

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**EUGENE EDDIE RACEY,
Grievant,**

v.

Docket No. 2021-2523-BOE

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

DECISION

Grievant, Eugene Eddie Racey, 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 November 5, 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 she needed someone to work there. Grievant contends the supervisor did not specifically address him or give an order. Respondent's witnesses gave conflicting testimony in this regard. Respondent did not prove that Grievant was ordered to go to Seaton Hall and thus failed to prove Grievant was insubordinate, willfully neglected his duty, or compromised student safety. Accordingly, 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, Eugene Eddie Racey, is employed as a Residential Care Specialist (RCS) 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 Rebecca Compton.

4. Two other RCS's, Henretta Fields and Cassy Whetzel, were also at the playground that day supervising a group of five resident students together.

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. Supervisor Swenson testified that Grievant was away on break when she arrived at the playground and sat next to RCS Compton at a table adjacent to where RCS Fields and RCS Whetzel were seated. (Level three "recording position" 24:40)

8. Supervisor Swenson testified that before Grievant returned from break, she said to RCS Compton, "I need someone [to cover at Seaton Hall so an employee stationed there can help decorate for the upcoming prom]." (Recording position 17:05)

9. Supervisor Swenson testified that when she needs help from an RCS in an emergency, she usually says, "I need you [to do this]." (Recording position 14:40)

10. However, Supervisor Swenson also testified that it is her management style to make open-ended requests rather than iron fisted directives and assumes her subordinates will say, "Yes, I'd be happy to go and do whatever you need." (Recording position 41:50)

11. While at the playground, Supervisor Swenson mentioned the behavioral problems of M.S.,² a resident at Seaton Hall.

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

12. Supervisor Swenson announced a need for coverage at Seaton Hall to employees in the playground, including Grievant and RCS Compton, but did not order anyone to go to Seaton Hall.

13. RCS Compton and Grievant previously had bad experiences with M.S.

14. RCS Compton told Supervisor Swenson that she would “prefer” not to go to Seaton Hall because she did not want to deal with M.S. again.

15. Supervisor Swenson testified that Grievant returned at that point and she said to him, “Eddie, I need somebody to go over to Seaton Hall to work with the boys.” (Recording position 17:35)

16. Supervisor Swenson testified that Grievant said, “Absolutely not, I’ve done my time with that boy [M.S.] before and I’m not working with him again.” (Recording position 18:20)

17. Supervisor Swenson testified that she immediately walked away and was fuming because either Grievant or RCS Compton could be reassigned without effecting the care of their two wards. (Recording position 19:30)

18. Supervisor Swenson testified that she interpreted Grievant’s response as a refusal. (Recording position 20:50)

19. However, Supervisor Swenson did not specifically address Grievant or order him to go to Seaton Hall and thus there was no order that Grievant could refuse.

20. Grievant told Supervisor Swenson he was not permitted to work with M.S.

21. RCS Fields testified that Supervisor Swenson did not address Grievant by name (recording position 57:55), and that, with all four RCS’s standing around after Grievant got back from his break (recording position 57:40), Supervisor Swenson said to

Grievant and RCS Compton together, “I need one of you to go to Seaton Hall” (recording position 57:30), and that Grievant told Supervisor Swenson he had papers in the office regarding his not working with M.S. (recording position 58:45).

22. RCS Whetzel testified that Supervisor Swenson did not sit down at the playground (recording position 47:40) and that Grievant told Supervisor Swenson he was involved in a CPS case with M.S. [so could not go to Seaton Hall] (recording position 48:40).

23. Supervisor Swenson testified that she had no knowledge of CPS allegations involving M.S. (recording position 31:50) and that “no one has ever told me anything about CPS allegations” (recording position 32:28).

24. Supervisor Swenson testified that Grievant previously told her that M.S. had injured him, but that she viewed this as a common occurrence for staff due to physical outbursts by some students towards staff.

25. In RCS Compton’s level three grievance hearing, Supervisor Swenson testified that she intended for either RCS Compton or Grievant to go to Seaton Hall and for the other one to stay to supervise their two wards. (*Compton v. BOE/SDB*, Docket No. 2021-2522-BOE, FOF 18)

26. Grievant failed to testify or present evidence regarding a CPS complaint against him or a prohibition against his working with M.S.

27. There was no allegation or evidence that Grievant was scheduled for duty at Seaton Hall that day.

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

- 29. RCS Compton also received a one-day suspension without pay.³
- 30. Grievant was apparently notified of his suspension by letter.
- 31. Respondent did not enter the letter of suspension into evidence and did not provide testimony as to its contents.
- 32. Neither party presented any exhibits.
- 33. All witnesses were called by Respondent.

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. ...

As Respondent did not submit into the record its letter of suspension, the grounds therein are unclear. However, Respondent now contends that Grievant was suspended

³ RCS Compton grieved the same in *Compton v. BOE/SDB*, Docket No. 2021-2522-BOE.

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 somebody" to cover at Seaton Hall. Respondent claims that Grievant refused an order and committed associated infractions because Supervisor Swenson addressed Grievant by name before telling him she needed "somebody" to go to Seaton Hall, and that Grievant refused. Grievant suggests that he did not refuse an order because Supervisor Swenson's request was too ambiguous to constitute an order and she was speaking to multiple employees rather than him alone.

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*).

The charge of willful neglect of duty "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). As for the charge of 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 the day of the alleged incident. Thus, 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 that Grievant had that day to go to Seaton Hall and keep the students there safe under his supervision would only exist if Grievant was ordered to go to Seaton Hall in deviation from his regularly assigned duties.

While Grievant did not testify or present any witness to back his denial of insubordination, he contests testimony given by Respondent’s witnesses, particularly Supervisor Swenson. Thus, credibility determinations of these witnesses are required. In situations where “the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required.” *Jones v. W. Va. Dep’t of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of

prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997). Not every factor is necessarily relevant to every credibility determination. In this situation, the relevant factors include motive, consistency, and plausibility.

Respondent presented three fact witnesses for the incident on May 19, 2021. These were Supervisor Swenson, RCS Fields, and RCS Whetzel. None had motive to go against the official version of events. It was apparent through their demeanor and portions of their testimony that RCS Field and RCS Whetzel had a favorable disposition towards the Respondent. For instance, their opinion testimony was that Supervisor Swenson's statement of need was an order directed at Grievant and RCS Compton, and that Grievant and RCS Compton had a duty to heed this need. Yet, their fact testimony diverged from their opinion testimony and from the testimony of Supervisor Swenson.

Supervisor Swenson testified that she went to the playground before Grievant returned from break, sat next to RCS Compton, and said to RCS Compton (in the presence of RCS Fields and RCS Whetzel), "I need someone [to cover at Seaton Hall]." However, RCS Whetzel testified that Supervisor Swenson did not sit down. RCS Fields testified that Supervisor Swenson said to Grievant and RCS Compton together, "I need one of you to go to Seaton Hall."

Supervisor Swenson testified that when Grievant returned, she approached him and said, "Eddie, I need somebody to go over to Seaton Hall to work with the boys," and that he replied, "absolutely not, I've done my time with that boy [M.S.] before and I'm not working with him again." However, RCS Fields testified that Supervisor Swenson did not

address Grievant by name, and that, with all four RCS's standing around after Grievant got back from his break, Supervisor Swenson said to Grievant and RCS Compton together, "I need one of you to go to Seaton Hall."

Supervisor Swenson testified that she had no knowledge of CPS allegations involving MS and that "no one has ever told me anything about CPS allegations." However, RCS Whetzel testified that Grievant told Supervisor Swenson he was involved in a CPS case with M.S., and RCS Fields testified that Grievant told Supervisor Swenson that he had papers in the office regarding his not working with M.S. While the truth of Grievant's alleged statement to Supervisor Swenson is not relevant to this credibility analysis, whether the statement was made is relevant.

There was no indication that RCS Whetzel and RCS Fields knew that any of their testimony would be helpful to Grievant, that their testimony contradicted Supervisor Swenson's, or that they said anything to hinder Respondent's case against him. Supervisor Swenson seemed more in tune with the implications of all aspects of her testimony and her stake in the outcome of this grievance. Moreover, Supervisor Swenson gave inconsistent testimony. For instance, she testified that when she needs help from an RCS in an emergency, she usually says, "I need you [to do this]." Yet she contradicted herself in explaining that she said, "I need somebody," because it is her management style to make open-ended requests rather than iron-fisted directives. Her testimony in RCS Compton's level three grievance hearing (that she intended for either RCS Compton or Grievant to go to Seaton Hall and for the other one to stay to supervise their two wards) verifies that her approach on this occasion was ambiguous. While these witnesses were all inconsistent during portions of their testimony, the lack of motive by RCS Fields and

RCS Whetzel makes their testimony more credible than Supervisor Swenson's testimony. Ultimately, as Respondent has the burden of proof, the lack of consistency and the lack of reliability in these witnesses hampers Respondent's case against Grievant.

Even if true, Supervisor Swenson's testimony that she said, "I need somebody to go over to Seaton Hall," is too vague to constitute a directive. Prefixing this statement with Grievant's name does not convert it into a command. Assuming, that Supervisor Swenson was only addressing Grievant, rather than Grievant and RCS Compton jointly, it is reasonable for Grievant to interpret the expression of need for "somebody" as a request. In the alternative, RCS Fields' testimony that Supervisor Swenson said to Grievant and RCS Compton together, "I need one of you ...," makes for an even less compelling case that a command was issued. Respondent provided no authority for the proposition that a group of employees is collectively insubordinate if they cannot compel a member of their group to accept a supervisor's call of need for "someone" from the group to step forward. If no one answers the call, the supervisor must direct one of them to do the job before holding that individual accountable for insubordination.

Revisiting the three-part test outlined in *Butts* for insubordination: "(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." 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. 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.” *Butts 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 evidence that Grievant was ordered to go to Seaton Hall, that he was insubordinate, that he engaged in willful

neglect of duty, or that he failed to maintain a safe environment, and thus failed to prove by a preponderance of the evidence that his suspension was justified.

Accordingly, the grievance is GRANTED. Respondent is ORDERED to pay Grievant for the day he 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

Joshua S. Fraenkel
Administrative Law Judge