

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**BOBBY PAULEY,  
Grievant,**

**v.**

**Docket No. 2019-1394-KanED**

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

**DECISION**

Grievant, Bobby Pauley, was employed by Respondent, Kanawha County Board of Education. On April 5, 2019, Grievant filed this grievance against Respondent stating:

Respondent has suspended Grievant without pay and notified him that the superintendent will recommend his termination. Respondent alleges that Grievant intentionally turned off the natural gas supply, turned the heating system off and on to disrupt it, and clogged a bathroom sink and turned on the faucet to flood the floor on multiple occasions. Grievant denies turning off the natural gas valve, clogging the sink and turning on the water faucet. Grievant admits turning the heating system off and on. However, his intent was to try to reset or restart the system to address complaints about the temperature in various classrooms from the other staff members. Grievant was never forbidden to operate the heating system and operation of the heating system is one of the duties of the Custodian III classification in West Virginia Code § 18A-4-8. Grievant denies that there are any legitimate grounds for his termination as provided in West Virginia Code § 18A-2-8. he had been informed termination of his employment would be recommended.

For relief, Grievant seeks:

reinstatement of his contract of employment with (a) compensation for all lost wages with interest; (b) restoration of all benefits, pecuniary and nonpecuniary, retroactive to date of termination; (c) restoration of seniority, (d) expungement [of] termination [from] any personnel file of Grievant maintained by Respondent or its agents, and; any other relief necessary to make Grievant "whole."

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 May 30, 2019, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared in person and by counsel, John Everett Roush, AFT-WV/AFL-CIO. Respondent appeared by Terry Hollandsworth and by counsel, Lindsey D.C. McIntosh, General Counsel. Following the level three hearing on June 21, 2019, Respondent's counsel emailed the Grievance Board to state she had discovered Grievant had not actually been terminated from employment. While Superintendent Ronald E. Duerring, Ed.D. gave Grievant notice he intended to recommend his termination from employment, the same had not gone forward to the school board for a vote. By letter dated June 6, 2019, Superintendent Duerring adopted the recommended findings of the independent hearing examiner dated March 12, 2019, and informed Grievant he would be recommending to the board at the meeting on June 13, 2019, that Grievant's employment be terminated. On June 13, 2019, the school board terminated Grievant's employment and Superintendent Duerring notified Grievant of this action by letter dated June 19, 2019. Respondent requested to be allowed to supplement the record with these two letters. By email dated July 2, 2019, Grievant, by counsel, stated he had no objection to the supplementation of the record. Therefore, the above letters were marked and admitted as Respondent's Exhibit 13. This matter became mature for decision on July 15, 2019, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

## **Synopsis**

Grievant was employed by Respondent as a Custodian III at Dunbar Primary School. Grievant was suspended without pay and then terminated from employment for insubordination and willful neglect of duty for purposely overflowing a sink, turning the boilers off, and shutting off the gas to the school. Respondent failed to prove Grievant overflowed the sink or shut off the gas. Grievant admitted he turned the boiler off and on in an attempt to reset it to get the heat working and that he had never been instructed not to do so. Operating and making minor repairs to the heating and cooling system was part of Grievant's job description. Respondent failed to prove this action was insubordination or willful neglect of duty. 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 Custodian III at Dunbar Primary School.
2. During the school year, Grievant was supervised by the principal of Dunbar Primary School, Michelle Adams. During the summer, Grievant was supervised by Supervisor of Custodial Services Bernard Dale Balser.
3. A second custodian, William Morris, was also employed at Dunbar Primary School during the relevant time.
4. Grievant worked the morning shift and Mr. Morris worked the evening shift with their shifts overlapping for a short time.

5. Beginning in September 2017, there were repeated incidents regarding school equipment that administration believed were suspicious.

6. Due to these incidents, in February 2018, Keith Vititoe, Executive Director of Safety and Security had video cameras installed in the boiler room.

7. These cameras were installed in addition to the existing cameras installed in the public areas of the school building.

8. The cameras were not hidden and Grievant was aware there were cameras in the boiler room.

9. Due to the age of the system there are frequent problems with the heating and cooling in the building. There were numerous work orders submitted for issues with the heating and cooling in the building.

10. Between October 2017 and December 2018 there were four instances where work orders were submitted for lack of heat in various parts of the building and maintenance workers reported on the completed work order that the lack of heat was due to the boiler being turned off.

11. Although cameras had been installed in the boiler room, on an unspecified date, the battery to the digital video recorder for the cameras failed, which wiped out the memory of the date and time and made it almost impossible to search for recordings from before the battery was changed on January 24, 2019. Therefore, no footage exists of who turned off the boiler on the dates of the work orders.

12. Sometime in January 2019, a male teacher, Jerry Sapp, discovered the sink in the adult men's restroom overflowing. The plunger was pulled up to engage the sink stopper and the water was turned on. Mr. Sapp pushed the plunger down to drain

the water, turned the water off, used the restroom and then reported the incident to Principal Adams.

13. Mr. Sapp discovered the sink overflowing on “probably two or three different occasions” but Mr. Sapp could only say this occurred “around January.”

14. After Mr. Sapp had reported the incident, Principal Adams became aware that Mr. Morris had also found the sink overflowing on another day.

15. Principal Adams reported the incidents to Director Vititoe and Terry Hollandsworth, Executive Director of Maintenance.

16. Mr. Vititoe reviewed security camera footage for January 2<sup>nd</sup>, 4<sup>th</sup>, and 8<sup>th</sup> from the hallway where the restroom is located.

17. Mr. Vititoe determined that Grievant had overflowed the sink because he was the last person in the restroom prior to the discovery of the overflow on all three days.

18. The video recording is from a camera at the opposite end of the hallway from the men’s restroom. The men’s restroom is the last door on the right side of the hallway. There are two classroom doors in sight directly opposite the camera at the end of the hallway. It appears from the video that the distance between the men’s restroom door and the adjacent classroom door is no more than a step or two.

19. The video quality of the security camera for the area where the restroom is located is poor and it is difficult to see which door is being entered as there is another door on the right wall beside the restroom closer to the camera. The video stutters and freezes.

20. All three videos have missing time in between Grievant entering the restroom and the discovery of the overflowing sink. The January 2<sup>nd</sup> video does not show Mr. Morris entering the restroom to discover the overflowing sink.

21. The videos show unescorted children frequently present in the hallway.

22. Sometime in January 2019, Director Vititoe reviewed the boiler room cameras to determine who was turning off the boiler. It is unclear what precipitated this review as the last work order showing that the heat was not working because the boiler was turned off was December 12, 2018.

23. Director Vititoe discovered that the digital video recorder battery had failed, as stated above, and the battery was changed on January 24, 2019.

24. Director Vititoe determined that on January 25, 2019 and February 5, 2019 Grievant turned the boiler off.

25. There is no work order for a heating outage on those two dates.

26. A picture of the boiler control panel shows the toggle switch with “on” being up and “off” being down and several indicator lights. In the picture, the toggle is set to “off” and none of the indicator lights are lit on the panel.

27. In the two videos, both times when Grievant approached the boiler control panel there was no light visible on the panel. After Grievant flipped the switch, a light appears on the panel. Further, although details are difficult to discern on the video, it appears the last motion Grievant makes each time is upward, which would indicate he flipped the switch to “on” and not downward to “off.”

28. Grievant admits to turning the boiler on and off at times in an effort to reset the boiler when the heat is not working. This maneuver has successfully restored the heat at times.

29. The job description for Custodian I, III, IV states: "Custodian II operates the heating or cooling systems and makes minor repairs."

30. Although Principal Adams had some discussion with Grievant about the boiler problems, neither she nor anyone else ever instructed Grievant specifically to not turn the boiler off and on in an attempt to reset it.

31. On an undetermined date in January or February, Director Hollandsworth determined the gas supply to the entire school had stopped working. He contacted the gas company to respond and also instructed a maintenance employee to report to the school and then left the school.

32. That evening, gas company employees reported to the school and corrected the problem. There is no work order for this issue and there was no documentation or testimony from the gas company employees or the maintenance employee.

33. Based on the report from Mr. Morris that the gas company employee had told him that the gas was shut off at the valve in the boiler room, it was determined that the boiler room video should be reviewed.

34. Director Vititoe was unable to perform the review so asked Director of Safety Ryan Bremar to perform the review.

35. Although Principal Adams stated that the date of the incident was February 1, 2019, Director Bremar stated that the incident was January 25, 2019.

36. A portion of the video Director Bremar reviewed was entered into evidence and the date on the video is January 2, 2019.

37. The shut off valve is not visible on the video.

38. The video only shows a short period of time at the end of Grievant's shift and ends when Grievant appears to leave for the day.

39. On some unspecified date, Grievant and Mr. Morris had a discussion regarding the water and gas shut off valves. Because Mr. Morris did not know where the gas shut off valve was located or how to operate it in case of emergency, Grievant showed Mr. Morris the valve and how to operate it.

40. By letter dated March 19, 2019, Superintendent Duerring notified Grievant he would be recommending Grievant's termination from employment for insubordination and willful neglect of duty.

41. While Superintendent Duerring, Ed.D. gave Grievant notice he intended to recommend his termination from employment, the same did not go forward to the school board for a vote.

42. Following the level three hearing, Respondent discovered Grievant had not actually been terminated from employment.

43. By letter dated June 6, 2019, Superintendent Duerring again adopted the recommended findings of the independent hearing examiner dated March 12, 2019, and informed Grievant he would be recommending to the board at the meeting on June 13, 2019, that Grievant's employment be terminated. On June 13, 2019, the school board terminated Grievant's employment and Superintendent Duerring notified Grievant of this action by letter dated June 19, 2019.



44. Multiple witnesses testified on Grievant's behalf that Grievant was always helpful and that they could not believe he would do anything intentionally to harm the school.

### **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).

Respondent asserts Grievant was intentionally sabotaging the school and that his misconduct constituted insubordination and willful neglect of duty. Grievant denies

that he overflowed the sinks or shut of the gas. Grievant admits to flipping the switch on the boiler off and on in an attempt to “reset” it and denies that he had been told not to do so.

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).

Willful neglect of duty “encompasses something more serious than ‘incompetence,’ which is another ground for [school employee] 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).

This case is not a question of credibility so much as reliability of evidence. As will be more fully discussed below, there is significant confusion of events between the witnesses and a lack of explanatory testimony and corroborating evidence. While there is certainly conflicting evidence and testimony regarding even the dates of relevant events, all indications are that this is a result of confusion or mistake and not untruthfulness. Rather than conflicting testimony regarding the alleged misconduct itself, which is most usually the issue, all proof of misconduct in this case is via video evidence. Therefore, a formal assessment of credibility is not necessary.

Respondent failed to prove Grievant overflowed the sink. Respondent asserts that the sink was overflowed on three dates in January 2019, the 2<sup>nd</sup>, 4<sup>th</sup>, and 8<sup>th</sup>. Respondent asserts the video evidence from those dates prove Grievant was the person who overflowed the sink because Grievant was the last person in the restroom each time before the overflow was discovered. Grievant denies he overflowed the sink and the video evidence is the only evidence Respondent submitted as proof that Grievant was the perpetrator.

Although Principal Adams testified the 2<sup>nd</sup>, 4<sup>th</sup>, and 8<sup>th</sup> of January were the dates, the two people who saw the overflowed sink, Mr. Sapp and Mr. Morris, did not specify the dates. Principal Adams testified that Mr. Sapp reported the sink overflow to her on January 4<sup>th</sup>, but she was not concerned because she thought it was a student who did

it. She testified that after the incident on the 4<sup>th</sup>, Mr. Morris told her that the same thing had also occurred on the 2<sup>nd</sup>. She testified Mr. Sapp reported to her a second time on the 8<sup>th</sup>, at which time she notified Directors Vittoe and Hollandsworth. Principal Adams did not testify regarding how she recalled those were the dates in question.

Mr. Sapp testified only that it happened on “probably two or three different occasions” and this occurred “around January.” Mr. Morris gave no time period at all for when he saw the sink overflow and his testimony regarding the sink overflow seems to be confused with another unrelated incident where the sink was leaking because of the cold water supply hose. Mr. Morris testified that he told Mr. Pauley and the school secretary about these incidents and not Principal Adams.

Because the evidence that Grievant overflowed the sink is circumstantial, it is particularly important that the circumstantial evidence be reliable. All the videos show is the door to the restroom. There is no evidence on the videos of the overflow itself. Therefore, the dates of the incident must be without question. While Principal Adams’ testimony on the dates would ordinarily be enough, in this case, if she is mistaken on the dates then the video evidence is meaningless. Her assertion of the dates without corroborating evidence or even an explanation of how she is certain those were the dates is not enough when Mr. Sapp and Mr. Morris could not provide dates and Mr. Morris’ testimony regarding reporting the incident is inconsistent with Principal Adams’ testimony.

Even if the dates of the videos are the dates of the incidents, the videos are not conclusive. Without direct evidence that Grievant was the perpetrator, Respondent’s video evidence must show that no other person could have entered the restroom

between Grievant exiting the restroom and the person discovering the overflow. The videos cannot prove this as all three videos are missing time and the January 2<sup>nd</sup> video does not show Mr. Morris entering the restroom when he allegedly discovered the sink overflow.

The video quality for the area where the restroom is located is poor. The camera is located at the opposite end of the hallway from the restroom and the restroom is located on the right wall of the hallway. There is also another door on the right wall beside the restroom closer to the camera and it is difficult to see which door is being entered due the distance from the camera and close proximity of the doors. The video also stutters and freezes.

While the videos do appear to show Grievant enter and exit the restroom, in all three videos there are blocks of time missing thereafter.<sup>1</sup> Respondent's witnesses did not specifically testify about the missing time from the hallway videos, however, in testifying about the cameras in the boiler room, Mr. Bremar stated that "99%" of the cameras in the schools are on motion detectors. Mr. Bremar provided no further information regarding how the motion detection works, its accuracy, or whether the camera in the hallway is a motion detection camera.

Even if the blocks of time are missing because of motion detection, the January 2<sup>nd</sup> video clearly shows that the motion detectors do not always work. At 1:48:05 Mr. Morris appears from beneath the camera view and walks down the length of the main hallway exiting the main hallway to the right into the branching hallway near the end of

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<sup>1</sup> For example, the January 2, 2019 video is missing seven blocks of time: 1:21:34 to 1:22:12, 1:23:14 to 1:27:08, 1:31:00 to 1:31:43, 1:32:25 to 1:35:36, 1:42:24 to 1:44:20, 1:45:55 to 1:46:11, and 1:50:53 to 1:53:14. The longest block of missing time is almost four minutes.

the main hallway. Mr. Morris disappears from view at 1:48:22. Mr. Morris is wearing a blue striped shirt and blue jeans. The camera freezes at 1:48:33 and resumes at 1:50:07 with a dark figure standing at the end of the hallway who then appears to enter the room in front of the men's restroom. There is no footage of how the figure came to be at the end of the hallway. The camera freezes again at 1:50:53 and when it resumes at 1:53:14 there is a dark figure at the end of the hallway on the side of the second classroom doorway that then enters and exits a door on the left side of the hallway, and then enters the left side classroom door. The video ends at 1:53:56 without the figure who entered the right-side door beside the restroom exiting that room. Further, multiple times when the video resumes after a missing block of time, there is nothing on the video moving when it resumes. These irregularities indicate that if the missing time is from motion detection, the motion detection is not reliable.

The missing time is particularly important because the restroom is situated within very close proximity to three doors, two of which are classrooms, and a hallway. The door to the restroom and the door to the nearest classroom appear to be only a few steps apart. Further, the videos show unescorted children frequently present in the hallway. Given where the restroom was situated, someone else could very easily have overflowed the sink within the missing periods of time, without being captured on video.

Further, while the January 4<sup>th</sup> and 8<sup>th</sup> videos do appear to show Mr. Sapp entering and exiting the restroom, the January 2<sup>nd</sup> video does not show Mr. Morris doing so. The figure at the end of the hallway is not identifiable and does not appear to enter the men's restroom meaning the full video was not provided or that portion of the video is missing.

Given the uncertainty of the dates, the missing time on the videos, and the failure to show Mr. Morris entering the restroom, it cannot be said it is more likely than not Grievant was the perpetrator, especially when even Principal Adams admitted that when the overflow first happened she assumed it was done by a student.

Respondent also failed to prove Grievant caused a service disruption by turning off the main gas valve in the boiler room. There is no direct evidence that Grievant turned the gas valve off or even that it was the gas valve in the boiler room that was turned off. The evidence is even inconsistent on what date this incident actually occurred. Principal Adams testified that the gas valve incident occurred on February 1, 2019. However, despite her specific testimony that she placed a work order on the day of the incident, no work order appears for that date in the voluminous records of work orders placed into evidence. Mr. Bremar testified that the incident occurred on January 25, 2019. The video entered into evidence, which Mr. Bremar testified he reviewed, is dated January 2, 2019, which is also a date for which Director Vititoe testified video should not exist due to the video recorder malfunction. Mr. Bremar did not acknowledge that the date of the video was different. No work order for this issue appears on either January 2<sup>nd</sup>, 25<sup>th</sup>, or any other date in the work orders for that matter.

Respondent's entire basis for asserting that Grievant shut off the gas valve is Mr. Bremar's assertion that he reviewed the video and Grievant was the only person near the gas valve before the gas valve was determined to be shut off. This is unreliable for a myriad of reasons. As stated, the video presented is from an entirely different date than the testimony of Principal Adams and Mr. Bremar of the date of the incident. That, alone, makes it inherently unreliable. Further, the action from the video does not match

the testimony of Mr. Morris who described that the conversation involving the different shut off valves, which resulted in Grievant showing him the gas shut off valve occurred while Mr. Morris was repairing a sweeper. The video does not show Mr. Morris repairing a sweeper. The video does not show the valve itself or Grievant actually turning off the valve. The only evidence presented that the video even shows the area of the valve is Mr. Bremar's testimony, in which he stated he identified the location of the valve by watching in the video where the maintenance employee and gas employee went when they arrived. Mr. Bremar stated that he did go to the boiler room in person to view the site but that he did not actually look at the valve. The video submitted as evidence ends when Grievant appears to leave at the end of his shift, so does not include the intervening time in which Mr. Bremar asserts no other person was in the area nor the actions of the maintenance employee or gas company employee. Finally, Mr. Bremar's assertion that Grievant must have shut off the valve is directly contradicted by the eye-witness testimony of Mr. Morris who said Grievant did not shut off the valve.

Even the assertion that the gas was shut off in the boiler room has not been proven. While Mr. Hollandsworth testified that he personally went to the building and determined that there was no gas in the building, which establishes that the gas was shut off in the building, the only evidence that the gas was shut off at the boiler room valve is hearsay testimony. Mr. Morris appears to be the only person to testify who actually spoke to the gas company employees. No one else who testified received information about the gas valve shut off from the gas company employees.

"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



(6<sup>th</sup> ed. 1990). "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).

Respondent offered no explanation why neither the maintenance employee nor the gas company employee was called to testify. No documentary evidence was submitted regarding this incident. It does not appear that either Director Vittoe or Director Bremar interviewed or requested statements from the maintenance employee or the gas company employee. While Mr. Morris testified that that gas company employee told him that the gas had been shut off at the boiler room valve, Mr. Morris did

not see the valve itself being turned back on and Mr. Morris may very well have been mistaken.

Even if Grievant did shut off the gas, Mr. Morris provided the reasonable explanation that as Grievant was showing him what to do in an emergency he may have shut off the gas accidentally. Morris denies that Grievant turned off the gas, but said that, if he did, it was just to show him what to do and would have been a mistake, not an intentional act. Further, in the video, Mr. Morris is there, very close to where Respondent asserts the valve was located when Grievant was in that area. It would make no sense for Grievant to have maliciously turned off the gas valve right in front of Mr. Morris. Therefore, even if Grievant did shut of the gas, which was not proven, it appears much more likely that this was due to a mistake and not insubordination or a willful neglect of his duty.

Respondent failed to prove Grievant committed any misconduct in flipping the boiler switch. Although Respondent provided work orders from four different days<sup>2</sup> over a period of more than a year ending in December 2018, which state that there was no heat because the boiler had been turned off, no work orders were provided for the dates of the videos in 2019 that Respondent states prove Grievant turned off the boilers.<sup>3</sup>

Grievant admits that, on the dates of the video and on other days, he flipped the boiler switch off and on in an effort to reset the boiler. He testified that doing so has sometimes resulted in successfully turning the heat on in the building. Respondent

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<sup>2</sup> Respondent provided seven total work orders but there were multiple work orders for several of the same days because the outage was reported by multiple classrooms and a separate work order is created for each reported incident.

<sup>3</sup> On January 25, 2019, there was a work order placed for a safety concern with a window heating unit reported on that date and completed the next day.

asserts this was misconduct because Grievant was not authorized to repair the boiler and because he had been instructed not to do so. Flipping the switch on and off is not a repair; it is consistent with Grievant's job description that he will "operate" the heating and cooling system. Even if such a thing could be considered a "repair," Grievant's job description also states that his position "makes minor repairs" of the heating and cooling system. There is no evidence Grievant was ever specifically told not to turn the boiler on and off in an effort to reset it. Although Principal Adams testified she discussed the boiler issues with Grievant, she testified she does not recall ever specifically telling Grievant not to turn the boiler off and on. No other witness testified that they had discussed the boiler issues directly with Grievant.

Further, the videos and the picture of the boiler control panel appear to show that Grievant turned the boiler on and not off. A picture of the boiler control panel shows the toggle switch with "on" being up and "off" being down and several indicator lights. In the picture, the toggle is set to "off" and none of the indicator lights are illuminated on the panel. In the two videos, both times when Grievant approached the boiler control panel there was no light visible on the panel. After Grievant flipped the switch, a light illuminates on the panel. Further, although details are difficult to discern on the video, it appears the last motion Grievant makes each time is upward, which would indicate he flipped the switch to "on" and not downward to "off."

Therefore, Respondent failed to prove that Grievant turned the boilers off on the dates alleged. Even if Grievant had turned the boilers off, Respondent failed to prove this action was insubordination or willful neglect of duty because that is an action that would be included in his duties and no one ever specifically told him not to do it.

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. 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).

4. 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).

5. Respondent failed to prove Grievant overflowed the sink or shut off the gas.

6. Respondent failed to prove that Grievant turning the boiler off and on in an attempt to reset it when he had never been instructed not to do so and operating and making minor repairs to the heating and cooling system was part of his job description was insubordination or willful neglect of duty.

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: August 26, 2019**

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

