THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CONNIE S. MIZE,
Grievant,

v. **Docket No. 2019-1644-CabED**

CABELL COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Connie S. Mize, was employed by Respondent, Cabell County Board of Education. On May 22, 2019, Grievant filed this grievance against Respondent protesting the termination of her employment. For relief, Grievant seeks reinstatement and restoration of lost pay and benefits.

The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held over three days on October 8, 2019, September 21, 2020, and May 7, 2021, before the undersigned at the Grievance Board's Charleston, West Virginia office.[1] Grievant appeared, in person, and by counsel, Katherine L. Dooley, The Dooley Law Firm, PLLC. Respondent appeared by Dr. Ryan Saxe, Superintendent, and was represented by its General Counsel, Sherrone D. Hornbuckle and by Howard Seufer, Bowles Rice LLP. This matter became mature for decision on June 24, 2021, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.[2]

---

[1] The resolution of this matter has been delayed due to continuances of the level three hearing for both the coronavirus pandemic and for good cause requests for continuance by the parties. In addition, due to the pandemic, the second day of hearing was conducted by video conferencing.

[2] Proposed Findings of Fact and Conclusions of Law were to be submitted by June 14, 2021, but the time to file was extended at Respondent's request with the agreement of Grievant.

Synopsis

Grievant was employed by Respondent as the principal of Meadows Elementary School. Grievant's employment was terminated for her failure of leadership during a security incident. Respondent proved that Grievant's failure to follow security protocols and the direction of her supervisor constituted wilful neglect of duty and insubordination. Grievant failed to prove that her termination from employment was retaliatory or that mitigation of the punishment was warranted. Accordingly, the grievance is denied.

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

Findings of Fact

Grievant was employed by Respondent as the principal of Meadows Elementary School and had been so employed for five years. Grievant had been employed by Respondent for twenty years and had served as a principal for eighteen of those years at three different schools.

At Meadows Elementary School, Grievant was the only administrator.

Grievant was supervised by Kristen Giles, Executive Director.

The State Department of Education provides a *Crisis Prevention and Response Plan Template* for use by county boards of education. Respondent has a detailed *Crisis Response Plan for Schools* based on that template. In addition, Meadows Elementary School has an *Emergency Procedures Notebook* for teachers and staff.

As principal, Grievant is bound to follow Respondent's *Crisis Response Plan for Schools.*

Under the lockdown procedure in the *Crisis Response Plan for Schools*, Grievant, as principal, is designated as the Incident Commander. The Incident Commander is solely responsible for emergency operations and is required to remain in the command post to direct operations. As Incident Commander, Grievant is to obtain a description of the incident and determine whether a threat still exists. Grievant is to then assess the situation to determine if additional outside resources are required. If so, Grievant is to call 911 if not already notified, alert staff, take protective actions including instituting a "lockdown" of the school, and dispatch personnel to the scene if safe to do so. Grievant is required to notify the Board of Education or Superintendent only as a last step after all other actions have been taken.

On January 16, 2019, Meredith Crawford, a substitute secretary, allowed a man into the school office without properly following security protocols.

The doors to the school are locked and to gain entrance visitors use an intercom to request entrance. Staff are required by the protocol to determine the reason for the visit and, if the visit is regarding a student, to confirm the name of the student with school records before allowing a visitor into the building.

On that day, a man used the intercom saying that he was there to pick up his nephew. Ms. Crawford let the man into the building without requiring the man to give the name of the student to confirm that there was a student present of that name or that the man was an authorized custodian of the child.

When the man entered the office, Ms. Crawford noticed that the man was acting strange and was sweating profusely. She asked for the name of the student the

man was to pick up but could not find the student that the man named. The man asked to use the telephone to call his sister, which Ms. Crawford allowed, but the man said he could not get through. At that time, Ms. Crawford instructed the man to leave the school and the man complied.

Once outside, the man then attempted to re-enter the building through another door, which was locked. A parent, who had been in the office at the same time as the man, saw this as she exited the building and called the secretary to report that the same man she had directed to leave was attempting to re-enter the school through another door.

Ms. Crawford immediately went to Grievant's office to report what had happened in the office and that the man was seen trying to get in another door after she told him to leave.

Upon learning that a man had entered the office claiming he was to pick up a child who was not a student, had been told to leave, and was then seen trying to re-enter the school through another door, Grievant did not call a lockdown or call 911.

Instead, Grievant called for her Head Custodian, Paul Miller to come to her office. When Mr. Miller reported to her office, Grievant then proceeded to "walk the perimeter" of the school building with Mr. Miller. During this walk, Grievant encountered a preschool class outside and instructed the teacher to return the class inside.

Grievant told Mr. Miller that they were checking outside because the man could have had a gun or could be hiding somewhere.

While Grievant and Mr. Miller were outside, 911 dispatch called the school to report that the police were looking for a suspect in the vicinity of the school. Ms. Crawford was unable to contact Grievant until Grievant returned to the office from her perimeter walk. At that time, Ms. Crawford informed Grievant of the 911 call. Upon being informed of the 911 call, Grievant still did not call a lockdown or return the 911 call to report the suspicious activity at the school. Instead, Grievant called her supervisor, Ms. Giles, to ask whether she should place the school on lockdown. Ms. Giles instructed Grievant to call a lockdown.

None of the security protocols or trainings require or even suggest that a principal is to seek the permission of their supervisor before calling a lockdown. Notifying the board or the superintendent is the last step on the list after all necessary actions are taken.

Even though there was no protocol to do so and Ms. Giles had instructed her to call an actual lockdown, Grievant, instead, announced over the school's public address system that the school was doing a "practice lockdown."

The man that had been asked to leave the school and then attempted to re-enter was the suspect being sought by police. The man was apprehended without further incident involving the school and the "practice" lockdown was cancelled when police informed Grievant of his apprehension.

Grievant delayed calling a lockdown by approximately twenty minutes after she first learned that the man had been asked to leave the school and then attempted to re-enter through another locked door.

Grievant hesitated to call a lockdown because she believed she had been "harshly criticized" by her superiors in the past.

Superintendent Saxe placed Grievant on paid administrative leave pending investigation of the January 16, 2019 incident, notifying her of the same by letter dated January 17, 2019.

Superintendent Saxe hired a private investigator to conduct an investigation into the incident.

Once teachers and parents learned that there had been an actual security incident and Grievant had only called a "practice" lockdown, many were upset and expressed concern to Respondent and the media regarding Grievant's perceived mishandling of security at the school. At one of Respondent's public meetings, Respondent was provided with a petition, purportedly signed by approximately one hundred people, expressing a lack of confidence in Grievant as the principal.

On April 30, 2019, Superintendent Saxe held a conference to allow Grievant to respond to the concerns raised by the investigation. Grievant was not provided any information regarding the specific allegations prior to the conference but was provided with a four-page document outlining the findings of the investigation during the conference.

By letter of the same date, Superintendent Saxe notified Grievant she would have until May 3, 2019, to respond in writing to the investigation conclusions.

On May 3, 2019, Grievant, by counsel, submitted her written response to Superintendent Saxe denying wrongdoing and objecting to Respondent's refusal

to provide the complete investigation report and failure to provide Grievant notice of the concerns prior to the conference.

By letter dated May 9, 2019, Superintendent Saxe suspended Grievant without pay and notified her of his intent to seek the approval of the school board to terminate her employment. The letter detailed Grievant's prior history of disciplinary and corrective actions, which improperly included two disciplinary actions that had been nullified through the grievance procedure. The letter further detailed the factual allegations and the determination that Grievant had failed to follow safety protocols, which Superintendent Saxe concluded was intentional. Specifically, Superintendent Saxe found that Grievant failed to ensure that the substitute secretary knew and followed the safety procedures for admitting people to the school; failed to call an immediate lockdown and call 911 after being informed of a possible intruder; made the perimeter walk with the head custodian before calling a lockdown; radioed Executive Director Giles before calling a lockdown in response to the call to the school from 911; and issued a "practice" lockdown rather than a proper lockdown. Superintendent Saxe also cited the public outcry protesting Grievant's failures.

On May 21, 2019, Respondent conducted a pre-termination hearing, during which Grievant was represented by counsel and chose to testify on her own behalf.

On May 22, 2019, Superintendent Saxe notified Grievant by letter that the school board had decided to terminate Grievant's employment.

One week prior to the incident, Respondent held a special training regarding security for all principals regarding the then-recent school shooting at Parkland High School, which Grievant attended.

Grievant had previously attended yearly training on emergency procedures.

Grievant had been subject to the following disciplinary and corrective actions: a three-day suspension in 2015 for failure to follow policy regarding building use, using school postage for personal use, improperly using the word “shooter” during an emergency drill, and denying the use of the word “shooter;” and a Corrective Action Plan in 2017.

Grievant’s performance evaluations were unsatisfactory for school years 2015 - 2016 and 2016 - 2017 but were satisfactory for the other three years as principal.

Grievant had previously filed two grievances against Respondent, the most recent of which had been granted, in part, and denied, in part, seven months prior to Grievant’s placement on administrative leave.

Discussion

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*.

The authority of a county board of education to terminate an employee 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.

W. VA. CODE § 18A-2-8(a).

"It is not the label a county board of education attaches to the conduct of the employee . . . that is determinative. The critical inquiry is whether the board's evidence is sufficient to substantiate that the employee actually engaged in the conduct." *Allen v. Monroe County Bd. of Educ.*, Docket No. 90-31-021 (July 11, 1990), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 90-AA-134 (Oct. 13, 1992); *Duruttya v. Mingo County Bd. of Educ.*, Docket No. 29-88-104 (Feb. 28, 1990), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 90-AA-72, *aff'd, Duruttya v. Bd. of Educ.*, 181 W. Va. 203, 382 S.E.2d 203 (1989).

Respondent argues that it was justified in terminating Grievant's employment for willful neglect of duty, insubordination, and notoriety. Grievant asserts Respondent failed to prove the charges against her and that the termination of her employment was retaliatory. Alternately, Grievant argues that the penalty of termination from employment should be mitigated.

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*). [F]or a refusal to obey to be "wilful," the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." *Id*., 212 W. Va. at 213, 569 S.E.2d at 460. This Grievance Board has previously recognized 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." *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).

Willful neglect of duty "encompasses something more serious than 'incompetence,' which is another ground for [school employee] discipline . . . 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). The West Virginia Supreme Court of Appeals has declined to make a comprehensive definition of "willful neglect of duty," instead finding that "[a] continuing course of lesser infractions may well, when viewed in the aggregate, be

sufficient." *Fox v. Bd. of Educ. of Doddridge County*, 160 W.Va. 668, 672, 236 S.E.2d 243, 246 (1977).

"This Court has held that willful neglect of duty constitutes a knowing and intentional act, rather than a neglect act. *Bd. of Educ. v. Chaddock*, 183 W.Va. 638, 640, 398 S.E.2d 120, 122 (1990). Willful neglect of duty encompasses something more serious than incompetence. *Id*. Furthermore, we noted in *Fox v. Board of Education of Doddridge County*, 160 W.Va. 668, 672, 236 S.E.2d 243, 246 (1977), that willful neglect of duty cannot be defined comprehensively. In some cases, termination of employment may be supported by evidence of a series of infractions, while in others 'a single act of malfeasance, whereby severe consequences are generated," may warrant a dismissal.' *Id*." *Costello v. Bd. of Educ.*, No. 13-0039, at 9 (W. Va. Sup. Ct., Nov. 8, 2013) (memorandum decision).

It was Grievant's duty to ensure the safety of her school. Grievant had been trained each year on security protocols and had received a special training precipitated by the then-recent school shooting at Parkland High School only one week prior to the incident. Grievant's own testimony shows she was not confused about what to do because of unclear protocols or inadequate training. Instead Grievant's actions on that day were motivated by her concern for how her actions might be viewed by administration because she had been "harshly criticized" in the past.

While the beginning of the incident was no cause for alarm in that the man's explanation that he may have gone to the wrong school was plausible, there is no innocent explanation for the man attempting to re-enter the school through a locked door thereafter. At that point, the man was clearly an intruder. He had been told to

leave the office and then attempted to sneak back into the school. When Grievant was informed of this by the secretary Grievant did not need to further "assess" the situation by walking the perimeter and as Incident Commander she should have remained inside to direct operations. A lockdown was required to ensure that the man who was actively trying to get back into the school could not gain entrance. Instead, Grievant delayed to wait for the custodian and delayed further to walk around the building. If Grievant was concerned there might be students outside the building, she could have taken action after she had assured the safety of the students inside the building by initiating a proper lockdown.

Grievant continued to fail in her duty when she did not connect the dots of the incident at the school with the contemporaneous 911 call of a suspect on the loose. Again, out of concern for herself, rather than call 911 to report that someone had tried to reenter the school after being told to leave or to call a lockdown to ensure that the fleeing suspect could not gain entrance, she delayed yet again to call her supervisor. Even after her supervisor specifically told her to call a lockdown, Grievant still failed to do so, calling only a "practice" lockdown. Grievant's argument that calling a "practice" lockdown was not improper because there was no difference and no harm in calling a "practice" lockdown is meritless. Grievant's supervisor told her to call a lockdown and disobeying that instruction was insubordinate. A "practice" lockdown is obviously not the same as a real lockdown and staff and students would not react with the same caution. There was an actual threat to the school and under those circumstances any chance of unnecessary confusion is unacceptable.

Respondent proved Grievant willfully neglected her duty and was insubordinate for the above. While, thankfully, no students were harmed, Grievant's failures created a situation in which students could have been harmed. Grievant's misconduct is of such a serious nature it is sufficient to justify her termination for that alone. It is, therefore, not necessary to address whether Grievant also failed in training the substitute secretary or whether Grievant could be terminated for the notoriety[3] caused by her misconduct. Nor do Grievant's arguments that the board's failure to train the secretary or provide her with additional security such as cameras or a mantrap excuse Grievant's misconduct. While the secretary's failure also placed the school in jeopardy, Grievant is responsible for her own actions after that point. The lack of additional cameras or a mantrap did not contribute to the incident.

Grievant further argues the termination of her employment was improper because it was in retaliation for her prior grievance activity. "No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination." W.VA. CODE § 6C-2-3(h). Reprisal is defined as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." W.VA. CODE § 6C-2-2(o).

[3] Respondent cited *Ellison v. Fayette County Bd of Educ*., No. 14-0344 (W. Va. Sup. Ct. of App., August 31, 2015) and *Woo v. Putnam County Bd. of Education*, 202 W. Va. 409, 504 S.E.2d 644 (1998) in support of this contention but those cases relate only to establishing a rational nexus for disciplining an employee for off-the-job conduct.

"In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation must establish a *prima facie* case." *Freeman v. Fayette Cty. Bd. of Educ.*, 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004). In syllabus point six of *Freeman*, the West Virginia Supreme Court of Appeals specifically applied the same elements required to prove a *prima facie* case under the West Virginia Human Rights Act to a claim arising from a public employee grievance stating,

> [T]he burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

Id., Syl. Pt. 6, 215 W. Va. at 275, 599 S.E.2d at 698 (citing Syl. Pt. 4, *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); Syl. Pt. 1, *Brammer v. Human Rights Comm'n*, 183 W. Va. 108, 394 S.E.2d 340 (1990); Syl. Pt. 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)).

"An employer may rebut the presumption of retaliatory action by offering 'credible evidence of legitimate nondiscriminatory reasons for its actions . . . .' *Mace v. Pizza Hut, Inc.*, 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); *see also Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983). Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for

unlawful discrimination. *Mace*, 377 S.E.2d 461 at 464." *W. Va. Dep't of Nat. Res. v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994); *Conner v. Barbour Cty. Bd. of Educ.*, 200 W. Va. 405, 409, 489 S.E.2d 787 (1997).

Grievant provided evidence of her protected activity of two prior grievance filings: a settlement agreement entered into on October 27, 2016 and a *Decision* entered June 18, 2018. The final decision of the Grievance Board granting Grievant's second grievance, in part, and denying her grievance, in part, was issued seven months prior to the decision to place Grievant on administrative leave. Superintendent Saxe was aware of Grievant's prior grievance activity. Thus, Grievant has established a *prima facie* case of retaliation.

Respondent has successfully rebutted the presumption of retaliation by providing legitimate nondiscriminatory reasons for the actions taken against Grievant. As discussed above, Grievant's willful neglect of her duty and insubordination in favor of her own concerns was serious misconduct. Grievant failed to prove this reason was a mere pretext. Grievant did prove Superintendent Saxe improperly considered the two prior written reprimands that had been voided by grievance action. However, it does not appear that error proves a retaliatory motivation and termination would be justified regardless of lack of past disciplinary action. It is very clear from the evidence presented that Superintendent Saxe was greatly disturbed by Grievant's lack of judgment and the potential disastrous consequences of her failures, a concern that was shared by many parents. That was the reason Grievant was terminated and not in retaliation for her prior grievance activity.

Grievant also asserts that Respondent's choice to hire an outside investigator and then "cover up" his report is proof of retaliation. The hiring of an outside investigator tends to support that Respondent was attempting to remain neutral in the face of Grievant's previous allegations of harassment against Assistant Superintendent Timothy Hardesty and illustrate how seriously Respondent was concerned with Grievant's alleged misconduct. As to the report, Grievant was not entitled to the report prior to her grievance filing. Although Grievant complains of the failure to provide the report prior to the pretermination meeting with Superintendent Saxe, due process only required that Grievant be provided with notice of the charges, explanation of the evidence, and an opportunity to be heard.[4] Superintendent Saxe provided Grievant with a four-page document outlining the evidence against her and Grievant was provided the opportunity to respond to those charges in writing. Grievant failed to prove Respondent's justification for her termination from employment was a pretext.

"[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the

---

[4] "The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest." Syl. Pt. 1, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 241 S.E.2d 164 (1977), *overruled in part on other grounds by W. Va. Dep't of Educ. v. McGraw,* 239 W. Va. 192, 201, 800 S.E.2d 230, 239 (2017). "A State civil service classified employee has a property interest arising out of the statutory entitlement to continued uninterrupted employment." *Id*. at Syl. Pt. 4. "'The constitutional guarantee of procedural due process requires "'some kind of hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment.' *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 [84 L. Ed. 2d 494, 105 S. Ct. 1487] (1985)." Syl. Pt. 3, *Fraley v. Civil Service Commission*, 177 W.Va. 729, 356 S.E.2d 483 (1987). "The pretermination hearing does not need to be elaborate or constitute a full evidentiary hearing. The essential due process requirements, notice and an opportunity to respond, are met if the tenured civil service employee is given 'oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story' prior to termination." *Id. at 732,* 356 S.E.2d at 486.

grievant bears the burden of demonstrating that the penalty was 'clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n,* Docket No. 89-SFC-145 (Aug. 8, 1989)." *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996). "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 Resources/Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996); *Olsen v. Kanawha County Bd. of Educ.*, Docket No. 02-20-380 (May 30, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994); *Cooper v. Raleigh County Bd. of Educ.*, Docket No. 2014-0028-RalED (Apr. 30, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

Grievant was a very long-term employee but she had some unsatisfactory work history in a prior suspension for misconduct and in unsatisfactory performance evaluations for two of her five years as principal of the school. Grievant asserts she was treated differently in that the principals of two other schools in the vicinity who did not lock down were not disciplined. Grievant did not prove that the compared principals committed any offense as those schools were farther away from the search and there was no evidence presented that 911 had contacted those schools or that the suspect had improperly entered the other schools. Grievant's offence as the principal in a position of authority in charge of safety for the whole school was not similar to the new substitute secretary. Grievant had received training on security protocols and expressed no legitimate confusion regarding the conduct that would be expected of her in an emergency situation. Termination of employment was not clearly disproportionate to Grievant's offense. Grievant's inability to appropriately respond to the seriousness of the situation and consideration of her own interests above the safety of the students is serious misconduct for which termination of employment is appropriate. Grievant failed to prove mitigation is warranted.

The following Conclusions of Law support the decision reached.

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 terminate an employee 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.

W. VA. CODE § 18A-2-8(a).

3. "It is not the label a county board of education attaches to the conduct of the employee . . . that is determinative. The critical inquiry is whether the board's evidence is sufficient to substantiate that the employee actually engaged in the conduct." *Allen v. Monroe County Bd. of Educ.*, Docket No. 90-31-021 (July 11, 1990), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 90-AA-134 (Oct. 13, 1992); *Duruttya v. Mingo County Bd. of Educ.*, Docket No. 29-88-104 (Feb. 28, 1990), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 90-AA-72, *aff'd, Duruttya v. Bd. of Educ*., 181 W. Va. 203, 382 S.E.2d 203 (1989).

4. 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*). [F]or a refusal to obey to be "wilful," the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." *Id.*, 212 W. Va. at 213, 569 S.E.2d at 460. This Grievance Board has previously recognized 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." *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).

5. Willful neglect of duty "encompasses something more serious than 'incompetence,' which is another ground for [school employee] discipline . . . 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). The West Virginia Supreme Court of Appeals has declined to make a comprehensive definition of "willful neglect of duty," instead finding that "[a] continuing course of lesser infractions may well, when viewed in the aggregate, be sufficient." *Fox v. Bd. of Educ. of Doddridge County*, 160 W.Va. 668, 672, 236 S.E.2d 243, 246 (1977).

6. “This Court has held that willful neglect of duty constitutes a knowing and intentional act, rather than a neglect act. *Bd. of Educ. v. Chaddock*, 183 W.Va. 638, 640, 398 S.E.2d 120, 122 (1990). Willful neglect of duty encompasses something more serious than incompetence. *Id*. Furthermore, we noted in *Fox v. Board of Education of Doddridge County*, 160 W.Va. 668, 672, 236 S.E.2d 243, 246 (1977), that willful neglect of duty cannot be defined comprehensively. In some cases, termination of employment may be supported by evidence of a series of infractions, while in others ‘a single act of malfeasance, whereby severe consequences are generated," may warrant a dismissal.’ *Id*.” *Costello v. Bd. of Educ.*, No. 13-0039, at 9 (W. Va. Sup. Ct., Nov. 8, 2013) (memorandum decision).

7. Respondent proved Grievant willfully neglected her duty and was insubordinate for failure to properly follow safety protocols.

8. “No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination.” W.VA. CODE § 6C-2-3(h). Reprisal is defined as “the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.” W.VA. CODE § 6C-2-2(o).

9. “In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation must establish a *prima facie* case.” *Freeman v. Fayette Cty. Bd. of Educ.*, 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004). In syllabus point six of *Freeman*, the West

Virginia Supreme Court of Appeals specifically applied the same elements required to prove a *prima facie* case under the West Virginia Human Rights Act to a claim arising from a public employee grievance stating,

> [T]he burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

Id., Syl. Pt. 6, 215 W. Va. at 275, 599 S.E.2d at 698 (citing Syl. Pt. 4, *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); Syl. Pt. 1, *Brammer v. Human Rights Comm'n*, 183 W. Va. 108, 394 S.E.2d 340 (1990); Syl. Pt. 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)).

10. "An employer may rebut the presumption of retaliatory action by offering 'credible evidence of legitimate nondiscriminatory reasons for its actions . . . .' *Mace v. Pizza Hut, Inc.*, 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); *see also Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983). Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. *Mace*, 377 S.E.2d 461 at 464." *W. Va. Dep't of Nat. Res. v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994); *Conner v. Barbour Cty. Bd. of Educ.*, 200 W. Va. 405, 409, 489 S.E.2d 787 (1997).

11. Grievant made a prima facie case of retaliation, which Respondent rebutted with proof of legitimate nondiscriminatory reasons for Grievant's termination from employment. Grievant failed to prove those reasons were pretextual.

12. "[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was 'clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n,* Docket No. 89-SFC-145 (Aug. 8, 1989)." *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996). "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 Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996); *Olsen v. Kanawha County Bd. of Educ.*, Docket No. 02-20-380 (May 30, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of

similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994); *Cooper v. Raleigh County Bd. of Educ.*, Docket No. 2014-0028-RalED (Apr. 30, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

13. Grievant failed to prove mitigation is warranted.

Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: August 5, 2021

Billie Thacker Catlett
Chief Administrative Law Judge