# THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**TRACEY RUDDLE,**
**Grievant,**

**v.** **Docket No. 2019-0534-RanED**

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

## DECISION

Grievant, Tracey Ruddle, was employed as a substitute classroom teacher by the Randolph County Board of Education. By letter dated September 25, 2018, Superintendent Devono informed Grievant that he would recommend the termination of her contract as a substitute classroom teacher. Grievant had been, in effect, suspended since the beginning of the 2018-2019 school year as she had not been permitted to accept substitute assignments. Grievant requested a hearing before Respondent on Mr. Devono's recommendation for termination. Respondent conducted a hearing on October 23, 2018. At the conclusion of the hearing, Respondent approved the recommendation of Mr. Devono for the termination of Grievant's contract. Grievant appealed her suspension without pay and termination directly to Level Three of the grievance procedure on October 26, 2018. The undersigned conducted an evidentiary hearing on September 9, 2019, and October 31, 2019, at the Randolph County Development Authority, Elkins, West Virginia. The Grievant appeared in person, and by her counsel, Jamie R. Fox, Fox Law Office, PLLC, and John E. Roush, AFT-WV/AFL-CIO. Respondent appeared by its superintendent and by counsel, Denise M. Spatafore, Dinsmore & Shohl, LLP. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on December 30, 2019.

## Synopsis

Respondent contends that Grievant was terminated from employment for willful neglect of duty and insubordination. Respondent failed to meet its burden of proof and establish these charges by a preponderance of the evidence at the evidentiary hearing. In addition, the record established that Respondent's action of termination was precipitous due to the nature of Grievant's conduct. Given the unique 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, under the unique circumstances of this case, 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 began employment with Respondent as a substitute teacher in 2009. Thereafter, she worked for several years as a regular, full-time teacher. In 2017, she was again employed as a substitute teacher.

2. During the 2017-2018 school year, Grievant was serving as a substitute in a long-term position at Elkins Middle School.

3. While working at Elkins Middle School, Grievant received two letters of reprimand from the school principal. The reprimands addressed concerns regarding Grievant's co-teaching abilities, classroom management skills, and inappropriate conduct, specifically issues regarding her unprofessional and disrespectful behavior toward superiors.

4. Grievant's daughter was a student at Beverly Elementary School in the preschool class during the 2011-2012 school year.

5. On or about May 31, 2018, Grievant first learned that her daughter reported disturbing experiences in the pre-K room at Beverly Elementary School in the 2010-2011 school year.

6. On or about June 1, 2018, members of the teaching staff at Elkins Middle School met in the late morning. The team leader, Kellie Vandevender, mentioned that her child would have had the same pre-K teacher as Grievant's child when she was in pre-K. Grievant replied that her daughter had a negative experience in pre-K at Beverly Elementary School.[1]

7. Two students, who happened to be in the room where the teachers were meeting, spoke up indicating that they also had negative experiences while in pre-K at Beverly Elementary School. Ms. Vandevender took the lead in asking questions of the students. Grievant took notes and asked one of the students to write down her experiences. The student did not appear upset by this request and complied.

8. Grievant related something of her daughter's experiences to the two students, but this was done after the two students disclosed their experiences and as a way of reassuring them that their disclosures would be taken seriously.

9. The group of teachers decided that Ms. Vandevender would report the allegations of misconduct to the principal and that Grievant would speak with

[1] The report by Grievant's daughter was that she was forced into a closet for hours, and that she was told that there was a monster in the closet that would eat her.

Superintendent Devono. The other teachers felt that these actions on the part of Ms. Vandevender and Grievant would satisfy their responsibilities as mandatory reporters.

10. Grievant worked at Beverly Elementary School as a fifth grade teacher when she was a regular employee. On February 7, 2017, via email, Principal Paul Zickefoose issued a reminder to Grievant regarding confidentiality rules and training she had received, warning her not to discuss students with others.

11. Grievant fulfilled her mandatory reporting duty by speaking with Superintendent Devono about the allegations on the same or next day after the teachers' meeting, and by her understanding that Ms. Vandevener reported the allegations to their principal. Grievant offered Mr. Devono the statement of her daughter, and the other two students. Mr. Devono accepted the daughter's statement, but declined the statement of the other two students. Mr. Devono indicated that the administration would investigate the allegations.

12. Grievant later contacted the Department of Health and Human Resources, but this was not an effort to report the allegations. This contact arose out of her concern that allegations were not being properly investigated.

13. Grievant made no public disclosures of the allegations of misconduct in the pre-K program at Beverly Elementary School. Grievant had prepared a social media post related to the situation. Grievant sought Ms. Vandevender's advice on whether or not to publish it on social media. Ms. Vandevender advised against publishing the post. This material eventually made it to Paul Zicekefoose. How is unclear from the record. Mr.

Zickefoose brought it to the evidentiary hearing, and it is now part of the record of this proceeding.

14. Grievant contacted Paul Zickefoose by text concerning the allegations of abuse. Mr. Zickefoose is the principal at Beverly Elementary School. Grievant did this because he was also the principal at Beverly Elementary School at the time of the alleged misconduct.

15. Mr. Zickefoose opined that the text itself did not constitute misconduct as it was appropriate for Grievant to report the alleged misconduct to him as the principal at the time the misconduct was alleged to have occurred.

16. Ellen Sycafoose is an employee of the Department of Health and Human Resources who was involved in the investigation of the allegations of abuse in the pre-K classroom at Beverly Elementary School. Ms. Sycafoose acknowledged that she was responsible for the report prepared by the Department of Health and Human Resources that the students indicated that Grievant had taken them out of class to talk about the allegations of abuse. However, Ms. Sycafoose admitted that she was not the employee who interviewed the students nor could she confirm that she had witnessed the interviews of these two students. Neither of the students testified at the evidentiary hearing.

17. Current Superintendent Debbie Schmidlen believed that Grievant had been terminated for going beyond the scope of her responsibilities as a substitute teacher by conducting an investigation of the allegations of abuse, doing so on school time, and making social media posts about the allegations of abuse. A more detailed list of grounds

for the termination is found in the letter of dismissal dated September 25, 2019. Respondent's Exhibit No. 4.

18. The letter of dismissal provided, in pertinent part, that:

> "[L]ast spring, while you were assigned as a long-term substitute teacher at Elkins Middle School ("EMS"), you raised the allegation that your daughter had just recently (in May of 2018) reported that she had been subjected to mistreatment while enrolled as a preschool student at Beverly Elementary in 2010. You then made contact with several EMS students who had reportedly attended the same preschool during that time, even taking students out of class and asking them questions, during the school day, regarding what may have happened to them in preschool. You also met with EMS students, again during school hours, and had them make lists of students who were students in the 2010 preschool class and assisted them in making 'lists' of the types of abuse and maltreatment that were alleged to have occurred in the preschool. After having these discussions with students and with other teachers at EMS, you posted allegations on social media regarding alleged abuse that might have occurred at Beverly Elementary School, asking people to contact you, and also published a list of allegations against school personnel. Despite being advised by other teachers that it was your legal responsibility as a mandatory reporter to report any abuse allegations to the proper authorities at the Department of Health and Human Resources, you did not make any official report until after spending more than a week, at least, discussing the allegations with students, parents, employees, and attorneys.
>
> After a proper report was finally made to DHHR (and school administration notified) of the abuse allegations, an investigation was conducted by the IIU unit over the summer. Numerous students, parents, and school employees were interviewed. The investigation concluded that, largely due to adult interference and influence over the students, along with the extreme inconsistencies in the allegations and witness statements, no abuse could be substantiated. Your inappropriate conduct in particular, such as conducting meetings with students at school, taking them out of class to ask questions and make lists, and publishing information given to you by them on social media, was specifically discussed in the IIU report as being problematic to the investigation. It was reported by students that you shared text messages between you and other parties with them in order to make sure that their statements of allegations 'matched' statements from other alleged victims. Some students were uncomfortable with you attempting to question them at school and reported this to other teachers."

19. The record does not support a finding that Grievant sent texts to students and school personnel in order to ensure the written statements of the students matched as alleged in the letter of charges.

20. The record does not support a finding regarding students being made uncomfortable by questions from Grievant concerning the allegations of abuse in the pre-K room at Beverly Elementary School as alleged in the letter of charges.

21. On August 15, 2018, Grievant inquired by email about the status of the investigation by Superintendent Devono because she was concerned that the investigation was not being actively pursued. The only response received by the Grievant was that Mr. Devono was considering discipline against her.

22. By letter dated September 25, 2018, Grievant was advised by Superintendent Devono that he would be recommending to the Board of Education that her employment be terminated. The reasons given were Grievant's inappropriate actions related to the abuse allegations, her conduct's impact upon the IIU investigation, and her history of being reprimanded for code of conduct violations.

23. Respondent terminated Grievant's employment after a hearing held before the Board of Education on October 23, 2018.

## 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 contends that Grievant's alleged conduct amounted to willful neglect of duty and insubordination. Grievant counters that the record does not establish that she failed in any duty as a substitute teacher or took any action inconsistent with her role as a substitute teacher. 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*.

"Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. *Adkins v. Cabell County Bd. of Educ.*, Docket No. 89-06-656 (May 23, 1990). This is a fairly heavy burden, given that Respondent must not only prove that the acts it alleges did occur, but also that the reason for Grievant's neglect of duty was more than simple negligence." *Tolliver v. Monroe County Bd. of Educ.*, Docket No. 01-31-493 (Dec. 26, 2001). Willful neglect of duty "is conduct constituting a knowing and intentional act, rather than a negligent act. *Williams v. Cabell County Bd. of Educ.*, Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ.*, Docket No. 95-29-151 (Aug. 24, 1995); *Hoover v. Lewis County Bd. of Educ.*, Docket No. 93-21-427 (Feb. 24, 1994).

The record of this case indicates that Grievant did not seek out students concerning the allegations of misconduct in the pre-K classroom at Beverly Elementary School. The sworn testimony of the witnesses, who were present for the meetings,

establish that the two students in question were already in the room where the teachers were meeting, and volunteered the information. Grievant's role in taking down the information provided by the students, and her reporting those allegations to Superintendent Devono were consistent with her responsibilities of a mandatory reporter of alleged abuse.

The record of the case lacks evidence that Grievant took students out of class to ask about the allegations of abuse or that she made students feel uncomfortable. Simply put, Ms. Sycafoose's representations of hearsay statements purportedly made by the students in question to another employee of the Department of Health and Human Resources do not establish the truth of such allegations. "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).

Respondent did not provide any explanation why the Department of Health and Human Resources' Investigator was not called to testify. Respondent did not provide any explanation why Superintendent Devono was not called to testify, although the undersigned does recognize that Mr. Devono is no longer employed by Respondent. Ms. Sycafoose did not conduct the interviews and could not confirm that she was present for the interviews of the students. Ms. Sycafoose's testimony at the evidentiary hearing was double hearsay, she testified to what another individual told her to which she was told by other individuals. While such statement are admissible in administrative proceedings, they cannot be given much, if any, weight. *Kennedy v. Dep't of Health & Human Res.*, Docket No. 2009-1443-DHHR (Mar. 11, 2010).

The lack of first-hand testimony from the students in question, while somewhat understandable, failed to provide the undersigned with proof of the allegations that Grievant improperly removed students from the classroom to ask about the allegations of abuse and made them uncomfortable. As counsel for Grievant points out, this scenario is similar to that in *Landy,supra.*, in which the failure of a board of education to produce two students who allegedly witnessed the misconduct resulted in a failure of the board of education to carry the burden of proof in a termination case.

The record did not demonstrate by a preponderance of the evidence that Grievant communicated with other individuals, by text or otherwise, to try and provide consistency concerning the allegations of abuse from various students so that the statements would corroborate one another. Grievant's communication with Paul Zickefoose was

appropriate. Grievant contacted Paul Zickefoose by text concerning the allegations of abuse. Mr. Zickefoose is the principal at Beverly Elementary School. Grievant did this because he was also the principal at Beverly Elementary School at the time of the alleged misconduct. Mr. Zickefoose opined that the text itself did not constitute misconduct as it was appropriate for Grievant to report the alleged misconduct to him as the principal at the time the misconduct was alleged to have occurred.

The one remaining issue in this case, which was not addressed by parties, is the question as to whether or not this type of behavior might be correctable. Assuming *arguendo* that the facts were even remotely close to the version as Respondent sets out in their brief, the undersigned is stumped why this analysis was not applied. The undisputed facts of this case are unique. Not only was Grievant put in a position as a mandatory reporter, she was also in the unenviable position as a parent. Respondent suggests that Grievant used poor judgment, at best, in handling the situation as an employee. The undersigned is at a loss why Respondent did not recognize that, as a parent, she must have been understandably upset.

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*.

In the instant case, the language of Policy 5300 explains that correctable conduct does not lend itself to an exact definition, but must be understood to mean an offense or conduct which affects professional competency. This appears to be exactly what occurred in this case. Respondent acknowledges that Grievant was an experienced professional who had been trained and even warned regarding issues related to student confidentiality, and appropriate behavior related to both students and coworkers. Grievant's actions regarding discussions with and about students, discussing allegations against other employees, and looking into allegations were completely contradictory of established expectations of any professional educator. Not only does this alleged misconduct relate to the performance of Grievant's job, nowhere in this case did Respondent take into consideration that Grievant was also the parent. The record has

not demonstrated that Grievant's conduct was not and is not 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. "Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. *Adkins v. Cabell County Bd. of Educ.*, Docket No. 89-06-656 (May 23, 1990). This is a fairly heavy burden, given that Respondent must not only prove that the acts it alleges did occur, but also that the reason for Grievant's neglect of duty was more than simple negligence." *Tolliver v. Monroe County Bd. of Educ.*, Docket No. 01-31-493 (Dec. 26, 2001). Willful neglect of duty "is conduct constituting a knowing and intentional act, rather than a negligent act. *Williams v. Cabell County Bd. of Educ.*, Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ.*, Docket No. 95-29-151 (Aug. 24, 1995); *Hoover v. Lewis County Bd. of Educ.*, Docket No. 93-21-427 (Feb. 24, 1994).

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 "willful neglect of duty" or "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 a substitute teacher, with back pay for the balance of her long-term contract for the 2018-2019 school year, seniority, and benefits. 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: January 31, 2020**

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**Ronald L. Reece**
**Administrative Law Judge**