THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MAMIE ANITA MULLINS,

Grievant,

v. **Docket No. 2012-0671-McDED**

MCDOWELL COUNTY BOARD OF EDUCATION
and DEPARTMENT OF EDUCATION,

Respondents.

DECISION

Grievant, Mamie Anita Mullins, filed this expedited Level Three grievance against her employer, McDowell County Board of Education[1], dated December 27, 2011, stating as follows: "Respondent has suspended the Grievant without pay for five days. Grievant alleges a violation of W. Va. Code 18A-2-7, 18A-2-8, 6C-2-2 & 18A-2-12a. Grievant also alleges disparate treatment, lack of due process, and asserts that she is not guilty of any misconduct that warrants a suspension without pay." As relief sought, "Grievant seeks compensation for lost wages with interest; restoration of all benefits, pecuniary and nonpecuniary; and removal of all references to this suspension from any and all records maintained by the Respondent."

The Level Three grievance hearing was held on August 28, 2012, at the Raleigh County Commission on Aging in Beckley, West Virginia, before the undersigned administrative law judge. Grievant appeared in person and by counsel, John Everett Roush, Esquire, of the West Virginia School Service Personnel Association. Respondent, McDowell County Board of Education, appeared by counsel, Howard S.

[1] It is noted that the West Virginia Department of Education has assumed control of the McDowell County Board of Education.

Seufer, Jr., Esquire, of Bowles Rice, LLP. This matter became mature for consideration on October 2, 2012, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was suspended for five days without pay for conduct including failure to set the parking brake on her bus at all stops, failure to drive with both hands on the steering wheel at all times, raising her voice toward students on her bus, failure to wear her seat belt at all times, and for having a conversation through the side window of the bus with a parent who had approached the bus with questions about her child who rode the bus. Grievant disputes some of these allegations, but argues that because the conduct was performance-related, Respondents were required to give her an opportunity to improve before suspending her. Respondents argue that Grievant's conduct constituted insubordination and willful neglect of duty; therefore, they did not have to offer Grievant an opportunity to improve before suspending her. Respondent failed to meet its burden of proving insubordination and/or willful neglect of duty. The conduct was performance-related and correctable. As such, Respondents were required to grant Grievant an opportunity to improve before suspending her. Accordingly, the grievance is GRANTED.

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

Findings of Fact

1. Grievant, Mamie Anita Mullins, is employed by Respondent, McDowell County Board of Education, as a bus operator. She has been so employed for approximately twenty-six years.

2. Respondent, West Virginia Department of Education, has assumed control of the McDowell County Board of Education.

3. Grievant made her usual bus runs as scheduled on September 14, 2011.

4. Within two days thereafter, Michael Tye, Director of Transportation for McDowell County, received two telephone calls from parents complaining that during Grievant's September 14, 2011, run, she stopped the bus, left her seat to go back to stop an argument between students, and when doing so, the bus drifted backward from its stop.[2]

5. Mr. Tye reviewed the video recording to see what had occurred during the September 14, 2011, run. However, Mr. Tye could not determine from the recording whether the bus had drifted backward as alleged.[3] However, he and Superintendent Brown met with Grievant on or about September 20, 2011, and discussed the fact that she raised her voice toward the students often during her run. Superintendent Brown then offered Grievant suggestions as to how to deal with student discipline issues.[4]

6. After calling Mr. Tye, the parents complained, by telephone calls and emails, to the State Transportation Director, Benjamin Shew.

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[2] It is noted that the parents who asserted that the bus drifted backward from its stop did not personally witness the same. They were told by their children that such had happened.
[3] *See*, level one testimony of Michael Tye.
[4] *See,* level three testimony of Grievant.

7. In response to said complaints, Mr. Shew contacted the school district and requested the video from Grievant's bus for the day in question.

8. Upon his review of the tape, Mr. Shew apparently concluded that the bus had drifted backward as had been alleged.[5] He also noted that Grievant did not set the parking brake when she left her seat, as well as committed numerous other infractions during her run. Mr. Shew contacted Mr. Tye and informed him of the same.

9. By letter dated September 27, 2011, regarding Grievant's "performance as a bus operator on September 14, 2011," Superintendent Brown charged Grievant with the following violations of Policy 4336 and Policy 5902: 1) failure to set the parking brake at stops; 2) failure to set the parking brake when she left her seat to address student behavior; 3) having a conversation with a person through the side window of the bus while students were unloading; 4) failure to wear a seat belt; 5) periodically driving with one hand; and, 6) shouting at the students.

10. By this same letter, Superintendent Brown suspended Grievant for five days without pay. The suspension was to run from September 28, 2011, through October 5, 2011.[6]

11. The five-day suspension imposed on Grievant was later ratified by the State Superintendent of Schools on December 21, 2011.

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[5] From the evidence presented, it appears that Mr. Shew based his conclusion mostly on the fact that a child is heard on the recording saying that the bus was moving and Grievant reacted to the same by returning to her seat at the front of the bus.

[6] *See*, Respondent lower level Exhibit 1. It is noted that this letter failed to inform Grievant that she had a right to a hearing on the charges against her and that the State Superintendent of Schools would either ratify or disapprove the suspension. By a separate letter dated September 30, 2011, Grievant was advised of these rights.

12. Grievant failed to set the parking brake at all of her stops. Further, Grievant drove the bus periodically with only one hand on the steering wheel. However, at such times, Grievant had her left hand to the left of the steering wheel ready to operate the lights and other controls for the bus. Grievant also had a conversation with a parent who approached the bus and raised her voice frequently to the students. The evidence is not clear as to whether Grievant failed to wear her seatbelt during her September 14, 2011, runs.

13. Prior to the five-day suspension, Grievant had not been warned about any of the conduct alleged in the suspension letter. Further, she was not given a chance to improve this conduct before she was suspended.

14. Prior to this five-day suspension, Grievant had only been disciplined one other time, and that was at the beginning of her tenure, more than twenty years ago.

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. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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*.

Respondent asserts that Grievant's conduct, as alleged in the suspension letter, constitutes insubordination and willful neglect of duty.[7] Grievant argues that the conduct alleged is all performance-related. Therefore, Grievant asserts that Respondent violated WEST VIRGINIA CODE § 18A-2-8 by failing to grant her the opportunity to improve prior to suspending her for this conduct.

WEST VIRGINIA CODE §18A-2-8 states, in part that,

> (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.
>
> (b) 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(a).

With regard to suspension of public school employees, the West Virginia Supreme Court of Appeals has noted that the causes for suspension are the same as the causes for dismissal set out in WEST VIRGINIA CODE § 18a-2-8. Accordingly, an employee's suspension must be based upon the causes found in that Code section. *See Totten v. Board of Educ. of County of Mingo,* 171 W. Va. 755, 301 S.E.2d 846

[7] Superintendent Brown does not label the conduct as insubordination or willful neglect of duty in the suspension letter.

(1983). Additionally, boards of education must exercise the authority granted by this statute reasonably and not arbitrarily or capriciously. *See Parham v. Raleigh County Bd. of Educ.,* 192 W. Va. 540, 453 S.E.2d 374 (1994).

Further, 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).

Grievant has been charged with numerous violations of policy. Grievant failed to set the parking brake at stops, engaged in the conversation with the person through the side window of the bus, and drove with one hand at times during her run. Grievant defends these actions asserting that when she was trained over twenty years ago, setting the parking brake was not a requirement. Further, Grievant explains that she did not have both hands on the wheel at all times because she kept her left hand free to operate the controls on the bus which are located to the left of the steering wheel. As far as the conversation through the side window of the bus, the person to whom she was speaking was a parent who had approached the bus at the stop to discuss her child, who rode the bus. Grievant felt she needed to speak with the woman given the woman’s physical condition and that she had made such an effort to come to the bus. Grievant further denies that while she was speaking with the woman that she ignored her duties to the children who were exiting the bus. Grievant further disputes the claim

that she was not wearing her seat belt.[8] It is undisputed that Grievant yelled at the students during her bus run in an effort to address the poor conduct of the students. Given the applicable law, it is necessary to determine whether Grievant's alleged conduct constituted insubordination or willful neglect of duty, or whether the conduct was performance-related.

The West Virginia Supreme Court of Appeals has held 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 willful; and, (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd./Shepherd Coll.,* 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (per curiam). The disobedience must be willful, meaning that "the motivation for the disobedience [was] contumaciousness or a defiance of, or contempt for authority." *Id.* at 213, 460 (citation omitted). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't,* Docket No. 90-H-128 (Aug. 8, 1990).

"Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. *Adkins v. Cabell County Bd. of Educ.*, Docket No. 89-06-656 (May 23, 1990). This is a fairly heavy burden, given that Respondent must not only provide that the acts it alleges did occur, but also that the reason for Grievant's neglect of duty was more than simple negligence." *Tolliver v. Monroe County Bd. of Educ.*, Docket No. 01-31-493 (Dec. 26, 2001). Willful

[8] Grievant testified that she uses a metal clip to pull the seat belt away from her left shoulder and the side of her neck. She contends that even though the seat belt is not clearly visible on the video footage because it is dark in color and so was her clothing, but the clip is visible which would indicate she was wearing the seat belt.

neglect of duty "is conduct constituting a knowing and intentional act, rather than a negligent act. *Williams v. Cabell County Bd. of Educ.*, Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ.*, Docket No. 95-29-151 (Aug. 24, 1995); *Hoover v. Lewis County Bd. of Educ.*, Docket No. 93-21-427 (Feb. 24, 1994). Willful neglect of duty encompasses something more serious than incompetence. *Bd. of Educ. v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120, 122 (1990); *Sinsel v. Harrison County Bd. of Educ*., Docket No. 96-17-219 (Dec. 31, 1996)." *Geho v. Marshall County Bd. of Educ.*, Docket No. 2008-1395-MarED (Oct. 30, 2008). 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).

Further, "[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).

From the evidence presented, Grievant's routine failure to set the parking brake at her stops was not willful, or an act of defiance. Neither was her failure to set the

parking brake when she stopped the bus on September 14, 2011, and left her seat to address what she believed to be an emergency with one of the children riding her bus. Further, Grievant's speaking with the parent through the side window of the bus was not a willful defiance of policy or rules. The same can be said for Grievant's failure to keep both hands on the steering wheel at all times. Clearly, Grievant has to use one hand at times to operate certain controls and lights on the bus, and those controls are located to the left of the steering wheel. It is readily apparent that Grievant has developed a habit of keeping her left hand poised at the ready near the controls. While this is not proper, it was not willful or an act of defiance. As for the allegations regarding wearing a seat belt, the undersigned cannot find that Grievant willfully refused or failed to wear her seat belt. While it appears that Grievant failed to wear her seat belt at all times during the September 14, 2011, runs, it does not appear that she willfully refused to wear it. The video clearly demonstrates that Grievant was in a terribly difficult situation with a bus full of misbehaving students, and that she was trying not only to properly operate the bus, but also to address numerous instances of student misconduct, and what she believed to be an emergency. Grievant's failure to put her seat belt on was not a willful act. Rather, it was negligence. It is important to remember that Grievant had not been warned about any of the conduct alleged prior to her suspension, and initially, her supervisors saw nothing wrong with her behavior on the recording except for her raising her voice at the students. In response to that, Superintendent Brown spoke to Grievant and offered her suggestions for how better to handle such situations. Grievant is a long-time employee who has a good record. She has only been disciplined one other time in her tenure with the Respondent, which stretches back to the Reagan

Administration. In fact, it appears that Grievant has received only good evaluations prior to the events detailed in this grievance.

Accordingly, the undersigned cannot find that Grievant was insubordinate or that she willfully neglected her duties. Nonetheless, Grievant's conduct was related to the performance of her duties, and was improper and violated policy. As such, Grievant's conduct would be considered unsatisfactory performance.

The West Virginia Supreme Court of Appeals has held that "where the underlying complaints regarding a teacher's[9] conduct relate to his or her performance . . . the effect of West Virginia Board of Education Policy is to require an initial inquiry into whether that conduct is correctable." *Maxey v. McDowell County Bd. of Educ.,* 212 W. Va. 668, 575 S.E.2d 278 (2002). The provisions of Policy 5300 referred to by the Court have since been codified in WEST VIRGINIA CODE § 18A-2-12a and state 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.

[9] Although the Court's discussion in *Maxey* referred to a teacher, the statutes in the case apply with equal force to all public school employees. *See* W. Va. Code §§ 18A-2-8 and 18A-2-12a.

The Court discussed this provision of Policy 5300 in detail in the case of *Mason County Bd. of Educ. v. State Superintendent of Sch.,* 165 W. Va. 732 (W. Va. 1980) where it wrote:

> Our holding in *Trimboli, supra,*[10] requires that a dismissal of school personnel be based on a § 5300(6)(a) evaluation after the employee is afforded an improvement period. It states that a board must follow the § 5300(6)(a) procedures if the circumstances forming the basis for suspension or discharge are "correctable." The factor triggering the application of the evaluation procedure and correction period is "correctable" conduct. What is "correctable" conduct does not lend itself to an exact definition but must, in view of the nature of the conduct examined in *Trimboli, supra,* and in *Rogers, supra,*[11] be understood to mean an offense of conduct which affects professional competency.

Id at 739. Concerning what constitutes "correctable" conduct, the Court noted that "it is not the label given to conduct which determines whether § 5300(6)(a) procedures must be followed but whether the conduct complained of involves professional incompetency and whether it directly and substantially affects the morals, safety, and health of the system in a permanent, non-correctable manner." *Id.*

Grievant argues that the conduct is related to her performance, and pursuant to WEST VIRGINIA CODE § 18A-2-12a, she could not be suspended for conduct that was not brought to her attention through evaluation and until she was given an opportunity to improve through an improvement plan. Grievant's position is supported by the Supreme Court's ruling that "a board must follow the § 5300(6)(a) procedures if the circumstances forming the basis for suspension or discharge are 'correctable.'" *Mason County Bd. of Educ., supra.* All of the conduct at issue in this grievance was correctable. In fact, in

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[10] *Trimboli v. Bd. of Educ. of the County of Wayne*, 163 W. Va. 1, 254 S.E.2d 561 (1979).
[11] *Rogers v. Bd. of Educ.,* 125 W. Va. 579, 588, 25 S.E.2d 537 (1943).

addition to her suspension, Respondents required Grievant to complete "retraining on the identified deficiencies." *See*, October 7, 2011, Letter to Grievant (Employer Ex. 1 at suspension hearing). From the evidence presented, it is apparent that Respondent(s) believed that Grievant's conduct was correctable. Certainly, all of the stated policy violations such as, setting the parking brake at all stops and keeping both hands on the wheel while driving, are easily correctable. Grievant disputes that she failed to wear her seatbelt on September 14, 2011, but even if that were conceded, it is also correctable conduct. As is the manner by which Grievant addressed the students' behavioral issues. Lastly, the evidence presented suggests that the retraining Grievant completed actually corrected some of the conduct of which Respondents complained. Accordingly, Respondent should have granted Grievant an opportunity to correct her conduct before imposing the five-day suspension.

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. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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. WEST VIRGINIA CODE §18A-2-8 sets out the reasons for which a public school employee may be suspended and 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.
>
> (b) 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.

3. The West Virginia Supreme Court of Appeals has held 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 willful; and, (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd./Shepherd Coll.,* 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (per curiam). The disobedience must be willful, meaning that "the motivation for the disobedience [was] contumaciousness or a defiance of, or contempt for authority." *Id.* at 213, 460 (citation omitted).

4. "Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. *Adkins v. Cabell County Bd. of Educ.*, Docket No. 89-06-656 (May 23, 1990). This is a fairly heavy burden, given that Respondent must not only provide that the acts it alleges did occur, but also that the reason for Grievant's neglect of duty was more than simple negligence." *Tolliver v. Monroe County Bd. of Educ.*, Docket No. 01-31-493 (Dec. 26, 2001). Willful neglect of duty "is conduct constituting a knowing and intentional act, rather than a negligent act. *Williams v. Cabell County Bd. of Educ.*, Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ.*, Docket No. 95-29-151 (Aug. 24, 1995); *Hoover v. Lewis County Bd. of Educ.*, Docket No. 93-21-427 (Feb. 24, 1994). Willful neglect of duty encompasses something more serious than incompetence. *Bd. of Educ.*

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

5. Further, "[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).

6. "[W]here the underlying complaints regarding [an employee's] conduct relate to his or her performance . . . the effect of West Virginia Board of Education Policy is to require an initial inquiry into whether that conduct is correctable." *Maxey v. McDowell County Bd. of Educ.,* 212 W. Va. 668, 575 S.E.2d 278 (2002).

7. Concerning what constitutes "correctable" conduct, the Court noted that "it is not the label given to conduct which determines whether § 5300(6)(a) procedures must be followed but whether the conduct complained of involves professional incompetency and whether it directly and substantially affects the morals, safety, and health of the system in a permanent, non-correctable manner." *Mason County Bd. of Educ. v. State Superintendent of Sch.,* 165 W. Va. 732 (W. Va. 1980).

8. The provisions of Policy 5300 referred to by the Court have since been codified in WEST VIRGINIA CODE § 18A-2-12a and state 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 . . . .

9. Respondents failed to prove by a preponderance of the evidence that Grievant's conduct on September 14, 2011, constituted insubordination and/or willful neglect of duty.

10. Grievant's conduct, as identified in the September 27, 2011, letter of suspension, was all correctable conduct related to the performance of her job duties. Therefore, Respondents failure to provide Grievant with an improvement plan prior to her suspension violated West Virginia Code §§ 18A-2-8 and 18A-2-12a.

Accordingly, the grievance is **GRANTED**.

The five-day suspension is **ORDERED REMOVED** from Grievant's record. Respondents are also **ORDERED** to pay Grievant five days of backpay, with interest, and to restore all other benefits which Grievant lost as a result of the five-day suspension, including leave, seniority, and retirement benefits.

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: March 14, 2013.

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Carrie H. LeFevre
Administrative Law Judge