THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TWANNA HOLTON,
Grievant,

v. **Docket No. 2018-1301-LinED**

LINCOLN COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Twanna Holton, was employed by Respondent, Lincoln County Board of Education. On June 4, 2018, Grievant filed this grievance against Respondent stating,

> Ms. Holton was suspended without pay on or about February 13, 2018 and terminated from employment after a hearing before the Board of Education held on May 29, 2018. Ms. Holton grieves her suspension and termination because: (1) there was no just cause; (2) Respondent violated West Virginia Code Section 18A-2-8 and CSR Section 126-142 *et seq*. by failing to put Ms. Holton on either a Focus Support Plan or Corrective Action Plan before she was disciplined; (3) If any punishment was warranted, termination is too harsh, thus her punishment should be "mitigated"; and (4) Respondent considered evidence of wrong doing that was not included in the Notice letter that she received.

For relief, Grievant seeks "[r]einstatement to her teaching position, back pay and interest."

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 September 24, 2018, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared and was represented by counsel, Andrew J. Katz, The Katz Working Families' Law Firm, L.C. Respondent appeared by Superintendent Jeff Midkiff and was represented by counsel, Leslie K. Tyree, Esquire. This matter became mature for

decision on November 26, 2018, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law ("PFFCL").

Synopsis

Grievant was employed by Respondent as a second-grade teacher. Grievant's employment was terminated for three incidents: forcing all her students to write the same letter to their guardians shaming behavior that not all children had demonstrated and discussing medication, restraining and confining a student under her desk, and holding children by the wrist and yelling at her assistant principal. Grievant had previously been suspended for taping a child to the wall with duct tape. Respondent proved Grievant was insubordinate, that her behavior was not correctable, and that termination of her employment was justified. Grievant failed to prove mitigation is warranted. 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 a second-grade teacher at West Hamlin Elementary and had been so employed for approximately eight to nine years. Grievant had been a public educator for approximately sixteen to seventeen years.

2. A majority of students at West Hamlin Elementary reside in homes at or below the poverty level. More than twenty percent of students are placed in foster care or other non-parental placement. The school's population has experienced a

heightened level of trauma. Due to this situation, it is particularly important that school personnel provide a supportive, encouraging, and compassionate environment.

3. Teachers were provided professional development for addressing problem behavior. Specifically, teachers were provided "classroom management and instructional practices to engage students and reinforce expected behaviors" and "non-violent crisis intervention" designed to de-escalate situations in which students become out of control. Grievant received both trainings.

4. In addition, there is a program to assist teachers with student behavior issues, the Student Assistance Team, which meets with parents of students for whom a teacher has made a referral to the team.

5. Grievant's class contained twenty-two students ages seven to eight. Grievant's class had an unusually high number of students with discipline problems, and some of those students were unusually disruptive.

6. Grievant was supervised by the Principal of West Hamlin Elementary, John Roy, who was assisted by Assistant Principal Richard Davis, who was replaced by Assistant Principal Angela Urling.[1]

7. Respondent's employees are subject to the following code of conduct pursuant to *Lincoln County Schools Bylaws & Policies 3210 – Employee Code of Conduct*:

> All Lincoln County professional employees shall:
>
> A. exhibit professional behavior by showing positive examples of preparedness,

[1] The record does not reflect when Assistant Principal Urling began serving in the position or when Assistant Principal Davis left the position.

communication, fairness, punctuality, attendance, language, and appearance;

B. contribute, cooperate, and participate in creating an environment in which all employee/students are accepted and are provided the opportunity to achieve at the highest levels in all areas of development;
C. maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse and/or violence, and free from bias and discrimination;
D. create a culture of caring through understanding and support;
E. immediately intervene in any code of conduct violation, that has a negative impact on students, in a matter that preserves confidentiality and the dignity of each person;
F. demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior;
G. comply with all Federal, West Virginia and Lincoln County laws, policies, regulations and procedures.

8. On March 24, 2005, Grievant received a letter of reprimand for touching students while disciplining them. Grievant was advised that it was inappropriate to touch a student unless the student posed a physical threat to self or others.

9. On February 23, 2011, Grievant was suspended for twenty days for taping a student to a wall with duct tape in front of her class in violation of the code of conduct.

10. On November 2, 2016, Principal Roy, while in his office at the other end of the hallway, heard Grievant screaming at students in the boys' restroom. Principal Roy went to Grievant and instructed her not to yell at the students. Grievant denied yelling and said she "could yell louder if [he] would like." Principal Roy again instructed Grievant not to raise her voice and instructed her to follow the proper discipline protocols per policy. Principal Roy completed an incident report. The incident report is

illegible, but includes Principal Roy's handwritten statement of the incident, which is legible.[2]

11. On January 9, 2017, Principal Roy issued an incident report notifying Grievant of a violation of the required professional conduct stating: "December 19, 2016, during a SAT[3] meeting for a student, Mrs. Holton recommended that the father "whip him." She also suggested that "you have to break their will." This type of suggestion during a meeting with a parent is entirely out of line and is not the view of West Hamlin Elementary." Grievant was required to sign the incident report and included the following comment: "I disagree that expressing my opinion is wrong." Principal Roy further stated, " I would advise and expect that comments of this nature never happen during a meeting to address academic and behavioral needs."

12. On October 19, 2017, while escorting children to the restroom, several children were misbehaving. Grievant grabbed the children by the wrists and raised her voice to Assistant Principal Davis to take the children from her. Assistant Principal Davis instructed Grievant not to raise her voice. Grievant stated that Assistant Principal Davis was not doing his job and told Assistant Principal Davis "you need to do your job," all in front of the children. Assistant Principal Davis completed an incident report on the same date, which was not signed by Grievant.

13. On February 8, 2018, Student A would not remain in his seat. He was laughing, jumping, and laying on the floor. Student A would not follow Grievant's

[2] Grievant asserted this document should not have been admitted because the incident report was not included in her discipline. The incident report is relevant and properly considered to prove Grievant had previously been instructed to not raise her voice and to use the proper disciplinary process.

[3] An acronym for the "Student Action Team," as described in FoF # 4.

instructions to sit or be quiet. Grievant took the child by the wrist and placed him under her desk. Grievant called Assistant Principal Urling to come to her classroom.

14. When Assistant Principal Urling entered the classroom she observed the child under Grievant's desk. Grievant was holding the child by the wrist and Grievant was seated in front of the desk, blocking the opening. Grievant's desk is metal and enclosed on three sides. Assistant Principal Urling instructed the student to come out from under the desk. Grievant did not let go of the child and complained in a raised voice about the misbehavior of her students, that they were too loud and out of control. Assistant Principal Urling then told Grievant that the child needed to come out from under the desk. Grievant continued to hold the child under the desk and complain to Assistant Principal Urling. Assistant Principal Urling was forced to repeat her instruction two more times before Grievant released the child and moved her chair back to allow the child out from under the desk. When the child came out from under the desk, he grabbed Assistant Principal Urling's hand and would not let go of it.

15. Student A has a diagnosis of ADHD. His mother died of a drug overdose and his father is incarcerated. He lives with his grandmother, who is an alcoholic, in extreme poverty, including long periods of time with no electricity. A child who has experienced such trauma particularly needs to feel safe, secure, and cared for at school. Confining the child in such a way was harmful.

16. On the same day, Grievant forced all the children in her class to write the following letter to take home to their parents/guardians:

> Dear parent's [student's name] I have not behaved at all this whole year so far. I run My Mouth <u>all the time</u> even though I know I shouldn't. I play <u>all the time</u> and don't pay attention I am very disespectfull to my teacher and ereryon else too. I

> wiggle around and squim all the time instead of pay attention I will not be still in my (sic) or in line anything my teacher gives me I just destroy. Please sign so Miss Holton will know you have read it. Also if I'm supposed to take Medicine please be sure to give it to me.[4]

Grievant wrote the letter and displayed it on the smartboard and instructed the children to copy the letter.

17. The next day, Superintendent Jeff Midkiff and Principal Roy received complaints from parents by telephone and in person. Parents also complained about the letter on social media and contacted the media, who also contacted administration. The parents were all very upset. Principal Roy met with six parents and others met with the assistant principal. Principal Roy received copies of seven or eight of the letters. The letters contained the same content as the letter quoted above.

18. In the past, Principal Roy had specifically instructed Grievant not to discuss medicine, not to hold children by the wrists, and had repeatedly instructed Grievant to be more aware of her tone in communications to parents and children, including things such as argumentative language, underlined words, capitalization, and exclamation points.

19. Assistance was available to Grievant. The school had adopted methods and procedures specifically designed to address the unique demographic of the school but Grievant did not support the school's approach and refused to use the same. Specifically, Grievant does not support positive reinforcement methods that had been used with her students in previous years and stated that raised voice and "negative

[4] The letter is reproduced as written. Respondent entered into evidence one letter as an example.

punishment" were "tried and true," but not allowed and that the new methods did not work.

20. A discipline process was available, but Grievant refused to use the same because it was a computerized process and she was "not a computer person." Although Grievant is missing fingers on one hand and has carpal tunnel syndrome, her stated reason for not using the discipline process was as above, and she did not inform administrators that she had any physical difficulty using the system. Principal Roy later allowed Grievant to submit handwritten behavior reports, which he then entered into the system for her, but Grievant only submitted the same for a brief period before she again stopped.

21. Grievant insisted that the only solution would be to remove some of the misbehaving children from her classroom and that is the only assistance she sought. Principal Roy did not accommodate this request because it was not in the best interests of the students. The other two second grade classes already had the maximum number of students allowed, 25, while Grievant had 22 students. To move students from Grievant's classroom would require not only disrupting those students, but also moving students from other classes who were not exhibiting behavioral process and would be detrimental.

22. On February 13, 2018, Grievant was notified by Superintendent Midkiff that she was suspended, without pay, pending decision by the school board on his recommendation that Grievant's employment be terminated. The letter described the incident of Grievant forcing her students to write the letter on February 8, 2018, and stated as follows:

> First it is a violation of Lincoln County Policy 3210, which is the Employee Code of Conduct. Policy 3210 requires that as an employee you exhibit professional behavior, create a culture of caring, demonstrate self-control and maintain a safe and healthy environment for our children. Your conduct fails to meet this standard.
>
> Second, in order to thrive and succeed elementary age children need to feel accepted by their teachers and also feel that school is a safe, welcoming place. When you chose to have the students write negative, derogatory things about themselves in a letter to their parent, including comments about taking their medication, you completely destroyed their trust in you and any good feelings they may have had about school. An educator would never verbalize to a student that their parent needs to give them medication and the fact that you felt this was acceptable is concerning. Discussions about medication should only occur during SAT meetings and only if a parent raises the concern. As a teacher you are not qualified to suggest that a student should be taking medication or discuss medication in that forum.
>
> I am completely at a loss to why you would ever think your conduct was appropriate. If you want to advise a parent about issues regarding their child you are to advise them. You are not to have the student write a letter to advise their parent of your concerns. I would have thought this would go without saying.

The letter then details the second incident that occurred on February 8, 2018, wherein Grievant restrained the student under her desk, and then stated as follows:

> This type of conduct is completely inappropriate and will not be tolerated by the Lincoln County Board of Education. Under no circumstances would it ever be appropriate for a student to be placed on the floor and confined under a desk. Your conduct is not only unprofessional and clear violation of the Employee Code of Conduct, it is also abusive.

The letter describes Superintendent Midkiff's meeting with Grievant to discuss the allegations as follows:

> I met with you on the 12th day of February to discuss these matters. You were given the opportunity to respond and

> provide any information in your defense or any information you wished for me to consider before making my final decision about appropriate discipline. During this meeting I explained to you the seriousness of your conduct and the level to which it was inappropriate. You indicated that you saw nothing wrong with your conduct. You did not believe your behavior was inappropriate or that you had done anything wrong. I find it deeply alarming that you didn't not believe anything was wrong with your conduct. Our meeting left me concerned about your future conduct with our students.

Superintendent Midkiff concluded:

> After reviewing the incidents in question, your failure to acknowledge that your conduct was inappropriate, and considering other instances of inappropriate behavior towards students, I have an overall concern and belief that it is not healthy or safe for our students to be in a classroom with you. As a result, I have decided to recommend that you be terminated from your employment with the Lincoln County Board of Education.

23. A hearing was held before the Lincoln County Board of Education, on May 29, 2018, at the conclusion of which Grievant was verbally informed of the termination of her 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 (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. 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).

Grievant argues her employment should not have been terminated as she was not insubordinate, she was entitled to be placed on an improvement plan, and, in the alternative, that her discipline should be mitigated as termination was too harsh a penalty. In its PFFCL, Respondent failed to identify the cause for which it was justified in terminating Grievant and incorrectly asserted that it was Grievant's burden to prove the decision to terminate her employment was arbitrary and capricious.[5] Respondent asserted only that Grievant's conduct was in violation of Respondent's policy and that Grievant's conduct was not correctable.

As stated above, it is Respondent's burden to prove by a preponderance of the evidence that the disciplinary action taken was justified, and a school employee may

[5]While it is likely Respondent intended this assertion of burden of proof in answer to Grievant's mitigation argument, which is the correct burden of proof for an affirmative defense, as Respondent's PFFCL failed to include argument on mitigation, the PFFCL appears to assert that the burden of proof on the merits of the claim rested with Grievant.

only be terminated for one of the specified causes under the statute. However, "[i]t is not the label a county board of education attaches to the conduct of the employee . . . that is determinative. The critical inquiry is whether the board's evidence is sufficient to substantiate that the employee actually engaged in the conduct." *Allen v. Monroe County Bd. of Educ.*, Docket No. 90-31-021 (July 11, 1990), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 90-AA-134 (Oct. 13, 1992); *Duruttya v. Mingo County Bd. of Educ.*, Docket No. 29-88-104 (Feb. 28, 1990), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 90-AA-72, *aff'd, Duruttya v. Bd. of Educ.*, 181 W. Va. 203, 382 S.E.2d 203 (1989).

While Respondent failed to identify the specific statutory cause for which Grievant's employment was terminated, Respondent presented significant evidence of the conduct for which she was terminated at the level three hearing. Grievant did not dispute that the conduct occurred but did dispute the specifics and severity of the conduct. In situations where "the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required." *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); Young v. Div. of Natural Res., Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). 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).

Principal Roy was credible. His demeanor was appropriate. He was professional and forthright. Principal Roy's responses were appropriately detailed. There was no evidence Principal Roy had any interest in the action or that he had any bias against Grievant. Principal Roy's testimony was consistent with his previous written statement.

Assistant Principal Urling was credible. Her demeanor was calm and professional. There was no evidence she had any interest in the action or that she had any bias against Grievant. Assistant Principal Urling's testimony was consistent with Principal Roy's testimony regarding her report of the incident to him.

Grievant was not credible. Grievant's thoughts appeared quite scattered and she frequently lost her train of thought. Grievant's testimony often lacked detail and specificity and she testified in absolutes: "nothing ever gets done" in the SAT meetings, "parents never show up," students "never look at you," she talked to administration "every day," the children destroy "everything," and "very rarely" are parents and guardians actually concerned about their children. Grievant was clearly dismissive of her supervisors, her student's guardians, and the methods in place to deal with misbehavior. Consistently, her attitude towards anyone who disagreed with her was antagonistic. She referred to the parents who complained about the letters as "the mother brigade." In explaining the responses she received from guardians regarding notes home she stated, "Sometimes it was just a snotty remark or some kind of long,

drawn out thing where they are trying to explain their vision for their child which is not what it should be" and laughed. Grievant's version of events was not plausible. Grievant claimed that the guardians in her class were almost completely uninvolved, yet, in describing the response to the letters she sarcastically called them "the mother brigade." Uninvolved guardians do not contact the media and are not a "brigade." Grievant's characterization of her actions as reasoned responses is not credible given her contemptuous attitude in describing her students, their guardians, the administration, and the methods in place at the school, and the credible testimony of administrators. Grievant's attempts to downplay her behavior regarding the incidents in question is clearly self-serving.

Grievant was terminated for three incidents: forcing her students to write the letter, restraining and confining a student under her desk, and holding children by the wrist and yelling at Assistant Principal Davis. As stated above Grievant did not dispute that the conduct occurred, but disputed specifics of the incidents and the severity of the conduct. Considering the credibility of the witnesses and the evidence presented, Respondent proved that the majority of the conduct occurred as asserted in the letter recommending termination.

Considering the evidence presented, the legal cause for Grievant's termination appears to be insubordination. 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. This Grievance Board has previously recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988), *aff'd*, *Sexton v. Marshall University*, 182 W. Va. 294, 387 S.E.2d 529 (1989).

Grievant's behavior was insubordinate. Grievant was aware of the code of conduct and had received training on classroom control and conflict resolution. She had previously been disciplined for violating the code of conduct for ductaping a child to the wall. Principal Roy had instructed Grievant multiple times not to hold children by the wrists, not to raise her voice, and to use appropriate communication with her students and their guardians. As will be discussed more fully below, Grievant's behaviors were in clear violation of the code of conduct and Principal Roy's previous instructions.

Regarding the incident with the letters, Grievant admitted that she put a copy of the letter on the smartboard and instructed the students to copy the letter and take it home to their guardians. Grievant's assertion that she exempted several students from this requirement is not credible. The language in the letter was negative and shaming. Like her testimony, the language the children were forced to write was absolute: "I have

not behaved at all this year," "anything my teacher gives me I just destroy," "I am very [disrespectful] to my teacher and [everyone]," and describing several different misbehaviors as occurring "all the time." That Grievant still asserts these letters were proper demonstrates her willful failure disregard of the code of conduct and Principal Roy's instructions regarding her communications and not discussing medication. Specifically, the letters violate the code of conduct's requirement to exhibit professional behavior by showing fairness, to create an environment where students are accepted, to maintain a healthy environment, and to create a culture of caring through understanding and support.

Grievant's restraint and confinement of Student A is particularly disturbing. While this behavior would be outrageous directed to any child, to do so to a child that was as particularly vulnerable as Student A is even more detrimental. Student A was confined and restrained by the wrist by an authority figure that was clearly not in control of herself and who was herself refusing the direction of a higher authority figure. Grievant's denial that she was told repeatedly to let Student A out is not credible. Her attempt to explain away her behavior by stating that the child could have hit another child was suggested by the questioning and was self-serving. When Grievant testified in her own words, she described only behavior such as laughing, jumping, lying on the floor, and refusal to follow instruction, not any danger to others. The behavior was insubordinate. It was clearly in violation of Principal Roy's repeated previous instruction not to hold children by the wrist and was in violation of the code of conduct as described above, with the addition of intimidating the child.

Regarding the October 19, 2017 incident, Assistant Principal Davis was not called to testify. The only evidence Respondent offered of this incident was the incident report Assistant Principal Davis completed regarding the incident. This document is hearsay.[6] "Hearsay evidence is generally admissible in grievance proceedings. The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings." *Gunnells v. Logan County Bd. of Educ.,* Docket No. 97-23-055 (Dec. 9, 1997). The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *Id.*; *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-H-115 (June 8, 1990).

[6]"Hearsay includes any statement made outside the present proceeding which is offered as evidence of the truth of the matter asserted." BLACK'S LAW DICTIONARY 722 (6th ed. 1990).

Respondent did not provide any explanation why Assistant Principal Davis was not called to testify, although the record does reflect that Assistant Principal Davis is no longer employed as the assistant principal of West Hamlin Elementary. Assistant Principal Davis' statement is in writing, signed, and one routinely made in the course of his employment. Although there was no testimony offered that Assistant Principal Davis had any bias against Grievant, Grievant did threaten to file a grievance during the incident, which would make Assistant Principal Davis an interested witness to the events in order to defend himself from possible allegations in a grievance. Grievant admitted she had raised her voice, but asserted it was only to get Assistant Principal Davis' attention. She did not deny that she had the children by the wrists and admitted that she stated Assistant Principal Davis was not doing his job and that she told him to do his job. She stated that Assistant Principal Davis "jumped down [her] throat," which supports Assistant Principal Davis's statement that he instructed Grievant not to raise her voice. As no reason was given for the failure to call Assistant Principal Davis as a witness, his statement is potentially interested, and Grievant disputes part of the statement, it cannot be given full weight. Therefore, Respondent proved Grievant held children by their wrists, raised her voice, was instructed not to raise her voice, stated that Assistant Principal Davis was not doing his job, and told Assistant Principal Davis to do his job, all in front of the children. Respondent did not prove Grievant yelled at Assistant Principal Davis despite repeated instruction not to do so. Grievant's proven behavior was insubordinate. It reflected a defiance of Assistant Principal Davis's authority that was particularly problematic in that it was done in front of students and was in violation of the code of conduct.

In making the decision to terminate Grievant's employment, Respondent also relied on Grievant's prior discipline for ductaping a child to the wall in front of the class. Grievant attempted to dispute the facts of that incident and explain her motivation. "If an employee does not grieve specific disciplinary incidents, he cannot place the merits of such discipline in issue in a subsequent grievance proceeding. *Jones v. W. Va. Dept. of Health & Human Resources,* Docket No. 96-HHR-371 (Oct. 30, 1996); *See Stamper v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-144 (Mar. 20, 1996); *Womack v. Dept. of Admin.*, Docket No. 93-ADMN-430 (Mar. 30, 1994). In such cases, the information contained in prior disciplinary documentation must be accepted as true. *See Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994)." *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997), *aff'd*, Mon. Co. Cir Ct. Docket No. 97-C-AP-96 (Dec. 7, 1999), *appeal refused*, W.Va. Sup Ct. App. Docket No. 001096 (July 6, 2000). Therefore, the incident occurred as described in the disciplinary documents. Further, Grievant's attempt to explain away her behavior as a joke simply reinforces her inability to judge what is appropriate behavior for her position. Grievant testified that the child in question had a diagnosis of ADHD, had been misbehaving, and she told him, "You know what, I think the only way to make you pay attention is to tape you to that wall so only your eyes are showing. Maybe then you'll pay attention." Grievant stated this was a joke and that "everybody was laughing." In her testimony regarding the incident, Grievant continued to be amused by what she said. Her insistence that her behavior should have been excused because she and the children were all laughing about it completely ignores how humiliating it would be for a child to have his teacher and the entire class laughing at

him, especially. This is the same ignorance she displayed in failing to acknowledge how shaming it was to have her students write the letters that are the subject of the current discipline. Further, Grievant completely left out that she had, in fact, followed her statement by actually ductaping the child to the wall, although not to the extent that she had threatened to do. This prior instant demonstrates Grievant's defiant and inappropriate pattern of behavior.

The West Virginia Supreme Court of Appeals has held that "where the underlying complaints regarding a teacher's[7] 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).

[7] 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.

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,*[8] 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,*[9] 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.*

Grievant's conduct is not correctable. Grievant's conduct shows a disregard for the safety and well-being of the children in her care. It is a continuance of the same disregard for which she had previously been disciplined and for which Principal Roy had repeatedly counseled her. Further, it is clear Grievant's disregard of the discipline and instruction was willful. She continues to assert that she did nothing wrong by ductaping a child to the wall and her response to the January 2017 incident report from Principal Roy was that she also did nothing wrong because she was just expressing her opinion.

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

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

After raising her voice to Assistant Principal Davis in front of students and being instructed not to do so, within a month, she was caught yelling at students by Principal Roy. This further illustrates her disregard of the well-being of the children in her care, both in terms of improper modeling of behavior and distress to the children. Grievant has had ample opportunity to correct her behavior and has defiantly refused to do so and, in fact, refuses to acknowledge that any of her behavior has been improper.

Grievant argues alternatively that the discipline was unreasonably severe and should be mitigated. "[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was 'clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n,* Docket No. 89-SFC-145 (Aug. 8, 1989)." *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996). "Mitigation of the punishment imposed by an employer is extraordinary relief, and is 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 employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996); *Olsen v. Kanawha County Bd. of Educ.*, Docket No. 02-20-380 (May 30, 2003), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*,

W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994); *Cooper v. Raleigh County Bd. of Educ.*, Docket No. 2014-0028-RalED (Apr. 30, 2014), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

Grievant did not present evidence of her prior work history, personnel evaluations, or of penalties levied against other employees. Grievant asserts the penalty was too severe due to the severity of the behavior problems with her class and the failure of administration to offer assistance to her. It is clear Grievant's class was particularly difficult. However, the evidence reflects assistance was available to Grievant, but that she refused it because she did not agree with it. Grievant insisted only that children be taken out of her class and placed in another class. This is an extreme solution that Principal Roy credibly testified he is very hesitant to use due to the detriment to the children that would be moved not only from Grievant's class but the non-misbehaving children that would be moved from the class to which they were accustomed into Grievant's class. It was not unreasonable and within his discretion for Principal Roy to refuse to do so.

Grievant received assistance in the form of training, which she believed was of little value. The SAT team and trauma team were available, but Grievant did not want

to participate in the SAT team because she did not believe it was worthwhile. A discipline process was in place for her use, but Grievant refused to use it because it was computerized. Although Grievant does have physical difficulties that might impact her use of a computer, she testified her refusal was because she is not "a computer person." Further, when Principal Roy later allowed her to submit her discipline via a hand-written form that he then would enter into the computer system for her, Grievant only requested discipline for a short time.

Grievant also asserts that she had never been instructed not to confine children under her desk. It is impossible for a school system to specifically prohibit every individual possible interaction between a teacher and student. Grievant had been previously disciplined for improperly restraining a child, had received training on intervention, and had been counselled not to hold children by the wrist. She should have been able to understand from those experiences that it was improper to confine a child under her desk while holding him by the wrist.

Grievant failed to prove mitigation is warranted. The difficulty of the behavioral problems in her classroom does not excuse the improper and harmful ways Grievant chose to confront those problems.

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. 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. "It is not the label a county board of education attaches to the conduct of the employee . . . that is determinative. The critical inquiry is whether the board's evidence is sufficient to substantiate that the employee actually engaged in the conduct." *Allen v. Monroe County Bd. of Educ.*, Docket No. 90-31-021 (July 11, 1990), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 90-AA-134 (Oct. 13, 1992); *Duruttya v. Mingo County Bd. of Educ.*, Docket No. 29-88-104 (Feb. 28, 1990), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 90-AA-72, *aff'd, Duruttya v. Bd. of Educ.*, 181 W. Va. 203, 382 S.E.2d 203 (1989).

4. 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. This Grievance Board has previously recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988), *aff'd*, *Sexton v. Marshall University*, 182 W. Va. 294, 387 S.E.2d 529 (1989).

5. "If an employee does not grieve specific disciplinary incidents, he cannot place the merits of such discipline in issue in a subsequent grievance proceeding. *Jones v. W. Va. Dept. of Health & Human Resources,* Docket No. 96-HHR-371 (Oct. 30, 1996); *See Stamper v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-144 (Mar. 20, 1996); *Womack v. Dept. of Admin.*, Docket No. 93-ADMN-430 (Mar. 30, 1994). In such cases, the information contained in prior disciplinary documentation must be accepted as true. *See Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994)." *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256

(Oct. 27, 1997), *aff'd*, Mon. Co. Cir Ct. Docket No. 97-C-AP-96 (Dec. 7, 1999), *appeal refused*, W.Va. Sup Ct. App. Docket No. 001096 (July 6, 2000).

6. "[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was 'clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n,* Docket No. 89-SFC-145 (Aug. 8, 1989)." *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996). "Mitigation of the punishment imposed by an employer is extraordinary relief, and is 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 employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996); *Olsen v. Kanawha County Bd. of Educ.*, Docket No. 02-20-380 (May 30, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions

against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994); *Cooper v. Raleigh County Bd. of Educ.*, Docket No. 2014-0028-RalED (Apr. 30, 2014), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

7. Respondent proved Grievant was insubordinate, that her behavior was not correctable, and that termination of her employment was justified.

8. Grievant failed to prove mitigation is warranted.

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 (2018).

DATE: January 14, 2019

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Billie Thacker Catlett
Chief Administrative Law Judge