DAVID WALL,

Grievant,

v. DOCKET NO. 98-40-457

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant David Wall filed this grievance against the Putnam County Board of Education ("PBOE") at Level IV of the grievance procedure on November 17, 1998, challenging his five day suspension for incompetence, willful neglect of duty, and unsatisfactory performance. His statement of grievance reads:

> Violations of WV Code 18A-2-8 in regard to grievant's five days suspension without pay. The grievant feels the five days are excessive and punishment too delayed.

The relief sought is five days backpay and the return of any benefits lost due to the suspension. (See footnote 1) The allegations against Grievant which led to the suspension he contests, arose out of an October 1997 audit of Poca Middle School, where Grievant is principal. The audit found that financial record-keeping and money handling related to various events at the school were not in compliance with acceptable procedures for handling public funds.

A hearing was held by Superintendent Sam P. Sentelle, on February 18, 1998, which he described as a "formal inquiry into certain questions which have arisen in a routine audit of funds of Poca Middle School." Evidence was presented at the hearing by James W. Withrow, Esquire, PBOE's attorney, and Grievant appeared with his attorney, Mike Kelly. Mr. Kelly cross-examined witnesses and was given the opportunity to present evidence, which he did. At the beginning of the hearing Superintendent Sentelle explained that the record "may be presented to the Prosecuting Attorney for appropriate action. It may be used as a basis for disciplinary actions by the Board of Education." Grievant's counsel placed no objection on the record to the possible uses of the hearing transcript as disclosed by Superintendent Sentelle.

Eight months later, by letter dated October 5, 1998, Superintendent Sentelle informed Grievant that the Putnam County Prosecuting Attorney would not be pursuing a criminal investigation against Grievant regarding alleged improprieties in the management of funds. The letter stated, "the matter now becomes a matter for administrative disciplinary action." The letter informed Grievant that Superintendent Sentelle was recommending a five day suspension without pay, for incompetency,willful neglect of duty, and unsatisfactory performance. The letter continued, listing certain findings from the audit, and stated the audit "indicated a failure to conform to the most basic procedures for accountability." The audit findings listed in the letter are:

> 1. On or about September 12, 1997, Amy Winter gave you $180 -- twenty dollars in checks and the balance in cash. Ms. Winter received a receipt for twenty dollars and there is nothing to show that the balance was ever deposited to the school account.
>
> 2. Receipts for a football game on October 9, 1997 were not deposited until the audit, nearly six weeks later. Checks for officials were not recorded.
>
> 3. Accounting was improperly conducted for a Dine-A-Mate fundraiser for the band program. A separate account was established at Rock Branch Community Ban[k] for this fundraiser, contrary to policy and accepted procedures, and you were a signatory for the account. Several students were listed both as receiving prizes and failing to turn in books or money.
>
> 4. Ticket reconciliation reports for at least four football games show numerous gaps in ticket numbers, and tickets out of sequence.
>
> 5. There was a failure to properly deposit and account for receipts from a school dance held on September 16, 1997. Deposit was made on December 8, 1997. There was an alteration of records, apparently to cover this deficiency. (See footnote 2)

The letter also informed Grievant:

> I anticipate Board consideration and action on this recommendation on October 12, 1998, beginning at 7:00 p.m. at the Board offices in Winfield. You will have an opportunity at that time to address the Board.

Respondent's Exhibit 1. Grievant stated he attended the October 12 board meeting, but was not allowed to address PBOE.

Grievant was then notified by Superintendent Sentelle, by letter dated November 10, 1998, that PBOE had voted the preceding evening to suspend him for five days without pay, "for incompetence, willful neglect of duty, and unsatisfactory performance in that you failed to conform to procedures for fiscal accountability as enumerated in my letter of October 5, 1998." Grievant's Exhibit 1. Grievant had not been informed of this meeting.

The following formal Findings of Fact are properly made from the record developed at Level IV. Respondent's case relied entirely upon the transcript of the investigative hearing before the Superintendent, held February 18, 1998, which was marked and admitted into evidence as Respondent's Exhibit Number 2.

Findings of Fact

1. Grievant has been employed by PBOE almost 32 years, and has been the principal at Poca Middle School since 1992. Prior to that, he was assistant principal at that school for 16 years.

2. An audit is conducted each year of each school in Putnam County, normally at the end of the school year. Prior to October 1997, no major problems had been found by an audit at Poca Middle School.

3. An audit of Poca Middle School was conducted in October 1997. All other Putnam County Schools were also audited that fall. The audit identified severalitems which were of concern, as detailed in the letter recommending Grievant's suspension.

4. Rebecca Flippin is a secretary at Poca Middle School. Her desk is outside Grievant's office. She handles all bank deposits for the school.

5. On September 12, 1997, Amy Winter, a substitute teacher for PBOE, and cheerleader sponsor at Poca Middle School, went to Grievant's office and handed him an envelope with $180.00 in it, which the cheerleaders had earned from a car wash fundraiser. $160.00 was in bills and change (cash), and $20.00 was in checks. Grievant took the envelope to his office.

6. Ms. Flippin told Ms. Winter she could wait for a receipt, or come back later. Ms. Winter left. Grievant gave Ms. Flippin two checks for $10.00 each and she prepared and signed a receipt showing $20.00 was received from Ms. Winter for the cheerleaders on September 12, 1997. When Ms. Winter returned, Ms. Flippin gave her the receipt.

7. Ms. Winter told Grievant she was concerned that the bill for the cheerleaders' warm-up suits would not be paid, because without the $160.00, they would not have enough money in their account to pay it, and he said the bill would be paid when it came in. The money to pay the bill for the cheerleader warm-up suits, $461.50, was taken from athletic funds.

8. From the cheerleading money, Grievant gave $150.00 cash to a teacher who was having financial problems due to the extended illness and death of herhusband. When Superintendent Sentelle told him this was illegal, Grievant replaced the money from his own pocket.

9. Football officials are normally paid by check for their services. On October 9, 1997, Grievant told Ms. Flippin not to write checks for the officials for that night's football game, as she normally did. He also told her, "Don't ask for the gate money because I'm keepin[g] it." Grievant gave her the gate receipts of $474.00 for the October 9, 1997 football game on November 14, 1997.

10. The ticket seller's report prepared for the October 9, 1997 football game shows 190 tickets were sold, resulting in $474.00 in revenues. (See footnote 3)

11. There are 400 numbered tickets not accounted for from the ticket roll between the last ticket number sold at the September 18, 1997 football game and the first ticket sold at the October 30, 1997 football game. The tickets listed as used for the October 9, 1997 football game are numbers which would fall after the numbers used for the October 30 football game. Other tickets are not accounted for, and tickets were sold out of order at other times.

12. Ticket rolls were kept in Grievant's office, and when someone needed tickets for something, a roll would be picked up for use without regard to whether it was the same roll used for the last event. Tickets were used by teachers for student contests, and by booster clubs for raffles, in addition to being used for ball games. 13. Poca Middle School had a fundraiser in which the students sold coupon books called "Dine-A-Mate." If all the Dine-A-Mate coupon books had been sold by the students, and all the money had been turned in by the students, this fundraiser would have grossed $20,545.00, and produced net funds of $9,422.00, after purchase of the Dine-A-Mate books at a cost of $11,122.50. This fundraiser actually grossed $17,606.50, and netted $5,284.00. (See footnote 4)

14. Over 300 students and 20 teachers participated in the Dine-A-Mate fundraiser. Grievant's reconciliation lists that students were given cash prizes totaling $1,200.00 as part of this fundraiser for selling a certain number of books. These prizes were given regardless of whether the students

collected and turned in all the money for the sale of these books. The detail of cash prizes given to particular students totals $1,100.00. One student listed as receiving a cash prize was interviewed, and stated she did not receive a cash prize.

15. Students did not return all Dine-A-Mate books, resulting in a loss of $1,250.00, and failed to turn in money collected in the amount of $1,688.50. Each year the students fail to sell all the books, and they earn $2,000.00 to $3,000.00 less than they ideally would have earned had all the books been sold.

16. A checking account was opened at Rock Branch Community Bank in the name of the "Poca Middle School Band Boosters," with Joe Patton, a teacher at PocaMiddle School, and Grievant as the signatories on the account. PBOE's Treasurer, William Duncan, was not a signatory on this account, and PBOE did not approve this account. State Board of Education policy requires the county board treasurer to be a signatory on every bank account.

17. Ms. Flippin did not receive admission money to deposit the morning after a school dance, which was held September 16, 1997, as she normally did. On December 8, 1997, about one-half hour after Superintendent Sentelle notified Grievant and Ms. Flippin by letter of the investigative hearing scheduled for February 18, 1998, a search was made for the dance money in Grievant's office, and it was found. Grievant gave Ms. Flippin $266.00, and told her it was the dance proceeds. If every student had paid the $2.00 admission charge, the receipts would have been $310.00. Some students are admitted to dances free of charge.

18. School dances were organized by the assistant principal, and he handled the gates and the money. Sometimes he gave the money to Grievant, and sometimes he gave it to Ms. Flippin. The assistant principal on September 16 left his employment shortly after that date.

19. On October 29, 1997, Ms. Flippin received a memorandum from Mr. Duncan stating an audit would be conducted, and requesting information on sports and dance schedules and fundraisers. Grievant was out of town. Ms. Flippin gathered the information Mr. Duncan requested, and sent it to him on October 31, 1997, while Grievant was out of town. She did not check with Grievant before sending this information. 20. When Grievant returned, he asked Mr. Duncan if he could review the information Ms. Flippin had sent to him, and Mr. Duncan let him do so. He reviewed the information in the presence of Mr. Duncan and Traci Gunther, and removed three documents concerning the September 16, 1997 dance, because he thought the dance had been

canceled.

21. Bill Posey, a teacher at the school, was given $90.00 cash by Grievant for working two dances and two basketball games.

22. Linda Hansen was given $21.00 cash by Grievant for the purchase of two cans of paint for her classroom.

23. James McComas was given $40.00 cash by Grievant for the purchase of items for a pizza party for students, and $150.00 cash for extra work he did after school on the computer system.

24. Susie Thomas was given $25.00 cash by Grievant for a class pizza party.

25. All school principals in Putnam County are provided with a copy of the 150 page "Accounting Procedures Manual for the Public Schools in the State of West Virginia." This manual explains how accounts are to be maintained, and how ticket sales are to be accounted for, and lists unlawful expenditures, including gifts and flowers. Mr. Duncan, who is also a certified public accountant, went over this manual at a principal's meeting during 1997, and gave the principals a handout of major provisions and changes. Grievant attended this meeting.

26. The principal of a school is ultimately responsible for all the financial activities of the school. 27. On February 18, 1998, a hearing was conducted by PBOE Superintendent Sam Sentelle. The hearing was the "formal inquiry" into questions arising from the audit. Grievant was represented at this hearing by Mike Kelly, Esquire, and Respondent was represented by James Withrow, Esquire. Superintendent Sentelle informed the parties that the transcript of the hearing "may be presented to the Prosecuting Attorney for appropriate action. It may be used as a basis for disciplinary actions by the Board of Education." Grievant's counsel placed no objection on the record to the possible uses of the hearing transcript as disclosed by Superintendent Sentelle.

28. Grievant received a letter dated October 5, 1998, from Superintendent Sentelle recommending his five day suspension without pay, notifying him of the charges against him, and notifying him of a PBOE meeting on October 12, 1998, during which he would be allowed to address PBOE members.

29. Grievant was given no opportunity at the October 12, 1998 board meeting to respond to the charges, and no action was taken on the Superintendent's recommendation at that meeting.

30. PBOE met on November 9, 1998, and voted to suspend Grievant for five days without pay. Grievant was not given notice of this meeting and did not attend.

31. In December 1997, Grievant was relieved of his signature authority and all responsibility for handling funds at Poca Middle School.

32. Grievant was not placed on an improvement plan.

Discussion

Pursuant to W. Va. Code § 18-29-6, the burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994).

W. Va. Code § 18A-2-8 provides that professional personnel may be suspended or dismissed at any time for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, a felony conviction, entry of a guilty plea or a plea of nolo contendere to a felony charge. "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 said charges to the board."

An employer asserting willful neglect of duty "must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act." Jones v. Mingo County Bd. of Educ., Docket No. 95-29-151 (Aug. 24, 1995). 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).

Finally, in assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, allof which must be determined on a case by case basis." McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995) (citations omitted).

Before addressing the charges against Grievant, however, Grievant's argument that his right to due process was violated when he was not allowed the opportunity to respond to the charges before PBOE, will be addressed. Respondent did not address this argument.

"[S]chool employees have a property interest in continued uninterrupted employment and due process safeguards must be provided when a county board of education seeks to deprive employees

of that interest." Knauff v. Kanawha County Bd. of Educ., Docket No. 20-88-095 (Jan. 10, 1989). These protections are afforded to employees who are suspended without pay, although "a temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation." Waite v. Civil Serv. Comm'n, 161 W. Va. 154, 241 S.E.2d 164 (1978). "[D]ue process is a flexible concept, and . . . the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985).

In determining "what process is constitutionally due," the United States Supreme Court enunciated three factors to be balanced:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest." Matthews v. Eldridge, 424 U.S. 319, 335 (1976). See also, e.g., [FDICv.] Mallen, [486 U.S. 230, 242 (1988)] . . . ; Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982).

Gilbert v. Homar, ___ U.S. ___, No. 96-651 (1997). Our Supreme Court of Appeals has found these factors to be "germane to a selection of an appropriate procedure under our [West Virginia Constitution] Due Process Clause," and applied these factors in Waite, supra. The Court also found in Waite, discussing the de minimus concept espoused in Goss v. Lopez, 419 U.S. 565 (1975), that a ten-day suspension was not such a minimal deprivation that no due process procedure need be afforded.

In this case, Grievant was given the opportunity to present his side to the Superintendent, but stated he was not allowed to address the board of education members. Respondent did not dispute this.

This Grievance Board has previously addressed a nearly identical issue, but the ruling therein was based upon statutory requirements, not due process requirements. In May v. Cabell County Board of Education, Docket No. 92-06-438 (May 20, 1993), the Administrative Law Judge found that "Code §18A-2-7's mandate that the suspension imposed by a superintendent `be temporary only pending a hearing upon charges filed by the superintendent with the board of education,'" clearly requires that the employee be provided the opportunity to defend himself before the board of education, even if he has been given the opportunity to defend himself before the superintendent. The grievant was awarded backpay for the period of his suspension, and all documents related to the charges and the

suspension which were placed in hispersonnel file due to the disciplinary action were ordered removed from his personnel file.

The issue was similar in Knauff, supra, except that the Grievant was not given the opportunity to address either the board of education or the superintendent. The Administrative Law Judge in Knauff ruled, solely on due process grounds, that the grievant was entitled to the opportunity to respond to the charges prior to the imposition of a three-day suspension, absent "compelling circumstances, clearly apparent on the record," and the failure to provide the grievant with such a pre- deprivation opportunity violated his due process rights. The three-day suspension was overturned.

Respondent did not indicate why Grievant was not allowed to address the board of education. However, the undersigned finds that the record developed at the hearing before the superintendent constituted a pre-deprivation hearing, and otherwise was sufficient that the risk of an erroneous deprivation of the employee's property interest was minimal. See Gilbert, supra. Grievant's due process rights were not violated, under these facts, by the failure to allow him to address the board of education.

With regard to whether the statute was violated, the difference in this case from May is there was a transcript available of a hearing before the superintendent. This is a critical difference in the facts.

The statutory language relied upon by the Administrative Law Judge in May reads:

> The superintendent's authority to suspend school personnel shall be temporary only pending a hearing upon charges filed by the superintendent with the board of education and such period of suspension shall not exceed thirty days unless extended by order of the board.

W. Va. Code § 18A-2-7. While this language requires a hearing "upon the charges filed by the superintendent," it does not say that hearing must be conducted by and before the board of education.

Further, the parties were specifically told at the beginning of the hearing before the superintendent that the transcript could be used "as a basis for disciplinary actions by the Board of Education." Grievant's counsel made no objection to this. Respondent presented no evidence to the undersigned other than the February 18, 1998 hearing transcript. Grievant offered limited evidence at the Level IV hearing. He admitted to making mistakes, and to some of the charges, and that making cash payments may have violated policy, and did not dispute some of the charges. He offered some explanations, and testimony that all the money was spent for the benefit of the school.

The undersigned concludes that, under the facts presented here, the statute was not violated. Further, those charges which were proven from the evidence presented at the February 18, 1998 hearing, represent sufficiently egregious instances of knowingly mishandling public funds, to justify a five day suspension without pay.

Grievant next argued the charge of unsatisfactory performance could not be made, because W. Va. Code § 18A-2-8 provides that such a charge can only result from a performance evaluation. Grievant argued the employee must be given noticeof the deficiencies, and an improvement plan must be developed. This argument need not be addressed, as Respondent has proven the charge of willful neglect of duty, and that is sufficient in this case.

As to the specific charges in the notice of suspension, Grievant admitted the $160.00 cash given to him by Ms. Winter was not deposited, but was instead given to a teacher, although other evidence indicated $150.00 was given to the teacher, and the other $10.00 was not accounted for. The first charge was proven, and constitutes willful neglect of duty. The fact that Grievant replaced the money from his own funds at a later point in time has no bearing on the charges.

Grievant admitted receipts for a football game on October 9, 1997 were not deposited until the audit, nearly six weeks later, and checks for officials were not recorded, as was charged.

Respondent specifically argued at the Level IV hearing that Grievant did not intend to deposit the receipts from this football game, and did so only because he was caught by the audit, insinuating he intended to steal the money. First, neither of the suspension letters indicates that this was one of the charges against Grievant, or that this was part of the reason PBOE decided Grievant should be suspended. To the contrary, if PBOE believed Grievant intended to steal money from the school, one would think a more severe penalty would have been imposed. Accordingly, this argument need not be considered.

Regardless of Grievant's intent, however, his failure to turn the money over to Ms. Flippin for deposit for six weeks after the football game was not proper procedure,and Grievant knew it. Further, it is apparent that the officials were paid in cash. These acts constitute willful neglect of duty.

With regard to tickets being sold out of order, Mr. Duncan explained that tickets are to be sold in order off a roll of tickets to provide internal control over the number of tickets sold and the amount of cash receipts, so receipts can be reconciled against tickets sold.

Grievant denied that any policy required the tickets be used in sequence, and testified this is

simply not something he and others at the school had ever paid any attention to. The tickets were used for a number of things, and everyone had access to them.

While Mr. Duncan's explanation that the tickets must be used in sequence as a means to reconcile cash receipts is logical, and seems to be a good accounting practice, this is not entirely practical, given that these tickets are used for any number of things. Respondent did not provide a cite to the policy which provides that tickets must be used in sequence. Respondent failed to demonstrate Grievant did anything wrong with regard to the use of tickets.

Grievant's explanation of what occurs with fundraisers such as Dine-A-Mate, with students not collecting all the money and not returning books makes a lot of sense. As with any account, a certain percentage of receivables have to be written off, and Grievant found that to amount to about $2,000.00 to $3,000.00 each year, which it was best for all concerned not to worry too much about. However, it is obvious even from this fundraiser that Grievant's record keeping skills were sorelylacking, as his list of students who received prizes was inaccurate and did not balance, and apparently no records were being kept which could be pulled at any moment to check the status of the fundraiser. Grievant's lack of concern with that aspect was disconcerting.

Grievant did not dispute the facts presented at the hearing before the Superintendent regarding the impropriety of establishment of a band boosters account without the Treasurer being a signatory. This again constitutes willful neglect of duty.

Respondent argued at the Level IV hearing that a school was allowed to have only two accounts: a general account and a lunch account; and that the opening of the band boosters account also violated this mandate. However, no testimony was offered regarding this, and Respondent did not cite to a policy, regulation, or statute to support its argument.

As to the school dance, although Grievant may not have been aware that the money was not properly accounted for and deposited, he was ultimately responsible for making sure procedures were in place to assure his subordinates properly handled monies collected. Apparently, these procedures were lacking. The undersigned, however, finds it hard to believe that $266.00 in cash was in a box in Grievant's office for several months and he was not aware of it, and then a search of his office found the missing money in about five minutes, and Grievant knew it was the money from the dance. More likely than not, this is just one more instance of Grievant using cash for those purposes he believed were appropriate. Mr. Duncan believed it was acceptable for Grievant to pay for a

pizza party for students. He stated it was not acceptable practice to reimburse teachers for out-of-pocket expenses, such as for paint for classrooms, except faculty senate monies are specifically allowed to be used for this, and the teacher must file an affidavit swearing the money has been spent in accordance with West Virginia law. Mr. Duncan testified that providing a gift of money from school funds to a teacher whose husband had recently died was an unlawful expenditure. Mr. Duncan explained it is improper procedure to pay a school employee in cash, and that such payments must go through the payroll, and this had been explained to employees many times. He explained cash payments expose PBOE to liability for unpaid taxes associated with employee wages.

Grievant did not dispute that he was not supposed to be making these cash payments, and admitted he made some mistakes in failing to follow the proper procedure.

While at first glance one might believe Grievant demonstrated a complete lack of understanding of the basic principles necessary to proper accounting for public funds, it is clear he knew what he was doing, and that he was not supposed to be doing it - that is why he intentionally kept cash when it was turned in, and manipulated the accounts. Grievant admitted as much. When he saw something he thought should be done at the school, he found a way to get it done.

The undersigned finds no criminal intent in Grievant's action. Grievant appears to have been simply bending the rules as he saw fit to help others, and he knew it. Nonetheless, this cannot be condoned. It was not Grievant's money. Under thesecircumstances, the undersigned will not require PBOE to return Grievant's authority to handle public funds.

Finally, Grievant argued the delay in bringing the charges, from October 1997, to October 1998, was cruel and harmful to his professional career. He testified information about the investigation was given to the press and was published, resulting in embarrassment and humiliation, and damage to his character. He did not argue his ability to defend against the charges was harmed due to the passage of time. The Grievance Board has declined to award a grievant tort-like damages for pain and suffering or mental anguish, as this is not an appropriate forum for such damages. Hall v. W. Va. Dep't of Transp., Docket No. 96-DOH-433 (Sept. 12, 1997).

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The employer bears the burden of proving the charges in a disciplinary proceeding by a

preponderance of the evidence. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994).

2. Pursuant to W. Va. Code § 18A-2-8, professional personnel may be suspended or dismissed at any time for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, a felony conviction, entry of a guilty plea or a plea of nolo contendere to a felony charge. The authority of a board of education to dismiss an employee must be exercised reasonably, and not arbitrarily and capriciously. Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975). 3. "[S]chool employees have a property interest in continued uninterrupted employment and due process safeguards must be provided when a county board of education seeks to deprive employees of that interest." Knauff v. Kanawha County Bd. of Educ., Docket No. 20-88-095 (Jan. 10, 1989). These protections are afforded to employees who are suspended without pay, although "a temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation." Waite v. Civil Serv. Comm'n, 161 W. Va. 154, 241 S.E.2d 164 (1978).

4. In determining "what process is constitutionally due," three factors are to be balanced:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest." Matthews v. Eldridge, 424 U.S. 319, 335 (1976). See also, e.g., [FDIC v.] Mallen, . . . [486 U.S. 230, 242 (1988)];l Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982).

Gilbert v. Homar, ___ U.S. ___, No. 96-651 (1997). Waite, supra.

5. The record developed at the hearing before the superintendent constituted a pre-deprivation hearing, and otherwise was sufficient that the risk of an erroneous deprivation of the employee's property interest was minimal. See Gilbert, supra. Grievant's due process rights were not violated, under the facts of this case, by the failure to allow him to address the board of education.

6. While W. Va. Code § 18A-2-7 requires a hearing "upon the charges filed by the superintendent," it does not say that hearing must be conducted by and beforethe board of education. As the February 18, 1998 hearing before the superintendent was transcribed, and the parties were told the hearing could be used to form the basis of disciplinary action by the board of education, and Grievant did not object to this, the statute was not violated.

7. Respondent proved Grievant knowingly and intentionally failed to follow proper procedures

in handling and accounting for funds, and in disbursing cash payments to employees for services, constituting willful neglect of duty.

8. Respondent failed to prove Grievant did anything improper in his management of use of tickets.

9. "Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995) (citations omitted).

10. The penalty imposed was not clearly excessive.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Putnam County. Any 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. 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: June 7, 1999

Footnote: 1

The Level IV hearing was held on March 18, 1999, and this matter became mature for decision on April 22, 1999, upon receipt of the last of the parties' submissions of proposed findings of fact and conclusions of law. Grievant was represented at Level IV by Susan Hubbard, and Respondent was represented by James W. Withrow, Esquire.

Footnote: 2

References in this letter to the transcript of the February 18, 1998 hearing before the Superintendent have been omitted

from the quoted language.

Footnote: 3

Respondent attempted to demonstrate the gate receipts should have been more than this, but presented no evidence that more than 190 people attended.

Footnote: 4

Grievant testified he had prepared a second reconciliation which showed a net of $6,700.00. That document was not produced, and Grievant did not explain how he arrived at this different number.