**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**KELLI WRIGHT,**
**Grievant,**

**v.** **Docket No. 2017-1370-KanED**

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

## DECISION

Grievant, Kelli Wright, was employed by Respondent, Kanawha County Board of Education. On December 8, 2016, Grievant filed this grievance against Respondent stating, "Grievant was suspended and terminated from her position as an Aide. Grievant asserts that she was not guilty of any misconduct. Grievant also contends that she 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." For relief, Grievant seeks "reinstatement to her position as an Aide with compensation for lost wages and benefits, pecuniary and nonpecuniary, with interest. Grievant also seeks expungement from her records of any documentation referencing her suspension and termination.

The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held on February 27, 2017, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by counsel, John Everett Roush, West Virginia School Service Personnel Association. Respondent was represented by counsel, James W. Withrow, General Counsel Kanawha County Board of Education. This matter became mature for decision

on March 27 2017, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

## Synopsis

Grievant was employed by Respondent as an Aide. Respondent terminated Grievant's employment for grabbing a three-year-old special needs child by the wrist with enough force to lift the child's feet off the floor eight to ten inches and then dropping the child back to the floor. Respondent proved it was justified in terminating Grievant's employment without an additional improvement plan. Grievant's conduct was not correctable as it both directly affected the safety of the child and was the same type of conduct and lack of judgment for which previous discipline, evaluation, and improvement plans had failed to correct. Accordingly, the grievance is denied.

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

## Findings of Fact

1. Grievant was employed by Respondent as an Aide at Ruffner Elementary School where she was assigned to a pre-school classroom.

2. Grievant had previously been placed as an Aide at Andrew Jackson Middle School, where she had received unsatisfactory performance evaluations and had been subject to several different disciplinary actions.

3. On March 1, 2013, Grievant received a letter of reprimand for inappropriate conduct with a student when she summoned a student from the mentally impaired self-

contained room into the classroom restroom, seated the student on a changing table, and asked the student if the student had ever had sex.[1]

4. On November 17, 2014, Grievant was rated unsatisfactory in the areas of safety practices, attitude, work judgments, acceptance of responsibility and employee relations. The evaluation also notes parents had reported that Grievant had been impatient with students and had handled them roughly.

5. On November 19, 2014, Grievant was placed on an improvement plan to address her continued unsatisfactory performance. Grievant successfully completed the improvement plan on January 23, 2015.

6. Grievant was then transferred to Edgewood Elementary School.

7. On or about March 7, 2015, complaints were made that Grievant had been verbally and physically aggressive with students. As a result, Respondent transferred Grievant to Ruffner Elementary.

8. On December 15, 2015, Grievant's performance was again rated as unsatisfactory, specifically in the areas of attendance, compliance with rules, safety practices, attitude, work judgments, and following instructions. The evaluation noted multiple specific incidents in which Grievant failed to properly supervise students in her care including an incident in which a special needs student ate mulch while Grievant was talking on her cellphone.

[1] Although the Letter of Reprimand mentions previous discipline in the form of a verbal reprimand, a letter of warning, and a letter of reprimand, proof of that prior discipline was not placed into evidence and is not considered.

9. Grievant was placed on a second plan of improvement for her unsatisfactory performance, which she successfully completed as indicated by her satisfactory evaluation on May 24, 2016.

10. On August 11, 2016, Grievant was supervising special needs pre-school students in the cafeteria. When it was time to leave the cafeteria and return to the classroom, one student, three-year-old S.R., resisted leaving the cafeteria. S.R. has Down Syndrome and is developmentally delayed. S.R. refused instruction to line up to leave the cafeteria, backed up to a wall and sat on the floor. When S.R refused to get back up, Grievant grabbed S.R. by the wrist and abruptly lifted her off the floor by her wrist until her feet were several inches off the floor, before dropping her back to the ground. S.R. was not injured.

11. Sarah Mullins, an itinerant special needs preschool teacher, observed the incident and reported the same to Principal Henry Nearman.

12. After receiving written statements from Ms. Mullins, and two other employees in the cafeteria at the time, Pamela Humphreys and Brandi Proctor, Principal Nearman questioned Grievant about the incident, which she denied occurred.

13. Grievant was suspended by letter dated August 18, 2016.

14. A disciplinary hearing was held before Respondent's hearing examiner on October 11, 2016, who recommended Grievant's employment be terminated.

15. On December 5, 2016, Kanawha County Board of Education voted to terminate Grievant's employment.

## Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2008). "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*.

Respondent asserts Grievant grabbed the child by the wrist and lifted her with enough force to lift the child's feet off the floor eight to ten inches and then dropped the child back to the floor. Respondent asserts Grievant's termination from employment was justified due to Grievant's continued unsafe work practices and poor judgment. Grievant disputes this assertion and states that, while holding two other children in one hand, Grievant scooped the child up under her bottom with her other hand to place the child on her hip and that Grievant grabbed the child when the child started to fall backwards. Grievant asserts she was entitled to evaluation and an opportunity to improve.

Four witnesses testified about the incident and none of the witnesses testified that they saw the same conduct. Accordingly, the undersigned must make credibility determinations. In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 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 ALJ should consider: 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. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Pamela Humphreys and Brandi Proctor are both cooks who were in the cafeteria wiping down tables when the incident occurred. Both testified the child backed up against the wall and crossed her arms. Ms. Humphreys testified Grievant was trying to get the child's hands, but that she saw no actual contact and that she did not see anything further. Ms. Proctor testified that Grievant looked aggravated and that she was tugging on the child's clothing at the shoulder or upper arm.

Ms. Humphreys appeared nervous but was not evasive in her answers. Ms. Humphreys' statements about the incident were all consistent. Although she saw less than what the other witnesses testified, her testimony about what she did see was not inconsistent with the other witness' testimony. Ms. Humphreys testified that it was hectic and she was in a hurry, which would explain why she may not have seen anything further than the child backing up and crossing her arms. Ms. Humphreys' testimony is credible.

Ms. Proctor's demeanor was appropriate. She made good eye contact and her answers were direct. Ms. Proctor's statements were all consistent. There is no evidence that Ms. Proctor has bias against Grievant or any reason to testify untruthfully. Neither Ms. Humphreys nor Ms. Mullins testified they saw Grievant pull on the child's clothing and Grievant specifically denied that she did so. Ms. Proctor stated in her written statement that she saw this incident as she glanced up. In her level one testimony, she explained

that she saw Grievant tugging on the child's clothing, but then turned around and went back to work. At level three, Ms. Proctor testified that it was busy.

Ms. Mullins' demeanor was awkward and she appeared nervous. She fidgeted, paused while answering, and looked around the room. However, during Ms. Mullins' testimony Grievant shook her head vigorously enough to be distracting, which may have contributed to Ms. Mullins' nervous reactions. Also, Ms. Mullins displayed this problematic demeanor even during simple questions regarding her own training and educational background. Ms. Mullins' testimony is not inconsistent with the testimony of Ms. Proctor and Ms. Humphries as towhat Ms. Mullins said she saw could have occurred after Ms. Proctor and Ms. Humphries stopped watching. However, while Ms. Mullins consistently stated Grievant pulled the child up by one wrist off the floor, her statements about how far off the floor changed slightly. In her written statement, she said the child was pulled eight to twelve inches off the floor. At level one, she stated it was a "few" inches. At level three, she did not specify how far off the floor the child was pulled. Ms. Mullins' written statement stated it was eight to twelve inches. She specifically denied that Grievant had scooped up and then grabbed the child in an effort to prevent a fall. There was no evidence of bias against Grievant or any other reason for Ms. Mullins to testify untruthfully. It is more likely than not that Ms. Mullins' demeanor was a result of mere nerves and not any indication of untruthfulness. Ms. Mullins' testimony was credible.

Other than her distracting behavior during Ms. Mullins' testimony, Grievant's demeanor was appropriate. During her testimony, her answers were direct and detailed and she made good eye contact. Her testimony at levels one and three was consistent.

Grievant specifically disputed pulling the child's clothing as Ms. Proctor testified and denied pulling the child by her wrist but she admitted she grabbed the child to prevent the child from falling, although she asserts she does not remember where she grabbed the child. While Grievant's demeanor was appropriate, her version of events does not seem plausible. Grievant testified that while she held two other children by the hand in her left hand she bent over and used her right hand under the child's bottom to scoop her up from where the child was sitting on the floor. Grievant had described this child as flopping herself on the floor to resist leaving. Grievant's description of scooping up an uncooperative three-year-old child from the floor with one arm while standing seems physically unlikely.

The authority of a county board of education to terminate an employee must be based on one or more of the causes listed in West Virginia Code § 18A-2-8 and must be exercised reasonably, not arbitrarily or capriciously. Syl. Pt. 2, *Parham v. Raleigh County Bd. of Educ.*, 192 W. Va. 540, 453 S.E.2d 374 (1994); Syl. Pt. 3, *Beverlin v. Bd. of Educ*., 158 W. Va. 1067, 216 S.E.2d 554 (1975)*; Bell v. Kanawha County Bd. of Educ*., Docket No. 91-20-005 (Apr. 16, 1991). The causes are:

> (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.

The West Virginia Supreme Court of Appeals has held that "where the underlying complaints regarding a teacher's[2] conduct relate to his or her performance . . . the effect of West Virginia Board of Education Policy is to require an initial inquiry into whether that conduct is correctable." *Maxey v. McDowell County Bd. of Educ.,* 212 W. Va. 668, 575 S.E.2d 278 (2002). The provisions of Policy 5300 referred to by the Court have since been codified in West Virginia Code § 18A-2-12a and state the following:

> (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. All school personnel are entitled to due process in matters affecting their employment, transfer, demotion or promotion….

*Id.*

The Court discussed this provision of Policy 5300 in detail in the case of *Mason County Bd. of Educ. v. State Superintendent of Sch.,* 165 W. Va. 732 (W. Va. 1980) where it wrote:

> Our holding in *Trimboli, supra,*[3] requires that a dismissal of school personnel be based on a § 5300(6)(a) evaluation after

[2] Although the Court's discussion in *Maxey* referred to a teacher, the statutes in the case apply with equal force to all public school employees. *See* W. Va. Code §§ 18A-2-8 and 18A-2-12a.

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

> the employee is afforded an improvement period. It states that a board must follow the § 5300(6)(a) procedures if the circumstances forming the basis for suspension or discharge are "correctable." The factor triggering the application of the evaluation procedure and correction period is "correctable" conduct. What is "correctable" conduct does not lend itself to an exact definition but must, in view of the nature of the conduct examined in *Trimboli, supra,* and in *Rogers, supra,*[4] be understood to mean an offense of conduct which affects professional competency.

*Id at 739*. Concerning what constitutes "correctable" conduct, the Court noted that "it is not the label given to conduct which determines whether § 5300(6)(a) procedures must be followed but whether the conduct complained of involves professional incompetency and whether it directly and substantially affects the morals, safety, and health of the system in a permanent, non-correctable manner." *Id.*

It is more likely than not Grievant grabbed the child by the wrist and abruptly lifted her from the floor such that the child's feet were several inches off the floor before dropping the child to her feet. However, even if the incident occurred as Grievant asserts, both situations placed the child at risk for bodily injury and subjected the child to unnecessary distress. In Grievant's version of events, the child was very nearly injured as Grievant states that the child did begin to fall backward, necessitating Grievant's grabbing at the child to prevent a fall. Regardless, Grievant's conduct was not correctable. Grievant's impatience with the child and improper physical handling of the child is part of a pattern of unsafe behavior and lack of judgment for which Grievant had previously been evaluated negatively on multiple occasions, placed on performance improvement plans, and disciplined. "A review of past improvement plans and disciplinary

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

action ‘can establish an employee was on notice of his inappropriate behavior, and that a continuing pattern of behavior is present which has proven not correctable.’ *Bierer v. Jefferson County Bd. of Educ.*, Docket No. 01-19-595 (May 17, 2002). *Byers v. Wood County Bd. of Educ.*, Docket No. 2013-2075-WooED (Oct. 31, 2013). To rule otherwise, ‘would result in an endless cycle of employee improvement, relapse into old work habits, and the need for additional evaluations and plans of improvement.’ *Dalton v. Monongalia County Bd. of Educ.*, Docket No. 2010-1607-MonED (Nov. 23, 2010), Affirmed, Kanawha County Cir. Ct., Civil Action No. 11-AA-2 (May 12, 2011).” *Yoders v. Harrison County Bd. of Educ.*, Docket No. 2016-0129-HarED (Jan. 15, 2016). Grievant’s conduct is not correctable as it both directly affected the safety of the child and was the same type of conduct and lack of judgment for which previous discipline, evaluation, and improvement plans had failed to correct.

The following Conclusions of Law support the decision reached.

**Conclusions of Law**

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2008). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

2. The authority of a county board of education to terminate an employee must be based on one or more of the causes listed in West Virginia Code § 18A-2-8 and must

be exercised reasonably, not arbitrarily or capriciously. Syl. Pt. 2, *Parham v. Raleigh County Bd. of Educ.*, 192 W. Va. 540, 453 S.E.2d 374 (1994); Syl. Pt. 3, *Beverlin v. Bd. of Educ*., 158 W. Va. 1067, 216 S.E.2d 554 (1975)*; Bell v. Kanawha County Bd. of Educ*., Docket No. 91-20-005 (Apr. 16, 1991). The causes are:

> (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.
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> (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.

3. "[W]here the underlying complaints regarding a teacher's conduct relate to his or her performance . . . the effect of West Virginia Board of Education Policy is to require an initial inquiry into whether that conduct is correctable." *Maxey v. McDowell County Bd. of Educ*., 212 W. Va. 668, 575 S.E.2d 278 (2002). The provisions of Policy 5300 referred to by the Court have since been codified in West Virginia Code § 18A-2-12a(6) and state the following:

> All school personnel are entitled to know how well they are fulfilling their responsibilities and should be offered the opportunity of open and honest evaluations of their performance on a regular basis and in accordance with the provisions of section twelve of this article. All school personnel are entitled to opportunities to improve their job performance prior to termination or transfer of their services. Decisions concerning the promotion, demotion, transfer, or termination of employment of school personnel, other than those for lack of need or governed by specific statutory

> provisions unrelated to performance, should be based upon the evaluations, and not upon factors extraneous thereto. All school personnel are entitled to due process in matters affecting their employment, transfer, demotion or promotion….

*Id.*

4. "[I]t 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, 739 (W. Va. 1980).

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

6. Respondent proved it was justified in terminating Grievant's employment without an additional improvement plan. Grievant's conduct was not correctable as it both directly affected the safety of the child and was the same type of conduct and lack of

judgment for which previous discipline, evaluation, and improvement plans had failed to correct.

Accordingly, the grievance is **DENIED.**

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

**DATE: May 22, 2017**

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**Billie Thacker Catlett**
**Chief Administrative Law Judge**