THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

SHEILA FOLTZ,
Grievant,

v. **DOCKET NO. 2017-1357-BerED**

BERKELEY COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed by Grievant, Sheila Foltz, at level three of the grievance procedure, on December 6, 2016, contesting her suspension and the subsequent termination of her employment by the Berkeley County Board of Education. The relief sought by Grievant is, "reinstatement to her position as an Autism Mentor/Aide with compensation for all lost wages and benefits, pecuniary and nonpecuniary, with interest. Grievant also seeks expungement from her records of any documentation referencing her suspension and termination."

A level three hearing was held before the undersigned Administrative Law Judge on February 1, 2017, in the Grievance Board's Westover office. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by Laura L. Sutton, Esquire. This matter became mature for decision on receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on March 10, 2017.

Synopsis

Grievant was terminated from her employment as an Autism Mentor after she pulled a nine year old Autistic student along the floor of the hallway at school by his arm and leg. His other arm was fractured and was in a sling at the time, as the result of an accident at his home. There was no threat to the student or others at the time of this incident, nor was there any other emergency situation which would necessitate moving the student. Grievant had extensive training as an Autism Mentor, Crisis Prevention Intervention training, and additional recent positive intervention training. The Crisis Prevention Training included training on the scenarios when a child might need to be moved, and how to move a child if it became necessary. None of Grievant's training instructed that it was appropriate for one person to drag a student along the floor by his arm and leg. Grievant never called for help with the student as her training has taught her when she is in need of assistance with a student. Respondent proved the charges against Grievant.

The following Findings of Fact are made based upon the record developed at level three.

Findings of Fact

1. Grievant was employed by the Berkeley County Board of Education ("BBOE") as an Autism Mentor at Tomahawk Intermediate School ("TIS"). Prior to her dismissal, she had been employed by BBOE since 2000 as a full-time employee, as an Autism Mentor since 2002, and she was a substitute employee for three years prior to her full-time employment.

2. Grievant is assigned to an Autism classroom at TIS. There are seven students assigned to this classroom, four of whom are in regular classrooms with non-special education students most of the day. There is also a second Autism Mentor assigned to the classroom and a special education teacher, Ms. Swartz.

3. G.C.[1] is a small fourth grade male student at TIS, who is nine years old, and has been diagnosed as severely Autistic. He is one of the three students in the Autism classroom most of the day. He is above the fourth grade level in reading and math, but is severely disabled in the area of social interaction. G.C. becomes focused on something, becoming obsessive, and it is difficult to refocus him. He has a tendency to sit and refuse to move if he does not want to do something, and may have a tantrum, and those who work with him must find ways to shift his focus. He has also attempted to run away from school in the past.

4. On September 13, 2016, the three students in the Autism classroom most of the day participated in an afternoon outdoor recess period. G.C. had a fractured arm, and it was in a sling, so he was allowed to use an iPad during recess, and he sat most of the time. While he was outside, G.C. saw an "X" painted on the ground, and decided there was buried treasure under the "X," which he wanted to look for. Grievant told G.C. they needed to go inside, and accompanied him to the water fountain in the hallway. G.C. continued to insist he wanted to go back outside to look for buried treasure. Grievant got G.C. to start down the hall toward the classroom, and then he sat down in the hallway and refused to return to the classroom. The other Autism Mentor assigned to the Autistic

[1] Consistent with the Grievance Board's practice, the student involved in this incident will be referred to only by his initials in order to maintain his privacy.

classroom had already accompanied the two other Autistic students to the classroom. Grievant told G.C. he could talk to his teacher about going back outside, but this did not have any affect. At some point G.C. told Grievant he was going to run, meaning he was going to try to run to where he wanted to go. It had been Grievant's experience that if G.C. said he was going to run, he would sometimes run.

5. Shelly Compton is a special education teacher at TIS, who has taught mentally impaired students for two years. Prior to that she taught regular education students for eight years. On September 13, 2016, Ms. Compton heard a student yelling out in the hall, and she stepped out of her classroom to see why the student was yelling. When she stepped into the hall Ms. Compton saw Grievant pulling G.C. around the corner and down the hallway. G.C. was on his back, and Grievant was walking backward, pulling him down the hall by the arm and the leg toward G.C.'s classroom. G.C.'s other arm was in a sling, and he was holding an iPad, which he dropped as he was being pulled down the hall by Grievant. Ms. Compton heard G.C. say "no" and "stop" as he was being pulled, and she observed the student resisting Grievant's efforts. Ms. Compton heard Grievant tell G.C. in a stern voice that she was taking him to the classroom and that he could not play with the iPad. Ms. Compton asked Grievant if she needed help and Grievant said she did not.

6. When Grievant arrived at the classroom, she "let go of him" and he stood and walked into the classroom. Grievant's testimony, Level Three Joint Exhibit A, page 135. Grievant's explanation for pulling G.C. down the hall was that he was being loud and she was afraid he would run. Grievant did not at any time call for assistance. Grievant admitted she had pulled G.C. down the hall by the arm and leg, but "didn't feel like [she]

had done anything wrong." Grievant's testimony, Level Three Joint Exhibit A, pages136, 138.

7. Grievant had received extensive training in dealing with autistic students in order to become an Autism Mentor, which included training in non-violent responses to non-compliant student behavior. She also has had Crisis Prevention Intervention, "CPI," training, which training is renewed annually. CPI training teaches de-escalation techniques, proper methods of restraining and moving students, and when restraint or moving students is appropriate. The training Grievant received instructed that students are to be restrained only in emergency situations, or when there is a health or safety concern. The training instructs if it is necessary to move the student, which is technically referred to as a "transport," the student is moved only by two or more adults who walk with the student guiding him, one adult on each side of the student. Grievant has been trained on methods to use to encourage a student to do what he is being asked to do without the use of force, and that touching the student is the last resort. G.C.'s classroom is a SPARK classroom,[2] which focuses on positive intervention, encouraging students to engage in a particular activity by offering enticements. Grievant received SPARK training in August 2016. None of Grievant's training instructed her that it was ever appropriate to move a child by the arm and leg dragging the child on his back down the hallway.

8. G.C. was not hurting himself or anyone else when he was sitting in the hallway refusing to move, nor was there an emergency. He had told Grievant he was going to run, but had made no attempt to do so.

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[2] SPARK is an acronym for Special Education Program for Achievement through Reinforced Knowledge.

9. By letter dated September 19, 2016, Grievant was notified by BBOE Superintendent Manny Arvon that she was being suspended without pay effective September 20, 2016, and that he was recommending that her employment be terminated, based on the incident involving G.C. on September 13, 2016, detailed in the foregoing Findings of Fact. The letter refers to Grievant's treatment of G.C. as physical abuse constituting corporal punishment. It states that mistreatment of a special needs student "is in violation of the Individuals with Disabilities Education Act and the West Virginia Board of Education Regulations for the Education of Students with Exceptionalities (Policy 2419)," and contravenes the State Employee Code of Conduct. It further characterized Grievant's behavior as immorality, incompetency, insubordination, and cruelty, and concluded that, "[t]he cruel and abusive manner in which you treated the student victim, your lack of concern for his safety and well-being along with your prior incident compels a conclusion that your behavior is not correctable."

10. The West Virginia State Board of Education Employee Code of Conduct states, in pertinent part:

> All West Virginia School Employees shall:
>
> > Exhibit professional behavior by showing positive examples of preparedness, communication, fairness, punctuality, attendance, language, and appearance.
> >
> > Contribute, cooperate, and participate in creating an environment in which all employees/students are accepted and are provided the opportunity to achieve at the highest levels in all areas of development.
> >
> > Maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free f[ro]m bias and discrimination.
> >
> > Create a culture of caring through understanding and support.

Counties are to provide professional development for all employees on the Code of Conduct.

11. Grievant's performance evaluations for many years have rated her performance in all areas as "acceptable," and have included mostly positive comments regarding her work. The only other category on BBOE's performance evaluation form is "unacceptable."

12. In 2001, Grievant was bitten on the hand by a student without warning, and she reacted by slapping the student's mouth. Grievant was given a written reprimand for this incident, which she did not grieve.[3]

13. After a hearing before the BBOE, Grievant was dismissed from her employment as an Autism Mentor on November 30, 2016, for immorality, incompetency, insubordination, and cruelty. The dismissal as an Autism Mentor, however, allowed her to bid on Cook positions. Grievant has not accepted a Cook position.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*,

[3] Grievant offered testimony that she simply jerked her hand as a response and her hand hit the student's lip. The written reprimand states that she slapped the student's mouth, and apologized for doing so. As Grievant did not grieve this prior discipline, "the merits of [that action] cannot be placed in issue now. *Jones v. W. Va. Dept. of Health & Human Resources,* Docket No. 96-HHR-371 (Oct. 30, 1996); *See Stamper v. W. Va. Dept. of Health & Human Resources,* Docket No. 95-HHR-144 (Mar. 20, 1996); *Womack v. Dept. of Admin.,* Docket No. 93-ADMN-430 (Mar. 30, 1994). Furthermore, all the information contained in the documentation of Grievant's prior discipline must be accepted as true. *See, Perdue v. Dept. of Health & Human Resources,* Docket No. 93-HHR-050 (Feb. 4, 1994)." *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997).

Docket No. 89-41-232 (Dec. 14, 1989). A preponderance of the evidence is evidence which is 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 proven is more probable than not. *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

The authority of a county board of education to discipline an employee must be based on one or more of the causes listed in WEST VIRGINIA CODE § 18A-2-8, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991). *See Beverlin v. Bd. of Educ*., 158 W. Va. 1067, 216 S.E.2d 554 (1975). WEST VIRGINIA CODE § 18A-2-8 provides that "[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." In the instant case, Respondent dismissed Grievant for insubordination, cruelty, immorality, and incompetency.

Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(*per curiam*). *See Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). "[F]or 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

wilful; and c) the order (or rule or regulation) must be reasonable and valid." *Butts, supra.* In other words, there must be not only a refusal to obey a reasonable and valid order, but the refusal must be wilful. *Id.* "[F]or a refusal to obey to be 'wilful,' the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." *Id.*

The Grievance Board has found that where a principal's conduct was not in accordance with the broad language of the employee Code of Conduct, "by failing to promote a safe and positive learning environment, and failing to be a good adult role model," the inappropriate conduct constituted insubordination. *Wells v. Upshur County Bd. of Educ.*, Docket No. 2009-1714-UpsED (May 6, 2011); *aff'd in part, and reversed in part, Wells v. Upshur County Bd. of Educ.*, Memorandum Decision, 2013 W. Va. Lexis 128 (Feb. 11, 2013)(mitigation of discipline reversed). However, the mere existence of an employee Code of Conduct is insufficient to automatically turn any inappropriate conduct into insubordinate behavior.

> While the undersigned agrees that violations of the Employee Code of Conduct may constitute insubordination in violation of W. Va. Code § 18A-2-8, any such violation must involve conduct which clearly contravenes some ascertainable standard of acceptable behavior rather than a broadly worded altruistic expression encouraging attainment of ideal pedagogical behavior. Grievant's conduct was not shown to represent a defiance of authority or a refusal to perform a clearly defined task.

Graham v. Wetzel County Bd. of Educ., Docket No. 2014-0901-WetED (July 9. 2014).

"'Incompetency'" is defined to include 'lack of ability, legal qualification, or fitness to discharge the required duty.'" *Black's Law Dictionary* 526 (Abridged Sixth Ed. 1991). *See*

Durst v. Mason County Bd. of Educ., Docket No. 06-26-028R (May 30, 2008). *Posey v. Lewis County Bd. of Educ.*, Docket No. 2008-0328-LewED (July 25, 2008).

The term immorality has been interpreted as, "connotes conduct 'not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior.'" *Golden v. Bd. of Educ. of the County of Harrison*, 169 W. Va. 63, 285 S.E.2d 665, 668 (1981); *Hayes v. Kanawha County Bd. of Educ.*, Docket No. 94-20-1143 (June 28, 1995). "'Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires at least an inference of conscious intent.' *See Hayes, [supra], citing Youngman v. Doerhoff*, 890 S.W.2d 330 (MOCC. 1994)." *Bell v. Mingo County Bd. of Educ.*, Docket No. 97-29-172 (Mar. 10, 1998); *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). "Possession of marijuana is illegal, and 'not in conformity with accepted principles of right and wrong behavior.' *Golden, supra.*" *Miller v. Wood County Bd. of Educ.*, Docket No. 03-54-376 (Mar. 16, 2004).

"Cruelty is a deliberate act to inflict pain and/or suffering. Behavior which is directed toward a student, and which may include harassment, belittling, threatening, and/or grabbing, slapping, and restraining, without the need for self-defense, meets this definition. *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996)." *Wimmer v. Braxton County Bd. of Educ.*, Docket No. 2008-1497-BraED (Aug. 14, 2008).

"Corporal punishment of any student by a school employee is prohibited." *W. Va. Code* § 18A-5-1(e). The statute does not define corporal punishment. Black's Law

Dictionary (Second online Edition) defines corporal punishment as "[p]hysical punishment as distinguished from pecuniary punishment or a fine; any kind of punishment of or inflicted on the body, such as whipping or the pillory; the term may or may not include imprisonment, according to the context."

Grievant admitted she had moved G.C. down the hall by the arm and leg, but asserted that she was not holding or restraining him, nor did she drag him, rather, she gently put her arms under his arm and leg and scooted him down the hall. She also testified, however, that she had moved him down the hall because she was afraid he might run, yet she did not call for help as she had been trained to do when a child runs. One must wonder how she was going to keep G.C. from running if she wasn't restraining him. Grievant testified that she did not intend to punish or hurt G.C.

While G.C. was not injured by Grievant's action, he certainly could have been, especially with one arm in a sling. The undersigned further cannot imagine any scenario where physically moving a child along the floor when he is non-cooperative, particularly when he has one arm which is clearly injured, would not cause suffering to the child. The child was forced to move down the hall on his back being pulled by Grievant. Respondent demonstrated that this was inappropriate and Grievant should have known it was inappropriate, which calls into question her fitness to perform the job. Grievant had been instructed that she was not to restrain a student or move him except in instances where there was a threat or emergency, that she was to call for assistance if such an instance arose, and that two people should be involved in moving a student. Grievant deliberately chose to ignore her training. Grievant's conduct constitutes insubordination. It also certainly was conduct which would seem to be always wrong under the circumstances, and

while it may not constitute corporal punishment, it fits within the case law definition of cruelty set forth above, which does not require any intent to punish or inflict harm. Grievant put her hands on the student without cause, and restrained him when there was no reason to do so. Respondent proved the charges against Grievant.

Grievant argued that she should have been placed on an improvement plan, and given an opportunity to improve her performance rather than being dismissed. WEST VIRGINIA CODE Section 18A-2-8(b) provides that "[a] charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve[§ 18A-2-12] of this article."

> [A] board must follow the § 5300(6)(a) procedures if the circumstances forming the basis for suspension or discharge are "correctable." The factor triggering the application of the evaluation procedure and correction period is "correctable" conduct. What is "correctable" conduct does not lend itself to an exact definition but must, in view of the nature of the conduct examined in *Trimboli [v. Board of Education of the County of Wayne,* 163 W.Va. 1, 254 S.E.2d 561 (1979)], and in *Rogers [v. Board of Education*, 125 W.Va. 579, 25 S.E.2d 537 (1943)], be understood to mean an offense or conduct which affects professional competency.

Mason County Bd. of Educ. v. State Superintendent of Sch., 165 W. Va. 732, 739; 274 S.E.2d 435 (1980). The provisions of Policy 5300 referred to by the Court have since been codified in WEST VIRGINIA CODE § 18A-2-12a, which provides as follows:

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

Concerning what constitutes "correctable conduct, the Court in *Mason County Bd. of Educ.* noted that

> it is not the label given to conduct which determines whether § 5300(6)(a) procedures must be followed but whether the conduct forming the basis of dismissal involves professional incompetency and whether it directly and substantially affects the morals, safety, and health of the system in a permanent, non-correctable manner.

Id.

"[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 had been employed as an Autism Mentor for many years. She had extensive training in autism, she had been trained in proper restraint and transport techniques and when they should be used, and she had training in positive intervention with special education students. Grievant suggested that none of her training advised her that pulling a student down the hall by one arm and one leg was not an appropriate means of moving the child. It would be impossible for any training to list every possible scenario which is an inappropriate action. Rather, the training is intended to instruct the trainee as to what is appropriate, and provide the tools for analyzing when restraint and transport of a student is appropriate, and how that is to be safely accomplished. Grievant was provided

with these tools, and told what was expected of her. However, she chose to ignore her training. Grievant's conduct is not correctable.

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. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in WEST VIRGINIA CODE § 18A-2-8, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991). *See Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975).

3. WEST VIRGINIA CODE § 18A-2-8 provides that "[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."

4. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(*per curiam*). *See Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*,

Docket No. 26-89-004 (May 1, 1989). "[F]or 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 wilful; and c) the order (or rule or regulation) must be reasonable and valid." *Butts, supra.* In other words, there must be not only a refusal to obey a reasonable and valid order, but the refusal must be wilful. *Id.* "[F]or a refusal to obey to be 'wilful,' the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." *Id.*

5. "'Incompetency'" is defined to include 'lack of ability, legal qualification, or fitness to discharge the required duty.'" *Black's Law Dictionary* 526 (Abridged Sixth Ed. 1991). *See Durst v. Mason County Bd. of Educ.*, Docket No. 06-26-028R (May 30, 2008). *Posey v. Lewis County Bd. of Educ.*, Docket No. 2008-0328-LewED (July 25, 2008).

6. The term immorality has been interpreted as, "connotes conduct 'not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior.'" *Golden v. Bd. of Educ. of the County of Harrison*, 169 W. Va. 63, 285 S.E.2d 665, 668 (1981); *Hayes v. Kanawha County Bd. of Educ.*, Docket No. 94-20-1143 (June 28, 1995). "'Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires at least an inference of conscious intent.' *See Hayes, [supra], citing Youngman v. Doerhoff*, 890 S.W.2d 330 (MOCC. 1994)." *Bell v. Mingo County Bd. of Educ.*, Docket No. 97-29-172 (Mar. 10, 1998); *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18,

1997). "Possession of marijuana is illegal, and 'not in conformity with accepted principles of right and wrong behavior.' *Golden, supra.*" *Miller v. Wood County Bd. of Educ.*, Docket No. 03-54-376 (Mar. 16, 2004).

7. "Cruelty is a deliberate act to inflict pain and/or suffering. Behavior which is directed toward a student, and which may include harassment, belittling, threatening, and/or grabbing, slapping, and restraining, without the need for self-defense, meets this definition. *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996)." *Wimmer v. Braxton County Bd. of Educ.*, Docket No. 2008-1497-BraED (Aug. 14, 2008). "Corporal punishment of any pupil by a school employee is prohibited." *W. Va. Code* § 18A-5-1(e).

8. County boards of education have the burden of proof to show that conduct was not and is not correctable. *McMann v. Jefferson County Bd. of Educ.*, Docket No. 2009-1340-JefED (Oct. 21, 2009), *citing, Maxey v. McDowell County Bd. of Educ.*, 212 W. Va. 668, 575 S.E.2d 278 (2002).

9. "[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).

10. Respondent demonstrated that Grievant's actions constituted insubordination, cruelty, and immorality, and that her conduct was not correctable.

Accordingly, this 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: March 23, 2017

BRENDA L. GOULD
Deputy Chief Administrative Law Judge