THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PAMELA PETERS,

Grievant,

v. **Docket No. 2019-0541-OhiED**

OHIO COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Pamela Peters, is employed by Respondent, Ohio County Board of Education. On October 30, 2018, Grievant filed this grievance against Respondent, stating in part:

> Grievant, Pamela Peters, sustained a compensable work place injury on April 14, 2016 while in her employment at Ohio County Schools. Ms. Peters subsequently and continues to receive treatment at the Cleveland Clinic. She was diagnosed with an injury to her left leg which has resulted in a disabling medical condition which has made her teaching duties onerous because of the continued pain of the workplace injury. Ms. Peters has continued to be treated for her workplace injury through her date of termination. …
>
> The Ohio County Board and its agents have acted in [an] arbitrary and capricious manner in terminating Ms. Peter's employment. Further, the Board of Education has disregarded its own regulations and policies and the regulations of the West Virginia Board of Education. …

Grievant further alleges that her termination was in retaliation for using Workers' Compensation and that Respondent violated HIPPA, the FMLA, and the ADA by contacting her medical provider without permission and failing to provide extended leave or sufficient accommodations. For relief, "Grievant desires reinstatement to her prior teaching position and back pay and benefits to her date of termination."

Grievant filed directly to level three of the grievance process.[1] On October 15, 2019, a level three hearing was held before the undersigned at the Grievance Board's Westover office. Grievant appeared in person and was represented by David White, Esq. Respondent appeared by Superintendent Kimberly Miller and by counsel, Jason Long, Dinsmore & Shohl, LLP. This matter became mature for decision on December 9, 2019. Each party submitted written proposed findings of fact and conclusions of law (PFFCL).

Synopsis

Grievant was employed by Respondent as a classroom teacher. After missing two years due to a workplace injury, she returned to work, only to be sidelined for a month with shingles. After Grievant exhausted her paid leave, Respondent processed the rest of her absence as unpaid leave. Respondent informed Grievant she would need preapproval to use her three remaining unpaid days. It also directed her to prepare lesson plans a week in advance. Grievant then missed three days due to illness, after informing Respondent of her absence each morning. Whereupon, Respondent terminated her for not obtaining preapproval to use unpaid leave and not having adequate lesson plans. Grievant challenges her termination because she was not provided an improvement period and lacked prior discipline. Respondent failed to prove Grievant's conduct was willful or non-correctable.

Grievant further alleges that Respondent terminated her in retaliation for using Workers' Compensation and violated HIPPA, the FMLA, and the ADA by contacting her medical provider without permission and failing to provide her extended leave or sufficient

[1]West Virginia Code § 6C-2-4(a)(4) permits a grievant to proceed directly to level three of the grievance process when the grievance deals with the discharge of the grievant.

accommodations. Grievant did not prove that these actions entitled her to relief. Accordingly, this grievance is GRANTED, in part, and DENIED, in part.

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 classroom teacher for thirteen years, the last eight of which were at Steenrod Elementary School.

2. On or about April 14, 2016, Grievant suffered a work-related injury, resulting in her missing work for a significant period during the 2016-2017 and 2017-2018 school years.

3. Grievant continues to receive treatment for this injury at Cleveland Clinic. (Grievant's testimony)

4. In December 2016, Respondent offered Grievant a temporary modified work assignment, teaching on a reduced hours schedule. Grievant's attorney never agreed to the proposal and it was not implemented. (Respondent's Exhibit 31 and Grievant's testimony)

5. Sometime after the injury, Grievant received Workers' Compensation until February 15, 2017.

6. On March 1, 2018, Grievant's physician issued a statement clearing Grievant to return to work full time but listed a few limitations. (Respondent's Exhibit 1)

7. On June 22, 2018, Respondent sent Grievant a letter stating that she had ten days to give notice of her intent to return to work for the 2018-2019 school year, that she could request reasonable accommodations to enable her to perform the essential

functions of her job, and that termination would be initiated if she was unable to return to work under reasonable accommodations. (Respondent's Exhibit 2)

8. On July 12, 2018, Grievant faxed Respondent a note from her doctor indicating her ability to return to work on August 15, 2018. The note did not indicate whether Grievant required any accommodations or had plans for returning to work. (Respondent's Exhibit 3)

9. On July 17, 2018, Respondent again sent Grievant a letter of inquiry regarding whether she intended to request accommodations and return to work. (Respondent's Exhibit 3A)

10. On July 24, 2018, Grievant again saw her doctor who released her to return to work on a trial basis with accommodations. (Respondent's Exhibit 6)

11. On July 25, 2018, Grievant's doctor sent Respondent a letter requesting accommodations, which included providing Grievant a teaching assistant and permitting her to wear an ankle brace/tennis shoes, avoid extreme temperatures, and use a cane. (Respondent's Exhibit 4 & 7)

12. On July 25, 2018, Grievant met with Respondent to review her request for accommodations and a return to work. (Respondent's Exhibit 4)

13. On August 3, 2018, Respondent sent Grievant a letter granting most of Grievant's requested accommodations but denying her request for a classroom aide. Respondent agreed to make the facility accessible, provide access to an ergonomic workstation, allow use of a fan/air conditioner or heater at workstation, modify non-instructional duties, provide assistance for the physical transition of students outside the

classroom, assist with moving classroom furniture, and honor statutory leave days. (Respondent's Exhibit 4)

14. On August 8, 2018, Grievant sent Respondent a letter questioning some of the accommodations, including its not allowing her to exceed her monthly sick leave, and she again requested a classroom aide. (Respondent's Exhibit 5)

15. On August 13, 2018, Grievant failed to report for her first day of work under her 200-day employment contract for 2018-2019. Respondent counted this as an unexcused absence.

16. On August 15, 2018, Grievant reported to work and met with Respondent to discuss accommodations. This meeting did not resolve their differences.

17. Grievant again reported to work on August 16 & 17, 2018, the first instructional days.

18. On Monday, August 20, 2018, Grievant reported a personal illness day for shingles. Grievant did not prepare lesson plans for the substitute teacher. (Respondent's Exhibit 10)

19. Grievant did not provide lesson plans for the period between August 20, 2018 through September 16, 2018. (Grievant's testimony)

20. Grievant's doctor provided a series of written excuses for her absence from work due to shingles, starting with August 20, 2018 and ending September 16, 2018. (Respondent's Exhibits 12, 14, 15, 18, & 19 and Grievant's testimony)

21. In conjunction with her frequent practice, Respondent's Director of Human Resources, Susan Fox-Nolte, contacted Grievant's doctor without Grievant's permission in order to verify Grievant's medical excuse. The doctor's office confirmed the excuse

and informed Ms. Fox-Nolte that Grievant could not prepare lesson plans. (HR Director Fox-Nolte's testimony)

22. After receiving the September 4, 2018, medical excuse, Respondent excused Grievant from preparing lesson plans through September 16, 2018. (HR Director Fox-Nolte's testimony)

23. On September 17, 2018, Grievant again met with Respondent to discuss accommodations and a return to work.

24. On September 17, 2018, Respondent provided Grievant a letter which included a copy of Respondent's Policy 4016.01. The letter noted that as of September 7, 2018, Grievant had exhausted her front-loaded statutory paid leave days for the 2018-2019 school year and that the days she took off from September 7, 2018 through September 16, 2018, were being treated as short-term unpaid leave, referred to as "dock-days." Grievant was put on notice that this was a one-time professional courtesy and that in the future she would be required to comply with policy requiring her to request and receive preapproval for "dock-days." However, the letter clarified that this directive was not disciplinary. (Respondent's Exhibit 20)

25. The letter informed Grievant that as of September 17, 2018, she had three "dock-days" remaining. "Dock-days" cannot exceed ten per school year. However, even if "dock-days" are available, there is no guarantee they will be approved. (Respondent's Exhibit 20)

26. Grievant did not read the September 17, 2018 letter right away. (Grievant's testimony)

27. On September 17, 2018, at 9:30 a.m., Grievant was provided with a laptop, teacher's manuals, and a copy of her weekly schedule to enable her to prepare lesson plans for the rest of the week. (Respondent's Exhibit 21)

28. On September 18, 2018, at 6:38 a.m., Grievant texted the Principal of Steenrod Elementary School, Michelle Dietrich, to inform her that Grievant had a doctor's appointment that day which would cause her to miss work. Even though Grievant had not put in a request for a substitute teacher, Respondent retained one. (Respondent's Exhibit 21)

29. On Tuesday, September 18, 2018, Respondent retrieved lesson plans from Grievant's desk. These plans were a photocopy of Grievant's plans from three years prior and did not match the resource schedule provided to Grievant. (Respondent's Exhibits 21 & 22)

30. In a letter dated September 18, 2018, Principal Dietrich informed Grievant that "the plans you left were not suitable for a substitute to follow" and failed to comply with West Virginia Code § 18A-2-12. This code section states that "lesson plans are intended to serve as a daily guide for teachers and substitutes for the orderly presentation of the curriculum." (Respondent's Exhibit 21)

31. The letter further instructed Grievant to turn in her lesson plans every Friday by 4:30 p.m. and notified her that further instances of unsuitable plans would be followed by disciplinary action. (Respondent's Exhibit 21)

32. In her thirteen years with Respondent, Grievant had never been cited, let alone disciplined, for failure to prepare adequate lesson plans, even though she had often

used lesson plans from textbooks rather than prepared them herself. (Grievant's testimony)

33. On September 19, 2018, the only lesson plans Grievant had available were from three years prior. Grievant had used these as templates to prepare lesson plans. (Grievant's testimony)

34. On September 20, 2018, at 7:21 a.m., Grievant notified Respondent of her intended absence for the day due to swollen ankles. That same day, Grievant's doctor diagnosed her with edema of her ankle and lower leg. (Grievant's Exhibits 1 & 3 and Grievant's testimony)

35. On September 20, 2018, Grievant did not leave lesson plans for the substitute teacher, even though Grievant had worked on Wednesday, September 19, 2018. (Respondent's Exhibits 24 & 25)

36. On September 21, 2018, at 6:17 a.m., Grievant notified Respondent of her intended absence for the day. Grievant did not leave lesson plans. No substitute teacher was available to accept the late request, so Respondent used a full-time teacher to cover. (Respondent's Exhibit 25)

37. Grievant's understanding is that the substitute is required to do lesson plans for subsequent days. (Grievant's testimony)

38. Grievant had not requested or received approval for "dock-days" on September 18, 20, & 21, as required by Respondent's September 17 letter and Policy 4016.01, even though Grievant had three "dock-days" remaining. (Superintendent Miller's testimony)

39. Grievant knew by September 17, 2018, that she had three “dock-days” available. (Respondent’s Exhibit 20 and Grievant’s testimony)

40. On September 20 & 21, 2018, Grievant had edema in her legs. (Grievant’s Exhibit 1 & 3)

41. On Friday, September 21, 2018, Grievant failed to submit her lesson plans for the following week. (Respondent’s Exhibit 25)

42. On September 21, 2018, Superintendent Miller notified Grievant by letter that she would be recommending Grievant for termination. She justified termination using the following infractions by Grievant: calling off on September 20 & 21, 2018 without having lesson plans available; using three-year-old lesson plans for September 18 & 19, 2018; failing to comply with the “dock-days” policy on September 18, 20, & 21, even after being informed of the process for receiving “dock-days”; failing to prepare lesson plans on September 21, 2018, for the following week; and being “AWOL” from her job. (Respondent’s Exhibit 25)

43. Respondent has never terminated a teacher simply for submitting inadequate lesson plans but has done so in combination with other infractions as a basis for dismissal. (HR Director Fox-Nolte’s testimony)

44. On May 3, 2019, Grievant’s doctor prepared a note stating that Grievant should have received a work excuse for September 20, 2018 and September 21, 2018. (Grievant’s Exhibit 1)

45. Grievant’s medical condition necessitates that she stand periodically. Even though Respondent promised to provide Grievant an ergonomic desk, one was never provided. (Respondent’s Exhibit 4 and Grievant’s testimony)

46. On September 17, 2019, a *TRS Application for Disability Retirement Benefits – Employer's Report* was completed on Grievant's behalf by Respondent. (Respondent's Exhibit 29)

Discussion

The grievant bears the burden of proof in a grievance that does not involve a disciplinary matter and must prove her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). In disciplinary matters, the burden of proof rests with the employer to prove that the action taken was justified, and the employer must prove the charges against an employee by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3. "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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

Respondent contends that it was justified in terminating Grievant because her conduct was willful and insubordinate, implying it was not correctable. Grievant counters that her conduct was not willful, implying that it was simply unsatisfactory performance and therefore correctable. Grievant argues that she should have first been provided an improvement plan and lesser discipline, since she has never received these in her thirteen years with Respondent. She contends she did not know that her failure to prepare lesson plans or receive permission could result in termination, and implies she was never properly trained.

Grievant further asserts that Respondent terminated her in retaliation for using Workers' Compensation. She contends that Respondent also violated the Health Insurance Portability and Accountability Act (HIPPA), the Family and Medical Leave Act (FMLA), and the Americans with Disabilities Act (ADA) by contacting her medical provider without permission and by not providing her extended medical leave or sufficient ADA accommodations. Grievant implies that these infractions render her termination improper. Respondent counters that the undersigned has no jurisdiction to determine ADA compliance, that the accommodations Respondent offered were reasonable, and that this grievance became moot when Grievant applied for disability retirement benefits.[2]

Before dealing with the merits, the undersigned must address Respondent's mootness and jurisdiction arguments. "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Burkhammer v. Dep't of Health & Human Res*., Docket No. 03-HHR-073 (May 30, 2003) (*citing Pridemore v. Dep't of Health & Human Res*., Docket No. 95-HHR-561 (Sept. 30, 1996)). Grievant did not have an opportunity to address mootness because it was first raised in Respondent's PFFCL. Nevertheless, Respondent failed to present authority for the proposition that this action would be moot if Grievant had applied for disability retirement after filing her grievance. Further, the only evidence touching on the allegation that Grievant retired is a *TRS Application for Disability Retirement Benefits – Employer's Report* signed by Respondent's payroll supervisor and unrefuted testimony that Grievant requested Respondent to process this form. Respondent also failed to submit sufficient authority

[2]Mootness was first raised in Respondent's PFFCL.

for the undersigned's lack of jurisdiction over Grievant's accommodation claim. Respondent's request for dismissal is therefore denied.

As for the merits of this grievance, the undersigned will first address termination. The authority of a county board of education to terminate an employee must be based on one or more of the causes listed in West Virginia Code § 18A-2-8 and must be exercised reasonably, not arbitrarily or capriciously. *See* Syl. Pt. 2, *Parham v. Raleigh County Bd. of Educ*., 192 W. Va. 540, 453 S.E.2d 374 (1994); Syl. Pt. 3, *Beverlin v. Bd. of Educ*., 158 W. Va. 1067, 216 S.E.2d 554 (1975); *Bell v. Kanawha County Bd. of Educ*., Docket No. 91-20-005 (Apr. 16, 1991). West Virginia Code § 18A-2-8 sets out the causes for termination as follows:

> (a) 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.
>
> (b) A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve [§ 18A-2-12] of this article. …

The pivotal issue is whether Grievant's conduct was correctable. Before dismissing Grievant, Respondent was required to determine whether Grievant's conduct was correctable, regardless of the label it applied to the conduct. The West Virginia Supreme Court has held that "where the underlying complaints regarding a teacher's conduct relate to his or her performance … the effect of West Virginia Board of Education Policy is to require an initial inquiry into whether that conduct is correctable." *Maxey v. McDowell County Bd. of Educ*., 212 W. Va. 668, 575 S.E.2d 278 (2002). The provisions

of Policy 5300 referred to by the Court have since been codified in West Virginia Code § 18A-2-12a and state the following:

> (6) All school personnel are entitled to know how well they are fulfilling their responsibilities and should be offered the opportunity of open and honest evaluations of their performance on a regular basis and in accordance with the provisions of section twelve [§ 18A-2-12] of this article. All school personnel are entitled to opportunities to improve their job performance prior to the termination or transfer of their services. Decisions concerning the promotion, demotion, transfer or termination of employment of school personnel, other than those for lack of need or governed by specific statutory provisions unrelated to performance, should be based upon the evaluations, and not upon factors extraneous thereto. All school personnel are entitled to due process in matters affecting their employment, transfer, demotion or promotion.

The West Virginia Supreme Court discussed this provision of Policy 5300 in detail in the case of *Mason County Bd. of Educ. v. State Superintendent of Sch*., 165 W. Va. 732, 274 S.E.2d 435 (1980) where it wrote:

> Our holding in *Trimboli, supra*, requires that a dismissal of school personnel be based on a § 5300(6)(a) evaluation after the employee is afforded an improvement period. It states that a board must follow the § 5300(6)(a) procedures if the circumstances forming the basis for suspension or discharge are "correctable." The factor triggering the application of the evaluation procedure and correction period is "correctable" conduct. What is "correctable" conduct does not lend itself to an exact definition but must, in view of the nature of the conduct examined in *Trimboli, supra*, and in *Rogers, supra*, be understood to mean an offense of conduct which affects professional competency.

Id. at 739. Concerning what constitutes "correctable" conduct, the Court noted that "it is not the label given to conduct which determines whether § 5300(6)(a) procedures must be followed but whether the conduct complained of involves professional incompetency and whether it directly and substantially affects the morals, safety, and health of the

system in a permanent, non-correctable manner." *Id*. "A board must follow the § 5300(6)(a) procedures if the circumstances forming the basis for suspension or discharge are 'correctable.'" *Mason County Bd. of Educ., supra*.

Respondent implies Grievant's conduct was not correctable because Respondent had already informed her that she needed preapproval before taking unpaid leave and that she had to prepare weekly lesson plans by Friday. "A review of past improvement plans and disciplinary action 'can establish an employee was on notice of his inappropriate behavior, and that a continuing pattern of behavior is present which has proven not correctable.' *Bierer v. Jefferson County Bd. of Educ*., Docket No. 01-19-595 (May 17, 2002). *Byers v. Wood County Bd. of Educ*., Docket No. 2013-2075-WooED (Oct. 31, 2013)." *Yoders v. Harrison County Bd. of Educ*., Docket No. 2016-0129-HarED (Jan. 15, 2016). Grievant had been employed by Respondent for thirteen years and had never been disciplined or reprimanded in any way. She had never been provided an improvement plan. Grievant did not immediately read Respondent's letter instructing her regarding preapproval and weekly lesson plans. Even after reading the letter, Grievant remained uncertain as to her lesson plan obligations. For years, Grievant had pieced together lesson plans in a combination of ways, including old lessons plans and textbooks. Grievant was also under the misconception that substitutes would prepare lesson plans for the following days.

Respondent had the burden of proving that Grievant's behavior was not correctible. Respondent did not present evidence that Grievant had ever correctly prepared lesson plans over her thirteen years of employment or that she had ever been provided an actual improvement plan. Further, Respondent's primary evidence of willful

intent is its September 17, 2018, letter instructing Grievant to obtain preapproval before utilizing unpaid leave. Yet the manner of obtaining preapproval would have been confusing, given the last-minute nature of Grievant's request the mornings of September 20 & 21, 2018. Grievant's conduct did not "directly and substantially affect[s] the morals, safety, and health of the system in a permanent, non-correctable manner." Grievant's performance, while unsatisfactory, is correctable.

Both the charge of insubordination and willful neglect of duty levied against Grievant require that her infraction be willful. Insubordination "at least includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued by the school board or by an administrative superior. . .This, in effect, indicates that for there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd./Shepherd Coll*., 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). [F]or a refusal to obey to be "willful," 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 teacher discipline … The term 'willful' ordinarily imports a knowing and intentional act, as distinguished from a negligent act." *Bd. of Educ. of the County of Gilmer v. Chaddock,* 183 W.Va. 638, 640, 398 S.E.2d 120, 122 (1990). The West Virginia Supreme Court of Appeals has declined to make a comprehensive definition of "willful neglect of duty," instead finding that "[a] continuing course of lesser infractions may well, when viewed in the aggregate, be sufficient." *Fox v. Bd. of Educ. of Doddridge County*, 160 W.Va. 668, 672, 236 S.E.2d 243, 246 (1977).

"[T]he factor which distinguishes willful neglect of duty and insubordination from unsatisfactory performance is that the employee knows [his] responsibilities, and is competent to perform them, but elects not to complete them. When an employee's performance is unacceptable because [he] does not know the standard to be met, or what is required to meet the standards, and [his] behavior can be corrected, the behavior is unsatisfactory performance. *Bierer v. Jefferson County Bd. of Educ*., Docket No. 01-19-595 (May 17, 2002)." *Waggoner v. Cabell County Bd. of Educ*., Docket No. 2008-1570-CabED (Oct. 31, 2008).

It is important in this case to be clear on the specific conduct for which Grievant was terminated. While Respondent did not in its letter of termination state a codified ground for Grievant's dismissal, it cited the following infractions: calling off on September 20 & 21, 2018 without having lesson plans available; not preparing lesson plans for the subsequent week by Friday, September 21, 2018; using three-year-old lesson plans for September 18 & 19, 2018; failing to comply with the "dock-days" policy on September 18,

20, & 21, even after being informed of the process for receiving “dock-days”; and being “AWOL” from her job.

It is undisputed that Grievant failed to obtain permission to utilize unpaid leave on at least three occasions subsequent to being informed of her obligation to do so. Grievant had three days of unused unpaid leave remaining when she missed September 19, 20, & 21. Grievant does not dispute that she failed to prepare lesson plans for her absences on September 20 & 21, and for the subsequent week. Respondent claims that on September 18 & 19, Respondent retrieved three-year old lesson plans from Grievant’s desk. Inadequate lesson plans are better than none in light of the dearth of corrective measures. Grievant’s failure to have lesson plans submitted by September 21, 2018, for the following week was not willful, given that Grievant had been out sick most of the week.

As for Grievant’s absences, Respondent’s use of “AWOL” refers to the three days (September 19, 20, & 21) Grievant failed to obtain preapproval for unpaid leave after Respondent’s letter informed her of her obligation to do so. It is apparent that Respondent had, as a professional curtesy, allowed Grievant to utilize a combination of paid and unpaid leave for the prior month when she had shingles, even though Grievant had not been preapproved. When Grievant subsequently failed to obtain preapproval for the three days in question, she informed Respondent ahead of time, albeit the same morning, and therefore was not “AWOL.” Pictures verify her physical state. On September 20, 2018, Grievant’s doctor diagnosed her edema. Grievant was clearly sick, which makes it more likely than not that her failure to meet Respondent’s expectations was not willful. While Grievant failed to meet the performance expectations of Respondent, Grievant was never on notice that she could be terminated for failure to obtain preapproval for unpaid leave,

even though she had called in sick, or for inadequately preparing lesson plans. Grievant's unsatisfactory performance was correctable.

Insubordination and willful neglect of duty are generally more severe than unsatisfactory performance and can also be distinguished by the willfulness of the conduct. Whether Grievant had a valid basis for missing the year subsequent to the expiration of her Workers' Compensation in February 2017 is a red herring. Grievant was simply terminated for missing three days in September 2018, and for failing to adequately prepare lesson plans for four days and for a week ahead following these days. It is true that Grievant had not requested unpaid leave despite being told to do so and that Respondent had not approved unpaid leave for those three days. It is true that Respondent was not obligated to provide Grievant the final three days of unpaid leave available to Grievant. Nevertheless, Grievant had a valid medical reason for missing work. Grievant's medical condition was serious enough to warrant her missing work.

Therefore, Grievant's failure to obtain preapproval for use of her remaining three days of unpaid leave would appear to be a mere technical violation that was correctable and should not have resulted in termination without some progressive discipline or advance notice that further infractions would result in her termination. It is difficult to delineate the nature of Grievant's conduct. Grievant's conduct was undoubtedly wrong. However, even though Respondent may have had a right to discipline Grievant, it did not prove that Grievant's conduct was willful or non-correctible.

Grievant's termination was excessive discipline under the circumstances. The record of this case established that Grievant had not been disciplined in her thirteen years of employment with Respondent for any reason, including failure to obtain preapproval

for unpaid leave or failure to adequately prepare lesson plans. Termination appears to be a severe penalty for the infractions cited by Respondent, particularly given the dearth of prior discipline and the confusion surrounding Grievant's obligations in preparing lesson plans and in obtaining last-minute preapproval for unpaid leave. Respondent's June 22, 2018 letter to Grievant informing her that she would be terminated if she failed to give notice of her intent to return within ten days was not disciplinary, but simply elicited information on Grievant's intent to continue working for Respondent. While Respondent had advised Grievant that she could not utilize unpaid leave without preapproval and that she had to prepare adequate lesson plans, Respondent had never given her reason to believe it could result in her immediate termination. Further, no witness could ever recall an instance where a teacher had been terminated without progressive discipline for failure to submit or adequately prepare lesson plans.

Grievant's remaining allegations are that Respondent failed to provide her with leave under the FMLA, failed to provide her sufficient ADA accommodations, violated HIPPA by contacting her doctor without permission, and terminated her in retaliation for her utilization of Workers' Compensation. Grievant implies that the lack of FMLA leave and sufficient ADA accommodations render her termination improper, but cites no authority for this remedy. Neither does Grievant cite any legal authority for the supposition that Respondent's calling her doctor to verify a doctor's excuse violated HIPPA, that she was entitled to leave under the FMLA, or that the accommodations offered her were insufficient. The undersigned will therefore not further address Grievant's claims that Respondent violated HIPPA, the FMLA, and the ADA.

As for the protections afforded Grievant in her pursuit of Workers' Compensation, under the Workers' Compensation Act, "[n]o employer shall discriminate in any manner against any of his present or former employees because of such present or former employee's receipt of or attempt to receive benefits under this chapter." W. VA. CODE § 23-5A-1. The Workers' Compensation Act is a statute applicable to Grievant which Respondent allegedly violated by retaliating against her. Grievant does not seek to adjudicate her claim for Workers' Compensation benefits (over which the Grievance Board does not have jurisdiction), but, rather, seeks to block her employer's alleged wrongful termination action taken against her in retaliation for her Workers' Compensation claim. This is a grievance claim which is cognizable under the statutory grievance procedure for state employees. *See Coddington v. W. Va. Dep't of Health & Human Res*., Docket Nos. 93-HHR-265/266/267 (May 19, 1994), *aff'd*, Lew. Co. Cir. Ct. Docket No. 94-C-00036 (Jan. 25, 1995).

The West Virginia Supreme Court has set forth a three-phased assessment for determining whether a discharged employee has been retaliated against for engaging in a protected activity. "In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation must establish a *prima facie* case." *Freeman v. Fayette Cty. Bd. of Educ*., 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004). In syllabus point six of *Freeman*, the West Virginia Supreme Court specifically applied the same elements required to prove a *prima facie* case under the West Virginia Human Rights Act to a claim arising from a public employee grievance, stating:

> [T]he burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant

> engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

Id., Syl. Pt. 6, 215 W. Va. at 275, 599 S.E.2d at 698 (*citing* Syl. Pt. 4, *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); Syl. Pt. 1, *Brammer v. Human Rights Comm'n*, 183 W. Va. 108, 394 S.E.2d 340 (1990); Syl. Pt. 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)). If Grievant establishes a *prima facie* case, the second and third phases of assessing retaliatory discharge come into play. Under these phases, Respondent must rebut Grievant's *prima facie* case of retaliatory discharge and Grievant must then prove that the reasons given by Respondent were pretext for unlawful discrimination or retaliatory discharge.

Under the first phase, the discharged employee must satisfy all four elements to make a *prima facie* case for retaliation. Grievant only satisfied three of the four elements. Grievant proved that she was on Workers' Compensation until February 2017, and that Respondent knew this when it terminated her. However, Grievant did not prove that her discharge was close enough in time to her last receiving Workers' Compensation to infer retaliatory motivate. One and a half years passed between the date Grievant last received Workers' Compensation in February 2017, and her termination in September 2018. The undersigned deems this too large a gap to infer retaliatory motive. Furthermore, Grievant failed to present any other evidence to establish a retaliatory motive. The second and third phases of retaliatory discharge analysis therefore do not come into play.

Grievant did not prove that Respondent terminated her for taking Workers' Compensation, that Respondent violated HIPPA by contacting her medical provider, that

Respondent thwarted the FMLA by not providing her extended medical leave, or that Respondent failed to provide her sufficient ADA accommodations. Conversely, Respondent did not prove that Grievant's conduct was willful or non-correctible. Grievant was therefore entitled to an opportunity to improve. As such, it was unreasonable for Respondent to terminate Grievant's employment.

Accordingly, the grievance is GRANTED, in part, and DENIED, in part.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The grievant bears the burden of proof in a grievance that does not involve a disciplinary matter and must prove her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). In disciplinary matters, the burden of proof rests with the employer to prove that the action taken was justified, and the employer must prove the charges against an employee by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3. "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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

2. The authority of a county board of education to terminate an employee must be based on one or more of the causes listed in West Virginia Code § 18A-2-8 and must be exercised reasonably, not arbitrarily or capriciously. *See* Syl. Pt. 2, *Parham v. Raleigh County Bd. of Educ*., 192 W. Va. 540, 453 S.E.2d 374 (1994); Syl. Pt. 3, *Beverlin v. Bd.*

of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975); *Bell v. Kanawha County Bd. of Educ*., Docket No. 91-20-005 (Apr. 16, 1991).

3. W. Va. Code § 18A-2-8 sets out the causes for discipline as follows:

> (a) 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.
>
> (b) A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve [§ 18A-2-12] of this article. ...

4. The West Virginia Supreme Court of Appeals has held that "where the underlying complaints regarding a teacher's conduct relate to his or her performance … the effect of West Virginia Board of Education Policy is to require an initial inquiry into whether that conduct is correctable. " *Maxey v. McDowell County Bd. of Educ*., 212 W. Va. 668, 575 S.E.2d 278 (2002). The provisions of Policy 5300 referred to by the Court have since been codified in West Virginia Code § 18A-2-12a and state the following:

> (6) All school personnel are entitled to know how well they are fulfilling their responsibilities and should be offered the opportunity of open and honest evaluations of their performance on a regular basis and in accordance with the provisions of section twelve [§ 18A-2-12] of this article. All school personnel are entitled to opportunities to improve their job performance prior to the termination or transfer of their services. Decisions concerning the promotion, demotion, transfer or termination of employment of school personnel, other than those for lack of need or governed by specific statutory provisions unrelated to performance, should be based upon the evaluations, and not upon factors extraneous thereto. All school personnel are entitled to due process in matters affecting their employment, transfer, demotion or promotion.

5. The Court discussed this provision of Policy 5300 in detail in the case of *Mason County Bd. of Educ. v. State Superintendent of Sch*., 165 W. Va. 732, 274 S.E.2d 435 (1980) where it wrote:

> Our holding in *Trimboli, supra*, requires that a dismissal of school personnel be based on a § 5300(6)(a) evaluation after the employee is afforded an improvement period. It states that a board must follow the § 5300(6)(a) procedures if the circumstances forming the basis for suspension or discharge are "correctable. " The factor triggering the application of the evaluation procedure and correction period is "correctable" conduct. What is "correctable" conduct does not lend itself to an exact definition but must, in view of the nature of the conduct examined in *Trimboli, supra*, and in *Rogers, supra*, be understood to mean an offense of conduct which affects professional competency.

Id. at 739. Concerning what constitutes "correctable" conduct, the Court noted that "it is not the label given to conduct which determines whether § 5300(6)(a) procedures must be followed but whether the conduct complained of involves professional incompetency and whether it directly and substantially affects the morals, safety, and health of the system in a permanent, non-correctable manner." *Id*. "A board must follow the § 5300(6)(a) procedures if the circumstances forming the basis for suspension or discharge are 'correctable.'" *Mason County Bd. of Educ., supra*.

6. Respondent did not prove by a preponderance of evidence that Grievant's conduct was non-correctible or willful. Grievant was therefore entitled to an opportunity to improve before being terminated, as her termination was not justified.

7. Grievant did not prove by a preponderance of evidence that Respondent terminated her for taking Workers' Compensation, that Respondent violated HIPPA by contacting her medical provider, that Respondent thwarted the FMLA by not providing her

extended medical leave, or that Respondent failed to provide her sufficient ADA accommodations.

Accordingly, this grievance is GRANTED, in part, and DENIED, in part. Respondent is ORDERED to reinstate Grievant to the position of a full-time 200-day teacher for the Ohio County Board of Education and to provide her back pay from the date of her dismissal to the date she is reinstated, plus interest at the statutory rate; to restore all benefits, including seniority; and to remove all references to the 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: January 28, 2020

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Joshua S. Fraenkel
Administrative Law Judge