

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

NANCY KINDER,

Grievant,

v.

DOCKET NO. 2015-0421-KanED

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

On October 14, 2014, Nancy Kinder (“Grievant”) filed this grievance directly at Level Three of the grievance procedure, as authorized by W. Va. Code § 6C-2-4(a)(4), challenging the termination of her employment by the Kanawha County Board of Education (“Respondent” or “KCBE”). The original statement of grievance reads: “Employee grieves the October 7, 2014, written decision of the Kanawha County Board of Education terminating her employment.” As relief, Grievant requested: “Reinstatement with back pay and damages for violations of Wage Payment and Collection Act,¹ WV Human Rights Act, Americans with Disabilities Act, etc.” Following multiple continuances, each of which was granted for good cause, a Level Three hearing was held on June 5 and 30, 2015, at the Grievance Board’s office in Charleston, West Virginia. Grievant was represented by Mark A. Toor, Esquire. Respondent was represented by Charles R. Bailey, Esquire, and Betsy L. Stewart,

¹ The Grievance Board does not have subject matter jurisdiction to determine liability for claims made pursuant to the West Virginia Wage Payment and Collections Act. *McCune v. Regional Jail & Correctional Facility Auth.*, Docket No. 2015-1185-MAPS (May 15, 2015); *Blake v. Dep’t of Health &*

Esquire, with Bailey & Wyant, PLLC. Respondent presented testimony from KCBE's Supervisor of Transportation, Safety and Training, Jimmy Lacy, KCBE's Supervisor of the Sissonville Bus Terminal, Oshel Wade Carnell, KCBE's former Executive Director of Transportation, George Beckett, KCBE's current Director of Transportation, Brette Fraley, and KCBE's Transportation Supervisor for Special Services, Brenda Taylor. Grievant testified in her own behalf. In addition, Grievant presented testimony from KCBE's Executive Director of Human Resources, Carol Hamric. This matter became mature for decision on August 5, 2015, upon receipt of the last of the parties' post-hearing arguments.²

Synopsis

Grievant was employed as a school bus operator. On April 4, 2014, a special needs student in a wheelchair was injured when his chair tipped over while being transported on Grievant's afternoon bus run. The video recording of that bus run revealed that the assigned bus aide failed to properly secure the wheelchairs of two special needs students when they were loaded on the bus using the hydraulic lift, and that Grievant failed to comply with her training and established job duties in that she did not check the restraints to verify that the students had been properly secured by the aide. In addition, the video showed Grievant releasing only 3 of 4 required restraints

Human Res., Docket No. 2013-0615-DHHR (June 11, 2013). See *Lunsford v. Dep't of Health & Human Res.*, Docket No. 2010-1386-CONS (Dec. 8, 2010).

² Grievant moved to strike Respondent's Proposed Findings of Fact and Conclusions of Law as untimely filed. Although Respondent's post-hearing submission was not received via telephone facsimile until after the close of regular business hours on August 5, the original submission was placed in the regular United States mail on August 5, 2015, which represented timely filing under the guidance issued at the conclusion of the Level Three hearing. Inexplicably, Grievant's timely-submitted Proposed Findings of Fact and Conclusions of Law were styled "Ron Duerring, Superintendent, v. Nancy Kinder, Employee, Docket No. 2015-0421-KanEd" (*sic.*). Superintendent Duerring was never joined as a party to this hearing. The sole Respondent throughout this proceeding was the Kanawha County Board of Education.

from the wheelchair of the first special needs student who was offloaded from the bus at the previous bus stop, so that she necessarily became aware that the aide had not properly secured that student's wheelchair. The video also makes evident that Grievant did not thereafter check the remaining student's wheelchair, to verify that it was secure, and that at least 2 of the 4 restraints can be seen lying on the bus floor in plain view of Grievant, and not properly attached to the wheelchair. After Grievant returned to the front of the bus, she was joined by the aide before driving the bus to the next stop. Before the bus reached the next bus stop, the wheelchair transporting a non-verbal special needs student tipped over, and the student was injured, suffering a cut on his head when he struck an object on or near the bus floor. Review of the video from Grievant's previous bus runs for approximately 10 days prior to the accident showed that she never checked to see that her regularly assigned aide had properly secured the wheelchairs of their special needs student passengers. KCBE established by a preponderance of the credible evidence of record that Grievant's conduct was a direct and proximate cause of injuries received by the special needs student while a passenger on Grievant's bus, and that Grievant's failure and refusal to verify that this wheelchair was properly restrained constituted both willful neglect of duty and insubordination under W. Va. Code § 18A-2-8(a). Further, in the circumstances presented, Grievant's conduct was not "correctable" within the meaning of West Virginia Board of Education Policy 5300. Therefore, this grievance must be denied.

The following Findings of Fact are made based upon the evidence and exhibits presented at the Level Three hearing and Grievant's pre-termination hearing before a Hearing Examiner for KCBE.

Findings of Fact

1. Grievant was employed as a school bus operator by Respondent Kanawha County Board of Education ("KCBE").

2. All KCBE school bus operators are required to complete 40 hours of classroom training and at least 12 hours of behind-the-wheel training before they are eligible to be hired as substitute school bus operators.

3. As part of the 40 hours of classroom training, all school bus operators are required to receive 6 hours of initial training on the transportation of students with special health care needs. See 126 C.S.R. 92 § 5.5.3. (2013).

4. During the 6 hours of initial training on the transportation of students with special needs, bus operators receive hands-on training in the use of lifts and anchorages for wheelchairs and the operations of the Child Restraint System.

5. Once a bus operator has successfully completed the initial training and been employed as a substitute or regular bus operator, an additional 18 hours of training must be completed annually, at least 1 hour of which must relate to transporting students with special needs.

6. Jimmy Lacy has been employed by KCBE since 2007 as its Supervisor of Transportation, Safety and Training. Prior to 2007, KCBE employed Mr. Lacy as a Bus Operator and a Bus Terminal Supervisor.

7. Mr. Lacy has experience driving a special needs bus equipped with a lift.

8. Mr. Lacy's current duties include investigating accidents involving school buses and training school bus operators. Mr. Lacy is certified by the West Virginia Department of Education to train school bus operators.

9. Consistent with the West Virginia School Bus Transportation Policy and Procedures Manual, 126 C.S.R. 92, KCBE trains school bus operators that they are in charge of any passengers riding on their bus, including employees, such as an assigned school aide on a special needs bus. See 126 C.S.R. 2 § 3.1 (2013).

10. KCBE trains school bus operators that when they operate a special needs school bus with a lift, the bus operator and the assigned bus aide are to work as a team, with the bus operator ordinarily getting off the bus to operate the hydraulic lift to raise a passenger in a wheelchair boarding the bus, or lower a passenger in a wheelchair disembarking from the bus, while the bus aide ordinarily secures the wheelchair of a boarding passenger into position, and releases the restraints on the wheelchair of a disembarking passenger. KCBE's training emphasizes that the bus operator always remains responsible for checking the restraints securing the wheelchair and the straps securing its passenger, to verify that the wheelchair passenger is properly secured.

11. Ordinarily, the bus aide sits in a location where he or she can best assist the students with special needs. In the case of students who are confined to a wheelchair, the bus aide should sit in a position where he can observe any wheelchair-restricted students while they are on the bus.

12. Brenda Taylor is employed by KCBE as its Transportation Supervisor for Special Services. Ms. Taylor's duties include insuring that all students with special needs receive transportation to and from school on a specially-equipped school bus. Ms. Taylor also trains special needs bus operators on their specific duties when operating special needs buses equipped with a lift.

13. Training material for trainers conducting the required 40 hours of classroom training for new school bus operators is contained in a document entitled the West Virginia School Bus Operator Instructional Program, which was prepared by the Office of School Transportation in the West Virginia Department of Education. Section "I" of that document covers the 6 hours of initial training required for all bus operators on the transportation of students with special needs. See R Ex 5.

14. Ms. Taylor ordinarily conducts the 6 hours of section "I" training for all new KCBE school bus operators on the operation of a special needs school bus with a lift, while Mr. Lacy conducts the remaining 34 hours of training which focuses upon duties performed by all school bus operators.

15. Ms. Taylor worked for KCBE as a substitute school bus operator for 5 years, and was employed as a full-time school bus operator for 12 years. Ms. Taylor continues to serve as a substitute bus operator on occasion when needed.

16. George W. Beckett was employed by KCBE as its Executive Director of Transportation until his retirement in June 2014.

17. Grievant attended the 40-hour training program for new KCBE bus operators in April 2009. Mr. Lacy taught the classroom portion of the training applicable

to all bus operators, and Ms. Taylor taught the 6-hour segment for bus operators who operate a special needs bus with a lift.

18. Each student who completes KCBE training is provided with a copy of the training material contained in the West Virginia School Bus Operator Instructional Program to refer to as a reference, including section “I” relating to the transportation of students with special needs.

19. In addition to the training material from the West Virginia Department of Education, Ms. Taylor provides each student who attends her section “I” training with a copy of a 2005 pamphlet that relates to wheelchair transportation safety (R Ex 15), an Internet posting on best practices for loading and securing students in wheelchairs (R Ex 16), a single page guide entitled “Principles of Decision-Making for Selecting Tiedown Sites on Wheelchairs” (R Ex 17), and a copy of a wheelchair screening form which is used to verify that the student’s wheelchair is in proper working order (R Ex 18).

20. During the section “I” training, Ms. Taylor teaches all prospective bus operators that it is the driver’s responsibility to check the wheelchairs that have been secured by the bus aide, and that they are to push forwards and pull backwards to make sure that the chair does not move, after the restraints have been attached to the chair, and the shoulder and lap belts have been secured.

21. On April 21, 2009, Mr. Lacy certified that Grievant had completed the training requirements for school bus operator certification. See R Ex 6. On that same date, Mr. Beckett likewise certified Grievant’s successful completion of the training

requirements, including 40 hours of classroom training and at least 12 hours of behind-the-wheel training. See R Ex 6.

22. In addition to completing 40 hours of initial classroom training, all school bus operators in West Virginia are thereafter required to receive 18 hours of in-service training annually, 1 hour of which must relate to operating a special needs bus equipped with a lift.

23. KCBE initially employed Grievant as a substitute school bus operator in late April 2009, after Grievant completed the initial training required for all school bus operators.

24. On April 28, 2009, Grievant signed a Kanawha County Schools Job Description for a Bus Operator which included the following statement: "Drivers of lift buses are to check to make sure wheelchairs are properly secured and restraints are properly used." R Ex 8.

25. In or about December 2010, Grievant successfully applied to fill a vacancy for a full-time school bus operator. The job posting for this position included the following qualification: "Drivers of lift buses are to check to make sure wheelchairs are properly secured and restraints are properly used." R Ex 7.

26. In or about October 2013, Grievant successfully bid to operate a special needs lift bus run that was posted for the Sissonville bus terminal. Grievant was qualified by her initial and annual training to drive a special needs bus. Grievant did not request additional training or seek guidance on her responsibilities as a special needs bus operator.

27. Oshel Wade Carnell, Jr., is employed by KCBE as Supervisor of the Sissonville Bus Terminal and Maintenance. Until January 2015, Mr. Carnell was certified by the State Board of Education as a bus operator instructor. Prior to becoming a supervisor, Mr. Carnell operated a special needs bus in Kanawha County for approximately 11 years.

28. During the time Mr. Carnell operated a special needs bus for KCBE, it was his standard practice to allow the bus aide to perform the initial duties involved in securing a wheelchair passenger on the bus. When the bus aide was done with the initial hookup, Mr. Carnell would then walk to the back of the bus and visually and physically check those restraints to verify that the wheelchair was secure.

29. Mr. Carnell was also trained that, when a special needs bus is transporting wheelchair bound students, the bus aide should be stationed in the part of the bus where the wheelchairs are located, to provide assistance to the students as needed.

30. All KCBE school buses are equipped with stationary video cameras which record activities that take place on the bus. Lift-equipped buses which transport students with special needs have four video cameras mounted in various locations inside the school bus.

31. Depending on the length of each bus run, the video system typically stores the visual record of all bus runs during a 10 to 11-day period. After that time, the system automatically begins recording over the oldest portion of the video record.

32. On the afternoon of April 4, 2014, Grievant's bus run was recorded by video cameras mounted inside the school bus. See R Ex 9.

33. There were two special needs students in wheelchairs on Grievant's April 4, 2014, afternoon bus run, student "M" and student "S."³ Student S's wheelchair was placed to the rear of the wheelchair in which student M was sitting. Student S was offloaded from the bus first, after reaching his bus stop.

34. While watching the video, as student S was being prepared to exit the bus, Mr. Lacy observed Grievant release 3 of the 4 straps restraining student S's wheelchair. Grievant did not release the fourth strap securing that wheelchair because it had not been secured. All 4 restraining straps should have been attached to secure student S's wheelchair at the time that wheelchair was loaded on the bus for Grievant's afternoon run.

35. In the process of releasing student S's wheelchair, Grievant leaned over 2 straps on the floor behind student M's wheelchair. At the time student M's wheelchair was loaded on the bus for the afternoon run, these 2 straps should have been attached to secure student M's wheelchair. It is apparent in the video recording that the straps are not secure. Grievant proceeds to allow student S to maneuver his motorized wheelchair onto the lift, without checking the restraints on student M's wheelchair.

³ Consistent with the practice of this Grievance Board, the students involved in this matter will be identified only by an initial. See, e.g., *Graham v. Wetzel County Bd. of Educ.*, Docket No. 2014-0901-WetED (July 9, 2014); *Hurley v. Logan County Bd. of Educ.*, Docket No. 97-23-394 (Dec. 11, 1997); *Bailey v. Logan County Bd. of Educ.*, Docket No. 93-23-383 (June 13, 1994).

36. After successfully offloading student S in his wheelchair, Grievant and the aide proceeded to the front of the bus, and Grievant continued to operate the bus along her assigned afternoon route.

37. Before the bus reached the next bus stop where student M would ordinarily be transferred to another special needs bus, student M's wheelchair begins to oscillate from side to side as the bus is in motion, increasing such movement to the point where the wheelchair tips over to the right, and student M strikes his head against the bus floor in front of the lift on the opposite side of the bus aisle.

38. As a result of his wheelchair tipping over on Grievant's afternoon bus run on April 4, 2014, student M suffered a laceration and contusion to the right temple which required a hospital visit for medical treatment.

39. Mr. Carnell was Grievant's immediate supervisor from February 2011 until her employment was terminated by KCBE.

40. On Saturday, April 5, 2014, the day following the accident, Mr. Carnell reviewed the video recording from Grievant's bus. Mr. Carnell's review extended to the previous 10 or 11 days up to the accident. Mr. Carnell observed that the students' wheelchairs were correctly secured on one of those days. On the one particular day that the video showed the wheelchairs were correctly secured, a substitute aide was assigned to Grievant's bus. The aide was observed in the video requesting assistance from Grievant in securing a student's wheelchair. Grievant went to the back of the bus and was observed correctly securing both wheelchairs.

41. Mr. Carnell was “speechless” when he observed Grievant’s repeated failure to properly secure the students’ wheelchairs. Prior to reviewing the video recording, Mr. Carnell had considered Grievant to be an exemplary employee.

42. Mr. Carnell’s routine practice was to review 2 or 3 minutes of randomly-selected video from each driver’s route on a monthly basis. Mr. Carnell had not observed any anomalies in Grievant’s performance through this process.

43. Mr. Lacy reviewed this same video recording of Grievant’s bus run on a day before the incident in which student M was injured, and Mr. Lacy similarly observed Grievant showing an aide substituting for Mr. Pauley how to properly secure a student’s wheelchair on the bus on that occasion. This indicated to Mr. Lacy that Grievant was fully proficient in the ability to correctly connect the restraints and properly secure a wheelchair.

44. Ms. Taylor reviewed the video from Grievant’s afternoon bus run on April 4, 2014, and observed that students M and S were not safely seated and neither of their wheelchairs had been properly secured. In addition, the bus aide was not seated where he could observe the passengers in their wheelchairs.

45. While reviewing the video recorded during Grievant’s afternoon bus run on April 4, 2014, Ms. Taylor observed Mr. Pauley go to the back of the bus after student M’s wheelchair was loaded on the bus. Student M’s wheelchair was visibly rocking or oscillating from side to side at that time, which the bus aide noted, making a verbal remark toward the student, before returning to sit in the front of the bus near Grievant.

46. On April 8, 2014, Mr. Beckett, Mr. Carnell and Ms. Taylor met with Grievant and Mr. Pauley to discuss the circumstances that led to student M's injury on April 4, 2014. Also present were Rod Stapler and Janice Black, employee representatives with the West Virginia School Service Personnel Association. See R Ex 13.

47. At no time during the meeting on April 8, 2014, did Grievant or Mr. Pauley request that their actions or employment status be considered separately.

48. During the meeting on April 8, 2014, the video recording of the bus run during which student M was injured was reviewed with those present.

49. During the meeting on April 8, 2014, Mr. Pauley acknowledged that he had not been securing the students' wheelchairs properly for the previous six months.

50. During the meeting on April 8, 2014, Grievant stated that Mr. Pauley had been a bus aide for a long time, and she saw no reason to check his work.

51. Following the meeting on April 8, 2014, Mr. Beckett determined that Grievant and Mr. Pauley should be relieved of their duties immediately, and then sent a written memo to KCBE Superintendent Ronald E. Duerring recommending that appropriate disciplinary action be taken, including possible termination. See R Ex 13.

52. Carol Hamric is employed by KCBE as its Executive Director of Human Resources. Ms. Hamric was not consulted on the disciplinary action that was proposed and taken against Grievant, just as she is not consulted on disciplinary actions generally. That function is performed by KCBE's General Counsel, James Withrow.

53. On April 9, 2014, KCBE Superintendent Ronald E. Duerring issued correspondence to Grievant notifying her that she was being suspended, stating as follows:

I have been advised that on April 4, 2014, a special needs student's wheelchair was not properly secured on the school bus and, as a result, the wheelchair fell over and the student was injured. A review of the video also revealed that the wheelchair was not secured on numerous prior occasions.

Based on the foregoing you are hereby suspended, without pay, pending a hearing and further recommendation. During the period of your suspension you are not to be present on Kanawha County Schools' property or communicate with any Kanawha County Schools employee, other than family members.

R Ex 1.

54. Mr. Pauley was also suspended at or about the same time as Grievant. Mr. Pauley subsequently submitted a request to retire which was accepted.

55. On May 3, 2014, Mr. Carnell issued an annual employee evaluation form to Grievant which rated her as "outstanding," the highest rating available, in every work factor rated. Mr. Carnell explained that these ratings were based upon Grievant's performance prior to April 4, 2014, and he did not want to "stack the deck" against her in any future disciplinary hearings. See R Ex 12.

56. Mr. Carnell recommended Grievant's continued employment on the evaluation he signed on May 3, 2014.

57. The ratings given on Grievant's 2014 employee evaluation were consistent with her previous evaluations from Mr. Carnell, who considered her to be an exemplary employee prior to April 4, 2014. See G Ex 1.

58. As Grievant's immediate supervisor, Mr. Carnell's review of Grievant's actions recorded on video on April 4, 2014, and the days immediately preceding the injury to student M, led him to conclude that Grievant should no longer be employed by KCBE.

59. Brette Fraley replaced Mr. Beckett as KCBE's Supervisor of Transportation in May 2014. Mr. Fraley was not involved in the decision to terminate Grievant's employment with KCBE.

60. On May 19, 2014, KCBE Superintendent Duerring issued correspondence to Grievant notifying her that a hearing concerning possible disciplinary action would be held on June 11, 2014, as follows:

A hearing will be held concerning the charges outlined in the letter to you dated April 9, 2014, on Wednesday, June 11, 2014, at 9:00 a.m., in Room 205, at 200 Elizabeth Street, Charleston, West Virginia. A copy of the letter is attached hereto. The purpose of such hearing is to determine whether or not disciplinary action, up to and including termination of employment, should be recommended to the Kanawha County Board of Education.

You may be present with counsel or other representative of your choosing. Testimony will be taken under oath and the hearing will be recorded by mechanical means. You may cross-examine witnesses called against you, present evidence and call witnesses on your behalf.

R Ex 20.

61. A pre-termination evidentiary hearing commenced on June 11, 2014, before Carole Bloom, Esquire, the designated Hearing Examiner. At the beginning of that hearing, Grievant elected to be represented by Janis Black, a non-attorney co-worker who is affiliated with the West Virginia School Service Personnel Association, and by Grievant's husband, who is also not an attorney.

62. In the course of the pre-termination hearing on June 11, 2014, Grievant asked to be represented by an attorney rather than a non-attorney union representative. Hearing Examiner Bloom adjourned the hearing to allow Grievant an opportunity to obtain legal counsel.

63. The pre-termination hearing reconvened on August 12, 2014, with Grievant being represented by an attorney, Mark Toor, Esquire. The hearing concluded later that same day.

64. On September 8, 2014, Hearing Examiner Bloom, issued her decision, recommending that Grievant be terminated from employment as a bus operator due to insubordination and willful neglect of duty.

65. On September 15, 2014, Superintendent Duerring notified Grievant that he had reviewed and considered the Hearing Examiner's September 8 decision. Superintendent Duerring went on to state: "I concur with the findings, conclusions and recommendation and adopt them as my own." Accordingly, Superintendent Duerring advised Grievant that he was proposing her termination to the Kanawha County Board of Education.

66. The Kanawha County Board of Education met and accepted Superintendent Duerring's recommendation on October 6, 2014. On October 7, 2014, Superintendent Duerring notified Grievant that her employment had been terminated.

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 Rule 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 & Human Resources*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily and capriciously. Syl., *DeVito v. Bd. of Educ.*, 173 W. Va. 396, 317 S.E.2d 159 (1984); Syl. pt. 1, *Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975); *Lake v. Barbour County Bd. of Educ.*, Docket No. 99-01-294 (Jan. 31, 2000); *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991). W. Va. Code § 18A-2-8(a) provides:

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.

In this particular matter, KCBE terminated Grievant on the grounds of insubordination and willful neglect of duty. 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.*, 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. The general rule is that an employee must obey a supervisor’s order when it is received, and thereafter take appropriate action to challenge the validity of the supervisor’s order. See *Stover v. Mason County Bd. of Educ.*, Docket No. 95-26-078 (Sept. 25, 1995). Thus, employees are expected to respect authority and do not have unfettered discretion to disobey or ignore clear instructions. See *Reynolds v. Kanawha-Charleston Health Dep’t*, Docket No. 90-H-128 (Aug. 8, 1990). Moreover, insubordination may involve “more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer.” *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988).

Certain facts relating to the charges against Grievant were the subject of conflicting testimony. 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. *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); *Massey v. W. Va. Public Serv. Comm’n*, Docket No. 99-

PSC-313 (Dec. 13, 1999); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). See *Harper v. Dep't of the Navy*, 33 M.S.P.R. 490 (1987). See also *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). Some factors to consider in assessing the credibility of a witness include the witness' demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the fact finder should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the witness' information. *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2009-0685-MAPS (Apr. 23, 2009); *Massey, supra*.

Respondent presented preponderant evidence that Grievant received training on multiple occasions which would make it clear to Grievant, or anyone standing in her shoes, that the school bus operator or driver is primarily responsible for the safety of everyone on her school bus. Buses transporting special needs students are staffed with another employee, a bus aide, who is responsible for assisting the children, whether getting on and off the bus, or while the bus is in motion. On a school bus transporting special needs students that is equipped with a lift, the school bus aide is the individual who ordinarily connects the tie-downs and places the appropriate restraints and straps on a wheelchair occupied by a student with special needs, while the bus operator ordinarily operates the lift. However, deviating from this practice does not violate any law, rule or regulation.

Whether the lift is operated by the bus operator or the aide, the bus operator's obligation to verify that the wheelchair-bound students are properly secured does not change. Likewise, the bus operator remains responsible for the conduct and safety of all passengers on the bus, including the assigned aide, notwithstanding that the bus operator does not possess independent supervisory authority to take or initiate disciplinary action against a bus aide who fails or refuses to comply with her instructions.

Grievant's testimony regarding the training she received was not persuasive. At one point, Grievant indicated that she did not know that she was responsible for verifying that her aide had properly secured the wheelchairs of her special needs bus passengers. In another response, Grievant acknowledged that she had probably been trained on her responsibility to verify the wheelchairs were secured, but had forgotten that part of her training because she did not drive a special needs bus for several years. Grievant conveniently failed to read the clear language in the training manual she was given during her initial training, the specific requirement in her job description, or the explicit qualification in the job posting on which she successfully bid. Although she wanted to drive a special needs bus, and was purportedly willing to take on the additional responsibilities that go with transporting a special needs population, she made no effort to review the detailed training materials she had been given during her initial 6 hours of section "I" training, nor did she take the initiative to review her duties with any of her supervisors or co-workers.

Further, Ms. Taylor, who, unlike Grievant, has no significant interest in the outcome of this grievance, recalled Grievant's statement during the initial disciplinary inquiry in Mr. Beckett's office, wherein Grievant did not think she needed to check on the work of an experienced bus aide like Mr. Pauley. Therefore, it was shown that Grievant was trained to inspect the work of her bus aide to verify that he was properly securing wheelchair-bound students on her bus. Ms. Taylor testified about the training she provides to all new bus operators, confirming that this was the same training Grievant received during her initial training in 2009 before qualifying to work as a substitute bus operator for KCBE. In addition, both Mr. Lacy and Mr. Carnell credibly testified that they had observed Ms. Taylor conducting classroom training for prospective bus operators on the proper operation of a lift-equipped bus transporting students with special needs, and that Ms. Taylor covered certain salient points on those occasions, including the responsibility of the bus operator for the safety of all passengers, as well as the requirement for the bus operator to verify that special needs passengers in wheelchairs have been properly secured.

The video evidence presented by KCBE further established Grievant's culpability. More particularly, the video shows Grievant releasing the tie-downs from the wheelchair transporting student S, who was offloaded from the bus at the bus stop preceding the stop where student M was ordinarily offloaded. Grievant can be seen releasing three of the four tie-downs securing student S's wheelchair, so that she would necessarily be aware that the fourth tie-down had not been properly secured by the bus aide, Mr. Pauley, when the student was loaded on the bus. Despite being aware that

this passenger's wheelchair had not been properly secured, Grievant did not question Mr. Pauley about this anomaly, nor did Grievant check the tie-downs and restraints for student M's wheelchair, which was sitting directly in front of the space where student S had been located. Further, the video shows Grievant, while releasing the two forward tie-downs on student S's wheelchair, leaning over two tie-down straps for student M's wheelchair, which are obviously not secured, providing a clear opportunity for Grievant to correct the aide's error, and avoid an inherently dangerous situation. KCBE's experienced bus operator witnesses who reviewed this same video footage all agreed that Grievant should have then seen that the bus aide had not secured at least two of the straps required to securely hold student M's wheelchair in place. In these circumstances, Grievant not only failed to comply with her responsibilities as a bus operator transporting special needs students in wheelchairs, she failed to exercise ordinary common sense that would have prevented student M from suffering a painful injury.

It is also significant that the credible testimony of Mr. Carnell established that the stored video recordings on Grievant's bus revealed that the events which resulted in the accident and injury to student M on April 4 did not represent a mere anomaly or aberration. During approximately 10 days preceding the incident, Mr. Pauley repeatedly failed to properly secure the wheelchairs, and Grievant consistently failed to check the wheelchair restraints to verify that the chairs were secure. During that 10-day period, the wheelchairs were secured properly on only one occasion, when another employee worked as a substitute in place of Mr. Pauley, and asked Grievant for assistance

because he was not certain how to secure the restraints.⁴ On this single occasion, Grievant properly secured all of the restraints on the student's wheelchair. The assistance Grievant provided to the substitute bus aide demonstrates that Grievant had been trained on the proper method for securing a wheelchair on a school bus. The regular bus aide's failure to properly secure the wheelchairs on the other days recorded in the video tends to corroborate his statement to Mr. Beckett that he had not been properly securing this equipment for six months prior to student M's injury. It also demonstrates that Grievant regularly and routinely disregarded her obligation to check the wheelchair restraints, a critical element of her duty to maintain the safety of her passengers, particularly a wheelchair-bound special needs student who is unable to communicate if a dangerous situation arises.

"Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. *Adkins v. Cabell County Bd. of Educ.*, Docket No. 89-06-656 (May 23, 1990). This is a fairly heavy burden given that Respondent must not only prove that the acts it alleges did occur, but also that the reason for Grievant's neglect of duty was more than simple negligence." *Tolliver v. Monroe County Bd. of Educ.*, Docket No. 01-31-493 (Dec. 26, 2001). In order 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. *Stover v. Mason County Bd. of Educ.*, Docket No. 95-26-078 (Sept. 25, 1995); *Hoover v. Lewis County Bd. of Educ.*, Docket No. 92-21-427 (Feb. 24, 1994). See *Bd. of Educ. v. Chaddock*,

⁴ Mr. Carnell testified that the substitute aide on this occasion was a retired bus operator who had driven a regular bus (not equipped with a lift), and thus had no recent experience securing wheelchairs.

183 W. Va. 638, 398 S.E.2d 120 (1990). See also *Fox v. Bd. of Educ.*, 160 W. Va. 668, 236 S.E.2d 243 (1977).

KCBE provided preponderant credible evidence that a school bus operator driving a bus transporting students with special needs is required to verify that each wheelchair-bound student passenger's wheelchair is properly secured by the tie-downs, and the student passenger is properly secured by the appropriate restraints. Ms. Taylor, who trains prospective bus operators on their duties when transporting special needs students, credibly described her established and consistent practice in covering this requirement in her classes, including the classroom training which Grievant attended before starting to work for KCBE. Ms. Taylor, Mr. Carnell, and Mr. Lacy, all of whom have experience driving special needs buses, described their routine practice, consistent with the applicable rules, wherein they consistently checked the wheelchair restraints to verify that the assigned bus aide had properly secured the student passengers. As demonstrated in the video recording of Grievant's bus runs over a period of nearly 10 days, Grievant did not simply forget this requirement on April 4, 2014, when student M was injured, but Grievant repeatedly ignored this requirement on all the other days except one, when she worked with a different aide who solicited her assistance with the wheelchair restraints.

Unlike the accident, which was recorded on digital video in color, the training programs which Grievant attended were not recorded. Therefore, Grievant seeks to focus on whether she was properly informed that she was required to verify that her assigned bus aide was properly securing wheelchair equipment on her bus. Consistent

with this argument, Grievant does not contest that she failed to verify that Mr. Pauley properly secured the wheelchairs on other occasions when he worked as the aide on her special needs bus run. While Grievant acknowledges that she knew how to properly secure the wheelchairs on the bus, Grievant concedes that she never checked Mr. Pauley's work because she did not understand that to be part of her job. Thus, she has no way of knowing whether Mr. Pauley's admission that he was not securing the wheelchairs properly for a six-month period was accurate. A preponderance of the evidence demonstrates that Mr. Pauley's admission accurately summarized the situation, because there is no evidence in the record that anyone on that school bus other than Grievant knew how to secure the wheelchairs properly, and she never checked Mr. Pauley's work.

Grievant's assertion that she was not aware of her responsibility to check the security of the wheelchairs is simply not credible. This is not some obscure or technical requirement of KCBE, and KCBE has made a significant effort to emphasize this aspect of a bus operator's duties. This requirement is inextricably intertwined with the general responsibility of the bus operator for the safety of all passengers on her bus. Grievant did not deny her general obligation to meet this basic responsibility.

The duty of a bus operator to secure a wheelchair on her bus is contained in the Bus Transportation Policy and Procedures Manual promulgated by the West Virginia Board of Education as a Legislative Rule. 126 C.S.R. 2 § 16.2.7 (2013). See R Ex 3. Consistent with this Rule, Section I of the West Virginia School Bus Operator Instructional Program prepared by the Office of School Transportation of the West

Virginia Department of Education includes in the responsibilities of the bus operator transporting students with disabilities: “assure that the protective safety devices are utilized.” See R Ex 5 at 194. Ms. Taylor covered this expectation with Grievant during her initial classroom training for KCBE in 2009, and gave Grievant a copy of the section I training material to keep as a reference after the class was completed. KCBE includes this in the job description for its bus operators, such as the one Grievant signed in 2009: “Drivers of lift buses are to check to make sure wheelchairs are properly secured and restraints are properly used.” R Ex 8. KCBE goes further and lists this duty in the qualifications portion of its bus operator job postings, including the posting which Grievant successfully bid on in 2010: “Drivers of lift buses are to check to make sure wheelchairs are properly secured and restraints are properly used.” R Ex 7.

Accordingly, the requirement for the bus operator to verify that the wheelchairs of special needs students are secure has been clearly and repeatedly communicated in training and policy. This is not some obscure obligation, initiated after Grievant was initially trained and employed, and then left dormant until needed as an excuse to support discipline. KCBE’s experienced special needs bus operators credibly testified that they consistently checked and verified the security of the wheelchairs on their assigned buses. This is an item of special emphasis because it goes to the heart of a bus operator’s duties, transporting students to and from school in a safe manner. It becomes more critical where the bus operator is responsible for the safety of a non-verbal special needs student, lacking any control over a situation which places him in peril.

Grievant's complete and repeated disregard for the rule that requires that the bus operator check to verify that the wheelchairs of special needs student passengers are properly secured demonstrates the required defiance of authority which constitutes insubordination. See *Butts, supra*; *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995). Similarly, Grievant's consistent indifference to her obligation to insure the safety of her special needs passengers by verifying that her assigned aide properly secured their wheelchairs on the bus, and her intentional refusal to check student M's wheelchair restraints after discovering that student S's wheelchair had not been properly secured, constituted willful neglect of duty. See *Myers v. Monongalia County Bd. of Educ.*, Docket No. 2012-1282-MonED (Jan. 11, 2013); *Wilkerson v. Lincoln County Bd. of Educ.*, Docket No. 99-22-420 (Mar. 27, 2000); *Lake v. Barbour County Bd. of Educ.*, Docket No. 99-01-294 (Jan. 31, 2000); *Williams v. Kanawha County Bd. of Educ.*, Docket No. 99-20-321 (Oct. 20, 1999).

Grievant asserts that she should not be terminated because her failure to assure the safety of her passenger involved correctable conduct within the meaning of West Virginia Board of Education Policy 5300. KCBE established that Grievant did not simply fail to follow her training by forgetting to verify that a special needs student's wheelchair was properly secured on her bus, Grievant ignored this training on a daily basis, concluding that it was not her job to check on the work performed by her assigned bus aide. Further, Grievant had an opportunity to use her training when she discovered that another wheelchair had not been properly secured by her bus aide, as she was preparing to help that student disembark from her bus. However, rather than apply

basic common sense and check the restraints securing the remaining passenger, Grievant blithely went about her bus driver duties, returning to her seat without seeing that at least two restraints which should have been secured to student M's wheelchair were lying on the bus floor in plain sight, literally right under Grievant's nose. This conduct does not represent some sort of technical violation where there is no foul because there is no harm. Student M was injured as a direct result of the Grievant's failure to verify that his wheelchair was properly secured. While Grievant's bus aide was negligent by failing to secure the wheelchair in the first instance, this accident happened as a direct result of the failure of Grievant to verify the aide's competence, not some external intervening cause. As recognized in *Conner v. Barbour County Board of Education*, 200 W. Va. 405, 410, 489 S.E.2d 787, 792 (1997)(*per curiam*), where the insubordinate and willfully negligent acts of a school employee directly compromise the safety of school children she has been entrusted to transport, such actions are not correctable within the meaning of Policy 5300. See *Mason County Bd. of Educ. v. State Superintendent of Schools*, 165 W. Va. 732, 274 S.E.2d 435 (1980).

Although Grievant alleged violations of the West Virginia Human Rights Act and the Americans with Disabilities Act in her grievance form, there was no evidence adduced to support these allegations. More particularly, Grievant failed to establish a *prima facie* case of discrimination based upon a handicap, disability or any other protected status.

Grievant suggests that she was somehow deprived of due process through the procedures followed by KCBE that led to her termination. However, Grievant received

a pre-termination hearing which was delayed to a second day so that she could be represented by counsel of her choice. She had a reasonable opportunity to respond to the charges before KCBE decided to terminate her employment as required by *Board of Education v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994). Grievant was given appropriate notice of the conduct for which she had been suspended and might be terminated: a special needs student's wheelchair on her bus had not been properly secured, resulting in the wheelchair falling over and an injury to the student. Grievant has failed to identify any meaningful defect in the process KCBE followed. Simply observing that an alternative procedure would have given Grievant some additional benefit is not the same as demonstrating a violation of a substantial due process requirement.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. In a grievance involving a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rule 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. The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in West Virginia Code § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. See *Maxey v. McDowell County Bd. of Educ.*, 212 W. Va. 668, 575 S.E.2d 278 (2002);

Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975); *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991).

3. W. Va. Code § 18A-2-8 provides that “[A] board may suspend or dismiss any person in its employment at any time for: immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge.”

4. “Willful neglect of duty may be defined as an employee’s intentional and inexcusable failure to perform a work-related responsibility. *Adkins v. Cabell County Bd. of Educ.*, Docket No. 89-06-656 (May 23, 1990). This is a fairly heavy burden, given that Respondent must not only prove that the acts it alleges did occur, but also that the reason for Grievant’s neglect of duty was more than simple negligence.” *Tolliver v. Monroe County Bd. of Educ.*, Docket No. 01-31-493 (Dec. 26, 2001). Willful neglect of duty “is conduct constituting a knowing and intentional act, rather than a negligent act. *Williams v. Cabell County Bd. of Educ.*, Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ.*, Docket No. 95-29-151 (Aug. 24, 1995); *Hoover v. Lewis County Bd. of Educ.*, Docket No. 93-21-427 (Feb. 24, 1994). Willful neglect of duty encompasses something more serious than incompetence. *Bd. of Educ. v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120, 122 (1990); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996).” *Geho v. Marshall County Bd. of Educ.*, Docket No. 2008-1395-MarED (Oct. 30, 2008)(footnote omitted).

5. Insubordination involves “willful failure or refusal to obey reasonable orders of a superior entitled to give such order.” *Riddle v. Bd. of Directors, So. W. Va.*

Community College, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989).

6. In order to establish insubordination, the employer must demonstrate that the employee's failure to comply with a directive was sufficiently knowing and intentional as 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).

7. Generally, an employee must obey a supervisor's order and take appropriate action to challenge the validity of the supervisor's order. *Stover v. Mason County Bd. of Educ.*, Docket No. 95-26-078 (Sept. 25, 1995). 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).

8. KCBE established by a preponderance of the evidence that Grievant was insubordinate when she repeatedly disregarded her duty as a special needs bus operator to verify that her assigned bus aide properly secured the wheelchairs of special needs students who were passengers on her bus. See *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*); *Conner, supra*.

9. KCBE established by a preponderance of the evidence that Grievant engaged in willful neglect of duty through her consistent indifference to her obligation to insure the safety of her special needs passengers by verifying that her assigned aide

properly secured their wheelchairs on the bus, and her intentional refusal to check student M's wheelchair restraints after discovering that student S's wheelchair had not been properly secured. See *Myers v. Monongalia County Bd. of Educ.*, Docket No. 2012-1282-MonED (Jan. 11, 2013); *Wilkerson v. Lincoln County Bd. of Educ.*, Docket No. 99-22-420 (Mar. 27, 2000); *Lake v. Barbour County Bd. of Educ.*, Docket No. 99-01-294 (Jan. 31, 2000); *Williams v. Kanawha County Bd. of Educ.*, Docket No. 99-20-321 (Oct. 20, 1999).

10. Grievant's insubordinate conduct and willful neglect of duty which resulted in the injury of a special needs student in a wheelchair who was a passenger on Grievant's bus did not involve conduct which is considered "correctable" within the meaning of West Virginia Board of Education Policy 5300. See *Conner v. Barbour County Bd. of Educ.*, 200 W. Va. 405, 410, 489 S.E.2d 787, 792 (1997) (*per curiam*); *Mason County Bd. of Educ. v. State Superintendent of Schools*, 165 W. Va. 732, 274 S.E.2d 435 (1980).

Accordingly, this grievance is hereby **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 appealing party must also

provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. See also 156 C.S.R. 1 § 6.20 (2008).

DATE: August 31, 2015

LEWIS G. BREWER
Administrative Law Judge