

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

JASON McCAULEY,
Grievant,

v.

Docket No. 2020-0728-BerED

BERKELEY COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Jason McCauley, filed this action on or about December 18, 2019, against the Berkeley County Board of Education challenging his dismissal from employment as a probationary art teacher. Grievant seeks to be placed back in this position with back pay and benefits. Grievant filed this action directly to level three. An evidentiary hearing was conducted before the undersigned on October 29 and 30, 2020, at the office of the Berkeley County Board of Education, Martinsburg, West Virginia. Grievant appeared in person and by counsel, Lawrence M. Shultz, Esquire, BURKE, SHULTZ, HARMAN & JENKINSON. Respondent appeared by its counsel, Kimberly S. Croyle, Esquire, BOWLES RICE LLP. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on February 11, 2021.

Synopsis

Grievant was employed as a probationary teacher by the Berkeley County Board of Education. Grievant was dismissed from his contract of employment for insubordination and willful neglect of duty following an incident involving a student that resulted in a finding of neglect by the Department of Health and Human Resources.

Respondent proved these charges by a preponderance of the evidence. In addition, Respondent was acting within its discretion to dismiss a probationary employee pursuant to the applicable law. The record did not support a finding that Grievant was entitled to a plan of improvement or a corrective action plan.

The following Findings of Fact are based upon the record of this case.

Findings of Fact

1. Grievant was employed by the Berkeley County Board of Education as a probationary teacher. Grievant was assigned as an Art teacher at Hedgesville High School for the 2019-2020 school year.

2. Prior to his work as a school teacher, Grievant worked at a hospital and completed the national cognitive and skills evaluations for the CPR and AED Health Care Providers Program.

3. Grievant was trained on Berkeley County Schools' Employee Code of Conduct and Hedgesville High School's Emergency Plan on August 14, 2019.

4. Grievant's evaluations indicated that he understood the necessity to create and maintain a safe and appropriate learning environment. Grievant acknowledged it was his responsibility to make sure that students in his class were safe and that they remained on task.

5. On September 16, 2019, Grievant was beginning his third year at Hedgesville High School. Grievant's first two years revealed that he was performing satisfactorily.

6. One of the students in his class was K.K., a ninth grader. The class was a third period 9th grade class which was to start at 9:31 a.m., in Room 34.

7. In addition to the 9th grade class and Grievant, present during the entire class was Isabelle Forte, a senior who was designated as a teaching assistant in the class.

8. During a PowerPoint driven lecture on certain art skills, K.K. put her head down on her arms at the table where she was seated. Prior to that time, K.K. was alert and did not appear ill before she put her head down.

9. It became apparent on September 16, 2019, that K.K. suffered a medical emergency that rendered her unconscious.

10. On the day in question, 3rd period began at 9:29 a.m. and ended at 10:19 a.m. Grievant began his 3rd period class by taking role, then started the aforementioned PowerPoint presentation.

11. Isabelle Forte observed that other students in class were picking up and dropping K.K.'s arms on the desk.

12. Students told Grievant that K.K. was not waking up. Grievant told the students if she was not taking notes, she would not get a good grade. During the PowerPoint, Grievant was facing the students with the PowerPoint to his back.

13. Grievant observed that K.K.'s head was down during the PowerPoint. Grievant indicated that the PowerPoint ended at 10:10 a.m.

14. Grievant knew that the student was unresponsive with 10 minutes remaining in the class, when the PowerPoint ended and she did not raise her head.

15. Isabelle Forte and some of the students told Grievant that the student was unresponsive and that it appeared serious with approximately 5 minutes remaining in the class.

16. K.K. did not leave class at 10:19 a.m. when the bell rang and the other students left the room.

17. When students began to arrive for Grievant's 4th period and K.K. still had not moved, Grievant checked her pulse, then left K.K. with a couple of students and went to the nurse's office to see what should be done.

18. When Grievant arrived back at his classroom, he placed K.K. in a wheelchair and transported her to the nurse's office.

19. When K.K. was brought to the Nurse's office, she was unconscious and could not be roused.

20. The school nurse described K.K. as limp. Her chin was on her chest. The nurse assessed her pupils and observed that they were rolling back in her head. K.K. was breathing, but it was shallow and irregular.

21. At no time during the class period did Grievant check on K.K.; use the phone in his classroom to call for assistance; or ask any of the students in the classroom to get help.

22. K.K. remained under the supervision of the school nurse from the time she was brought to the office by Grievant until EMS arrived and transported her to the hospital. K.K. regained consciousness at the hospital and was able to return to the school the next day.

23. Ron Lyons, Principal at Hedgesville High School, along with his assistant principals, conducted an investigation into the incident.

24. According to Principal Lyons' investigation, some students in the classroom indicated that K.K. had been unresponsive and the Grievant did not check on her and did not seek help until after the class ended.

25. Principal Lyons reported Grievant's failure to respond to an unconscious student under his care to the Department of Health and Human Resources, Child Protective Services.

26. Grievant was placed on administrative leave, with pay, pending the outcome of the Department of Health and Human Resources' investigation.

27. On October 21, 2019, the Department of Health and Human Resources informed the Respondent that child neglect had been substantiated. On the same date, the Department of Health and Human Resources sent Grievant a letter informing him of the findings.

28. On October 22, 2019, Grievant was informed by Berkeley County Schools Superintendent Patrick Murphy that he was converting the administrative leave to a suspension without pay. In addition, Superintendent Murphy would recommend to the Board of Education the termination of the Grievant's probationary contract. Attached to Superintendent Murphy's letter was a copy of the October 21, 2019, letter and findings from the Department of Health and Human Resources.

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).

An employee of a county board of education may be suspended or dismissed for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, a finding of abuse by the Department of Health and Human Resources in accordance with §49-1-1 *et seq.* of this code, 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).

Respondent argues that Grievant’s failure to act in circumstances involving a student’s medical emergency constituted insubordination and willful neglect of duty.

Grievant argues that placing all the blame on him to provide a safe and secure environment is unfair. Grievant argues that there is no clear policy regarding emergency medical issues, and no clear standard regarding procedures which teachers must follow and their authority to act without the approval of administrators. In essence, Grievant argues that Respondent failed to meet its burden of proof by a preponderance of the evidence.

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*.

The Grievance Board has found that where an employee's conduct was not in accordance with the broad language of the Employee Code of Conduct, "by failing to promote a safe and positive learning environment, and failing to be a good adult role model," the inappropriate conduct constituted insubordination. *Wells v. Upshur County Bd. of Educ.*, Docket No. 2009-1714-UpsED (May 6, 2011).

Grievant was trained prior to the 2019-2020 school year on the Employee Code of Conduct; the procedures to follow in the event of a medical emergency; and First Aide.

Grievant acknowledged at the evidentiary hearing that he had advanced training in addition to that regarding emergency situations. The Employee Code of Conduct requires all school board employees to follow applicable state statutes, rules and regulations. In addition, it requires all employees to foster a safe environment for all students.

Despite seeing K.K. with her head down on her desk, and being told that something was wrong, Grievant did nothing. Grievant did not check to see if the student was asleep or unconscious; did not call for assistance; and did not sent a student for assistance. Grievant waited until class was over and when K.K. failed to move, went to check on her. This course of conduct appears in contrast to the standard required of all school employees and the failure to act in the case of a student safety issue has been recognized as insubordination by the Grievance Board. *Colley v. Logan County Bd. of Educ.*, Docket No. 2020-1074-LogED (Jan. 8, 2021); *Blankenship v. McDowell County Bd. of Educ.*, Docket No. 2016-0772-McDED (Aug. 15, 2016); *Kinder v. Kanawha County Bd. of Educ.*, Docket No. 2015-0421-KanED (Aug. 31, 2015).

Grievant's behavior can also be characterized as willful neglect of duty. Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. *Russell v. Kanawha County Bd. of Educ.*, Docket No. 2016-0447-KanED (Mar. 21, 2016). The term "willful" ordinarily imports a knowing and intentional act, as distinguished from a negligent act. *Crum v. Logan County Bd. of Educ.*, Docket No. 2015-1197-CONS (Oct. 19, 2015). Grievant's failure to check on K.K. until after class while she lay unconscious at her desk meets the definition of willful neglect of duty.

The record of this case established that the Board of Education acted within its discretion when it dismissed the Grievant, a probationary employee, for failing to attend to a student who was unresponsive and in need of care. Because the Respondent was acting within its duty and authority, the action of the Respondent to dismiss the Grievant can also be upheld pursuant to WEST VIRGINIA CODE 18A-2-8(d). This statute mandates that school boards do everything in their power to protect the safety and welfare of students:

A county board of education has the duty and authority to provide a safe and secure environment in which students may learn and prosper; therefore, it may take necessary steps to suspend or dismiss any person in its employment at any time should the health, safety, and welfare of students be jeopardized or the learning environment of other students has been impaired.

The facts of this case demonstrate that Respondent was well within its duty and authority to terminate a probationary employee for failing to act when confronted with a student's medical emergency that resulted in a finding of child neglect. The critical period in this case is the amount of time that elapsed in the classroom before the Grievant took any action with respect to K.K. There is no dispute that during his PowerPoint presentation, Grievant saw K.K. with her head down and did nothing to check on her condition. There is no dispute that Grievant was told by students after the PowerPoint ended that K.K. would not wake up. Instead of checking on her, Grievant told the class that she would receive a bad grade. There is no dispute that Grievant was told toward the end of class by his teaching assistant that the situation was serious. Grievant did nothing to address the situation until after the end of class bell rang and K.K. remained with her head on the desk.

The facts of this case demonstrate that Grievant knew it was his responsibility as a teacher to keep students safe and to keep them on task. Grievant was trained in first aide. On September 16, 2019, Grievant failed to act responsibly. Respondent was within its authority as set out in WEST VIRGINIA CODE 18A-2-8(d) to terminate Grievant's probationary contract.

The West Virginia Supreme Court of Appeals has held that where the underlying complaints regarding an employee's conduct relate to his or her performance, West Virginia Board of Education 5300 requires 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 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 involves professional incompetency and whether it directly and substantially affects the morals, safety, and health of the system is a permanent, non-correctable manner." *Id.*

Where a school employee's insubordinate and willfully negligent acts directly compromise the safety of school children he has been entrusted to educate, such actions are not correctable within the meaning of the State Board policy that entitles an employee to an improvement plan before his contract of employment is suspended or terminated. *Jarrell v. Jackson County Bd. of Educ.*, Docket No. 04-18-204 (Oct. 27, 2004); *Pilkington v. Raleigh County Bd. of Educ.*, Docket No. 2017-1498-RaIED (June 15, 2017). Because the Grievant's behavior directly related to K.K.'s safety and resulted in a finding by the

Department of Health and Human Resources of child neglect, the record does not support a ruling that 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). “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).

2. An employee of a county board of education may be suspended or dismissed for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, a finding of abuse by the Department of Health and Human Resources in accordance with §49-1-1 *et seq.* of this code, 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.

3. “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).

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. *Russell v. Kanawha County Bd. of Educ.*, Docket No. 2016-0447-KanED (Mar. 21, 2016). The term “willful” ordinarily imports a knowing and intentional act, as distinguished from a negligent act. *Crum v. Logan County Bd. of Educ.*, Docket No. 2015-1197-CONS (Oct. 19, 2015).

6. The failure of an employee to act in the case of a student safety issue has been recognized as insubordination by the Grievance Board. *Colley v. Logan County Bd. of Educ.*, Docket No. 2020-1074-LogED (Jan. 8, 2021); *Blankenship v. McDowell County Bd. of Educ.*, Docket No. 2016-0772-McDED (Aug. 15, 2016); *Kinder v. Kanawha County Bd. of Educ.*, Docket No. 2015-0421-KanED (Aug. 31, 2015).

7. The West Virginia Supreme Court of Appeals has held that where the underlying complaints regarding an employee's conduct relate to his or her performance, West Virginia Board of Education 5300 requires 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 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 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.*

8. Respondent established by a preponderance of the evidence the allegations of insubordination and willful neglect of duty that led to the dismissal of Grievant.

9. Because the Grievant's behavior directly related to a student's safety and resulted in a finding by the Department of Health and Human Resources of child neglect, the record does not support a ruling that Grievant is entitled to an improvement plan.

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: March 16, 2021

Ronald L. Reece
Administrative Law Judge