

# THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**TERRI MCDONALD,**  
**Grievant,**

**v.**

**Docket No. 2019-0317-FayED**

**FAYETTE COUNTY BOARD OF EDUCATION.**  
**Respondent.**

## **DECISION**

Grievant, Terri McDonald, was a classroom teacher employed by Respondent, Fayette County Board of Education ("Board") to teach students with special needs. She was assigned to Fayetteville Elementary School. Ms. McDonald filed an expedited grievance<sup>1</sup> form dated September 4, 2018, alleging that she was improperly suspended without pay, pending action by the Board upon a recommendation to terminate her employment. Grievant alleges violation of W. VA. CODE §§ 18A-2-8 and 18A-2-12a and that the anticipated punishment was too severe. As relief Grievant seeks:

(a) Compensation for lost wages and all benefits, pecuniary and nonpecuniary; (b) interest on all sums; and (c) reinstatement to her position as a classroom teacher at Fayetteville Elementary School; and (d) any other relief necessary to render Grievant whole.

On September 24, 2018, the Board approved the Superintendent's recommendation and terminated Grievant's employment. On October 3, 2018, counsel for Grievant moved to amend the grievance to include contesting the dismissal. The motion was granted by Order dated October 31, 2018.

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<sup>1</sup> See W. VA. CODE § 6C-2-4(a)(4) allowing employees to file directly to Level Three in certain circumstances.

A Level Three hearing was held in Beckley, West Virginia, on January 11, 2019. Grievant appeared personally and through her counsel, John E. Roush, AFT-WV. Respondent was represented by Denise Spatafore, Dinsmore and Shohl, LLP. This matter became mature for decision on February 25, 2018, upon receipt of the last of the parties' Findings of Fact and Conclusions of law.

### **Synopsis**

Grievant's employment as a teacher for special needs students was terminated after it was discovered that she had kept a student from leaving the classroom by grabbing the hood on her jacket to pull her back, and she dragged the same student across the floor by her arm after the student succeeded in leaving the room.

Grievant argued that termination of her employment violated her rights under the Code to improve her performance. She also argued that the incident was not nearly as onerous as it appeared on the video, and she had several years of successful employment with the Board. This made dismissal too severe as well as arbitrary.

Respondent proved that Grievant's actions were in violation of specific methods required to address such situations which is taught to all employees. Further, the training indicates that the actions taken by Grievant are known to cause injuries to students. Respondent met its burden of proof.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

## **Findings of Fact**

1. Grievant, Terri McDonald, had been employed by Respondent, Fayette County Board of Education for around 29 years prior to the incident leading to her dismissal. During her entire tenure she had been certified as a Special Education Teacher and has worked with students with special needs related to learning and behavior.

2. During her years of employment, Grievant has regularly received training and retraining about passive restraint in dealing with students who pose a physical threat to themselves and others.

3. West Virginia Board of Education ("WVBOE") Policy 4373 sets out specific regulations regarding the use of restraint with students by all school employees. The policy provides generally:

Reasonable force may be used to restrain a student from hurting himself/herself or any other person or property. All students, including students with disabilities, must be treated with dignity and respect. Behavior interventions and support practices must be implemented in such a way as to protect the health and safety of the students and others.

The policy defines "Restraint" as, "the use of physical force to significantly restrict the free movement of all or a portion of a student's body," and an "Emergency" is defined as, "a situation in which a student's behavior poses a threat of imminent, serious physical harm to the student or others or serious property destruction." W. VA. CODE ST. R. § 126-99-4.4.

4. WVBOE requires restraint may only be used in an emergency and the following guidelines be followed when restraint is necessary:

- Restraint shall be limited to the use of such reasonable force as is necessary to address the emergency. Procedures and maneuvers that restrict breathing or may cause physical harm are prohibited.

- Restraint shall be discontinued at the point at which the emergency no longer exists.

*Id.*

5. Additionally, Policy 4373 requires that specific personnel “must be trained annually in the use of a nationally recognized restraint process.”<sup>2</sup> Teachers and Aides who regularly work with special needs students are among those who receive that training.

6. Fayette County Schools have adopted the Crisis Prevention and Intervention (“CPI”) program which is developed and taught by the Crisis Intervention Institute, a nationally recognized company engaged in the business of providing such training. The training focuses on the use of nonviolent crisis intervention techniques, such as de-escalation, which are designed to respond to difficult behavior. Grievant had last received a refresher training in CPI on May 31, 2018.<sup>3</sup>

7. The CPI training adopted by the Board as establishing appropriate restraint procedures requires that while a student is on the ground there is no longer a need to restrain him or her. At that point the staff person is required to stay with the student and call for help if necessary. Additionally, pulling or dragging a student by the wrist is specifically prohibited because of the risk of dislocating the child’s shoulder and other injury to the arm.<sup>4</sup>

8. On Friday, August 24, 2018, Grievant was assigned to cover a classroom of special education students while the regular teacher of that class performed a different

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<sup>2</sup> W. VA. CODE ST. R. § 126-99-4.4.

<sup>3</sup> Respondent Exhibit 2.

<sup>4</sup> Testimony of Principal Harrah and Director of Special Education and Preschool, Linda Palenchar.

duty. There were fourteen students in the classroom,<sup>5</sup> the majority of whom were diagnosed with behavior disorders. Amanda Kincaid was also assigned to the room. She is an experienced special education aide. Grievant and Ms. Kincaid were supervising the students while they waited to be called to their respective buses.

9. During this period, a male student took an item from the shelf in the back of the room which caused a female student sitting nearby to become angry and agitated. Ms. Kincaid and Grievant took steps to retrieve the object from the male student and he became combative with Ms. Kincaid. While struggling with Ms. Kincaid the student threw a crumpled sheet of paper at the female student. She became more agitated and began to walk toward the front of the room. Both students appeared to be nearly five feet tall. (Respondent Exhibit 3).

10. Ms. Kincaid was passively fending off tentative kicks and punches from the male student while Grievant pursued the female to prevent her from leaving the classroom. When Grievant approached, the female student made a move for the door. Grievant grabbed the hood of the student's jacket, pulled her back and blocked the path to the door. Grievant directed the student to a seat in the front of the room while Ms. Kincaid held the boy in a chair in the back of the room in an authorized restraint position called child's control,<sup>6</sup> to keep him from hitting and kicking her or other students. Ms. Kincaid had the situation with the boy well in hand. *Id.*

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<sup>5</sup> Respondent Exhibit 3, video recording of the classroom.

<sup>6</sup> The student was seated at the desk and Ms. Kincaid was standing behind him. Ms. Kincaid had crossed the boy's arms in front of him and was holding each wrist close to the student's body. The boy wriggled but was unable to break free and appeared to be angry but in no pain.

11. Once the girl was seated, Grievant went to the back of the room to speak with the boy. The girl got up and walked furtively toward the door. Another student who was seated near the classroom door touched the girl's arm and dissuaded her from leaving, but she remained poised to exit the room. When Grievant turned to look at the front of the room, Grievant pointed at the girl, spoke sharply, and started moving with purpose toward her. When Grievant had made it about halfway to the front, the girl bolted for the door and out of the classroom with Grievant in hot pursuit. *Id.*

12. Upon leaving the classroom the student ran across the hall and against the locker where Grievant caught up with her. Grievant immediately grabbed the girl's right wrist with one hand and placed her other hand on the girl's right shoulder to pull her back into the classroom. The student resisted by sliding down the lockers and laying on the floor.

13. As the girl slid to the floor, Grievant's hand on her shoulder slid to the girl's right wrist. At that point Grievant had both hands of the girl's right wrist and dragged her across the hall and across the front of the classroom.<sup>7</sup>

14. Another staff person entered the room within seconds of Grievant's entrance. Together they reseated the girl. The newly arrived staff person pulled up a chair and watched her while Grievant returned to the back of the room and talked with the boy who was still restrained by Ms. Kincaid.

15. Grievant casually mentioned the incident while in the office with colleagues discussing the day. Shortly, after hearing Grievant mention pulling a student back into

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<sup>7</sup> Approximately 15 to 20 feet.

the classroom the principal, Melissa Harrah, reviewed the video tapes from the classroom and the hallway and discovered the incident.

16. Principal Harrah believed the incident to be inappropriate handling of the child and called the central office and spoke to Associate Superintendent Margaret Pennington to receive instructions on how to proceed.

17. That afternoon Principal Harrah met with Grievant and asked her to provide a written statement describing the events. Ms. Harrah also notified Grievant that she was being placed on paid administrative leave pending the outcome of an investigation. The leave was effective Monday, August 27, 2018.<sup>8</sup>

18. Grievant was notified by letter and email dated August 28, 2018, that a meeting was scheduled for her at the Central Office for Thursday, August 30, 2018, to discuss possible disciplinary actions and encouraged Grievant to bring a representative.

19. A meeting was held as scheduled. In attendance were: Superintendent Terry George; Associate Superintendent Pennington; Principal Harrah; John Roush, Esquire, Grievant's counsel; and Grievant. The video clips of the incident were viewed and Grievant was given an opportunity to explain her conduct.

20. Grievant indicated that the student was known to be a "runner." Grievant pursued her because she could have easily run out of the building and get injured. Grievant stated she was concerned for Ms. Kincaid's safety with the restrained boy so when the girl refused to get off the floor, Grievant dragged her back into the classroom so that Ms. Kincaid would not be alone with the other students.

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<sup>8</sup> Respondent Exhibit 1, Letter to Grievant from Superintendent Terry George dated August 28, 2018.

21. After discussing with Grievant the inappropriateness of her actions and other available solutions, Superintendent George offered Grievant until September 4, 2018, to resign before he recommended termination of her employment. He was notified on September 4, 2018, by Attorney Roush that Grievant was not going to resign. By letter dated September 5, 2018, Superintendent George advised Grievant that she was suspended without pay effective August 30, 2018, and that he would recommend termination of her employment at the Board's September 25, 2018, meeting.

22. Superintendent George informed Grievant by letter dated September 26, 2018, that at the meeting held the previous evening the Board approved the termination of Grievant's employment effective August 30, 2018.

23. Grievant McDonald has a history of disciplinary issues during her employment including the following:

- May 6, 1991, Three-day suspension without pay for "intemperance and cruelty, based on your conduct involving a Collins Middle School student."
- January 24, 2013, Thirty-day suspension for pushing a special education student against the wall and holding him there. As well as sending an inappropriate message to a special education student's mother.
- June 7, 2013, Written warning for entering an Individualized Education Plan ("IEP") on-line with erroneous information.
- December 7, 2016, Three-day suspension without pay for failing to conduct mandatory annual IEP reviews within the required timeline in violation of *West Virginia Board of Education Policy 2419, Regulations for the Education of Students with Exceptionalities*.<sup>9</sup>

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<sup>9</sup> Respondent Exhibit 1.

24. Grievant's colleague, Bessie Thompson, respects Grievant as an effective teacher at maintaining discipline and classroom management. Ms. Thompson used Grievant's classroom as a "cooling off station" where disruptive students could go to regain their composure.

25. Brian Good is the regular teacher for the classroom for students with behavior disorders. His is the room where Grievant was assigned on the afternoon when the incident described herein took place. He views Grievant as a valuable resource for advice in handling students with behaviors because of Grievant's many years of experience.

### **Discussion**

As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

. . . See [*Watkins v. McDowell County Bd. of Educ.*, 229 W.Va. 500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education*, 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). See also *Hovermale v. Berkeley Springs Moose Lodge*, 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

*W. Va. Dep't of Trans., Div. of Highways v. Litten*, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision). Where the evidence equally supports both sides,

a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

The authority of a county board of education to suspend or terminate an employee's contract 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).

Respondent argues that Grievant was guilty of insubordination and willful neglect of duty by disregarding the regulations for restraining students set out in WVBOE Policy 4373 and the CPI training adopted by the Board in compliance with that policy. Grievant counters that she was responding to what she believed to be an emergency situation in the classroom which justifies her actions.

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 willful; 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*). The disobedience must be willful, meaning that "the motivation for the disobedience [was] contumaciousness or a defiance of, or contempt for authority." *Id.*,

212 W. Va. at 213, 569 S.E.2d at 460 (citation omitted). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990).

The underlying principle in these causes for dismissal is that the employee's conduct must be a knowing and intentional disregard of mandatory duties or authority. *Tolliver v. Monroe County Bd. of Educ.*, Docket No. 01-31-493 (Dec. 26, 2001); *Stover v. Mason County Bd. of Educ.*, Docket No. 95-26-078 (Sept. 25, 1995); *Hoover v. Lewis County Bd. of Educ.*, Docket No. 92-21-427 (Feb. 24, 1994).

The term "willful neglect of duty" encompasses something more serious than incompetence. 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, 398 S.E.2d 120 (1990); *Williams v. Cabell County Bd. of Educ.*, Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ.*, Docket No. 95-29-151 (Aug. 24, 1995); *Hoover v. Lewis County Bd. of Educ.*, Docket No. 93-21-427 (Feb. 24, 1994). "Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. *Adkins v. Cabell County Bd. of Educ.*, Docket No. 89-06-656 (May 23, 1990).

The case of *Lancaster v. Ritchie County Board of Education*, No. 15-0554 (W. Va. Sup. Ct., May 23, 2016) (memorandum decision), provides insight into the present case. In *Lancaster* the board of education dismissed a bus driver for violation of the Employee Code of Conduct, improper discussions with student, and failure to follow regulations

related to the operation of school buses. The Grievance Board granted the grievance, but that decision was overturned in the Circuit Court of Kanawha.

“The circuit court found that despite trainings and warnings in the past, grievant willfully engaged in prohibited behaviors. The Supreme Court affirmed the circuit court, thereby allowing for the termination of an employee who received proper training on the employee code of conduct for subsequently engaging in unprofessional behavior violating the same with and around students because such would constitute insubordination and/or willful neglect of duty. *See, Lancaster v. Ritchie County Board of Education*, No. 15-0554 (W. Va. Sup. Ct., May 23, 2016) (memorandum decision).” *Shamblin v. Mineral County Bd. of Educ.*, 2018-0458-MnrED (Nov. 29, 2018).

Similarly, Grievant McDonald has received many hours of training in proper restraint techniques for special education students during nearly three decades of employment in that field. In fact, Grievant completed a seven-hour refresher course on *Nonviolent Crisis Intervention* less than three months immediately preceding this incident. Moreover, Grievant has been suspended twice previously for improper restraint of students. Consistent testimony proved that the CPI training given to all Fayette County teachers of special needs students specifically prohibits pulling students by their limbs. Additionally, *WVBOE Policy 4373* applies to this situation. It defines “restraint” as “the use of physical force to significantly restrict the free movement of all or a portion of a student’s body.” Grievant used physical force on the student to prevent her from running away, and again when she forced the student back into the classroom by dragging her across the floor and into the classroom. *Policy 4373* requires that, “restraint shall be limited to the use of such reasonable force as is necessary to address the emergency”

and “restraint shall be discontinued at the point at which the emergency no longer exists.” “Emergency” is defined in the Policy as, “a situation in which a student’s behavior poses a threat of imminent, serious physical harm to the student or others or serious property destruction.”

Arguably, Grievant was justified in pursuing the student when she ran from the classroom because she placed herself in potential danger by leaving the school. However, when Grievant caught up with the student at the opposite wall lockers the student did not attempt to flee, and when Grievant attempted to pull her back into the classroom the student fell to the floor. The student no longer posed a threat to anyone when she was lying on the floor. At that point no emergency existed and Grievant was no longer authorized to restrain her in any way.

Grievant claims that she felt she had to drag the student back to the classroom to assist Ms. Kincaid with the boy she was restraining. This is not supported by the evidence. The video showed that Ms. Kincaid had the boy under control and he was beginning to settle down. Additionally, as the last part of the student’s body went through the classroom door another staff person entered the room to provide assistance. That person was obviously in the vicinity and there is no reason why Grievant could not have waited with the girl while that person went into the room to help with the remaining students. Grievant did not hesitate when she caught the girl. She began pulling the student back into the room by her arm and continued through with that tactic when the student slid to the floor.

Grievant received extensive and proper training in appropriate restraint of students pursuant to CPI and *WVBOE Policy 4373*. She subsequently engaged in unprofessional behavior in direct violation of the policy and training. Such action constitutes

insubordination and/or willful neglect of duty. *Lancaster v. Ritchie County Board of Education*, No. 15-0554 (W. Va. Sup. Ct., May 23, 2016) (memorandum decision). *Shamblin v. Mineral County Bd. of Educ.*, 2018-0458-MnrED (Nov. 29, 2018). See also, *Costello v. Bd. of Educ.*, No. 13-0039 (W. Va. Sup. Ct., Nov. 8, 2013) (memorandum decision).

Grievant argues that there was no proof that CPI was a written policy which she was required to follow in light of W. VA. CODE § 18A-2-12a (7) which requires that “All official and enforceable personnel policies of a county board must be written and made available to its employees.” However, the evidence demonstrated that CPI was a written training program and that the prohibitions discussed were clearly contained therein. More importantly, Grievant’s behavior violated *WVBOE Policy 4373* which undoubtedly is a duly adopted written policy which must be followed by school employees.

Respondent proved by a preponderance of the evidence that Grievant committed insubordination and willful neglect of duty as set out in W. VA. CODE § 18A-2-8(a). Termination of Grievant’s contract was justified and was further supported by her prior history of similar conduct. Accordingly, the grievance is **DENIED**.

### **CONCLUSIONS OF LAW**

1. As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. The authority of a county board of education to suspend or terminate an employee's contract 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. 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 willful; 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 curium*). The disobedience must be willful, meaning that "the motivation for the disobedience [was] contumaciousness or a defiance of, or contempt for authority." *Id.*, 212 W. Va. at 213, 569 S.E.2d at 460 (citation omitted).

4. The term "willful neglect of duty" encompasses something more serious than incompetence. 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, 398 S.E.2d 120 (1990); *Williams v. Cabell County Bd. of Educ.*, Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ.*, Docket No. 95-29-151 (Aug. 24, 1995); *Hoover v. Lewis County Bd. of Educ.*, Docket No. 93-21-427 (Feb. 24,

1994). “Willful neglect of duty may be defined as an employee’s intentional and inexcusable failure to perform a work-related responsibility. *Adkins v. Cabell County Bd. of Educ.*, Docket No. 89-06-656 (May 23, 1990).

5. A school employee who has received proper training on specific policy rules or regulations and subsequently engages in unprofessional behavior intentionally violating the same may be dismissed for insubordination and/or willful neglect of duty. *See, Lancaster v. Ritchie County Board of Education*, No. 15-0554 (W. Va. Sup. Ct., May 23, 2016) (memorandum decision). *Shamblin v. Mineral County Bd. of Educ.*, 2018-0458-MnrED (Nov. 29, 2018).

6. Respondent proved by a preponderance of the evidence that Grievant committed insubordination and willful neglect of duty as set out in W. VA. CODE § 18A-2-8(a). Termination of Grievant’s contract was justified and was further supported by her prior history of similar conduct.

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* 156 C.S.R. 1 § 6.20 (2008).

**DATE: March 20, 2019.**

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**WILLIAM B. MCGINLEY**  
**ADMINISTRATIVE LAW JUDGE**