and R. B. were friends. They were in the same childhood education program at Ben Franklin, had the same teacher, Ms. Hewitt, were close in age, and were assigned to observe the preschool classes at Dunbar Primary. While M. M. was assigned to Ms. Richardson, a former close friend of Ms. Clark, she had some contact with Ms. Clark, who is widely understood to have had problems with Grievant, during the time these incidents were alleged to have occurred and were reported. Neither R. B. nor M. M. mentioned reporting the incidents to Shellie Clark, or giving her written statements, in their testimonies or otherwise. In fact, M. M. testified at the disciplinary hearing that she did a written statement for the mother of the student from the playground incident. While R. B. and M. M. made a number of consistent statements, they were inconsistent on certain critical details, and even appeared to contradict one another at times. Their ages, nerves, and passage of time can explain some of these irregularities. However, M. M. and R. B. have made serious allegations against Grievant, and described events that could be described as disturbing. It seems somewhat implausible that R. B. and M. M. would have trouble remembering the details of such disturbing events, the timeline of events, and what they did in reporting the same. Further, it seems implausible that if Grievant treated the small children in the manner described that they would have no visible injuries. For example, R. B. testified that the student on September 13 landed on his face in the floor

and Grievant held him there. Also, M. M. testified that the other student had her hands through the chain-link fence when Grievant jerked/pulled her away from it. It would seem that these actions would have left some visible marks if they occurred as described. Given the number of inconsistencies, especially R. B.'s testimony at level three that she did not think that Grievant's actions in putting the student on the floor and holding him there were intentional, the Administrative Law Judge cannot find R. B. credible. Further, while M. M. made fewer inconsistent statements, there were still significant inconsistencies, and contradictions. Also, both R. B. and M. M. displayed a certain level of bias toward Grievant, such as the language used in the written statements. Moreover, their connections to Shellie Clark cast some doubt on their credibility. It is noted that M. M. did not acknowledge any connection to Shellie Clark, even though her written statement was directed to her. Also, it is curious that no one who testified in the matter indicated that Ms. Clark had any role in investigating the allegations made against Grievant or taking statements. For the foregoing reasons, the Administrative Law Judge cannot find M. M. credible.

Respondent charged Grievant with insubordination and willful neglect of duty for conduct alleged to have occurred on September 13, 2016, and September 14, 2016, based upon the allegations made by R. B. and M. M. who were not credible witnesses. Ms. Turner was present with Grievant and R. B. on September 14, 2016, and she credibly testified that Grievant did not call anyone "thunder cunt" as R. B. alleged. There were no other witnesses to these alleged incidents. As Respondent correctly pointed out, this matter hinges on the credibility of the witnesses. Given that Respondent's star witnesses were not credible, Respondent has failed to prove by a preponderance of the evidence

its claims that Grievant engaged in acts of insubordination and willful neglect of duty on September 13, 2016, and September 14, 2016. The Administrative Law Judge need not address Grievant's conspiracy theory. This case came down to the credibility of the witnesses who made the allegations upon which the charges were based. It does not matter how these allegations were conceived or why. The only thing that matters is whether Respondent met its burden of proof, and it did not.

Lastly, the incident on September 12, 2016, was addressed by Principal Spencer on September 13, 2016, in a meeting with Grievant. There has been no allegation that he was disciplined for his actions in transporting the child in and of itself. It appears that the matter was handled by Principal Spencer and SES Rohmiller by meeting with Grievant, and the other Autism Mentor involved, and reviewing procedures. As stated in the beginning, it does not appear from the letter that any discipline would have been imposed but for the allegations of misconduct occurring on September 13, 2016, and September 14, 2016. While the letter states that Grievant "dragged" a student, the video evidence shows that such did not occur. Nonetheless, the letter states that "[y]ou were advised to use correct procedures when dealing with students in the future." It appears that this incident was only brought up again when there were additional allegations that Grievant had failed to use correct procedures when dealing with students within the next two days. Accordingly, it appears that regardless of whether the parties dispute that the technique Grievant used on September 12, 2016, was correct, Principal Spencer treated it like correctable conduct, and no discipline resulted from that incident alone. As such, no further discussion, analysis, or determination is needed regarding the September 12, 2016, incident. For the reasons set forth herein, the grievance is GRANTED.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W.VA. CODE ST. R. § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health,* Docket No. H-88-005 (Dec. 6, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.,* Docket No. 96-20-380 (Mar. 18, 1997). "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).

2. WEST VIRGINIA CODE §18A-2-8 sets out the reasons for which a public school employee may be suspended 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.
>
> (b) A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article. The charges shall be stated in writing served upon the employee within two days of presentation of the charges to the board.

3. The West Virginia Supreme Court of Appeals has held that, for there to be "insubordination," the following must be present: (a) an employee must refuse to obey

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

4. "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).

5. Further, "[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. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995)*; Perdue v. Dep't of Health & Human Res.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

7. The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and, 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the administrative law judge should consider the following: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and, 4) the plausibility of the witness's information. *See Id.; Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

8. Respondent failed to prove by a preponderance of the evidence that Grievant engaged in conduct constituting insubordination and/or willful neglect of duty justifying his suspension and dismissal.

Accordingly, the grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant to his position as an Autism Mentor/Aide, and to pay him back pay from the date of his suspension to the date he is reinstated, plus statutory interest, and to restore all benefits lost as a result of his suspension and dismissal, including seniority. Further, Respondent is **ORDERED** to remove all references to this suspension and dismissal from Grievant's personnel file, and any and all personnel records maintained by Respondent, or its agents.

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: July 21, 2017.

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Carrie H. LeFevre
Administrative Law Judge