# WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**HEATHER COLLEY,**
**Grievant,**

**v.** **Docket No. 2020-1074-LogED**

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

## D E C I S I O N

Heather Colley, Grievant, filed this grievance against the Logan County Board of Education ("LCBE"), Respondent, protesting a suspension and the termination of her employment. The original grievance was filed on March 23, 2020. The grievance statement provides:

> Grievant, a regularly employed RN, has been suspended without pay and recommended for dismissal from employment. Grievant denies all allegations. In the alternative, Grievant contends that a plan of improvement should have been implemented to address work performance issues. Grievant additionally alleges a violation of W. Va. Code 18A-2-8 and that mitigation is an appropriate remedy in this case.

The relief sought is as follows:

> Grievant seeks reinstatement to her employment in her former position; retroactive wages, benefits, & seniority, removal of any reference to this suspension and dismissal from Grievant's personnel records & any other records, paper or electronic; & an award of interest on all monetary sums.

On March 10, 2020, the Superintendent of Logan County Schools, Patricia Lucas, suspended Grievant without pay and notified Grievant that she would recommend the termination of her contract of employment on the basis that she "had not exhibited the professionalism expected of a School Nurse" and that the "performance of Grievant's job duties (or lack thereof) had put students in her care in potentially grave danger in relation to their health issues." On March 24, 2020, the Logan County Board of Education,

Respondent, voted regarding the employment status of Grievant. By letter(s) dated March 25, 2020, Superintendent Lucas advised Grievant that Respondent had approved the termination of Grievant's contract of employment and her suspension without pay.

As authorized by W. VA. CODE § 6C-2-4(a)(4), Grievant appealed her suspension without pay and the termination of her contract of employment directly to level three of the grievance process.[1] A level three hearing was held before the undersigned Administrative Law Judge on November 12, 2020, at the Grievance Board's Charleston office. Grievant appeared in person and was represented by John Everett Roush, Esq., Legal Services, American Federation of Teachers-WV, AFL-CIO. Respondent was represented by its legal counsel Stephanie Abraham, Esq., Abraham Law, PLLC. At the conclusion of the level three hearing, the parties were invited to submit written proposed findings of fact and conclusions of law. The deadline for the submission of the parties' proposed fact/law proposals was established as November 30, 2020. Both parties submitted their respective fact/law proposals early, this matter is mature for decision.

## Synopsis

Grievant was suspended and terminated from her employment as a school nurse for her failure to adequately perform her duties. Grievant, in her filing, denied all the allegations but through her testimony admitted she repeatedly did not supervise, monitor, document or follow the care plan and physician orders for a highlighted student.

[1] W. VA. CODE § 6C-2-4(a)(4), provides that an employee may proceed directly to level three of the grievance process upon agreement of the parties, or when the grievant has been discharged, suspended without pay, demoted or reclassified resulting in a loss of compensation or benefits.

Grievant argued that her penalty was too severe and that she should have been provided an opportunity to improve. Respondent maintains that Grievant's conduct amounted to willful neglect of duty and insubordination but nevertheless was an inexcusable failure to perform work-related responsibilities. Respondent maintains it is within its discretion to terminate Grievant's employment without an additional improvement plan or opportunity to improve. By a preponderance of the evidence, Respondent established justification for the disciplinary actions taken. This grievance is denied.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

## Findings of Fact

1. Heather Colley, Grievant, is currently, and has been for many years, a licensed Registered Nurse. Grievant was employed as a school nurse by Respondent, prior to the instant disciplinary action, for approximately thirteen years.

2. Prior to the instant disciplinary matter, Grievant was placed on an improvement plan. The plan of improvement commencing on November 1, 2019, included expectations and goals which included, in relevant part:

- To update pertinent and vital health information obtained from parent/guardian and physician continually;
- Keep all medical records updated on a monthly basis (i.e. healthcare plans, health intervention plans, medication logs, etc.);
- A health intervention plan is to be completed for students who may need medical treatment at school (i.e. seizures, diabetics, etc.) or included in the student's health care plan.

G Ex 4

3. The areas of concern that motivated the plan of improvement were identified in relevant part as:

> Accurate medical documentation for students at assigned schools. Healthcare plans have not been accurately and continuously updated each school year. During a life threatening incident involving a student, [Grievant] stated that she copies and pastes each healthcare plan without reviewing each plan. She stated that she does not contact the parent/guardian and she does not see the importance of the plans.

G Ex 4

4. Grievant successfully completed the improvement plan on or about January 29, 2020.

5. As part of Grievant's regular duties as a school nurse during the 2019-2020 school year Grievant served no less than ten diabetic students. One such student entrusted to Grievant's care was CC,[2] a student at Chapmanville Middle School.

6. CC is approximately thirteen years of age and had been considered by Grievant and CC's mother, JC,[3] to be extremely responsible and compliant. In rough terms, a compliant diabetic patient is conscientious about performing or allowing the appropriate tests to be performed and allowing the administering of the appropriate medication without resistance. A noncompliant patient or student is not conscientious about reporting to the nurse's office and is resistant to the testing and administration of medication process. Sometimes this attitude reflects frustration with the restrictions and precautions a diabetic individual must observe and a general desire to be "normal" like

[2] Consistent with the Grievance Board's practice, this student and all minors referenced will be referred to by initials in this decision.

[3] Although it is not necessary to use initials for adults, naming CC's mother would be equivalent to naming CC. Hence, the undersigned will use initials for the mother as well.

the individual's nondiabetic peers.

7. CC tests herself and administers medication, if necessary, with and/or without assistance, between six and eight times a day. Prior to March 2, 2020, both Grievant and JC believed CC to be complaint.[4]

8. CC's physician's orders, which were to be included in the student's care plan and was located in Grievant's office, required that the "student must be supervised by licensed provider (RN, LPN) or parent/guardian. At discretion of school nurse blood glucose testing may be progressed to adult supervised."[5] R Ex 6

9. CC's physician's orders also required that:

- The student's ketones be checked when her blood glucose was over 300;
- If the student's blood glucose was over 300, the school nurse may administer injection of short-acting insulin every two hours prn;
- A call must be made to the Endocrine office if the blood glucose was "HI" at any time. R Exs 3, 4, and 6

10. According to CC's blood sugar documentation logs, there were approximately 24 times that the student's blood sugar level was over 300.[6]

11. Grievant failed to follow the physician's orders, never checked student CC's ketones, never administered insulin to the student, never called the parent/guardian and

[4] CC's mother was specifically informed that CC may become noncompliant during her adolescent years. Health care professionals who regularly work with diabetic children should be aware that such individuals may periodically become noncompliant during adolescent years. Nevertheless, both apparently trusted CC to be conscientious about testing herself and administering the appropriate medication in timely manner and in the appropriate dosage.

[5] Supervise is defined as "to direct the performance of." Webster's New Pocket Dictionary, Houghton Mifflin Harcourt, New York, 2007.

[6] The accuracy of CC's Blood Sugar log is not necessarily trustworthy, but the data documented therein indicated further attention regarding CC was warranted. *See also* fnt 8,infra.

never called the Endocrine office as was required by the physician's orders. *See* Grievant's L3 testimony; *also see* R Ex 7.

12. Grievant failed to properly *supervise*[7] CC while she was in Grievant's office checking her blood sugar or administering insulin to herself as required by the physician's orders.

13. Grievant failed to oversee (supervise) CC's medical records or blood sugar documentation logs while she was in the office, resulting in several instances of incorrect and inaccurate health information data. Grievant allowed CC to self-document without verifying the accuracy of the information provided.[8]

14. Kristie Skaggs, Lead School Nurse for Logan County schools, testified at the instant level three (L3) hearing. Ms. Skaggs is a Registered Nurse who has been employed with Respondent for twenty-five years. She is uniquely aware of the standard of care recommended and practiced by a school nurse.

15. Lead School Nurse Skaggs served as an evaluator of Grievant's performance as a school nurse and assisted with Grievant's prior improvement plan.

16. Periodically (approx. annually) Respondent provided in service curricula and/or educational tutorials for school nurses employed in Logan County schools.

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[7] Grievant suggests that being nearby during the action may reasonably be understood to be supervision. Proper supervision in the context of a medical procedure/care in the circumstances of a minor is believed to be more encompassing than being in the vicinity.

[8] CC was not accurately recording the appropriate dates she tested herself, either failing to record the results and insulin administered on a particular date or possibly recording that information for the wrong date, i.e., for a date that she was not in school due to absence or on a date that was a Saturday or Sunday. Respondent's witness(es) at the level three hearing implied that, in addition to failing to record tests/medication administered accurately, C.C. skipped the process altogether on some dates or wrote down false readings.

17. Grievant was provided instructions regarding proper protocol and procedures in which to attend to diabetic children in her care via various trainings which she attended on October 18, 2016, October 17, 2017, and November 2, 2018. Grievant's attendance and the curriculum is evidenced by the respective training agendas. R Ex 8

18. During the training on November 2, 2018, Logan County school nurses, were instructed that:

- "if students don't want to come to the office for care, then it is our responsibility to call them down to do their BS ("blood sugar'), and monitor if is [*sic]* is in Dr. order."
- "if they don't come to your office for their meds, call them down, same as diabetics."
- "document if their *[sic]* absent and sign logs."
- "middle and high school, some are self sufficient but do what is on the Dr. order. Always document and sign all orders and logs.

Skaggs L3 testimony, *also see* R Ex 8

19. During the training on October 17, 2017, the school nurses, including Grievant, were instructed to:

- "carry out the CP ("care plan") for each child, send to teachers if you want but make sure teacher's know what is on the health care plan, this has to be followed."
- "follow the dr order…"
- "don't put anything on the care plan that you aren't going to do this is a legal document."
- "Same with diabetics. Middle schoolers don't want to be excluded from their friends so they won't come but you have to call them to √ ("check") BS ("blood sugar") and do their insulin."

Skaggs testimony, *also see* R Ex 8

20. During the training on October 18, 2016, Logan County school nurses, were instructed that:

- "same as always, follow what the dr's orders say and apply it on the CP ("care plan"). And follow what the dr. says."
- "Make sure whenever a procedure is done you sign your name."

Skaggs L3 testimony

21. Grievant attended the October 18, 2016, October 17, 2017, and November 2, 2018 in-service training sessions. R Ex 8

22. JC, the mother of the highlighted 13 year old diabetic student CC, testified at the instant level three proceeding.

23. On March 2, 2020, CC's glucose levels were "dangerously" high. JC questioned CC about the reasons for the high readings. CC responses to her mother is not established fact but it is represented among information relayed that CC was forth coming with information indicating that her compliance or daily regiment with regard to reporting to Grievant's office was not fully compliant with the diabetic health management and care protocol envisioned.[9]

24. Grievant failed to properly document or sign CC's blood sugar documentation logs.

25. Grievant acknowledges she did not follow CC's care plan.

26. Grievant acknowledges she did not follow CC's physician's orders.

[9] It is alleged that CC did not report to Grievant's office on some dates, failed to test herself properly, and wrote down false readings on other days when she went to Grievant's office. JC contacted Respondent's administrators and indicated that she did not feel that CC was safe in Grievant's care. R Ex 2 An inquiry was commenced to investigate into Grievant's conduct and practices as a Logan County school nurse.

27. Grievant did not properly supervise student CC while in Grievant's office for diabetic health management and care.

28. While it was strongly inferred that Grievant more likely than not chooses to be unmindful of other students in her care, Respondent did not provide any evidence that the inaccuracies in CC's log were replicated in any of the other nine diabetic students for whom Grievant was responsible. Grievant has a history of dubious medical documentation for students at assigned schools.

29. It is more likely than not that Grievant failed to call student CC to her office when CC did not appear for daily care, supervision, and monitoring.

30. The performance evaluations for Grievant for the last three previous school years 2016-2017, 2017-2018 and 2018-2019 were all acceptable.

> The two areas marked needing improvement on the 2016-2017 and 2018-2019 evaluations were in the areas of knowledge of school law or policy and knowledge of the total school program. Grievant was also marked as needing improvement in knowledge of the Basic and Specialized Health Care Procedure Manual for West Virginia Public Schools and knowledge of county and school health procedures on her 2017-2018 evaluation. There were no areas marked needing improvement for Grievant's 2018-2019 school year performance evaluation.

*See* G Exs 5 ,6 and 7.

31. Effective and applicable to Grievant during the time period of relevant matters is the code of conduct for Logan County school employees specified by Policy 3210 – Employee Code of Conduct. R Ex 9

## Discussion

In disciplinary matters, the employer bears the burden to prove by a preponderance of the evidence that the disciplinary action taken was justified. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018).

> . . . *See* [*Watkins v. McDowell County Bd. of Educ.,* 229 W.Va. 500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education,* 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). *See also Hovermale v. Berkeley Springs Moose Lodge,* 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

*W. Va. Dep't of Trans., Div. of Highways v. Litten*, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision). 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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Grievant was employed as a school nurse during the 2019-2020 school year. Respondent asserts Grievant's behavior was willful and was not an isolated or insignificant incident. Respondent argues it is justified in dismissing Grievant for insubordination as her behavior violated Respondent's employee code of conduct. Grievant admits that she repeatedly failed to supervise, adequately document and follow

the care plan and doctor's orders as they relate to student CC's diabetic issues and health needs, but believes that she should be placed on an improvement plan rather than terminated.

The authority of a county board of education to terminate an employee's contract 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. 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). The causes are:

> 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.

West Virginia Code § 18A-2-8(a).

In a lion's share of grievance cases it is important for the Administrative Law Judge to determine whether the testimony of the various witnesses were credible so that he may determine the weight of the evidence. However, in the circumstances of this matter, the credibility assessment in not necessarily as intensive given that a majority of the essential facts are not in dispute.[10] Grievant admits she repeatedly failed to adequately monitor

[10] In situations where the existence or nonexistence of 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 Resources,* Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res*., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ*., Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp*., Docket No. 93-HHR-050 (Feb. 4, 1994). This Grievance Board has

student CC when she entered into Grievant's office to address her diabetic health issues on a daily basis. Grievant acknowledges that her inaction constituted a violation of the doctor's orders and student's care plan (highlighted specifics of order and care plan provided in findings of fact). Grievant tends to dispute that she did not track down student CC when she did not come to Grievant's office as required, in that pursuant to Grievant's recollection CC visited her office on a daily basis but Grievant acquiesces she did not check CC's attendance records. It is factually accurate that Grievant did not adequately document CC's health data as envisioned and mandated by applicable procedure. Accordingly, pursuant to Grievant's own testimony, coupled with, and initiated by Respondent's evidence of record (documentation & witnesses' testimony) it is established by a preponderance of the evidence that Grievant committed misconduct.

Grievant's prior Plan of Improvement did not reference specifically as a deficiency to be corrected the following:

- Reliance upon students to accurately record glucose tests performed by themselves;
- Failure to check the results of the test on the device utilized for that purpose and to compare it with the readings recorded.

Nevertheless, Grievant's understanding of the purpose of the plan of improvement was a need to do a better job with preparation of the student health care plans and to have a

applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge 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. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*. The testimony of all witnesses was provided direct attention and assessed with the identified factors in consideration.

more organized office space.[11] Thus, the undersigned is limited in his ability to find that Grievant's actions were without some recognized conscious behavior. Grievant was uniquely aware of her duty to accurately record the medical treatment of students.

While both Grievant and JC (diabetic student's mother) may have been of the belief that CC was complaint, they were incorrect. Both trusted her to be conscientious about testing herself and administering the appropriate medication in timely manner and in the appropriate dosage. The problem is student CC is a 13-year-old child. CC is not an adult. The responsible adults in CC's life share a duty of protecting and caring for her well-being.[12] CC was not accurately recording the appropriate dates she tested herself, either failing to record the results and insulin administered on a particular date or possibly recording that information for the wrong date.[13] R Ex 7 demonstrate inaccurate and inconsistent data. Grievant's reliance on CC to properly perform duties that were Grievant's responsibilities was unwise and dangerous.

Respondent's witnesses have implied that the spike in CC's insulin on March 2, 2020 may have been the result of CC's habitual injection with inappropriate units of insulin and that this irregularity resulted from Grievant's negligence. However, the noon glucose

[11] Testimony of Grievant, level three hearing.

[12] The undersigned is of the belief that CC's mother tends to unduly lay all the blame for CC episode at Grievant's feet without adequately assuming her fair share of culpability. When judging the reasonableness of the trust Grievant held toward CC, one must remember that JC had a greater opportunity to accurately gauge CC's attitude toward caring for her health needs than Grievant. JC was forewarned that the onset of adolescence might result in a change in CC's attitude toward the process necessary for the maintenance of health as a diabetic.

[13] Grievant admitted that she did not review the log CC kept of these activities or check the glucometer to make sure the reading matched the log. In addition to the trust that Grievant had in CC, Grievant indicated she felt that CC would have been offended if Grievant had not maintained a hands-off manner toward CC and the testing/insulin administration process.

test and insulin injection were merely one of six to eight of such instances each day. Further at Chapmanville Middle School there are four unattended "snack" tables where food left-over from lunch is made available to students. Indulgence at one of these tables after lunch by CC could have resulted in a spike in CC's readings.[14] Attributing the glucose spike of March 2, 2020 solely to failures of Grievant has not been proven factually or scientifically.

Nevertheless, pursuant to the evidence presented, Grievant's behavior violated the code of conduct for Logan County school employees. The code of conduct for Logan County school professional employees is expressed in Policy 3210 – Employee Code of Conduct. R Ex 9 The policy states that professional employees shall:

A. Exhibit professional behavior by showing positive examples of preparedness, communication, fairness, punctuality, attendance, language, and appearance;
B. Contribute, cooperate, and participate in creating an environment in which all the employee/students are accepted and are provided the opportunity to achieve at the highest levels in all areas of development;
C. Maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination;
D. Create a culture of caring through understanding and support;
E. Immediately intervene in any code of conduct violation, that has a negative impact on students, in a manner that preserves confidentiality and the dignity of each person;
F. Demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior;
G. Comply with all Federal, West Virginia and Logan County laws, policies, regulations and procedures.

Respondent specifically argues that Grievant violated subsection C, which requires her

[14] Testimony of Kristie Skaggs, level three hearing.

to “maintain a safe and healthy environment…”. Grievant repeatedly fostered an unsafe and unhealthy environment for CC by willfully ignoring her persistent health issues. Grievant failed to adequately monitor and supervise the student when she entered Grievant’s office to test her blood sugar and administer insulin. Grievant willfully and knowingly disregarded her duty to follow CC’s care plan and accompanying doctor’s orders which mandated that the school nurse take certain actions when blood glucose levels rose above 300. Respondent alleges Grievant was not creating a “culture of caring and support” as required by subsection D. Grievant failed repeatedly to maintain a high standard of conduct and did not contribute, or properly participate in creating a healthy environment for a vulnerable student. Grievant failed to demonstrate the professionalism required of her position. Accordingly, Grievant’s behavior is in violation of applicable Logan County school employees code of conduct. which was in place during Grievant’s employment. A violation of an applicable Employee Code of Conduct has been found to constitute insubordination. *See Domingues v. Fayette County Bd. of Educ.*, Docket No. 04-10-341 (Jan. 28, 2005); *Booth & Ware v. Randolph County Bd. of Educ*., Docket No. 04-42-418 (Mar. 28, 2005); Marl v *Marshall County Bd. of Educ.* Docket No. 06-25-112 (June 29, 2006) .

Willful neglect of duty is 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). Willful neglect of duty encompasses something more serious than incompetence. *Bd. of Educ. v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120, 122 (1990); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996)." *Geho v. Marshall County Bd. of Educ.*, Docket No. 2008-1395-MarED (Oct. 30, 2008).

Respondent persuasively argues it is justified in dismissing Grievant for willful neglect of duty rather than unsatisfactory performance as Grievant contends. The West Virginia Supreme Court of Appeals has held that "where the underlying complaints regarding a teacher's[15] 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. Concerning what constitutes "correctable" conduct, the Court noted in *Mason County Bd. of Educ. v. State Superintendent of Sch.,* 165 W. Va. 732 (W. Va. 1980) 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

[15] *See* W. Va. Code § 18A-2-8 and 18A-2-12a, which apply with equal force to all public school employees.

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.*

"[T]he factor which distinguishes willful neglect of duty and insubordination from unsatisfactory performance is that the employee knows [her] responsibilities, and is competent to perform them, but elects not to complete them. When an employee's performance is unacceptable because [she] does not know the standard to be met, or what is required to meet the standards, and [her] 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). In this case, it is evident that Grievant was aware of her health care duties, she was aware of her responsibility, and she repeatedly failed to properly complete the tasks. Grievant repeatedly failed to supervise and monitor CC when she entered into Grievant's office to address diabetic health issues. Grievant acknowledges that her inaction constituted a violation of the care plan and doctor's orders. Grievant was aware of the health care plan. R Ex 3 Grievant did not maintain CC's attendance records. Furthermore, Grievant did not adequately document CC's health data. Grievant's admitted conduct was not just incidental, Grievant's conduct amounts to an intentional, willful and wanton failure to perform established responsibility.

The West Virginia Supreme Court of Appeals in *Conner v. Barbour County Board of Education*, 200 W. Va. 405, 410, 489 S.E.2d 787, 792 (1997)(*per curiam*), recognized that where a school employee's insubordinate and willfully negligent acts directly compromise the safety of school children she has been entrusted to transport, such

actions are not correctable within the meaning of the policy that entitles an employee to an improvement plan before her contract of employment is suspended or terminated, Citing *Kinder v. Kanawha County Bd. of Educ.*, Docket No. 2015-0421-KanED (August 31, 2015); also se*e Mason County Bd. of Educ. v. State Superintendent of Schools*, 165 W. Va. 732, 274 S.E.2d 435 (1980). The West Virginia Supreme Court of Appeals has consistently defined "correctable conduct" as "whether the conduct directly and substantially affects the morals, safety, and health of the system in a permanent, non-correctable manner." The evaluation and correction provisions of Policy 5300 codified in West Virginia Code § 18A-2-12a are not apply to misconduct which substantially affects the safety of students. *Mason County Bd. of Educ. v. State Superintendent of Sch*., 165 W. Va. 732, 739 (W. Va. 1980); *see also, Trimboli v. Bd. of Educ. of the County of Wayne*, 163 W.Va. 1, 254 S.E.2d 561 (1979).

Grievant's failure to perform her duties as the tending school nurse compromised CC's safety. It is not established that Grievant is entitled to an improvement plan or another opportunity to show whether she will follow rules and policies that are designed to ensure the safety of school children with health concerns while they are at school. Respondent is not obligated to conclude Grievant's behavior is correctable and should have been addressed through an improvement plan. *See* Kanawha County Circuit Court ruling *Ritchie County Board of Education v. Lancaster,* Civil Action No. 14-AA-101 (May 12, 2015) which reversed *Lancaster v. Ritchie County Bd. of Educ.,* Docket No. 2014-0868-RitED (Sept. 19, 2014). The undersigned is not of the opinion that CC's mother is blameless, in the totality of the facts, nor is CC without her percentage of blame. But

Grievant's willful negligent actions directly compromised the safety of a student entrusted to her care.

The argument a disciplinary action was excessive given the facts of the situation is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. [State] Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001). In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995) (citations omitted).

When a grievant is seeking mitigation of the discipline imposed for misconduct, the Grievant's past indiscretions are relevant to the determination. *Blankenship v. McDowell County Board of Educ.,* Docket No. 2016-0772-McDed (August 15, 2016). In the present matter, Grievant had previously been placed on an Improvement Plan, which included language that documentation was unsatisfactory. Also, recent past evaluations presented by Grievant noted that Grievant did not adequately recognized or adhere to policies. It cannot be found that Respondent is without reason for its actions. Where a school employee's insubordinate and willfully negligent act directly compromises the safety of

school children she has been entrusted to care for, such actions are significant. *Id.* Respondent demonstrated that Grievant engaged in the conduct for which she was charged, and that the conduct arguably constituted willful neglect of duty.

Grievant's conduct or failure to perform recognized duties compromised the health and safety of a diabetic student entrusted to Grievant's care. The punishment imposed is harsh but is not clearly excessive. Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. A lesser disciplinary action may be imposed when sufficient mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory performance. Sufficient mitigating factors are not found present in the instant matter which mandates overriding the action of Respondent.

The following conclusions of law are appropriate in this matter:

## Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. 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. W. Va. Dep't of Health & Human Res.*, Docket No. 92-

HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

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 West Virginia Code § 18A-2-8, 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).

3. West Virginia Code § 18A-2-8 provides that "[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."

4. Employees are expected to respect authority and do not have unfettered discretion to disobey or ignore clear instructions. *See Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). Moreover, insubordination may involve "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).

5. In order to establish insubordination, a county board must demonstrate a policy or directive applied to the employee, was in existence at the time of the violation and that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Domingues v. Fayette County Bd. of Educ.*, Docket No. 04-10-341 (Jan. 28, 2005).

6. An employee code of conduct for professional employees of Logan County school system is contained in Policy 3210. Said Code of Conduct, provides a reasonable standard of care for employees entrusted with the care of students.

7. It is not necessary that an employee have a malicious intent to harm another in order for his violation of the Employee Code of Conduct to constitute insubordination within the meaning of W. Va. Code §18A-2-8. Rather, it is enough that he carried out his actions, which are violative of that important policy, in a knowing and intentional manner. *See Hennen v. Wirt County Bd. of Educ*., Docket No. 05-53-110 (Sept 30, 2005).

8. Respondent demonstrated that Grievant was insubordinate due to her repeated failure to abide by the Logan County Schools Employee Code of Conduct that was in place during Grievant's employment.

9. "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). Willful neglect of duty encompasses something more serious than incompetence. *Bd. of Educ. v. Chaddock*, 183 W. Va. 638,

398 S.E.2d 120, 122 (1990); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996)." *Geho v. Marshall County Bd. of Educ.*, Docket No. 2008-1395-MarED (Oct. 30, 2008)(footnote omitted).

10. "[T]he factor which distinguishes willful neglect of duty and insubordination from unsatisfactory performance is that the employee knows [her] responsibilities, and is competent to perform them, but elects not to complete them. When an employee's performance is unacceptable because [she] does not know the standard to be met, or what is required to meet the standards, and [her] 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).

11. Respondent demonstrated that Grievant willfully neglected her duties.

12. Grievant's failure to adequately perform her duties resulted in a diabetic child's health (care plan) being repeatedly neglected.

13. The West Virginia Supreme Court of Appeals has consistently defined "correctable conduct" as "whether the conduct directly and substantially affects the morals, safety, and health of the system in a permanent, non-correctable manner." The evaluation and correction provisions of Policy 5300 codified in West Virginia Code § 18A-2-12a are not apply to misconduct which substantially affects the safety of students. *See Mason County Bd. of Educ. v. State Superintendent of Sch*., 165 W. Va. 732, 739 (W. Va. 1980); *Also see Trimboli v. Bd. of Educ. of the County of Wayne*, 163 W.Va. 1, 254 S.E.2d

561 (1979); *Kinder v. Kanawha County Bd. of Educ.*, Docket No. 2015-0421-KanED (August 31, 2015)

14. “The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was ‘clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action.’ *Martin v. W. Va. [State] Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).” *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

15. In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case-by-case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995)(citations omitted). The Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee’s offense that it indicates an abuse of discretion. Considerable deference is afforded the employer’s assessment of the seriousness of the employee’s conduct and the prospects for rehabilitation." *Overbee v. Dep’t of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

16. In the circumstances of this matter Grievant did not demonstrate that the penalty imposed was clearly excessive.

Accordingly, this grievance is **DENIED**.

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 (2018).

**Date: January 8, 2021**

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**Landon R. Brown**
**Administrative Law Judge**