

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**NAOMI PILKINGTON,
Grievant,**

v.

Docket No. 2017-1498-RaIED

**RALEIGH COUNTY BOARD OF EDUCATION,
Respondent.**

DECISION

Grievant, Naomi Pilkington, filed a grievance against the Raleigh County Board of Education ("the Board") on January 11, 2017. Ms. Pilkington was employed by the Board as a bus operator. Her statement of grievance is, "Grievant was suspended without pay and her contract terminated for the circumstances surrounding a traffic accident on November 28, 2016. Grievant contends that her conduct did not merit termination and that she was entitled to an evaluation and opportunity to improve prior to termination. Grievant alleges that her suspension without pay and termination were arbitrary and capricious and violated W. Va. Code § 18A-2-12a and W. Va. Code § 18A-2- 8." As relief, "Grievant seeks reinstatement to her position as bus operator with compensation for all lost wages and benefits, pecuniary and non-pecuniary, with interest." Grievant appealed directly to Level three pursuant to W. VA. CODE §18A-2-8 from the Raleigh County Board of Education's January 10, 2017, decision approving the suspension and termination of her contract of employment.

A Level three hearing was held before the West Virginia Public Employees Grievance Board ("Grievance Board"), in Beckley, West Virginia, at the Raleigh County Commission on Aging on March 28, 2017. The undersigned presided over the Level three hearing. Grievant appeared with her counsel, John E. Roush of the West Virginia School Service

Personnel Association. The Board appeared by its counsel, Howard Seufer, Jr., of Bowles Rice LLP. Testimony was taken from the Transportation Director, the Superintendent and Grievant. The undersigned also viewed the audio/video recordings, with sound, made by the four cameras on the bus in hearing and various documents were entered into evidence. At the conclusion of the hearing, the parties agreed to submit Proposed Findings of Fact and Conclusions of Law, the last of which was received on May 3, 2017. This matter became mature for decision on that date.

Synopsis

Grievant, a bus operator, collided with a truck at an intersection, while transporting 21 students, because she failed to yield the right-of-way. Respondent alleges that Grievant violated numerous safety policies, as well as a medication reporting policy, which endangered the student bus passengers and justified her termination. Grievant contends that her termination was unjustified and that she is entitled to an improvement plan to correct her performance. Respondent proved, by preponderance of the evidence, that Grievant was aware of the safety and medication-reporting policies cited by Respondent; she received training on them, and yet willfully disregarded them, jeopardizing the safety of her passengers and that her termination was, therefore, justified.

Findings of Fact

1. At some time during February of 2012, Grievant was employed by the Raleigh County Board of Education (the "Board") as a substitute bus operator. Beginning with the 2013-2014 school year, Grievant became a regular bus operator for Respondent. *Transcript of the January 10, 2017, School Board Hearing, p. 17 and Board Exhibit 2.*

2. On November 28, 2016, during her regular morning bus route, while transporting approximately 21 students to school, Grievant halted to observe the stop sign at the intersection of Breckenridge Road and Route 99 in Raleigh County, West Virginia.

3. The traffic that crossed in front of Grievant's bus on Route 99 had the right of way at the intersection, as it did not have a stop sign. *Transcript of the January 10, 2017, School Board Hearing, p. 18-21, Board Exhibits 3, 4, 5.*

4. Before making a left turn onto Route 99, Grievant clearly looked both ways. Yet the bus collided with a truck that had been traveling on Route 99, from left to right, in front of the bus. *Transcript of the January 10, 2017, School Board Hearing, pp. 18-20, Board Exhibits 4 and 5.*

5. The right front portion of Grievant's bus struck the left rear portion of the truck. The two vehicles were thus stopped on Route 99 following the accident, entirely blocking one lane of traffic on the two-lane highway.

6. The two vehicles remained stationary in the middle of the lane for at least 20 minutes. *Transcript of the January 10, 2017, School Board Hearing, p. 61 and Board Exhibits 4 and 5.*

7. When Grievant collided with the moving truck, the roads were dry and her view of traffic on Route 99 was wholly unobstructed. *Transcript of the January 10, 2017, School Board Hearing, Board Exhibit 4.*

8. Grievant failed to yield the right of way. *Transcript of the January 10, 2017, School Board Hearing, Board Exhibit 4.*

9. When a school bus is involved in an accident when students are aboard the bus, West Virginia Board of Education Policy 4336, "West Virginia School Bus

Transportation Policy and Procedures Manual,” 126 CSR 92, requires the bus operator to “provide for the safety of the students and request assistance as soon as possible.”

10. The West Virginia School Bus Operator Instructional Program training instructs that in the event of an accident, “your primary responsibility is to your passengers.” The training specifically states that after turning off the ignition, reassuring the students and evacuating the bus if required, the bus operator should “apply first aid as needed,” “use warning devices to protect the scene, be alert for fire, and “check for injury to passengers.”

11. Local Board Policy B.5.1 further specifies that,

[i]t is the driver who has the responsibility for the lives and safety of the pupils transported every day. During the time that the students are transported to and from school, the bus driver stands in the place of the parent and shall exercise such controls as are necessary to insure their safe trip.

Transcript of the January 10, 2017, School Board Hearing, pp. 37-38 and Board Exhibits 6, 7, 8.

12. The collision jarred the 21 students on the bus, who ranged in age from 12 to 18. During the first two and one half minutes following the collision, while the bus remained stopped on Route 99, several of the students began talking about the accident and left their seats. Others remained silent and seated, some slumped down in their seats.

Transcript of the January 10, 2017, School Board Hearing, Board Exhibit 5.

13. For much of the time following the accident, Grievant was seated at the front of the bus, for at least 18 minutes in total. An audio/videotape of the interior of the bus shows that she was spending much of the time either trying ineptly to communicate by radio with the Board’s transportation base or shuffling and marking documents, rather

than reassuring the students and actively attempting to determine whether they were all safe and calm.

14. Grievant admitted that she had a difficult time properly using the radio to communicate following the accident because she was upset and explained she was trying to find phone numbers or addresses for the students when looking at the papers.

15. A full 10 minutes passed following the collision before Grievant asked the students whether anyone had been hurt. She got up from the driver's seat, stood in front of the first row of bus seats and simply asked, "Is anyone hurt?" One of the students responded that no one was hurt and Grievant returned to the driver's seat. She did not walk back through the bus at this time to check on the students in each seat to ascertain whether they were all safe and uninjured, even though some of the students had not responded to her inquiry and were slumped down in their seats. *Grievant's Proposed Level three Findings of Fact and Conclusions of Law (proposed finding of fact no. 7); Transcript of the January 10, 2017, School Board Hearing, p. 26-27 and Board Exhibit 5.*

16. As heard on an audio/video recording from one of the bus cameras, one student replied to Grievant's question about whether anyone was hurt, saying "yes," his leg hurt. Grievant did not respond to him and there was no follow-up until emergency medical personnel arrived, at which time the same student reported that his head was hurting. When the father of the student who claimed to be injured arrived at the collision site, the police officer on the scene released the student to his father, who took the boy for medical attention. Following the accident, this student was absent from school for a while. *Transcript of the January 10, 2017, School Board Hearing, pp. 33, 42 and Board Exhibit 5.*

17. Grievant communicated via her bus radio that there were no injuries before she rose from the driver's seat to inquire whether any of the students had been injured. *Grievant's Proposed Level three Findings of Fact and Conclusions of Law (proposed finding of fact no. 7); Transcript of the January 10, 2017, School Board Hearing, pp. 26-27 and Board Exhibit 5.*

18. Grievant's communication with the students was very limited following the accident and she did not attempt to reassure them. Her communications included her instruction to, "sit down and be quiet, I am trying to talk, that is rude," "I need everybody to sit down please," and "nobody is getting off the bus" and her question about whether anyone was hurt. The only personal interaction she had with a student occurred over two and a half minutes after the accident when a male student approached Grievant and appeared to check on her status. *Transcript of the January 10, 2017, School Board Hearing, pp. 26, 31-32 and 63, and Board Exhibit 5.*

19. Approximately six and one-half minutes following the collision, after being repeatedly asked over the bus radio whether any fluids were leaking from the bus, Grievant prepared to check for possible leaking fluids. Before she could turn off the ignition to exit the bus to inspect for leaking fluids, Grievant had to walk to the back of the bus to turn off the "child minder."¹ In just 20 seconds, Grievant completed her walk up and down the aisle, walking directly to the child minder, shutting it off, turning around and

¹ School buses are equipped with child minders to prevent students from being left alone on an empty bus. The child minder effectively requires the bus operator to walk to the back of the bus, to inspect the seats for any children who have neglected to exit the bus for some reason, e.g., because they have fallen asleep.

walking directly to the front of the bus, She did this without moving her head from side to side as she moved up and down the aisle.²

20. After inspecting for leaked fluids outside the bus, Grievant returned to sit in the driver's seat.

21. Grievant had received written rules as a part of The West Virginia School Bus Operator Instructional Program training, which instructed the bus operator to use warning devices to preserve the accident scene and protect the bus passengers and bus from further accident or injury, yet Grievant failed to put out hazard/warning devices at the scene, even though her bus was obstructing a lane of the highway. *Grievant's Proposed Level three Findings of Fact and Conclusions of Law (proposed finding of fact no. 7); Level three Testimony of Transportation Director Gary Daniel; Transcript of the January 10, 2017, School Board Hearing, p. 62 and Board Exhibit 8.*

22. Grievant knew from her training as a bus operator that her delay in determining whether any students had been injured violated various state and local rules for bus operators.

23. Section 18.1 of West Virginia Board of Education Policy 4336, "West Virginia School Bus Transportation Policy and Procedures Manual," 126 CSR 92, instructs that:

The school bus operator shall notify the county transportation supervisor and Medical Examiner of any illness or the use of any controlled and/or over-the-counter substance that may interfere with the safe operation of a school bus.

² Grievant conceded at the School Board hearing that "I might not have looked seat to seat" when she traveled to the child minder, and that she didn't think she turned her head from side to side as she walked the aisle.

24. Following the accident, and until the hearings in this matter, Grievant consistently stated that she may have briefly “blacked out” at the time of the accident, as a result of taking certain medications, which had been prescribed to her, during the weekend immediately preceding the accident, for an illness. The three prescribed medications were Levofloxacin, Benzonatate and Prednisone, and all provided a caution that they can affect one's ability to safely operate a vehicle.

25. Grievant did not ask to be relieved of driving her route on Monday, November 28, 2016, because she was taking the medicines, nor did she report to any school official, in advance of driving the bus that day, that she was taking the three prescription medications. She only reported her use of the medications to school officials after the accident.

26. Grievant believed that these medications would not affect her driving, because the healthcare provider who prescribed the medications indicated she could safely drive her bus. Additionally, Grievant drove over the weekend, before the accident, and reportedly felt unaffected by the medication. *Transcript of the January 10, 2017, School Board Hearing, pp. 27, 29, 45-47, 58, 68 and Board Exhibits 1 (letters of December 12 and December 13, 2016) and 11.*

27. Two days after the bus accident, the Board's Transportation Director and Assistant Superintendent of Schools met with Grievant to discuss the incident. Grievant's explanation for colliding with the truck was that, “maybe I blacked out from taking cold medicines.”³

³ Following the accident, and until the hearings in this matter, Grievant consistently stated that she may have briefly “blacked out” at the time of the accident, as a result of taking the prescribed medications.

28. Mr. Gary Ray Daniel, the Transportation Director, also reviewed the audio/video recordings from the bus and the Sheriff's Office report of the accident and was "surprised" at Grievant's inattention to the students immediately after the accident.

29. Based upon his review of the accident and interview of Grievant, the Transportation Director placed Grievant on administrative leave on November 12, 2016, and referred the matter to Mr. C. David Price, the Superintendent ("Superintendent") of Raleigh County Schools. *Transcript of the January 10, 2017, School Board Hearing, p. 26, Board Exhibit 1.*

30. On December 13, 2016, the Superintendent met with Grievant and discussed his concerns about the events surrounding the accident. Grievant again suggested that perhaps the prescribed medicines she had been taking for her cold had caused her to black out, which resulted in the collision.

31. Prior to the accident that is the subject of this grievance, Grievant had been involved in a number of other accidents as a bus operator. During September of 2014, after unloading students at an elementary school, Grievant moved her bus out of the unloading zone to conduct a post-trip walk-through. She neglected to set the parking brake, but rather placed the bus in neutral, violating a clear, published safety rule.⁴ When Grievant left the driver's seat and walked down the bus aisle, she noticed the bus moving and ran to the front to stop it. The front tire of the bus came into contact with another vehicle. No one was injured due to her failure to set parking brake. In response to this accident, the Superintendent disciplined Grievant by suspending her for five days without

⁴ "Any time you park, or are loading or unloading students, use the parking brake."

pay. The Board subsequently ratified the suspension and Grievant did not appeal. *Transcript of the January 10, 2017, School Board Hearing, pp. 39-40, Board Exhibit 10.*

32. In addition, during 2016, there was an incident when Grievant's bus slid off the road in a snowstorm because she failed to install tire chains. This omission was reflected in a reprimand letter imposing an improvement plan. In 2014, Grievant backed her bus into a tree. In 2012, there were two further accidents, one in which Grievant's bus struck a basketball hoop and, finally, a mailbox, pushing it out of place. *Level three Joint Exhibit 1; Transcript of the January 10, 2017, School Board Hearing, pp. 59, 66-68.*

33. Based upon the collision of November 28, 2016, and her acts or omissions immediately thereafter that involved multiple safety violations, together with Grievant's previous disciplinary history of a five-day unpaid suspension for violating another safety rule, to use the parking brake, the Superintendent was concerned for the safety of the students and lost confidence that Grievant could reliably comply with safety rules.

34. By letter dated December 13, 2016, the Superintendent specifically cited to Grievant's violation of 18.1 of West Virginia Board of Education Policy 4336, "West Virginia School Bus Transportation Policy and Procedures Manual," 126 CSR 92, which required Grievant to notify her supervisor that she was using medications that might interfere with the safe operation of a school bus and violation of WVDE Policy 4336, Section 13.14, which requires the bus operator to provide for the safety of students and request assistance as soon as possible in the event of an accident or mechanical failure during transport, and notified Grievant that he was suspending her without pay and would be recommending the termination of her employment based upon her conduct on

November 28, 2016. *Transcript of the January 10, 2017, School Board Hearing, Board Exhibit 1.*

35. Grievant timely requested a hearing, which Respondent conducted on January 10, 2017. At the hearing, the Board heard the testimony of the Transportation Director, the Superintendent and Grievant, who was represented by counsel. The Board also viewed audio/video recordings made by four cameras mounted on the Grievant's bus, beginning shortly before the bus collided with the truck and continuing through the aftermath of the crash. Eleven exhibits were admitted to the record. *Transcript of the January 10, 2017, School Board Hearing, and Board Exhibits 1 and 5.*

36. At the School Board hearing, in defense of his recommendation that Grievant should be terminated rather than placed on an improvement plan, the Superintendent cited to Grievant's history of discipline for failing to follow policy when she neglected to set the parking brake on her bus. In explaining why he did not recommend placing Grievant on an improvement plan, he stated that his primary concern was for the safety of the students and he was not persuaded that Grievant could improve.

37. Following the hearing, Respondent approved Grievant's suspension without pay and the termination of Grievant's contract of employment.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden of proof by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C. S. R. 1 § 3 (2008); *Ramey v. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). A preponderance "is generally recognized as evidence of greater weight, or which is more convincing than the evidence

which is offered in opposition to it.” *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. Dept. of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Respondent contends that it permissibly suspended Grievant without pay and then properly terminated her for violations of various Board policies relating to safety on the day of the accident, and for failing to notify Respondent that she was taking prescribed medications that could affect her driving capability, also in violation of policy. The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. 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). The “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency’s actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep’t of Educ.*, 210 W. Va. 105; 556 S.E.2d 72 (2001)(citing *In re: Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)); *Powell v. Paine*, 221 W. Va. 458, 655 S.E.2d 204 (2007). The causes listed in the statute are immorality, incompetency, cruelty, insubordination, intemperance, willful neglect duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a nolo contendere to a felony charge. In order to establish insubordination, a county board must demonstrate a policy or directive applied to the employee, was in existence at the

time of the violation and that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Domingues v. Fayette County Bd. of Educ.*, Docket No. 04-10-341 (Jan. 28, 2005). Grievant was admittedly aware of and had been trained on all of the policies that Respondent alleges she violated or failed to observe.

In defending against Respondent's assertion that she violated state policy by failing to notify her supervisor of the medication that she was prescribed, Grievant contends that she was somehow exempted from this requirement because she experienced no bad effects, such as dizziness, while operating her own vehicle over the prior weekend, and because a medical professional who prescribed the drugs on Friday, November 25, 2016, told her that it was alright for her to operate a school bus. However, Respondent replies that the State Board Policy requiring a bus operator to report using medications that may interfere with the safe operation of a bus does not make any exceptions because a bus operator decides he or she is unimpaired by the medications she is taking. Grievant's justification for her failure to comply with this reporting policy is clearly obviated by the fact that when individuals are taking particular medications, their judgment as to whether they are impaired by them may be wholly unreliable, whether due to the medication itself or to their faulty self-assessment. In addition, as Respondent points out, the Board has not enacted any policy excusing a bus operator from complying with the reporting requirement because she received the oral assurance of a medical professional that her use of a particular medication would not create a safety hazard.⁵ As

⁵ Appendix H to State Board Policy 4336 contains a form of local policy that a county board might adopt regarding bus operators' use of medications. The form of policy would require a bus operator who is taking a prescription medicine to furnish her employer

such, Respondent proved Grievant willfully neglected her duty to observe the medication-reporting requirement.

Respondent also alleges that Grievant did not attempt to promptly ascertain whether any of the students were injured following the accident, in violation of policy. Though Grievant's counsel contends in post-hearing argument that Grievant could have swept her eyes from side to side to check on the students when she turned off the child minder, the undersigned finds this to be highly unlikely, particularly in light of Grievant's admission at hearing that she "might not have looked seat to seat" when she traveled to the child minder, and that she did not think she turned her head from side to side as she walked the aisle. Also, in viewing the video, one can see that Grievant was primarily focused on turning off the child minder, because she moved so quickly up and down the aisle. In the span of just 20 seconds, she walked to and from the back of the bus, without turning her head to observe the students whom she passed. Clearly this "quick pass" would not have allowed adequate time for Grievant to assess the welfare of the students. Additionally, Grievant inexplicably waited until 10 minutes after the accident before she bothered to inquire whether anyone was hurt, and before that she was preoccupied with far less urgent matters. As such, the evidence demonstrates that Grievant did not properly

with the practitioner's written statement indicating whether the bus operator should be medically disqualified from performing a safety-sensitive function while taking the medicine. In the instant case, there is no evidence that the Board had adopted such a policy. Even if it did, the Grievant would not have been in compliance, since prior to the accident she furnished her supervisors with nothing about the medications she was taking, oral or written, much less a written statement from a medical practitioner. See *Appendix H to West Virginia Board of Education Policy 4336, "West Virginia School Bus Transportation Policy and Procedures Manual,"* 126 CSR 92.

attend to whether the 21 students on her bus were injured or needed attention, thereby willfully violating Respondent's safety policies.

Moreover, Grievant indicated that she did not use the hazard signs or equipment outside the bus because the traffic/cars that had been traveling on the roads were already stopped. Yet the safety policy requiring bus operators to place these warning or hazard signs outside in situations like this is not discretionary. However, Grievant's testimony demonstrates that she, nonetheless, made a conscious decision to disregard this safety procedure.

In conclusion, Grievant's failure to comply with State Board of Education Policy 4336, the medication reporting policy and the other cited safety procedures, was sufficiently knowing and intentional to constitute insubordination. She had been trained on the rules and policies, was admittedly aware of them, and chose not to follow them. Grievant's irresponsible conduct was an inexcusable failure to perform work-related responsibilities and, therefore, willful neglect of duty.

Grievant effectively requests mitigation of the discipline imposed by Respondent in light of the totality of the circumstances, asserting that her conduct on November 28, 2016, "did not merit termination." The Grievance Board has previously recognized that lesser penalties can be imposed for the offenses listed at W. VA. CODE § 18A-2-8. See *Wahl v. Mineral County Bd. of Educ.*, Docket No. 98-28- 175 (Sept. 14, 1998); See also *Blankenship v. Mingo County Bd. of Educ.*, Docket No. 97-29-486 (Apr. 17, 1998)."
Showalter v. Marshall County Bd. of Educ., Docket No. 07-25-165 (May 28, 2008).
"Whether to mitigate punishment imposed by the employer depends upon a finding that the penalty was clearly excessive in light of the employee's past work record and the

clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis.” *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995) (citations omitted). The argument that a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was “clearly excessive or reflects an abuse of the agency[’s] discretion or an inherent disproportion between the offense and the personnel actions.” *Martin v. W. Va. State Fire Comm’n*, Docket No. 89-SFC-145 (Aug. 8, 1989). Grievant asserts that she should have been given an opportunity to improve her poor performance through another improvement plan. Grievant defends her conduct following the accident, saying that it reflects how upset and shocked she was. She admits she, “could have done better,” and believes that an improvement plan could correct her performance deficiencies.

Respondent replies that the State Board policy, the local Board policy and the West Virginia School Bus Operator Instructional Program training, which places a premium on student safety, does not permit an exception to be made on Grievant’s behalf simply because she was “upset” by the accident. Respondent adds that the rules assume that when a mishap occurs with a school bus, the bus operator, unless injured, will be in control of her emotions and capable of executing all of the prescribed measures to protect the students aboard the bus. Moreover, Respondent asserts, and the undersigned agrees, that Grievant’s demeanor did not signify that she was particularly upset, alarmed or concerned. Significantly, Grievant’s testimony that the collision “didn’t seem very much to me,” directly contradicts her statement that she was upset. Rather, Grievant appeared

to be preoccupied with matters other than student safety, as she focused on her paperwork and the radio.

The Supreme Court of Appeals has held that when a bus operator compromises student safety by violating the West Virginia Board of Education's School Bus Transportation Policy, the bus operator's misconduct is not considered correctable and does not require an improvement plan. The bus operator can be disciplined for insubordination and willful neglect of duty even if no students are injured. *Conner v. Barbour Cty. Bd. of Educ.*, 200 W. Va. 405, 489 S.E.2d 787 (1997) (accident with no student injuries; in violation of the state policy, bus operator failed to maintain control of her passengers, compromising their safety). *Conner, supra*, was decided under West Virginia Board of Education Policy 5300, the provisions of which have since been incorporated into the very statute upon which Grievant relies in the instant case, W. Va. Code § 18A-2-12a(a)(6). In this matter, Grievant's disobedience of the State Board Policy and the Board's rules on November 28, 2016, threatened and compromised the safety of school children. As Respondent persuasively argues, that only one child apparently suffered an injury, ultimately received treatment, and may not have been further harmed by Grievant's failure to earlier detect his injury, is fortunate. It is also fortunate that even though Grievant did not place warning devices at the site of the wreck, no further damage or injury occurred. Obviously, these fortuitous outcomes should have no influence over the determination of whether Grievant's misconduct is correctable and requires an improvement plan as a prerequisite to discipline. Conduct is not correctable and subject to an improvement period if it directly and substantially affects the morals, safety, and health of the system in a permanent, non-correctable manner. *Williams v. Lincoln County*

Bd. of Educ., Docket No. 2012-0669-LinED (Oct. 23, 2012). The foregoing evidence clearly demonstrates that the safety of the students using Respondent's bus transportation system might well be in jeopardy if Respondent tried, yet again, to correct Grievant's performance.

Moreover, mitigation of the punishment imposed upon an employee by a county board is extraordinary relief, to be granted by the Grievance Board only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the county board's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation. *Griffin v. Raleigh County Bd. of Educ.*, Docket No. 2014-0432-RalED (Oct. 7, 2014); *Wiley v. Mason County Bd. of Educ.*, Docket No. 2010-1431-MasED (Apr. 8, 2011); *Kirk v. Lincoln County Bd. of Educ.*, Docket No. 2010-0152-LinED (Nov. 17, 2009); *Hoover v. Wirt County Bd. of Educ.*, Docket No. 2008-1482-WirED (Feb. 12, 2009); *Painter v. Kanawha County Bd. of Educ.*, Docket No. 2008-0724-KanED (Jun. 18, 2008); *Thomas v. Greenbrier Bd. of Educ.*, Docket No. 05-13-433 (Mar. 17, 2006); *Holley v. Lincoln County Bd. of Educ.*, Docket No. 03-22-326 (June 17, 2004). In consideration of the foregoing, the Grievance Board will not grant the extraordinary relief of mitigation to Grievant in this matter.

Based upon the collision of November 28, 2016, in which Grievant was at fault, and the several safety violations that occurred that day, together with Grievant's previous disciplinary history of a five-day unpaid suspension for violating another safety rule, the Superintendent lost confidence that Grievant could or would reliably comply with safety rules. Moreover, Grievant's defense of her actions or omissions, which clearly violated

safety policies, did not reassure the Superintendent that Grievant would not, in the future, violate school transportation policies, even if placed upon an improvement plan. The Superintendent reasonably concluded that Grievant's violations of known safety rules jeopardized student safety. In summary, Respondent proved that Grievant's failure to comply with State Board of Education Policy 4336, the medication reporting rule, and other cited relevant safety policies was sufficiently knowing and intentional to constitute insubordination and a willful neglect of duty in violation of W. VA. CODE § 18A-2-8, justifying Grievant's termination.

The grievance is, therefore, DENIED.

The following Conclusions of Law support the decision reached.

CONCLUSIONS OF LAW

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden of proof by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C. S. R. 1 § 3 (2008); *Ramey v. W.Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). A preponderance "is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W.Va. Dep't. of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105; 556 S.E.2d 72 (2001)(citing *In re: Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)); *Powell v. Paine*, 221 W. Va. 458, 655 S.E.2d 204 (2007).

3. The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, as amended, 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). The causes listed in the statute are immorality, incompetency, cruelty, insubordination, intemperance, willful neglect duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a nolo contendere to a felony charge.

4. In order to establish insubordination, a county board must demonstrate a policy or directive applied to the employee, was in existence at the time of the violation and that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Domingues v. Fayette County Bd. of Educ.*, Docket No. 04-10-341 (Jan. 28, 2005).

5. Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. *Russell v. Kanawha County Bd. of Educ.*, Docket No. 2016-0447-KanED (Mar. 21, 2016). Willful neglect of duty encompasses something more serious than "incompetence," which is another ground for teacher discipline. The term "willful" ordinarily imports a knowing and intentional act, as

distinguished from a negligent act. *Crum v. Logan County Bd. of Educ.*, Docket No. 2015-1197-CONS (Oct. 19, 2015).

6. Respondent proved that by preponderance of the evidence that Grievant's failure to comply with State Board of Education Policy 4336, the medication-reporting rule, and other cited relevant safety policies was sufficiently knowing and intentional to constitute insubordination and a willful neglect of duty in violation of W. VA. CODE § 18A-2-8, justifying Grievant's termination.

7. Where the underlying complaints regarding an employee's conduct relate to his or her performance, West Virginia Board of Education Policy 5300 requires an initial inquiry into whether that conduct is correctable. *Maxey v. McDowell County Bd. of Educ.*, 212 W. Va. 668, 575 S.E.2d 278 (2002). The provisions of Policy 5300 have since been codified in W. Va. Code § 18A-2-12a. Concerning what constitutes "correctable" conduct, "it is not the label given to conduct which determines whether § 5300(6)(a) procedures must be followed but whether the conduct complained of involves professional incompetency and whether it directly and substantially affects the morals, safety, and health of the system in a permanent, non-correctable manner." *Mason County Bd. of Educ. v. State Superintendent of Sch.*, 165 W. Va. 732 (W. Va. 1980).

8. Where a school employee's insubordinate and willfully negligent acts directly compromise the safety of school children he has been entrusted to transport, such actions are not correctable within the meaning of the State Board policy that entitles an employee to an improvement plan before her contract of employment is suspended or terminated. *Blankenship v. McDowell County Bd. of Educ.*, Docket No. 2016-0772-McDED (Aug. 15, 2016); *Kinder v. Kanawha County Bd. of Educ.*, Docket No. 2015-0421-

KanED (Aug. 31, 2015); *Jarrell v. Jackson County Bd. of Educ.*, Docket No. 04-18-204 (Oct. 27, 2004).

9. When a bus operator compromises student safety by violating the West Virginia Board of Education's School Bus Transportation Policy, the bus operator's misconduct is not considered correctable and does not require an improvement plan. The bus operator can be disciplined for insubordination and willful neglect of duty even if no students are injured. *Conner v. Barbour Cty. Bd. of Educ.*, 200 W. Va. 405, 489 S.E.2d 787 (1997).

10. The Grievance Board's mitigation of the punishment imposed upon an employee by a county board is extraordinary relief, to be granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the county board's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation. *Griffin v. Raleigh County Bd. of Educ.*, Docket No. 2014-0432-RaED (Oct. 7, 2014); *Wiley v. Mason County Bd. of Educ.*, Docket No. 2010-1431-MasED (Apr. 27, 2011); *Kirk v. Lincoln County Bd. of Educ.*, Docket No. 2010-0152-LinED (Nov. 17, 2009); *Hoover v. Wirt County Bd. of Educ.*, Docket No. 2008-1482-WirED (Feb. 12, 2009); *Painter v. Kanawha County Bd. of Educ.*, Docket No. 2008-0724-KanEd (Jun. 18, 2008); *Thomas v. Greenbrier Bd. of Educ.*, Docket No. 05-13-433 (Mar. 17, 2006); *Holley v. Lincoln County Bd. of Educ.*, Docket No. 03-22-326 (June 17, 2004).

11. Grievant compromised the safety of the students with whom she was entrusted and is not entitled to an improvement plan, nor is any other mitigation warranted.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See *also* W. VA. CODE ST. R. § 156-1-6.20 (2008).

Accordingly, the Grievance is **DENIED**.

DATE: June 15, 2017.

Susan L. Basile
Administrative Law Judge