THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

REBECCA COMPTON,
Grievant,

v. **Docket No. 2021-2522-BOE**

WEST VIRGINIA BOARD OF EDUCATION/
WEST VIRGINIA SCHOOLS FOR THE DEAF AND THE BLIND,
Respondent.

DECISION

Grievant, Rebecca Compton, was employed by Respondent, the West Virginia Board of Education, at the West Virginia Schools for the Deaf and the Blind when she was suspended. On June 22, 2021, Grievant grieved her suspension directly to level three pursuant West Virginia Code § 6C-2-4(a)(4). The grievance states:

> On May 19th, 2021, grievant was accused of refusing to work at Seaton Hall Deaf Boys Dorm. Grievant, in fact, did not refuse to work. The shift supervisor, Susan Swanson, did not ask anyone specifically to work in the boy's dorm. The supervisor stated to a group of employees that she needed "someone" to work the dorm. As a result, the grievant was never asked directly to work in the dorm. Grievant is being suspended for one (1) day, without pay, at the beginning of the 2021/2022 school year. The respondents' actions are arbitrary and capricious, they also violate WV Code 18A-2-8.[1]

As relief: "Grievant requests any record of the suspension be removed from their personnel file, backpay for one (1) full day with interest, reinstate seniority, all rights and benefits that may be lost as a result of the suspension. In the alternative, grievant seeks extra ordinary relief requesting more proportional punishment."

[1]It appears that Grievant meant West Virginia Code § 18-17-8, which covers the grounds for suspension and dismissal of employees at the West Virginia Schools for the Deaf and the Blind.

On September 16, 2021, a level three hearing was held online before the undersigned at the Grievance Board's Westover office. Grievant appeared and was represented by Gordon Simmons, West Virginia School Service Personnel Association. Respondent appeared by Superintendent, Patricia Homberg, and was represented by Stephanie Abraham, Esq. This matter became mature for decision on October 29, 2021. Each party submitted written proposed findings of fact and conclusions of law.

Synopsis

Grievant is employed by the West Virginia Board of Education at the West Virginia Schools for the Deaf and the Blind. Grievant was suspended for not going to Seaton Hall after a supervisor said, "I need someone" to work there. Respondent did not prove this constituted an order and thus failed to prove Grievant was insubordinate, willfully neglected her duty, or compromised student safety. As such, this grievance is GRANTED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant, Rebecca Compton, has been employed as a Residential Care Specialist (RCS) for seventeen years by Respondent, the West Virginia Board of Education, at the West Virginia Schools for the Deaf and the Blind.

2. Grievant's duties entail monitoring resident students.

3. On May 19, 2021, Grievant was monitoring two resident students on the facility playground with fellow RCS Eddie Racey.

4. Two other RCS's, Henretta Fields and Cassy Whetzel, were also at the playground that day monitoring five resident students.

5. As a Residential Shift Supervisor (Supervisor), Susan Swenson had direct oversight of and was authorized to reassign any RCS based on need.

6. Supervisor Swenson went to the playground that day to look for someone to cover at Seaton Hall.

7. RCS Racey was away on break when Supervisor Swenson arrived at the playground and sat next to Grievant at a table adjacent to where RCS Fields and RCS Whetzel were seated.

8. Supervisor Swenson began talking about the behavioral problems of M.S.,[2] a resident at Seaton Hall.

9. Grievant had been instructed by supervisors on numerous occasions to work outside her regularly assigned duties and had always complied.

10. Over the years, Supervisor Swenson had given directives to Grievant and Grievant had never refused them.

11. Usually, in issuing directives, Supervisor Swenson tells subordinates "I need you to go and do [this]." However, on the occasion in question, she was not as direct. (Supervisor Swenson's testimony at level three "recording position" 52:20)

12. Rather, as Supervisor Swenson sat at the playground table next to Grievant, she said, "I need someone [to cover at Seaton Hall]." She said this so an employee stationed at Seaton Hall could be relieved of supervisory duties over resident students so she could decorate for the upcoming prom.

13. While RCS Fields and RCS Whetzel were not the ones nearest Supervisor Swenson, they were in her presence and within hearing range.

[2]In conjunction with Grievance Board protocol, initials are used to refer to juveniles.

14. Supervisor Swenson acknowledged that even though RCS Fields and RCS Whetzel could reasonably see her request as directed towards them, they did not respond. (Supervisor Swenson's testimony)

15. In her expression of need, Supervisor Swenson never ordered Grievant to go to Seaton Hall.

16. Supervisor Swenson testified that despite not informing Grievant, she did not want Grievant to go to Seaton Hall without proper coverage for her two wards. (Recording position 43:05)

17. Rather, Supervisor Swenson testified that she intended for either Grievant or her work partner, RCS Racey, to go to Seaton Hall and for the other one to stay to supervise their two wards. (Recording position 48:40)

18. Grievant did not construe the expression of need by Supervisor Swenson as an order. (Grievant's testimony)

19. Grievant previously had bad experiences with M.S.

20. Thus, Grievant told Supervisor Swenson that she would "prefer not to go" and never wanted to deal with M.S. again. (Supervisor Swenson's testimony)

21. However, Grievant did not refuse to go to Seaton Hall and did not refuse an order.

22. At this point, RCS Racey returned from break. Without any follow up with Grievant, Supervisor Swenson approached RCS Racey about covering at Seaton Hall.

23. Grievant did not go to Seaton Hall and was subsequently disciplined through a one-day unpaid suspension.

24. RCS Racey was also suspended for a day without pay for not going to Seaton Hall.[3]

25. Grievant was apparently notified of her suspension by letter.

26. Respondent did not enter the letter of suspension into the record and did not provide testimony as to its contents.[4]

Discussion

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*.

West Virginia Code § 18-17-8 covers the grounds for suspension and dismissal of employees at the West Virginia Schools for the Deaf and the Blind as follows:

> …Notwithstanding any other provisions of law, the state board may suspend or dismiss any teacher, auxiliary personnel or service personnel, subject to the provisions of this article, for immorality, incompetency, cruelty, insubordination, intemperance or willful neglect of duty. …

[3] RCS Racey grieved the same in *Racey v. BOE/SDB*, Docket No. 2021-2523-BOE.
[4]Respondent mailed its exhibits to the Grievance Board, but they had not arrived by the time the issue was addressed at the hearing. Respondent also emailed them. The undersigned informed Respondent that Grievance Board practice prohibited the Board from printing them. Respondent requested that the record be left open for a late submission of exhibits but withdrew this request before the hearing concluded.

As Respondent did not submit into the record its letter of suspension, the grounds for suspension therein are not clear. However, Respondent now contends that Grievant was suspended for insubordination, willful neglect of duty, and failure to maintain a safe environment when Grievant failed to go to Seaton Hall after Supervisor Swenson said, "I need someone [to cover at Seaton Hall]." Grievant counters that she did not take this as an order because Supervisor Swenson is usually more explicit and does not typically say "someone" when giving orders.

Respondent concedes that Supervisor Swenson was less than direct but argues that insubordination does not necessitate an explicit order. In support of this contention, it cites the following definition of insubordination provided by the Grievance Board. 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).

As for the charge of willful neglect of duty, it "encompasses something more serious than 'incompetence,' … The term 'willful' ordinarily imports a knowing and intentional act, as distinguished from a negligent act." *Bd. of Educ. of the County of Gilmer v. Chaddock*, 183 W.Va. 638, 640, 398 S.E.2d 120, 122 (1990). Regarding failure to maintain a safe environment, the code of conduct for West Virginia school employees contained in the legislative rules of the State Board of Education states that employees shall "maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination." W.VA. CODE ST. R. § 126-162-4.2.3 (2002).

The primary basis for Grievant's suspension is insubordination. There was no allegation or evidence that Grievant was scheduled for duty at Seaton Hall that day. Thus, the charges of willful neglect of duty and failure to maintain a safe environment emanate from, and can only exist, in the context of insubordination. Any duty Grievant had that day to go to Seaton Hall and keep the students there safe under her supervision would only exist if Grievant was ordered to deviate from her regularly assigned duties and cover at Seaton Hall.

There is no dispute that Supervisor Swenson said, "I need someone [to cover at Seaton Hall]." Rather, the issue is whether Grievant should have known that supervisor Swenson was talking to her and whether Grievant should have taken this ambiguous expression of need as a directive rather than a suggestion. Grievant submits that Supervisor Swenson did not directly address her but essentially made a pitch for a volunteer to the three employees seated at two adjoining tables. Supervisor Swenson sat next to Grievant. Grievant was the only one of the three to respond to the request. RCS Fields and RCS Whetzel were at the adjacent table and heard the request. They testified that they assumed Supervisor Swenson was talking to Grievant. Even so, this does not mean Grievant should have thought the same or taken it as a directive. Grievant at least knew she was part of the conversation because she told Supervisor Swenson she preferred never to work with resident M.S. (at Seaton Hall) again. This does not exclude the possibility that Grievant reasonably thought that Supervisor Swenson was talking to all three of them.

More importantly, even if Supervisor Swenson was only talking to Grievant, there was nothing in her statement to indicate it was a directive. Grievant reasonably perceived

it as a request for volunteers. The evidence shows that Supervisor Swenson usually directs subordinates to do something by saying "I need you to go and do [this]." However, on this occasion, Supervisor Swenson was ambiguous in saying "I need someone." Even if Supervisor Swenson was only addressing Grievant, it was reasonable for Grievant to interpret this statement as a request rather than an order, given that the prior directives she received were more direct. It is noteworthy that Grievant had never been accused of disobeying an order and had received numerous orders over the years from Supervisor Swenson. The only factor raised at the hearing that was different on this occasion was the ambiguous phrasing used by Supervisor Swenson.

Supervisor Swenson testified that even though her wording was ambiguous, she intended it as a directive, meaning Grievant should have gleaned her intent. Adding to the ambiguity of her request, supervisor Swenson testified that even though she did not say as much to Grievant, she did not want Grievant to go to Seaton Hall if there was no one to watch her two wards. She went on to testify that she wanted either Grievant or RCS Racey to watch their two wards while the other went to cover at Seaton Hall. Thus, even from Supervisor Swenson's perspective, it is apparent that she was looking for one of them to volunteer.

Respondent acknowledges the ambiguity of supervisor Swenson's request in quoting the already cited definition of insubordination from *Sexton*. Respondent highlights the Grievance Board's recognition in *Sexton* 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." *Id*. However, context is crucial. Grievant's willfulness is key. The act of insubordination in *Sexton* involved an employee

commandeering a disciplinary meeting and reading ever more loudly from his written grievance while ignoring multiple directives from the chair to "please sit down." Despite the employee's contention that he was never directly ordered to sit down, the Grievance Board in *Sexton* found that the employee was told to "please sit down" but did not comply. The facts in *Sexton* are clearly much different than those in the current action. The directive to "please sit down" was more direct and emphatic, and the employee's refusal to obey blatant. In *Sexton*, the chair could only have been more forceful if he had dropped the "please." Supervisor Swenson could have easily changed her request to an order by saying, "Please go" or "I need you to go" to Seaton Hall. In the instant case, there was no willful disregard on Grievant's part because the request was so ambiguous in its tone and lack of certainty that Grievant reasonably saw it as a request for a volunteer.

When the West Virginia Supreme Court dealt with the issue over a decade after *Sexton*, it set forth a three-part test. The Court held that 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*).

Respondent did not show that Supervisor Swenson ever ordered Grievant to go to Seaton Hall, let alone that Grievant refused to follow an order to go. Without the prerequisite order and refusal to obey, there cannot be willful refusal. Thus, Respondent

failed to prove by a preponderance of the evidence that Grievant was insubordinate, that she engaged in willful neglect of duty, or that she failed to maintain a safe environment.

Accordingly, the grievance is GRANTED. The following Conclusions of Law support the decision reached.

Conclusions of Law

1. 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 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. 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. West Virginia Code § 18-17-8 covers the grounds for suspension and dismissal of employees at the West Virginia Schools for the Deaf and the Blind as follows:

> …Notwithstanding any other provisions of law, the state board may suspend or dismiss any teacher, auxiliary personnel or service personnel, subject to the provisions of this article, for immorality, incompetency, cruelty, insubordination, intemperance or willful neglect of duty. …

3. "[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." B*utts v. Higher Educ. Interim Governing Bd./Shepherd Coll*., 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*).

4. Respondent did not prove by a preponderance of the evidence that Grievant was ordered to go to Seaton Hall, that she was insubordinate, that she engaged in willful neglect of duty, or that she failed to maintain a safe environment, and thus failed to prove by a preponderance of the evidence that her suspension was justified.

Accordingly, the grievance is GRANTED. Respondent is ORDERED to pay Grievant for the day she was suspended, plus interest at the statutory rate; to restore all benefits effected by the suspension, including seniority; and to remove all references to the suspension 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: December 10, 2021

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Joshua S. Fraenkel
Administrative Law Judge