THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LITTLE THOMAS,
Grievant,

v. **Docket No. 2018-1419-KanED**

KANAWHA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Little Thomas, was employed by Respondent, Kanawha County Board of Education. On June 22, 2018, Grievant filed this grievance against Respondent alleging he had been wrongfully terminated from employment. For relief, Grievant sought reinstatement to his position and back pay.

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 October 1, 2018, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by counsel, George B. Morrone III, General Counsel, West Virginia School Service Personnel Association. Respondent was represented by counsel, James W. Withrow, General Counsel. This matter became mature for decision on November 1, 2018, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a Bus Operator. Grievant suffers from a chronic medical condition that caused him to be absent from work for ten days out of the school year. Although school employees are allowed fifteen personal days per school year to be absent, Respondent requires that employees provide a doctor's

excuse for any absence for sickness after five days have been missed in the year. Grievant did not provide doctor's excuses for his absences. Respondent terminated Grievant's employment for his ten unexcused absences. Respondent asserts Grievant's absences are insubordination, willful neglect of duty, or unsatisfactory performance that is not correctable. Grievant's conduct was not willful and was correctable. It was not reasonable for Respondent to terminate Grievant's employment when his absences were not excessive, when the need to provide a doctor's excuse for absence due to his chronic medical condition was not explained, and when Grievant had been specifically told that he would receive another plan of improvement and then told that he would start with a "clean slate" following his suspension. Accordingly, the grievance is granted.

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

Findings of Fact

1. Grievant was employed by Respondent as a Bus Operator and had been so employed since the 2009 – 2010 school year.

2. Prior to 2015, Grievant's performance evaluations were satisfactory.

3. In 2005, Grievant was diagnosed with gout, a chronic medical condition, which causes inflammation and severe pain during flare ups and can lead to joint damage. During a flare up, Grievant's mobility is limited and he is unable to drive a bus. Grievant has visible damage to the joints in his fingers.

4. Grievant assumed his supervisor, Peggy Stone, was aware of his medical condition, but never specifically informed her of his condition.

5. Grievant is required to report any medication he takes on a yearly form that is submitted to the training and safety department, and he did report his gout medication on the form, but that form was not shared with Grievant's supervisors in the transportation department.

6. Ms. Stone received a text message with pictures from Grievant showing him seeking treatment in the hospital with swelling in his elbow. She later observed him with the elbow wrapped but assumed that this was due to injuries sustained in his secondary employment as a landscaper.

7. Grievant's supervisor was not aware of that Grievant had gout.

8. Employee attendance is governed by Respondent's *Employee Attendance Policy*. Absences under the policy are categorized as either authorized or unauthorized. Employees are permitted five unauthorized absences each year without penalty. Of relevance to this grievance, absence for sickness is authorized only when accompanied by a doctor's excuse. More than five unauthorized absences may result in corrective action as follows: Six absences result in a conference; seven absences result in a conference, a letter of warning "may be written based upon the reasons for the absences," and "referral to employee assistance program if circumstances warrant;" and eight or more results in a conference, meeting with a central office supervisor, "referral to employee assistance program if circumstances warrant," and "possible development of a plan of improvement." The policy does not state that employees can be suspended or terminated for violation of the policy.

9. In the summer of 2015, Grievant was placed on an improvement plan for absenteeism, tardiness, and failing to complete required pre-trip inspections. Grievant

had accumulated nine unauthorized sick days during the 2014 – 2015 school year. As part of the plan, Grievant was directed to comply with the attendance policy, but the plan contained no information regarding the requirement to provide doctor's excuses.

10. Grievant successfully completed his improvement plan in December 2015, and his performance was good for the 2015 – 2016 and 2016 – 2017 school years.

11. On September 1, 2017 and September 12, 2017 Grievant received written reprimands for two instances of being tardy.

12. At an unspecified time thereafter, Ms. Stone told Grievant that he would be placed on another plan of improvement if he continued to miss work. Ms. Stone did not discuss the need to provide doctor's excuses to authorize the absences.

13. Later, Ms. Stone went to the Director of Transportation, Brette Fraley, to request to put Grievant on another plan of improvement because he had been tardy to work. Director Fraley, mistakenly believing Grievant had been on an improvement plan the year before, determined that Grievant should be suspended rather than placed on a plan of improvement.

14. By letter dated December 5, 2017, Superintendent Ronald E. Duerring, Ed. D. informed Grievant that Respondent had approved his recommendation to suspended Grievant for three days. The letter does not state why Grievant was suspended, but a previous letter informing Grievant of the Superintendent's intention to seek suspension stated that the reason was for his continued tardiness following the two previous written reprimands.

15. Director Fraley advised Grievant that if he served his suspension he would return with "a clean slate."

16. Following his suspension, Grievant was absent due to his chronic medical condition six days, for a total of ten days of absence due to his chronic medical condition for the school year.

17. Neither Ms. Stoney nor Director Fraley advised Grievant of the need to provide doctor's excuses for his absences.

18. By letter dated April 10, 2018, Grievant was suspended pending hearing for his ten total unexcused absences during the school year.

19. A pre-disciplinary administrative hearing was held before a hearing examiner on April 24, 2018, at which Grievant appeared in person and by counsel, Joe Spradling, West Virginia School Service Personnel Association.

20. On June 7, 2018, the hearing examiner issued *Hearing Examiner's Recommended Decision*, in which she recommended Grievant be terminated from his position.

21. On June 21, 2018, upon review of the *Hearing Examiner's Recommended Decision*, Respondent approved the Superintendent's recommendation that Grievant's employment be terminated, of which Grievant was informed by letter dated June 22, 2018.

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 (2018). "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*.

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. *See* 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:

> 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.

W. VA. CODE § 18A-2-8(a). "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." W. VA. CODE § 18A-2-8(b).

The West Virginia Supreme Court of Appeals has held that "where the underlying complaints regarding a teacher's[1] 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:

[1] 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.

> 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….

W. VA. CODE § 18A-2-12a(6).

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,*[2] requires that a dismissal of school personnel be based on a § 5300(6)(a) evaluation after 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,*[3] 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

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

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

and whether it directly and substantially affects the morals, safety, and health of the system in a permanent, non-correctable manner." *Id.*

Respondent asserts it was justified in terminating Grievant's employment for failing to improve his attendance practices, which constituted insubordination, willful neglect of duty, or unsatisfactory performance that was not correctable. Grievant asserts Respondent's action was arbitrary and capricious as Grievant's absences were due to his chronic medical condition for which he was entitled to other corrective action under Respondent's policy.

Credibility determinations must be made of the testimony of Grievant and Ms. Stone. 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).

Both Grievant and Ms. Stone are credible. They both demonstrated appropriate demeanors and attitudes towards the proceeding. While Grievant could have a motive to lie to regain his job, nothing in his demeanor or answers indicated he was being untruthful. Grievant's testimony regarding his condition was plausible and supported by the statement from his doctor and the visible condition of his fingers during the hearing.

Ms. Stone could have a motive to lie to support the decision of her superior, but nothing in her demeanor or answers indicated she was being untruthful. Ms. Stone's statements were plausible and supported by the testimony of Director Fraley.

Reviewing the demeanor and the testimony of these witnesses reveals that neither one is being untruthful; they simply misunderstood each other. There is no question Grievant actually suffers from gout as he has provided evidence of the same from his doctor and his testimony regarding the same was credible, nor did any of Respondent's witnesses assert that they doubted Grievant's condition. Grievant believed Ms. Stone knew about his condition. He believed that reporting his medication on the yearly physical form would have alerted Ms. Stone to his condition. However, he admits that he never actually told her specifically that he had gout. Ms. Stone credibly denied that she knew Grievant had gout. Ms. Stone asserts she was not provided copies of the physical form listing Grievant's medication, which is supported by Director Fraley's testimony that those forms are collected by the travel and safety department and are not shared with the transportation department. While Ms. Stone acknowledged that she had seen Grievant's elbow swollen and wrapped, she plausibly asserted that she assumed it was an injury caused by Grievant's secondary employment as a landscaper. Therefore, while it is clear Grievant has gout, it is also clear his supervisor simply did not know he had gout. As to other important assertions made by Grievant, they are undisputed. Director Fraley admitted he told Grievant his slate would be clean after he served his suspension. Ms. Stone admitted she had told Grievant he would be put on another improvement plan.

Both the charge of insubordination and willful neglect of duty levied against Grievant require that his infraction be willful. Insubordination "at least includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued by the school board or by an administrative superior. . .This, in effect, indicates that for there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd./Shepherd Coll.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). [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*., 212 W. Va. at 213, 569 S.E.2d at 460.

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." *Bd. of Educ. of the County of Gilmer v. Chaddock*, 183 W.Va. 638, 640, 398 S.E.2d 120, 122 (1990). The West Virginia Supreme Court of Appeals has declined to make a comprehensive definition of "willful neglect of duty," instead finding that "[a] continuing course of lesser infractions may well, when viewed in the aggregate, be sufficient." *Fox v. Bd. of Educ. of Doddridge County*, 160 W.Va. 668, 672, 236 S.E.2d 243, 246 (1977).

"[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).

It is important in this case to be clear on the specific conduct for which Grievant was terminated. In its April 10, 2018 letter, Superintendent Duerring stated, "Since your suspension, you have been absent, without an excuse, for six days, and ten days total for this school year."[4] Respondent in its Proposed Findings of Fact and Conclusions of Law attempts to characterize Grievant's absences as "excessive." Grievant is allowed by statute fifteen days of leave per year. *See* W.VA. CODE § 18A-4-10(b). Grievant was only on leave a total of twelve days.[5] Grievant's absences were not excessive. Grievant's only inappropriate conduct was in violating Respondent's policy that requires he have no more than five "unauthorized" absences. Absences for sickness are authorized only if the employee provides a doctor's excuse. Therefore, once Grievant accumulated five unauthorized absences, he was required to provide a doctor's excuse for any further absence due to illness.

Grievant's failure to provide doctor's excuses for his absences was not willful. The evidence clearly shows that Grievant was simply bewildered by this process.

---

[4]Grievant asserted he was disciplined for taking six days of sick leave. This was clearly incorrect as shown by the letter. Grievant's assertion stems from missing six days of work for illness following his suspension, however, Grievant missed ten total days for illness for the school year. The letter is consistent with Respondent's policy that calculates occurrences during the school year.

[5] Respondent lists Grievant's total absences as fifteen, but this includes the three days he was not at work due to his suspension.

Grievant believed his supervisor knew he had gout and, generally, there is no need for Grievant to go to the doctor for his gout because it is a chronic condition for which he has standing doctor's instructions to take medication to treat a flare when it occurs. Although Grievant's supervisor was aware Grievant was missing work due to illness, there is no evidence she ever told him he needed to provide doctor's excuses. Even when Grievant sent her pictures of himself in the hospital, she did not tell him he needed to provide doctor's excuses. In fact, her testimony was that she told Grievant to stop missing work. Grievant could not stop missing work because he was only missing work due to a chronic condition that rendered him unable to drive a bus during a flare. Grievant clearly did not understand that the actual problem was the failure to provide doctor's excuses. Grievant was further confused by Director Fraley's assurance that he would start with a clean slate if he served his suspension. This is not to excuse Grievant's failure to effectively communicate with his employer. Obviously, Grievant should have explicitly told his supervisor of his condition and should have asked questions if he did not understand the policy. However, those failures are not willful, they are negligent. Therefore, Grievant's failure to provide doctor's excuses was not insubordination or willful neglect of duty, it was unsatisfactory performance.

Respondent argues Grievant's conduct was not correctable because he had already received an improvement period and prior discipline. "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), ***aff'd***, 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 had been on an improvement plan two years prior to his termination, which he successfully completed. Grievant had two years of good evaluations with no problems with his attendance. When Grievant had two instances of tardiness at the beginning of this school year Respondent immediately reprimanded him despite the fact that he had completed two years of good performance since his prior improvement plan. Respondent then suspended Grievant for an unspecified amount of further tardiness. However, it does not appear that those actions provided Grievant with notice or an opportunity to improve regarding his failure to provide doctor's excuses for his chronic medical condition.

There is no evidence that the need to provide doctor's excuses was ever discussed with Grievant. It was not present in his improvement plan. It was not present in his disciplinary actions, which were specific to tardiness. Grievant's supervisor specifically told him that if he continued to miss work he would be put on an improvement plan, not that he would be terminated or that his absences would be authorized if he presented doctor's excuses. Mr. Fraley then confused Grievant further by telling him that after serving his suspension Grievant would return "on a clean slate" and "start all over." Mr. Fraley was unable to explain how Grievant was to interpret that

statement other than that the corrective action process would start over. Grievant had no reason to expect at that time, given what he had been told by his supervisor and Mr. Fraley, that failing to provide doctor's excuses for his chronic medical condition would result in the termination of his employment. Further, although Grievant is expected to know Respondent's policies, the policy itself is confusing as nowhere in the policy does it state that an employee can be suspended or fired for violation of the policy. Therefore, given the confusion created by his supervisors and the fact that his absences were not actually excessive, this case does not establish a pattern of behavior that is not correctable.

It was not reasonable for Respondent to terminate Grievant's employment under these circumstances. Grievant's failure to follow the policy was not insubordination or willful neglect of duty because it was not willful; it was unsatisfactory performance. Grievant was entitled to notice and an opportunity to improve as his conduct was correctable. Grievant did not receive adequate notice or opportunity to improve.

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 (2018). "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. *See* 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:

> 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.

W. VA. CODE § 18A-2-8(a).

3. The West Virginia Supreme Court of Appeals has held that "where 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 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….

W. VA. CODE § 18A-2-12a(6).

4. 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* requires that a dismissal of school personnel be based on a § 5300(6)(a) evaluation after 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,* 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.*

5. Insubordination "at least includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued by the school board or by an administrative superior. . .This, in effect, indicates that for there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and

(c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd./Shepherd Coll.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). [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*., 212 W. Va. at 213, 569 S.E.2d at 460.

6. 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." *Bd. of Educ. of the County of Gilmer v. Chaddock*, 183 W.Va. 638, 640, 398 S.E.2d 120, 122 (1990). The West Virginia Supreme Court of Appeals has declined to make a comprehensive definition of "willful neglect of duty," instead finding that "[a] continuing course of lesser infractions may well, when viewed in the aggregate, be sufficient." *Fox v. Bd. of Educ. of Doddridge County*, 160 W.Va. 668, 672, 236 S.E.2d 243, 246 (1977).

7. "[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).

8. “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), ***aff’d***, 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).

9. Respondent failed to prove Grievant’s conduct was insubordination or willful neglect of duty as Grievant’s conduct was not willful.

10. Respondent proved Grievant’s failure to follow Respondent’s policy was unsatisfactory performance, however Grievant was entitled to notice and an opportunity to improve as his conduct was correctable. Grievant did not receive adequate notice or opportunity to improve.

11. Respondent’s decision to terminate Grievant’s employment was not reasonable when his absences were not excessive, when the need to provide a doctor’s excuse for absence due to his chronic medical condition was never explained, and when Grievant had been specifically told that he would receive another plan of improvement and then told that he would start with a “clean slate” following his suspension.

Accordingly, the grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant to his position, to pay him back pay from the date of his unpaid suspension to the date he is reinstated, plus statutory interest, and to restore all benefits, including seniority. Further, Respondent is **ORDERED** to remove all references to the suspension and dismissal from Grievant's personnel records maintained by Respondent.

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 (2018).

DATE: December 19, 2018

_____

Billie Thacker Catlett
Chief Administrative Law Judge