LINDA RICE

v. **Docket No. 94-26-608**

MASON COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, Linda Rice, grieves her dismissal for willful neglect of duty from her employment as a cook with the Mason County Board of Education ("MCBOE"). As this was a disciplinary proceeding, this grievance came directly to Level IV, and a hearing was held on December 16, 1994. After the submission of proposed findings of fact and conclusions of law this case became mature for decision on February 3, 1995.

Respondent argues MCBOE properly terminated Grievant when she did not return to work after two approved days off, failed to contact MCBOE about her absence, and failed to notify Respondent of her whereabouts so clarification of her absence and return could be obtained.

Grievant argues her behavior did not rise to the level of intentional and inexcusable failure required for willful neglect of duty, thus she should not have been dismissed. Grievant does not wish to return to her employment with MCBOE, but requests a medicalleave of absence for six months to one year. She argues returning to Point Pleasant High School ("PPHS") as a cook is too stressful because "people can't get along" and "people have to put their nose in other people's business." (See footnote 1)

Findings of Fact

The facts of this grievance are not in dispute:

1. Grievant worked as a full-time cook for the MCBOE for five years. Before that time she worked as a substitute cook. At the time of her termination she was employed under a continuing contract. Her evaluations have been satisfactory and no mention of abuse of leave had been noted before this grievance.

2. In the Fall of 1993, Grievant divorced and thereafter shared living quarters with her eldest

daughter, son-in-law, two grandchildren and her son-in-law's brother. The arrangement resulted in many disagreements and Grievant found this situation stressful.

3. On September 13, 1994, Grievant requested two consecutive days of personal leave without cause, September 15 and 16, 1994. Mr. Rick Northup, Principal at PPHS, granted this request and Grievant was absent these two days. Although not required to do so, Grievant volunteered she wanted this leave time to try and locate her "birth" father through his army records in Washington, D.C.

4. Personnel in Washington, D.C. directed the Grievant to Fort Stewart, Georgia, thirty minutes from her sister's house in Savannah, Georgia. On September 17, 1994, Grievant drove to Savannah to look for her father and visit her sister.

5. Grievant decided to stay with her sister for a while because being away from home had a "calming" effect on her nerves.

6. On September 18, 1994, Grievant called a friend in Mason County, Debra Crump, to ask about things at home and to request she notify MCBOE that she would not return to work the week of September 19 through 23, 1994.

7. Ms. Crump did not call MCBOE, but Grievant's daughter called Cristi Utterback, Director of Food Services, and stated Grievant would not return to work September 19 through 23, 1994, due to a "personal emergency."

8. While in Savannah, Grievant's van broke down and parts had to be ordered. This was the principal reason Grievant remained in Savannah, but the other reason was the beneficial effect on her nerves.

9. On Sunday, September 25, 1994, Grievant again called Ms. Crump and asked her to tell MCBOE she would not be at work the week of September 26 through 30, 1994, because the van was not fixed yet.

10. Ms. Crump did not call MCBOE.

11. On Monday, September 26, 1994, the head cook at PPHS notified Ms. Utterback that Grievant had not reported to work. Ms. Utterback called Grievant's home and was told by Grievant's son-in-law Grievant would not be back. Mrs. Utterback left a message for Grievant to call her.

12. Also on September 26, 1994, Superintendent Whalen received an express mail letter from the Grievant requesting "a leave of absents [sic] for 6 months till [sic] one year. For Personal

Emergency Problems [sic]." Grievant indicated she was out of town, did not know when she would return, and gave her address as the one in Point Pleasant. Res. Ex. 4.

13. Ms. Utterback called Grievant's home everyday that week requesting her to call her back to discuss her situation.

14. On September 29, 1994, Superintendent Whalen sent Grievant a certified letter notifying Grievant he intended to recommend her termination to the MCBOE at the October 11, 1994 Board meeting. This letter recounted MCBOE's policy on personal leave. Superintendent Whalen also stated Grievant was to contact him by October 10, 1994, if she wanted to request a hearing. Res. Ex. 3.

15. Grievant's eldest daughter signed for this letter on September 30, 1994, but Grievant states she did not receive it until October 7, 1994, when she returned home.

16. On October 6, 1994, Grievant flew into Charleston to be with her younger daughter, who was critically ill and hospitalized in Huntington.

17. Grievant phoned Ms. Utterback on October 10, 1994 and stated she wanted to resign. Ms. Utterback offered to helpGrievant compose the letter, but Grievant changed her mind and did not go to Ms. Utterback's office for help.

18. On October 10, 1994, Grievant called Superintendent Whalen's office and his secretary said to come in and he would talk to her. Grievant went to Superintendent Whalen's office and waited twenty-five minutes, but did not see Superintendent Whalen. She then left. Testimony was unclear as to why Grievant was not seen. It is clear Grievant did not request a hearing for the October 11, 1994 Board meeting.

19. At 4:00 p.m. on October 11, 1994, Grievant came to the Board office. She gave Ms. Elizabeth Mattox, the Personnel Director, a prescription form dated October 11, 1994, which stated, "[d]ue to her medical condition of having acute Depression [sic] and Anxiety [sic] she must take a medical leave until further notice[.]" This form was signed by Dr. Danny R. Westmoreland, D.O. Resp. Ex. 6.

20. Grievant stated Dr. Westmoreland gave her some sample pills, but did not write her any prescriptions. He did not make a follow-up appointment for her. Ms. Mattox gave the prescription form to the MCBOE.

21. Grievant has no medical excuse for the days prior to October 11, 1994.

22. Grievant attended the Board meeting but did not ask to speak on her own behalf. MCBOE voted to terminate Grievant and on October 12, 1994, Grievant was hand delivered a copy of hertermination letter. Grievant also signed for a certified copy of the same letter on October 20, 1994. Resp. Exs. 5 and 7.

23. After October 11, 1994, Grievant attended two counseling sessions with a licensed psychotherapist, Mr. David Clay, at River Park Hospital. Grievant was to see a psychiatrist at River Park Hospital in January, 1995, and the record was left open for further psychological, psychiatric, or medical reports. Apparently Grievant did not receive further treatment for her anxiety and depression, as the parties agreed there were no other medical reports to be included in this record. Resp. letter, January 9, 1995.

24. Grievant applied for unemployment benefits and swore at that time that she was "able and willing to work."

25. On December 3, 1994, Grievant began working at McDonald's as a probationary employee. This probationary period lasts 90 days and Grievant's goal is to eventually work full-time at McDonald's.

26. Respondent's policy on "Leave - Leave of Absence" is as follows:

Upon written request, the Board of Education, with the recommendation of the Superintendent, may approve a leave of absence for not more than one employment term to a professional or service employee for any of the following reasons:

- Ill health, with recommendation of a physician;
- For advanced study in school in order to make professional improvement;
- Sabbatical leave for professional teachers and teacher aides. (Refer to State Policy 5530);

- Any employee who has exhausted his/her accumulated sick leave (must be requested within twenty (20) working days);

- To serve in the Armed Forces of our Government;

- Pregnancy, childbirth, adoptive or infant bonding.

Discussion

This grievance actually has two separate and distinct issues: 1) did MCBOE properly discharge Grievant for willful neglect of duty; and 2) should MCBOE have granted Grievant a medical leave of absence.

When an employee is dismissed for willful neglect of duty, the Respondent must prove its case by a preponderance of the evidence. Arbaugh v. Putnam County Bd. of Educ., Docket No. 90-40-437 (May 22, 1991). W. Va. Code §18A-2-8 gives a county board of education the authority to "suspend or dismiss any person in its employment at any time for: . . . willful neglect of duty . . . ." This authority must be based on the reasons listed in W. Va. Code §18A-2-8 and "must be exercised reasonably, not arbitrarily or capriciously." Rovello v. Lewis County Bd. of Educ., Syl. Pt., 381 S.E.2d 237 (W. Va. 1989). Although the West Virginia Supreme Court has not formulated a precise definition of "willful neglect of duty", it does encompass something more serious than incompetence and imports "a knowing and intentional act, as distinguished from a negligent act." Bd. of Educ. of the County of Gilmer v. Chaddock, 389 S.E.2d 120, 122 (W. Va. 1990). In Rovello the West Virginia Supreme Court of Appeals held the grievant's dismissal was arbitrary and capricious given the lack of a clear policy on the subject, the isolated nature of the offense, the minimal harm to the school system, and the grievant's otherwise "sterling" record. Id. at 241.

This Board has defined willful neglect of duty as "an employee's intentional and unexcusable

failure to perform a work-related responsibility." Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990). Additionally, the Board has held that "[f]ailure of [an employee] to report to work and to report the absence to the school as previously directed amounts to insubordination and willful neglect of duty justifying disciplinary action." Carrell v. Kanawha County Bd. of Educ., Docket No. 20-87-036-1 (Apr. 8, 1987), citing Kidd v. Kanawha County Bd. of Educ., Docket No. 20-86-096 (Apr. 23, 1986).

When the above-stated law is applied to the facts of this case, it is clear Grievant's dismissal must be upheld and MCBOE has met its burden of proof. Grievant demonstrated she was aware of the leave regulations when she properly requested and received permission to have September 15 and 16, 1994, off to go to Washington, D.C. That was the last time she asked for leave and the last time leave was granted. Thereafter, Grievant did not contact MCBOE personally again until much later, but instead requested third parties to inform Respondent she would not be at work. This third party was not dependable and did not notify Respondent. Further, Grievant gave Respondent no way to contact her directly so she could be informed her demands were inappropriate and would not be granted.

This behavior constituted willful neglect of duty because it was a knowing and intentional act and demonstrated a failure to perform a work-related duty. MCBOE's action was not arbitrary andcapricious because the policy on leave is clear. Since the behavior continued over a two-week period of time it created a disruption at PPHS. See Rovello, supra. Respondent did not know where Grievant was, when she would return, and could not plan for proper staffing of the cafeteria. Although Grievant's past performance evaluations were satisfactory, this fact alone does not justify her retention.

Although not clearly discussed at hearing, the issue of Grievant's state of health prior to termination should be discussed. There is no evidence to support that Grievant was too ill to work during this time. Apparently, Grievant was feeling some anxiety and stress due to her living arrangements, but this did not incapacitate Grievant from traveling hundreds of miles from West Virginia to Washington, D.C. and then to Savannah, Georgia. Additionally, it must be remembered Grievant did not request sick leave for this time, even though she had twelve days that she could have utilized. Thus, Grievant did not demonstrate she was too sick to work.

Because Grievant's dismissal was proper, the request for medical leave will be discussed only

briefly. Grievant, on September 26, 1994, sent a brief note to Superintendent Whalen requesting a leave of absence for six months to one year for personal emergency problems. No other information was attached to this note, other than Grievant's statement she was out-of-town and did not know when she would return. Later, on October 11, 1995, the day Grievant was to be terminated, Grievant presented a notefrom Dr. Westmoreland, written on a prescription pad, stating Grievant "due to her medical condition of having acute depression and anxiety [Grievant] must take a medical leave of absence until further notice." A leave of absence may only be granted pursuant to the policy listed in finding of fact 26. The applicant must request the leave in writing, receive the recommendation of the Superintendent, and the approval of MCBOE. The granting of a leave of absence is within the discretion of MCBOE as the term "may" is used. Although not clearly spelled out, it also appears the policy contemplates employees will exhaust their sick leave before they apply for a medical leave of absence. For ill health, a recommendation of a physician is required.

Grievant requested a leave of absence for a "personal emergency," not illness, and did not clarify what this "personal emergency" was. No supporting data, medical diagnosis, or prognosis was attached to this request. Indeed, Grievant did not seek medical attention until the day of her termination, and this diagnosis and request for leave of absence was prospective, not retrospective. Further, Grievant had twelve days of sick leave at the time of her request. As previously stated, MCBOE repeatedly attempted to contact Grievant and clarify her situation to no avail. Grievant did not contact MCBOE again until she contacted Ms. Utterback on October 10, 1994, to say she was resigning.

Grievant maintains she should receive a leave of absence because she cannot work due to her mental health. At the same time Grievant signed a sworn statement with the UnemploymentCompensation Division saying she was willing and able to work. Now that Grievant is working part-time at McDonald's and plans to increase her work schedule if allowed, she still requests this medical leave of absence. Further, Grievant stated she did not plan to go back to work at PPHS.

Additionally, although some evidence was presented at hearing that Grievant had seen a counselor twice, this Board was to receive more detailed information on this issue and the record was left open to obtain this data. No further information was received. Apparently, Grievant received no further care. Given the above set of circumstances, MCBOE did not abuse its discretion in

terminating Grievant instead of granting her request for a leave of absence.

The above discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. When an employee is dismissed for willful neglect of duty the Respondent has the burden of proving its case by a preponderance of the evidence. See W. Va. Code §18-29-6.

2. Failure of an employee to report to work and to report absences to the school amounts to willful neglect of duty justifying disciplinary action. Carrell, supra.

3. Grievant's failure to appear at work or to personally notify her supervisors that she would be absent constituted willful neglect of duty. Carrell, supra.

4. Respondent has met its burden of proof and has demonstrated by a preponderance of the evidence that Grievant's dismissal was proper.

5. MCBOE's failure to grant Grievant's request for a leave of absence was not an abuse of discretion.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mason County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: March 31, 1995

Footnote: 1Grievant also argued in her post-hearing submissions that her behavior was correctable and as such Respondent had failed to comply with W. Va. Bd. of Educ. Policy No. 5300. As this issue was not raised at the Level IV hearing, it is considered waived.