THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

KRISTEN AINSWORTH,
Grievant,

v. **Docket No. 2020-1006-JefED**

JEFFERSON COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Kristen Ainsworth, was employed as a teacher's aide at T.A. Lowery Elementary School by Respondent. On or about October 31, 2019, Superintendent Bondy Shay Gibson suspended Grievant with pay pending an investigation of an incident that occurred in the classroom on October 16, 2019. By letter dated February 11, 2020, Superintendent Gibson informed Grievant that she would be suspended without pay effective immediately and that Dr. Gibson would recommend the termination of her contract of employment as a teacher's aide. On February 24, 2020, the Jefferson County Board of Education approved this recommendation. Grievant filed a challenge to this dismissal of employment directly to Level Three of the grievance process on February 27, 2020, Grievant seeks reinstatement to employment, back pay, benefits and seniority, removal of reference to her suspension and dismissal from any of Respondent's employee records, and an award of interest on all monetary sums.

The undersigned conducted a Level Three hearing, by Zoom video conference, on July 14, 2020, from the Grievance Board office location in Westover, West Virginia.

Grievant appeared in person, and by John Everett Roush, Esquire, American Federation of Teachers. Respondent appeared by Laura L. Sutton, Esquire, General Counsel, Jefferson County Board of Education. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on August 17, 2020.

Synopsis

Respondent contends that Grievant was dismissed from employment for immorality and insubordination. The only evidence to support these accusations was the testimony of the Human Resource Director, and her report summarizing interviews conducted by her and a third-party investigator. This is hearsay and, in some instances, hearsay upon hearsay. Under the circumstances of this grievance, this hearsay is entitled to no weight. Respondent failed to meet its burden of proof and establish these charges by a preponderance of the evidence. In addition, the record established that Respondent's action of termination was precipitous due to the nature of Grievant's conduct. Given the facts of this case, it appears that Grievant's alleged misconduct could be correctable. Accordingly, the undersigned finds that Respondent failed to establish the charges against Grievant, and Grievant is entitled to an improvement plan. This grievance is granted.

The following Findings of Fact are based upon the record of this case.

Findings of Fact

1. Grievant was employed as a teacher's aide at T.A. Lowery Elementary School by Respondent prior to the disciplinary action that is the subject of this grievance.

2. Grievant began working for Respondent as a regular employee, teacher's aide, on or about April 9, 2018, at Driswood Elementary School. Prior to that time,

Grievant served as a substitute employee in several classifications for two years. Grievant's Exhibit No. 1.

3. Before working for the Respondent, Grievant was employed as a special education aide by the Loudon County Board of Education for eight years. Grievant was employed for two years as an instructor at the Grafton School, a private school for children with special needs.

4. In May 2019, Grievant bid on and was the successful applicant for the position of Person Care Aide at T.A. Lowery Elementary School. Grievant was assigned to provide behavioral and instructional support to one student, per his Individualized Education Plan (IEP).

5. Grievant's duties as a Special Education Aide involve working with students with severe intellectual disabilities.

6. Grievant's performance evaluations as a regularly employed teacher's aide met expectations. Prior to the current discipline, Grievant had never been suspended without pay or placed on a plan of improvement during her employment with Respondent.

7. The only incident on Grievant's employment record with Respondent was a letter dated April 5, 2019, documenting a verbal confrontation with the classroom teacher with whom she worked at the time.

8. As previously noted, Grievant transferred to T.A. Lowery Elementary School at the beginning of the 2019-2020 school year. At this school, Grievant worked in a classroom with a teacher and another aide.

9. Grievant's primary responsibility at the school was working with a student with a history of violent behavior towards staff members. The student has significant

intellectual, behavioral, and emotional issues. The student uses plush toys for comfort and emotion management during the school day.

10. Near the end of the school day on October 16, 2019, the student became upset because the teacher decided that he would not be allowed to take some plush toys home with him that afternoon due to his misbehavior during the school day. The student began throwing a temper tantrum. He ran about the room, turned over desks, and knocked items off a shelf. The other aide assigned to the classroom took the rest of the students out of the room as it was time for them to go home. This left only Grievant and the teacher present in the room.

11. The student charged toward Grievant. Grievant assumed a defensive posture, crossing her hands in front of her torso, and backed away. In the process of approaching Grievant, the student tripped and fell. The student alleged that he was injured, notwithstanding, there was no objective finding of physical injury.

12. Present in the room at the time, the classroom teacher told the investigator that the student's fall may have been attributed to him losing his balance. The classroom teacher acknowledged that Grievant was in a defensive posture when attacked by the student.

13. Grievant was not wearing the over-sized pads/gloves, referenced as Ukeru training pads, at the time the incident occurred. Grievant noted that an employee does not always have time to put on the pads/gloves when an attack occurs. Grievant also noted that the Ukeru training pads were not very effective with this student as taking the gloves away from the aide and throwing them is a ploy of this student.[1]

[1] Ukeru is a trauma-informed care program that includes managing and deescalating conflict by diverting an aggressive student, and physical techniques using protective

14. After the student fell, the classroom teacher called the assistant principal by intercom and explained the situation. The assistant principal came to the classroom and took charge of the student.

15. Grievant did not file a written report concerning the incident on October 16, 2019. Grievant believed that the assistant principal of the school had been made aware of the situation and that was sufficient.

16. Grievant was suspended with pay on or about October 31, 2019.

17. The Department of Health and Human Resources investigated the incident. The investigator did not make a finding of abuse or neglect on the part of the Grievant.

18. Amy Loring, Respondent's Human Resource Director, conducted Respondent's investigation, along with a third-party investigator, into the incident which occurred on October 16, 2019. Ms. Loring's conclusions, based on the statements of individuals who did not testify at the evidentiary hearing, differed slightly from the recollection of Grievant. Ms. Loring concluded that the student had made contact with Grievant, though she concluded that the student was the aggressor. Ms. Loring also concluded that Grievant made the comment "natural consequence" after the student fell, Grievant did not recall making such comment.

19. Ms. Loring advised Superintendent Gibson of a range of possible disciplinary actions, including a plan of improvement for Grievant.

20. On January 17, 2020, Superintendent Gibson met with Grievant and her representative. Dr. Gibson presented the allegations against Grievant and provided her

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equipment and soft, cushioned blocking materials to keep both the employee and student safe. It teaches the aides how to recognize and deescalate a student's behavior. Grievant was trained in the Ukeru program.

an opportunity to respond. Neither Grievant nor her representative spoke during the meeting.

21. By letter dated February 11, 2020, Dr. Gibson advised Grievant that she would be suspended without pay immediately, and that the termination of her contract of employment would be recommended to the Jefferson County Board of Education. Dr. Gibson would be making this recommendation on the basis that Grievant had "acted inappropriately and unprofessionally in the commission of her duties. This incident is documented with a student injury." Respondent's Exhibits No. 2 and 3.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying determines the weight of the testimony." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

Respondent asserts that it dismissed Grievant for insubordination, immorality, and failure to provide a safe and secure environment in which students may learn and prosper and jeopardizing the health, safety, and welfare of students. Grievant points out that the dismissal and suspension letters are vague as to why she was suspended and terminated from employment. Grievant presents its proposals in such a way as to examine the possible reasons for the disciplinary action in question and answer format. Subsequently, Grievant addresses the question of whether Grievant was entitled to notice of the alleged deficiencies and an opportunity to improve prior to dismissal.

An employee of a county board of education may be suspended or dismissed only 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. “The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. VA. CODE § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ*., Docket No. 91-20-005 (Apr. 16, 1991). *See Beverlin v. Bd. of Educ*., 158 W. Va.1067, 216 S.E.2d 554 (1975).” *Graham v. Putnam County Bd. of Educ*., Docket No. 99-40- 206 (Sep. 30, 1999).

Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002) (*per curiam*). *See Riddle v. Bd. of Directors, So. W. Va. Community College*,

Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). "[F]or 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, supra*.

The Grievance Board has found that where an employee's conduct was not in accordance with the broad language of the employee Code of Conduct, "by failing to promote a safe and positive learning environment, and failing to be a good adult role model," the inappropriate conduct constituted insubordination. *Wells v. Upshur County Bd. of Educ.*, Docket No. 2009-1714-UpsED (May 6, 2011).

The term "immorality" has been interpreted as, "connotes conduct 'not in conformity with accepted principles of right and wrong behavior; contrary to the moral codes of the community; wicked; especially, not in conformity with the acceptable standard sexual behavior.'" *Golden v. Bd. of Educ. of the County of Harrison*, 169 W. Va. 63, 285 S.E,2d 665, 668 (1981); *Hayes v. Kanawha County Bd. of Educ.*, Docket No. 94-20-1143 (Jun. 28, 1995). "'Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires at least an inference of conscience intent.' *See Hayes, citing Youngman v. Doerhoff*, 890 S.W.2d 330 (MOCC, 1994)." *Bell v. Mingo County Bd. of Educ.*, Docket No. 97-29-172 (Mar. 10, 1998); *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

Respondent argues in its fact/law proposal that when the student's behavior began to escalate, Grievant did nothing to deescalate his behavior and failed to use Ukeru pads to the protect the student during the incident. Grievant's failure to react appropriately

resulted in the student falling and injuring his leg. Grievant taunted the student when he fell. Respondent argues that they demonstrated that this was inappropriate, and Grievant should have known it was inappropriate, which calls into question her fitness to perform the job. Respondent instructed Grievant that she was to use the training provided by Ukeru when the student's behavior escalated. Grievant deliberately chose to ignore her training. Grievant's conduct constitutes insubordination. It was also conduct which would seem to be always wrong under the circumstances, fits within the definition of cruelty, which does not require intent to inflict harm. Grievant jeopardized the health, safety, and welfare of the student. The limited record of this case does not establish any of these allegations by a preponderance of the evidence.

Respondent, in presenting only the testimony of Ms. Loring, does not contend that Grievant pushed or physically caused the student in question to fall. The limited record of this case supports the finding that the student sought to initiate the contact. The limited record also supports the finding that Grievant, in some fashion, assumed a defensive stance. The emotional outburst by the student seems to have been brought on by the fact that he would not be allowed to take his plushy toys home that afternoon and it was the teacher rather than Grievant who made that decision. The record lacks any evidence that Grievant did anything to provoke the student's assault. Grievant's defensive actions of backing away and raising her arms to absorb the potential impact and protect her body were completely reasonable. The undersigned agrees with Grievant's counsel that the record makes clear that Grievant was not responsible for the student's fall.

The record also established that Grievant did not have the chance to put on the Ukeru pads before or during the encounter with the student. In the actual situation in

which Grievant found herself on October 16, 2019, diverting her attention from the student, even momentarily, in order to wear the Ukeru pads to protect herself would have been impractical. It appears that Grievant chose the more prudent course of action in keeping her attention focused on the student rather than taking additional steps to protect herself. In addition, there is no evidence that Grievant being barehanded contributed in any way to the student losing his temper or falling. Grievant does not refuse to use the Ukeru pads, she indicated that she did use them, and Respondent's Investigative Report corroborated that Grievant consistently used the Ukeru pads.

Respondent focuses on whether or not Grievant made the comment "natural consequences" when the student fell on October 16, 2019, in justifying the imposed discipline. Grievant contends that her sworn testimony should be accorded more weight than non-sworn statements given during the investigation and reported by Ms. Loring. Given that Ms. Loring was the only witness called by Respondent and she based her testimony upon hearsay statements from Respondent's investigation conducted by a third-party, a credibility determination is not possible. If witnesses to an incident are not called to testify, a credibility judgement by the administrative law judge is difficult if not impossible. Accordingly, failure to call material witnesses at an evidentiary hearing can prevent an employer from meeting the burden of proof. *Landy*, *supra*.

The comment in question was not a taunt. The comment can just as easily be viewed as a reasonable attempt at redirecting behavior. Grievant was pointing out to the student that if he acted out and tries to hurt others, he may injure himself in the process. Grievant does not believe that she made the statement. In any event, assuming *arguendo*

that Grievant's recollection is mistaken, the statement does not constitute misconduct. It most certainly does not constitute conduct that is not correctable.

Respondent also places reliance on Grievant's failure to make a formal or written report of the incident that occurred on October 16, 2019, as justification for discipline. Under the circumstances of the incident, Grievant contends that she was not obligated to make a formal or written report of the incident. It is undisputed that the assistant principal was made of aware of the situation as it was ending. Grievant has a well-founded belief that the administration of the school and her teacher were aware of the incident and that this was sufficient. Respondent produced no written directive or policy that requires a formal or written report any time a student falls or, for that matter, throws a temper tantrum. In any event, even if Respondent can produce such a regulation or directive, a one-time omission or failure to put a report in writing does not constitute conduct that is not correctable.

Respondent introduced an Investigative Report, dated September 3, 2020 as an exhibit. This document contains witness statements that indicate that the student in question had a history of aggression, kicking, throwing items and made claims he was going to get employees fired. None of the employees that were interviewed, except for the classroom teacher, had any first-hand knowledge of the incident on October 16, 2019. The classroom teacher reported in her statement that the student struck Grievant and she allegedly blocked him using her hands quickly, not the Ukeru pads. The classroom teacher did not testify at the evidentiary hearing. All of the statements contained in the report of Grievant's coworkers are hearsay.

Under the statutes and procedural rules relating to grievances the formal rules of evidence are not applicable in grievance proceedings, except for the rules of privilege recognized by law.[2] 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. Accordingly, an administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. *Kennedy v. Dep't of Health & Human Res.*, Docket No. 2009-1443-DHHR (Mar. 11, 2010); *Warner v. Dep't of Health and Human Resources*, Docket No. 07-HHR-409 (Nov. 18, 2008); *Miller v. W. Va. Dep't of Health and Human Resources*, Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996).

"[T]he primary reason for the exclusion of hearsay is that there is no way for the trier of fact to judge the trustworthiness of the information. Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers* § 1-7(C)(2) at 78 (3rd ed. 1994). The evidence is inherently unreliable because; it denies the accused the opportunity for cross examination of the speaker at the time it is being made, it often lacks the sanction of being made under oath, and it facilitates the use of perjured evidence. *Id*." *Lundsford and Kelly v. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2016-1368-CONS (Sept. 28, 2016).

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]*See generally* W. VA. CODE § 6C-2-4(a)(3).

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.[3] *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (1997); *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. 90-8-115 (June 8, 1990).

Applying these factors, the undersigned determines that Ms. Loring's testimony and the co-workers' statements are entitled to virtually no weight. Ms. Loring was not present for any of the alleged acts of misconduct in the classroom, and obtained the majority of her information from an investigator who was also not present. The classroom teacher with some first-hand knowledge did not testify at the Level Three hearing. In any event, in reviewing the statements one comes away with nothing but uncertainty because the interview subjects based their representations on hearsay and speculation. Again, the classroom teacher did not testify at the Level Three hearing; the co-workers

[3]The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing hearsay. *See Borninkhof v. Department of Justice*, 5 MSBP 150 (1981).

statements seem to collaborate the testimony of Grievant; and the credibility of the declarants when they made the statements could not be assessed.

Under the factors set out above, the witness with some first-hand knowledge was clearly available to testify at the hearing; the statements were not routinely made; some contradictory evidence exists in the case; and, the credibility of the declarants could not be tested at Level Three. The Respondent cannot meet its burden of proof in this grievance with very limited evidence based solely upon this hearsay. *Kennedy*, *supra*.

The one remaining issue in this case is the question as to whether or not this type of behavior might be correctable. Respondent's report to Superintendent Gibson recommends a plan of improvement for Grievant. The statutory and case law authority makes it clear that a school employee may not be dismissed for performance issues if the misconduct in question is correctable.

The West Virginia Supreme Court of Appeals has made it clear that it is not the label given to the conduct that controls the application of W. VA. CODE § 18A-2-12a, but whether the conduct was related to Grievant's performance and is correctable. Accordingly, even when Respondent labels Grievant's conduct as "willful neglect of duty" or "insubordination" where the underlying complaints regarding an employee's conduct relate to her employment "the effect of West Virginia Board of Education Policy 5300 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). In addition, "[f]ailure by any board of education to follow the evaluation procedure in West Virginia Board of Education Policy 5300 . . . prohibits such board from discharging, demoting or transferring an employee for reasons having to do with prior misconduct or incompetency that has not

been called to the attention of the employee through evaluation, and which is correctable." *Id.* "A board must follow the West Virginia Board of Education Policy 5300 . . . 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 be understood to mean an offense or conduct which affects professional competency." *Id*. Policy 5300 "envisions that where a teacher exhibits problematic behavior, the improvement plan is the appropriate tool if the conduct can be corrected. Only when these legitimate efforts fail is termination justified." *Id*.[4]

Assuming *arguendo* that the facts were even remotely close to the version as Respondent sets out in their brief, it appears that Grievant's conduct was correctable. The failure of Grievant to use Ukeru pads did not cause or affect the safety of the student. The conduct, if deficient in the use of the Ukeru pads, may be corrected. Respondent is encouraged to provide Grievant clear directions and additional training as to how she should have handled the situation that occurred on October 16, 2019. Respondent is encouraged to select the best of two training programs. Provide one of the two approved training programs for Grievant to complete. Once the re-training is successfully completed and evaluated, Grievant may return to the previous position.

Since the alleged inappropriate comments to the student did not involve profanity or a threat, it does not appear that what Grievant said was inherently wrong.

[4] The provisions of Policy 5300 referred to by the Court in these cases have since been codified with virtually the same language in W. V. CODE § 18A-2-12a. Therefore, cases citing Policy 5300 remain precedential. *Phillips v. Boone County Bd. of Educ.* Docket No. 2017-2333-CONS (Jan. 9, 2018).

Respondent's concern is apparently with the circumstances in which the comment was made. Respondent could address this concern by a review concerning the type of communication Grievant should avoid when a student has lost his or her temper with a follow-up observation and evaluation as to whether Grievant is able to put instruction into practice.

Finally, when and under what circumstances to make a formal or written report appear to be amenable to correction. Grievant should be required to review the reporting requirements and her future adherence to the expectations can be monitored by the observation and evaluation process. In essence, all of the misconduct of which Grievant is accused is correctable. Accordingly, the undersigned finds that Respondent failed to establish the charges against Grievant, and, under the unique circumstances of this case, Grievant is entitled to an improvement plan.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989).

2. "The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. VA. CODE § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ*., Docket No. 91-20-005 (Apr. 16, 1991). *See Beverlin v.*

Bd. of Educ., 158 W. Va.1067, 216 S.E.2d 554 (1975)." *Graham v. Putnam County Bd. of Educ*., Docket No. 99-40- 206 (Sep. 30, 1999).

3. An employee of a county board of education may be suspended or dismissed only 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.

4. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002) (*per curiam*). *See Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). "[F]or 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, supra*.

5. The term "immorality" has been interpreted as, "connotes conduct 'not in conformity with accepted principles of right and wrong behavior; contrary to the moral codes of the community; wicked; especially, not in conformity with the acceptable standard sexual behavior.'" *Golden v. Bd. of Educ. of the County of Harrison*, 169 W. Va. 63, 285 S.E,2d 665, 668 (1981); *Hayes v. Kanawha County Bd. of Educ.*, Docket No. 94-20-1143 (Jun. 28, 1995). "'Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires at least

an inference of conscience intent.' *See Hayes, citing Youngman v. Doerhoff*, 890 S.W.2d 330 (MOCC, 1994)." *Bell v. Mingo County Bd. of Educ.*, Docket No. 97-29-172 (Mar. 10, 1998); *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

6. Respondent failed to prove the reasons for termination of Grievant's employment by a preponderance of the evidence.

7. Even when Respondent labels Grievant's conduct as "insubordination," where the underlying complaints regarding an employee's conduct relate to her employment, "the effect of [W. VA. CODE § 18A-2-12a] 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).

8. County boards of education have the burden of proof to show that conduct was not and is not correctable. *Maxey*, *supra*.

9. Respondent did not establish that Grievant's conduct was not and is not correctable.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant to her position as an Aide, with back pay, seniority, and benefits. Respondent is **ORDERED** to remove any reference to this discipline in Grievant's personnel file. Respondent is **ORDERED** to develop a feasible improvement plan consistent with this Decision.

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 (eff. July 7, 2018).

Date: September 24, 2020

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Ronald L. Reece
Administrative Law Judge