WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DONNA K. DAVIS,

Grievant,

v. **Docket No. 2011-1557-CabED**

CABELL COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

_____Grievant, Donna K. Davis ("Grievant"), filed this expedited Level Three grievance on April 25, 2011, against her employer, Respondent Cabell County Board of Education ("Respondent"), following its April 20, 2011, ratification of the county Superintendent's recommendation to suspend Grievant without pay and approval of the Superintendent's recommendation to terminate Grievant from her employment. Grievant's Statement of Grievance states as follows:

> On April 20, 2011 Respondent terminated Grievant and approved a suspension without pay from March 23, 2011 through April 20, 2011. These actions were based on several incidents of misconduct, which Respondent labeled as insubordination and willful neglect of duty. Grievant contends that the alleged incidents of misconduct were actually misjudgments and as such would be properly characterized as unsatisfactory performance. Grievant asserts that: (a) termination and suspension without pay for a month were too severe a penalty considered alone and in comparison with punishment administered to similarly situated employees; (b) she was not notified of her deficiencies by an evaluation and given an opportunity to improve her performance; and (c) her judgment during the critical time period was affected by an incident of harassment by her supervisor, Grievant asserts discrimination / favoritism and harassment as defined by West Virginia Code § 6C-2-2 and a violation of West Virginia Code § 18A-2-12a.

As relief, Grievant seeks the following: "reinstatement with compensation for all lost wages and benefits (pecuniary and nonpecuniary) with interest and removal of all references to her termination from her personnel file."

The Level Three grievance hearing was held on September 30, 2011, at the West Virginia Public Employees Grievance Board office in Charleston, West Virginia, before the undersigned administrative law judge. Grievant was represented by counsel, John E. Roush, Esquire, West Virginia School Service Personnel Association. Respondent was represented by counsel, Howard E. Seufer, Jr., Esquire, Bowles Rice McDavid Graff & Love, LLP. This matter became mature for consideration on November 8, 2011, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a bus operator. Grievant was terminated for insubordination and willful neglect of duty for four incidents of misconduct, the first of which was that without authorization, she intentionally left three middle school students unattended at a local chain restaurant for approximately forty minutes while she drove to the county bus garage. Grievant argues that Respondent has failed to meet its burden of proof and that her termination was improper because she was not given the opportunity to improve before she was terminated. Grievant further asserts discrimination and favoritism. Given the totality of the circumstances, the Respondent has demonstrated that Grievant's actions in three of the four incidents identified were insubordinate and a willful neglect of duty. Further, Respondent proved that the discipline imposed on the Grievant was justified. Therefore, this 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

1. Grievant was employed as a bus operator by Respondent from 1998 until April 20, 2011.

2. During the 2010-2011 school year, Grievant's regular morning and evening runs required her to transport children living in the Ona and Barboursville, West Virginia, areas to and from school.

3. During this time, Grievant was allowed to keep her bus overnight at her home in Milton, West Virginia.

4. On or about February 1, 2011, while Grievant was off work due to illness, Joseph Meadows, Grievant's supervisor, telephoned her about an error found in her schedule. During this telephone conversation Meadows commented to Grievant, something to the effect of, "had he [Meadows] been able to get to her, he would have slapped/smacked her upside the head" because of the error.

5. On March 21, 2011, Grievant made her regular runs operating a spare bus because her regular bus was being repaired at the bus garage. The radio on the spare bus did not work properly. Grievant could hear what was being said on the radio, but she could not call out on it.

6. During the course of making her evening run that day, Grievant heard her name called over the radio informing her that her regular bus was ready to be picked up at the garage. Because Grievant could not call out on her radio, during her stop at Ona

Elementary, she asked another bus driver to radio the garage to let them know that she would be in to get her bus that evening.

7. Later on that day, without the permission or authorization of Respondent, her supervisor(s), and without speaking to the students' parents, Grievant decided to leave the last three students on her bus, all middle school students, at the Steak 'n' Shake restaurant in Barboursville, West Virginia, while she drove to the bus garage to pick up her regular bus. These three students are identified as H.N., R.S., and A.H.[1]

8. These three students were regularly assigned to Grievant's bus route. R.S. would normally have exited the bus at her home, prior to the bus approaching Steak 'n' Shake. However, on March 21, 2011, while on the bus that afternoon, R.S. had obtained permission from her mother, Lora Sammons, to go home with H.N.[2]

9. R.S. did not have a "boarding pass" permitting her to be discharged at the home of H.N. R.S.'s mother, Lora Sammons, had not contacted the school to take the appropriate steps to obtain a boarding pass for R.S. Ms. Sammons was unaware that a "boarding pass" was required to change a student's designated stop.[3]

10. The three middle school students were left unsupervised and unattended at the restaurant for approximately forty minutes.

11. While at Steak 'n' Shake, R.S. contacted her parents using her cell phone,

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[1] Given that the students mentioned herein are all minors, they are being identified only by their initials.

[2] *See*, testimony of Lora Sammons.

[3] The Boarding Pass Policy is located in the Cabell County Schools Transportation Department procedures manual and in the "tri-fold" that goes home to parents. *See,* testimony of Joseph Meadows.

by both text message and phone call, and informed them of her whereabouts. R.S. did not ask her parents for permission to stay at Steak 'n' Shake while Grievant exchanged buses.[4] A.H. also contacted her mother using her cell phone. However, A.H. asked her mother, Gail Thompson, for permission to stay at the restaurant with the other two students while Grievant went to the bus garage.[5]

12. Upon learning that R.S. was at Steak 'n' Shake, Lora Sammons told R.S. to stay there and that she was coming to get her. Sammons instructed R.S. to inform her if Grievant came back before she got to the restaurant. Thereafter, Sammons received a telephone call from the child's father, who had also received a text from R.S. about being at Steak 'n' Shake. Before Sammons could get to the restaurant, R.S. informed her via text message that Grievant had returned and picked them up.[6] Sammons did not continue on to the restaurant.

13. Grievant returned to Steak 'n Shake after retrieving her regular bus, Bus #690, picked up the three students, and resumed her run. Grievant let A.H. off at A.H.'s home. Grievant let the other two students, R.S. and H.N., off at the home of H.N.

14. Mr. Meadows and Director of Transportation, Patty Pauley, learned that Grievant had left the three students at Steak 'n Shake from R.S.'s father, who had called

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[4] *See*, testimony of Lora Sammons.

[5] *See*, testimony of Gail Thompson. No evidence was presented regarding whether H.N. contacted her parents.

[6] Actual copies of the text messages exchanged between R.S. and her parents were not offered into evidence during the Level Three hearing. Instead, documents purporting to be typed summaries of the same, which were prepared by Joseph Meadows, were offered into evidence.

their office to complain about Grievant's actions. Meadows received this call while the students were still at the restaurant.

15. Because he could not get to Steak 'n' Shake in time to meet the bus upon Grievant's return, Meadows contacted Lora Sammons and asked her for a written statement from her daughter, R.S., regarding the incident. Meadows arranged to meet Sammons later that day at the Cabell Midland High School parking lot to get the written statement. Sammons then provided Meadows two hand-written documents purported to be the written statements of R.S. and H.N.[7]

16. No members of school administration interviewed, or spoke with, any of the three students involved in this incident during Meadows' investigation.[8]

17. Grievant operated her regular bus on March 22, 2011, making her regular runs. On that morning, Meadows met Grievant and retrieved the hard drive from the recording system on Grievant's regular bus as part of his investigation into the Steak 'n' Shake incident.[9]

18. On March 23, 2011, Lora Sammons called Meadows and complained about Grievant having operated her daughter's school bus the day before. Meadows acknowledged that Grievant operated the bus on March 22, 2011, and informed Sammons that Grievant was not operating the bus on March 23, 2011. Further, Meadows advised

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[7] *See*, testimony of Joseph Meadows and Lora Sammons. *See also*, Joint Exhibit 1 and Respondent's Exhibit 7.

[8] *See*, testimony of Joseph Meadows.

[9] It is unclear from the record whether the hard drive from the spare bus Grievant operated on March 21, 2011 was also reviewed.

Sammons that Grievant's March 21, 2011 conduct was being addressed and that Grievant would be meeting with the Superintendent.

19. While reviewing the hard drive from Grievant's regular bus, Bus #690, Meadows discovered that on March 21, 2011, the camera at the front of the bus was covered by a cloth at the time Grievant retrieved the three students from Steak 'n' Shake. However, the GPS data of Bus #690 shows that Grievant stopped at the restaurant then returned to Route 60 heading east. Because the camera was obstructed, no video of the three students boarding the bus at Steak 'n' Shake was recorded. Although the camera records audio, no sounds were detected by the camera when the students were boarding the bus. The camera resumed capturing images and sound after the bus had left the restaurant.

20. Meadows decided to review older video footage contained on the hard drive because the front camera had been obstructed on March 21, 2011.

21. In reviewing the older video footage, Meadows identified additional incidents of Grievant violating various county and/or state transportation policies, each of which occurred before the Steak 'n' Shake incident. Respondent had received no complaints regarding these other incidents.

22. On February 18, 2011, Grievant picked up two Cabell Midland High School students, who had missed their bus and were walking along Route 60. Grievant later discharged these students from the center lane of Route 60 while none of the bus' safety lights/equipment were activated.

23. On March 17, 2011, after discharging a student, "D.B.," at his regular stop, Grievant picked him up again, and took him home with her so that he could perform yard

work for her mother for pay. D.B.'s mother had given permission for him to be with Grievant and to do the yard work.

24. Upon stopping the bus on the trip to her home, Grievant instructed D.B. to go to the back of the bus and push the "child reminder button," and to also activate the "Zonar" for her, which he did.[10] When D.B. finished the yard work, Grievant drove him to his home in her personal vehicle.

25. From February 14, 2011 until March 22, 2011, Grievant covered the camera at the front of her bus at various times during her morning runs, in violation of county policies/procedures.

26. Director Pauley, Meadows, and Sandra Rupert, Manager of Service Personnel for Cabell County Schools, met with Grievant on the morning of March 23, 2011, about the Steak 'n' Shake incident, as well as the other incidents discovered on the bus hard drive. Also present during the portion of the meeting concerning the Steak 'n' Shake incident, was parent, Jennifer Neal, mother of the child, H.N.[11]

27. Initially, Grievant denied covering the camera at times during her morning runs between February 14, 2011 and March 22, 2011. Grievant later admitted to covering the camera to hide the fact she was drinking water while operating her bus.

28. Despite Grievant feeling that she needed to drink water because of her

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[10] Both of these devices are security/safety features installed on buses to prevent a bus operator from accidently leaving a child on the bus unattended.

[11] *See*, testimony of Joseph Meadows and Respondent's Exhibit 7, Letter dated March 28, 2011. *See also*, Letter dated March 23, 2011, Respondent's Exhibit 15. It is noted that Jennifer Neal was not called by either party to testify at the Level Three hearing. The record is silent as to the reason why only this one parent attended this meeting.

illness, she did not seek advance permission from her supervisor(s) for such.

29. On March 23, 2011, Director Pauley suspended Grievant without pay as a result of the Steak 'n' Shake incident, as well as the incidents Meadows discovered on the bus video recordings. By letter dated March 28, 2011, Director Pauley informed Superintendent William Smith of all the incidents involving Grievant.[12]

30. On April 4, 2011, Grievant met with Superintendent Smith and other school administration regarding the various incidents. Gail Thompson, parent of the child A.H., also attended this meeting.

31. By letter dated April 5, 2011, Superintendent Smith informed Grievant that he would be asking the Board of Education, at its April 20, 2011 meeting, to approve her suspension without pay from March 23, 2011 until April 20, 2011, and that he would be recommending that her employment contract be terminated for insubordination and neglect of duty jeopardizing the safety of students during each of the identified incidents.[13]

32. On April 20, 2011, the Cabell County Board of Education ratified Grievant's suspension and accepted the recommendation of the Superintendent to terminate Grievant's employment contract. Grievant was informed of the Board's decision by letter dated April 21, 2011.[14]

33. While employed by Respondent, Grievant's performance was evaluated regularly, and all of her evaluations were good.

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[12] *See*, Respondent's Exhibit 7.

[13] *See*, Letter dated April 5, 2011, Joint Exhibit 1.

[14] *See*, Letter dated April 21, 2011, Joint Exhibit 2.

34. School administration did not counsel Grievant about her conduct during any of these incidents before suspending and/or terminating her. Grievant was not given the opportunity to improve before she was suspended and/or terminated.

35. Grievant had attended the training sessions required by Respondent for its bus operators. Grievant had also received the policies and procedures manuals developed by the Cabell County Schools Transportation Department.[15]

36. Although Grievant did not inform her supervisors in advance or afterward, Grievant made no attempt to conceal her actions in picking up the high school students along side Route 60, or in discharging them from the center lane of the road. Further, Grievant made no attempt to conceal the fact that she took D.B. to her home on the school bus. Grievant made no attempt to conceal the fact that she instructed D.B. to push the "child reminder button" or to activate the "Zonar" for her. These incidents were clearly recorded by the video monitoring system on her bus. Grievant made no attempt to obstruct the camera to prevent the recording of these incidents. Respondent simply did not review the recordings.

37. Grievant attempted to conceal from her employer the fact that she was drinking water while making her morning runs between February 14, 2011 and March 22, 2011. Grievant further attempted to conceal from her employer the fact that she left the three students unattended at Steak 'n' Shake on March 21, 2011. Such is evidenced by Grievant's covering the camera at the front of the bus so that the camera would not record the students getting back on the bus at the restaurant. However, Grievant did not attempt

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[15] *See*, Respondent's Exhibits 8, 9, 10, 11, and 12.

to conceal this event from the students' parents.

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." *Petry v. Kanawha County Bd. of Educ.* Docket No. 96-20-380 (Mar. 18, 1997). "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 and 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*.

WEST VIRGINIA CODE §18A-2-8 states, in part as follows:

> (a) 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). Dismissal of an employee under WEST VIRGINIA CODE section 18A-2-8 "must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously." Syl. Pt. 3, in part, *Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975). Syl. Pt. 4, in part, *Maxey v. McDowell County Board*

of Education, 212 W. Va. 668, 575 S.E.2d 278 (2002); Syl. Pt. 7, in part, *Alderman v. Pocahontas County Bd. of Educ.,* 223 W. Va. 431, 675 S.E.2d 907 (2009).

Respondent has charged Grievant with insubordination and neglect of duty for purposely leaving three middle school students unattended at Steak 'n' Shake in Barboursville, West Virginia, on March 21, 2011, while she drove to the county bus garage. Additionally, Respondent charged Grievant with insubordination and neglect of duty for her conduct during three other incidents that were only discovered during Joseph Meadows' investigation into the Steak 'n' Shake incident.

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) (*citing Weber v. Buncombe County Bd. of Educ.*, 266 S.E.2d 42 (N.C. 1980)). In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ.,* Docket No. 94-01-394 (Jan. 31, 1995).

To prove willful neglect of duty, the employer must establish that the employee's conduct constituted 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). 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).

However, "[i]t 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); *Duruttya v. Mingo County Bd. of Educ.*, Docket No. 29-88-104 (Feb. 28, 1990).

Grievant does not dispute that she left the three students at Steak 'n' Shake. However, Grievant disputes the circumstances under which she left them. Grievant further contends that her actions during the Steak 'n' Shake incident, as well as during each of the other incidents identified by Respondent, were "misjudgments" on her part, and not conduct warranting termination and suspension. She further argues that each of the incidents identified by Respondent involve, at most, "unsatisfactory performance," not "insubordination" or "willful neglect of duty," and that Respondent failed to give her the opportunity to improve before terminating her.

WEST VIRGINIA CODE section 18A-2-8(b) provides that "[a] charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article. The charges shall be stated in writing served upon the employee within two days of presentation of the charges to the board." W. VA. CODE § 18A-2-8(b). Further, West Virginia Code section 18A-2-12a provides, in

part, the following:

> (6) All school personnel are entitled to know how well they are fulfilling their responsibilities and should be offered the opportunity of open and honest evaluations of their performance on a regular basis and in accordance with the provisions of section twelve of this article. All school personnel are entitled to opportunities to improve their job performance prior to termination or transfer of their services. Decisions concerning the promotion, demotion, transfer, or termination of employment of school personnel, other than those for lack of need or governed by specific statutory provisions unrelated to performance, should be based upon the evaluations, and not upon factors extraneous thereto. All school personnel are entitled to due process in matters affecting their employment, transfer, demotion or promotion . . . .

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

The issue becomes whether Grievant's conduct during the identified incidents is correctable. If correctable, the county board must inform the employee of her deficiencies and afford her a reasonable period to improve. *See, Mason County Bd. of Educ. v. State Supt. of Schools,* 165 W. Va. 732, 274 S.E.2d 435 (1980). *See also, Maxey v. McDowell County Board of Education*, 575 S.E.2d 278, 2002 W. Va. LEXIS 226 (2002); *McMann v. Jefferson County Bd. of Educ.*, Docket No. 2009-1340-JefED (October 21, 2009). An

offense or conduct which affects professional competency is correctable, if the conduct or offense does not "directly and substantially affect the morals, safety, and health of the system in a permanent, non-correctable manner." *Mason County Bd. of Educ.*, 165 W. Va. 732, 739, 274 S.E.2d 435, 439 (1980).

Looking first at the Steak 'n' Shake incident, Grievant asserts that she only stopped at the restaurant because R.S. told her that she needed to use the restroom "really, really bad."[16] As such, Grievant stopped at Steak 'n' Shake to allow R.S. to use the restroom. Because she had to go retrieve her bus before the garage closed, Grievant asked the students if it was okay if they waited at the restaurant while she went to get her bus. Grievant contends that she told the three students to call their mothers to see if this was okay before she left the students. Grievant asserts that the three students told her that they had contacted their mothers, using their cell phones, and that each had received permission to stay at the restaurant. Grievant did not speak to the students' parents. Grievant simply relied on what the students told her. Respondent, however, asserts that Grievant chose to stop at Steak 'n' Shake for her personal convenience and instructed the three students not to tell their parents about it.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dept. of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility

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[16] *See*, testimony of Grievant.

of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995)*; Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1993). The Grievance Board has 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 the following: 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.*

Neither party called any of the three students to testify at the Level Three hearing. Respondent called Lora Sammons, mother of R.S, to testify about the Steak 'n' Shake incident. To further support its position, Respondent offered documents purported to be the written statements of R.S. and H.N. concerning the Steak 'n' Shake incident that were obtained by Lora Sammons. Respondent also offered documents prepared by Joseph Meadows which were presented as reproductions of the text messages exchanged between R.S. and Lora Sammons while the students were at Steak 'n' Shake. Grievant testified about the incident, and presented the testimony of Gail Thompson, mother of A.H. Neither party called Jennifer Neal, mother of H.N., who had apparently attended the conference held on March 23, 2011.[17]

Because neither party called the students as witnesses, the undersigned cannot

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[17] *See*, Respondent's Exhibit 7.

assess their credibility. Two of Respondent's witnesses, Lora Sammons and Joseph Meadows, testified in great detail regarding the written statements of H.N. and R.S. and the reproduction text messages. However, those pieces of evidence are somewhat problematic as they are hearsay and contain hearsay upon hearsay. Further, the text message reproductions are just that–reproductions.

Under the statues and procedural rules regarding the grievance process, the formal rules of evidence are not applicable in grievance proceedings, except as to the rules of privilege recognized by law. *See,* W. VA. CODE § 6C-2-4(a)(3). The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings. Accordingly, an administrative law judge must determine what weight, if any, that is to be accorded hearsay evidence in a disciplinary proceeding. *See, Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (March 11, 2010) (affirmed by the Circuit Court of Kanawha County, WV June 9, 2011); *Warner v. Dep't of Health and Human Resources,* Docket No. 07-HHR-409 (Nov. 18, 2008); *Miller v. W. Va. Dep't Health and Human Resources,* Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996).

The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4)

whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements.[18] *See, Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (March 11, 2010) (affirmed by the Circuit Court of Kanawha County, WV, June 9, 2011)*; Gunnells v. Logan County Bd. of Educ.,* Docket No. 97-23-055 (Dec. 9, 1997); *Sinsel v. Harrison County Bd. of Educ.,* Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't,* Docket No. 90-8-115 (June 8, 1990).

In applying these factors, the undersigned determines that the documents presented as the handwritten statements of H.N. and R.S. are entitled to no weight. There has been no evidence presented that the students were unavailable to testify at the Level Three hearing. The students are not disinterested witnesses to the incident, and contradictory evidence has been presented. Moreover, these "statements" were not taken by school administration. They are alleged to have been written by the students at the request of Lora Sammons, who received a request for the same from Joseph Meadows. No member of school administration spoke with the three students, or interviewed them in any way, about the incident. Lora Sammons spoke to H.N. and R.S. about the statements.

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[18] The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these factors to examine when assessing hearsay. *See, Borinkhof v. Department of Justice*, 5 MSBP 150 (1981).

Sammons delivered the written statements to Meadows. Even though Meadows was investigating this incident, he had no contact with the students. Similarly, the reproduction text messages are entitled to no weight. The document is hearsay, contains hearsay upon hearsay, and because it is not the actual text message, it is not a reliable piece of evidence. The original text messages could have been obtained and offered as evidence.

The undersigned is not persuaded that Grievant instructed the students not to tell their parents about Steak 'n' Shake. This was a significant detail in Respondent's case and in the decision to terminate Grievant. Gail Thompson testified that her daughter had called her and asked for permission to stay there while Grievant went to the bus garage. Sammons testified that her daughter did not ask her for permission. The undersigned does not doubt the testimony of either of these witnesses. The problem faced in this part of the analysis is that each witness has based her testimony on what her daughter has said or done, and how each has reacted to the same. The students' testimony was needed.

However, the fact remains that Grievant left the three students unattended at the restaurant without the permission, or authorization, of her supervisor(s) and of all the students' parents. The undersigned can understand why the stop was initially made as Grievant was faced with a student claiming to urgently need to use the restroom. However, there is absolutely no reason to explain why Grievant saw fit to leave the students at the restaurant while she went to the bus garage. The undersigned is not persuaded by Grievant's argument that her actions were simply a misjudgment. Further, Grievant's argument that she left the students at the restaurant to save the Respondent money because it reduced the miles she traveled is wholly without merit. To say that Grievant exercised poor judgment in this situation is an understatement. By leaving the three

students unattended at Steak 'n' Shake, Grievant violated various state and county policies/procedures, and endangered the students' safety. Further, as illustrated by the fact that Grievant covered the camera located in the front of the bus to conceal her picking up the students from Steak 'n' Shake, Grievant knew that leaving the students at the restaurant violated the rules, and Grievant was attempting to hide her actions from her supervisors. Grievant's actions during this incident far exceed "unsatisfactory performance," and are not correctable. Grievant knowingly and intentionally violated the rules. Therefore, Respondent was not required to provide Grievant the opportunity to improve before terminating her employment contract. Grievant was clearly insubordinate and willfully neglected her duties during this incident. Therefore, Respondent has met its burden of proving the charges against Grievant with respect to this incident.

At the Level Three hearing in this matter, much was made about the fact that Grievant was going to, and did allow, R.S. to get off the bus at the home of H.N. without a "boarding pass." Respondent's Transportation Procedures manual requires such a pass before a student can be picked up or discharged at a stop other than his or her designated stop.[19] Grievant claimed no knowledge of this procedure at the Level Three hearing. However, so did Lora Sammons, R.S.'s mother. Sammons testified that she did not know of the requirement. Sammons also testified that R.S. had her permission to go home with H.N. that day. Although Meadows testified that parents are informed of this procedure in a "tri-fold" that is sent to them, Sammons did not know of it. As Grievant was not aware of the boarding pass requirement, the undersigned wonders how many of these passes

[19] *See,* Respondent's Exhibits 8, 9, and 10.

are issued by Cabell County Schools each day? The undersigned finds Respondent has failed to meet its burden of proof regarding this event.[20]

Next, Respondent has charged Grievant with insubordination and willful neglect of duty for intentionally obstructing the front camera on her bus during her morning runs from February 14, 2011 to March 22, 2011, in violation of state and county policies/procedures, to conceal the fact she was drinking water, which is also a violation of county procedures. Grievant has admitted to covering the camera as described above.

Cabell County Schools has a written safety procedure prohibiting bus operators from having open drink containers in the driver's area at any time while driving or when students are present.[21] Further, the county procedures require that operators have the cameras operating when making their runs.[22] Grievant admits knowing these procedures but explains violating the open container policy by asserting that she was ill and needed to drink water in the mornings to alleviate a cough and a throat condition. Grievant never informed her supervisors that she needed to drink water due to illness. Grievant did not ask her supervisors for permission to be able to drink water as needed during her runs. When asked why she did not ask her supervisor for permission to have water with her on

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[20] Based upon the evidence presented at the Level Three hearing, it appears that Respondent should offer additional training to its personnel, as well as to the parents, on the issue of boarding passes. The undersigned finds it very interesting that R.S. is the student who had no boarding pass, her having to use the restroom initiated the stop at the restaurant, and that her parent(s) is who alerted the school of the incident. Further, it was R.S.'s mother who assisted with the investigation and complained about Grievant driving the bus on March 22, 2011, but did not attend any of the conferences held with Grievant, even though the other students' mothers each attended one conference.

[21] *See*, Respondent's Exhibits 8, 9, and 10.

[22] *See*, Respondent's Exhibits 8, 9, and 10.

the bus, Grievant testified that she "never thought about it."[23] However, Grievant argues that Meadows' February 1, 2011 comment about "slapping" her, caused her to be reluctant to approach Meadows about her illness and such is why she covered the camera to conceal her drinking water.

By intentionally covering the camera to conceal the fact that she was drinking water while operating her bus, Grievant was knowingly violating, or disregarding, two separate policies/procedures. Although Meadows' comment was inappropriate, the undersigned is not persuaded by Grievant's argument that Meadows' comment is at the root of her conduct during this incident. Grievant presented no evidence to support her allegations that Meadows' comment caused her anxiety or affected her judgment. When asked why she intentionally violated these polices/procedures, Grievant testified that she did so because she thought she could get away with it that one time. This is not correctable conduct. Although this is a very unfortunate situation, Grievant was insubordinate and willfully neglected her duties in that she knowingly and intentionally violated the established policies/procedures. Respondent has met its burden regarding this incident and was not required to grant Grievant the opportunity to improve before terminating her.

The next charge of insubordination and willful neglect of duty against Grievant arises out of an incident occurring on February 18, 2011. While making her regular afternoon run that day, Grievant picked up two students who were walking along the side of Route 60. Grievant recognized one of the students as a boy who rode her bus sometimes, "L.B."[24]

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[23] *See*, Grievant's testimony.

[24] The second boy has not been identified in the record.

Grievant confirmed the students had missed their bus and allowed them to board.

After picking up the two boys, Grievant proceeded on her regular run. L.B.'s stop was at the Halfway Market in Milton, West Virginia, where his mother would be waiting to get him and the other boy. When Grievant got to L.B.'s stop, his mother was not there. This stop happens to be just before the turn off to Grievant's home, where she keeps her bus at night. Grievant pulled into the turning lane of Route 60 to make a left turn into her driveway. At that point, L.B. saw his mother coming toward the bus in the west-bound lane. Instead of completing the turn or pulling out of the center lane to the right-hand lane to discharge the students, Grievant discharged the students from the center lane of Route 60. Further, when the students were discharged from the bus, the yellow warning lights, the red lights, and the bus stop sign were not activated.

Grievant is charged with numerous policy/procedure violations, both state and county, arising out of this incident.[25] The first violation Respondent alleges Grievant made during this incident is that Grievant made a prohibited unauthorized stop, in violation of both West Virginia Board of Education Policy 4336 and county Transportation Procedures "School Bus Routes and Stops," when she picked up the two students in the first place.[26] Respondent argues picking up these two students violated safety policies, in that Grievant did not know both students, they were not assigned her bus, and when she picked them up, she encouraged them to cross Route 60, thereby endangering their safety.[27]

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[25] *See*, Respondent's Exhibits 8-10 and 14.

[26] *See*, Respondent's Exhibits 8-10 and 14.

[27] There was much debate about whether L.B. was really assigned to Grievant's bus. Given the circumstances, the undersigned finds this detail to be irrelevant and it will not be

However, the major issue identified in this incident was that Grievant discharged the students from the center lane of Route 60, while none of the safety lights/equipment were activated.[28] Grievant was well aware that discharging students from the center lane of traffic is prohibited, and that she should have had all the lights and safety equipment activated. Grievant had received training on these issues.[29]

Grievant argues that L.B.'s mother's car was blocking traffic so it was safe for the students to exit the bus from the center lane. Grievant further asserts that she checked her mirrors to make sure traffic was clear before she allowed the students to exit the bus. However, the video footage taken from Grievant's bus shows a vehicle passing the bus on the right just after the students exited the bus.[30] Grievant did not dispute that the yellow lights were not activated, and she offered no explanation for not activating them. Further, the red lights and stop sign should have been, and were, activated automatically, but were immediately disarmed.[31] Grievant had no explanation for this as well.

The undersigned finds that the Respondent has met its burden of proving Grievant was insubordinate and that she willfully neglected her duties by discharging these two students from the center lane of Route 60 without having the required safety lights/equipment activated. Grievant had received sufficient training on the proper ways

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discussed further.

[28] *See*, testimony of Meadows and video clips from Bus #690 hard drive, identified as Respondent's Exhibit 6. *See also*, Respondent's Exhibits 8-10 and 14.

[29] *See*, Respondent's Exhibit 11.

[30] *See*, Respondent's Exhibit 6.

[31] *See*, Respondent's Exhibit 6 and the testimony of Joseph Meadows.

to discharge students from her bus, but she ignored it. This conduct goes well beyond "unsatisfactory performance." Grievant's actions in this incident are not correctable. Therefore, Respondent was not required to give Grievant the opportunity to improve before terminating her contract.

The last charge of insubordination and willful neglect identified by Respondent was that on March 17, 2011, after Grievant had discharged a student identified as "D.B." at his regular stop, she returned in her school bus and picked him up to take him home with her to perform yard work for pay. D.B.'s mother knew about this and had consented. She had even accompanied him to the bus when Grievant picked him up. On the way to her home, Grievant stopped to refuel her bus at the county garage. Before exiting the bus for this stop, Grievant instructed D.B. to go to the back of the bus and push the child reminder button, which he did. Thereafter, when Grievant and D.B. arrived at her home, the end of Grievant's route, she instructed D.B. to take the Zonar device to the back of the bus to activate the same, and he complied. When D.B. was finished with the yard work that evening, Grievant took him back to his home using her personal vehicle.

Again, Respondent charges Grievant with numerous county and state policy/procedure violations during this incident. First, Respondent charges Grievant with making an unauthorized stop, that being when she picked D.B. up to take him to her home, using her bus for her own personal benefit, and improperly delegating some of her duties to D.B.[32] Grievant admits that she used the bus to take D.B. home with her and that she had him assist her by pushing the child reminder button and activating the Zonar. Grievant

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[32] *See*, Respondent's Exhibits 8-10 and 14.

explains her actions by stating that she did not think of it as violating procedure/policy by taking D.B. home with her on the bus, or by having him help her with the child reminder button and the Zonar. Grievant asserts that she did these things to make D.B. feel special, and that they were acts of kindness.

Pressing the child reminder button and activating the Zonar are procedures that are part of the bus operators' post-trip duties designed to make the bus operator get up and walk to the back of the bus to check to ensure that no students are left on the bus at the end of the route. These procedures are also used to make the operators inspect their buses for damage or other problems at the end of each run. Bus operators, including the Grievant, have received training on both the child reminder and Zonar systems.[33]

Grievant violated numerous established policies/procedures contained in both the West Virginia Board of Education 4336 and various county transportation policies/procedures during this incident. Grievant testified that she remembered walking with D.B. as he activated the Zonar; however, the video evidence does not show this.[34] Grievant testified that she never thought about taking D.B. home with her on the bus as being a violation of procedures, even though she knew the rules prohibited personal use of the bus. Grievant instructed D.B. to push the child reminder button and to activate the Zonar for her even though she knew this was her responsibility. However, Grievant did not seem to grasp that she was violating a rule by having D.B. do these things under her supervision. Although Grievant violated policies/procedures during this incident, the

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[33] *See*, Respondent's Exhibits 8-12.

[34] *See*, Respondent's Exhibit 6.

undersigned cannot find that Grievant's conduct during this incident rises to the level of insubordination and/or willful neglect of duty. Grievant did not intentionally disregard or violate established policies/procedures during this incident. Yes, her actions were intentional, but Grievant did not understand that her actions were violating the rules. Further, Grievant made no attempt to conceal this incident from anyone. Grievant's conduct here could have been correctable. Accordingly, Respondent has failed to meet its burden regarding this incident.

Grievant argues that the discipline she received was disproportionate to her conduct and that she was disciplined more severely than other similarly situated employees. Grievant also alleges discrimination and favoritism. Dismissal pursuant to WEST VIRGINIA CODE section 18A-2-8 "must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously." W. VA. CODE § 18A-2-8. Further, "[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 the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995). *See, Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Hoover v. Wirt County Bd. of Educ.*, Docket No. 2008-1482-WirED (February 12, 2008).

"W. VA. CODE § 18-29-2(m) defines 'discrimination' as 'any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.'" *Hogsett, et al., v. Wayne County Bd. of Educ.*, Docket No. 01-50-056 (Apr. 5, 2001). In order to establish

a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

The Board of Education of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004). Favoritism is defined by W. VA. CODE § 18-29-2(o) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." *Rice v. Putnam County Bd. of Educ.,* Docket No. 00-40-011 (May 4, 2000).

"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).

Grievant presented evidence that in the past, two bus operators who had covered cameras on their buses were suspended, not terminated. Further, Grievant argued that Respondent suspended, not terminated, a bus operator who had left a sleeping kindergarten student on the bus. That student was soon found by another bus operator in

the bus garage, then taken on to school. That incident resulted in a Child Protective Services investigation ("CPS"). Upon investigation, CPS determined the incident to have been accidental and found no abuse or neglect.[35] Grievant also presented evidence that Respondent had suspended, not terminated, another bus operator who had discharged a kindergarten student to a stranger along side a road. This incident was the result of a miscommunication as the operator was instructed that the student's grandmother, who would be in a red car, would be waiting to get the child at the stop. Unfortunately, the bus operator discharged the student at the wrong red car.

Respondent argues that the instances of other bus operators' misconduct and discipline can be distinguished from Grievant's in that leaving the sleeping child on the bus and discharging the student to the stranger were accidents, not intentional conduct. Respondent argues that all of Grievant's actions were intentional. Further, Respondent argues that in Grievant's case, there was a series of incidents of misconduct, not one isolated incident. Superintendent Smith testified that had Grievant's only infraction been the camera obstruction from February 14, 2011 to March 22, 2011, he would have only suspended Grievant. Superintendent Smith further testified that he decided to terminate Grievant because all of Grievant's actions during the identified incidents were of an intentional nature and because there was a series of incidents.

Grievant's actions in leaving the three students at Steak 'n' Shake and discharging the two students from the center lane of the road while having no safety lights/equipment activated simply cannot be compared to those of the other bus operators who

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[35] *See*, Respondent's Exhibit 16.

unintentionally left a sleeping child on a bus and mistakenly discharged a student to the wrong person because of a miscommunication. Further, no evidence was presented to establish that these other drivers, including those who had obstructed their cameras, had engaged in a series of closely related incidents of misconduct.

Grievant knowingly and intentionally left three students at Steak 'n' Shake while she ran a work-related errand. In doing so, Grievant endangered the safety of those students. Grievant further tried to hide her actions from Respondent by obstructing the camera. Also, Grievant endangered the safety of the two high school students when she discharged them from the center lane of the road without having any safety lights/equipment activated. Further, Grievant knowingly and intentionally violated policies/procedures by obstructing her camera in February and March to hide the fact that she had an open container on the bus. Respondent's termination of Grievant was not arbitrary, capricious, or an abuse of its discretion. The law allows Respondent to terminate employees for insubordination and willful neglect of duty, and that is what occurred. The discipline imposed on Grievant is not disproportionate to her offenses. Although Respondent did not meet its burden with respect to the incident with D.B., the severity of Grievant's conduct during the Steak 'n' Shake incident and the L.B. incident alone warrant termination. Mitigation of the discipline imposed is not warranted. Respondent has met its burden of proving the charges against Grievant by a preponderance of the evidence. Grievant has failed to meet her burden of proving her claims of discrimination and favoritism.

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).

2. An employee of a county board of education may be suspended or dismissed only for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a *nolo contendere* to a felony charge. *See*, W. VA. CODE § 18A-2-8.

3. Dismissal of an employee under WEST VIRGINIA CODE section 18A-2-8 "must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously." Syl. Pt. 3, in part, *Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975). Syl. Pt. 4, in part, *Maxey v. McDowell County Board of Education*, 212 W. Va. 668, 575 S.E.2d 278 (2002); Syl. Pt. 7, in part, *Alderman v. Pocahontas County Bd. of Educ.,* 223 W. Va. 431, 675 S.E.2d 907 (2009).

4. 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) (*citing Weber v. Buncombe County Bd. of Educ.*, 266 S.E.2d 42 (N.C. 1980)). In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently

knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ.,* Docket No. 94-01-394 (Jan. 31, 1995).

5. To prove willful neglect of duty, the employer must establish that the employee's conduct constituted 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). 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).

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

7. If conduct is correctable, the county board must inform the employee of her deficiencies and afford her a reasonable period to improve. *See, Mason County Bd. of Educ. v. State Supt. of Schools,* 165 W. Va. 732, 274 S.E.2d 435 (1980). *See also, Maxey v. McDowell County Board of Education*, 575 S.E.2d 278, 2002 W. Va. LEXIS 226 (2002); *McMann v. Jefferson County Bd. of Educ.*, Docket No. 2009-1340-JefED (October 21, 2009). An offense or conduct which affects professional competency is correctable, if the conduct or offense does not "directly and substantially affect the morals, safety, and health of the system in a permanent, non-correctable manner." *Mason County Bd. of Educ.*, 165 W. Va. 732, 739, 274 S.E.2d 435, 439 (1980).

8. Under the statutes and procedural rules regarding the grievance process, the formal rules of evidence are not applicable in grievance proceedings, except as to the rules of privilege recognized by law. *See,* W. VA. CODE § 6C-2-4(a)(3). The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings. Accordingly, an administrative law judge must determine what weight, if any, that is to be accorded hearsay evidence in a disciplinary proceeding. *See, Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (March 11, 2010) (affirmed by the Circuit Court of Kanawha County, WV, June 9, 2011); *Warner v. Dep't of Health and Human Resources,* Docket No. 07-HHR-409 (Nov. 18, 2008); *Miller v. W. Va. Dep't Health and Human Resources,* Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996).

9. An 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 the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995). *See, Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

10. In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show: (a) that he or she has been treated differently from one or more similarly-situated employee(s); (b) that the different treatment is not related to the actual job responsibilities of the employees; and, (c) that the difference in treatment was not agreed to in writing by the employee. *The Board of Education of the County of Tyler v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

11. "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).

12. Respondent has proven by a preponderance of the evidence that Grievant's conduct during the Steak 'n' Shake incident, the L.B. incident, and intentionally obstructing the camera between February 14, 2011 and March 22, 2011, constituted insubordination and willful neglect of duty.

13. Respondent failed to prove that Grievant's conduct during the D.B. incident constituted insubordination and willful neglect of duty.

14. Grievant has failed to meet her burden of demonstrating that the discipline she received was clearly disproportionate to her offense, or that Respondent abused its discretion in suspending and subsequently terminating her.

15. Grievant has failed to meet her burden of proving her claims of discrimination and favoritism by a preponderance of the evidence.

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 (eff. July 7, 2008).

DATE: January 26, 2012.

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CARRIE H. LEFEVRE
ADMINISTRATIVE LAW JUDGE