CHARLES ROSENAU,

Grievant,

v.

DOCKET NO. 99-47-192

TUCKER COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Charles Rosenau, a teacher employed by the Tucker County Board of Education ("Board"), also served as Athletic Director at Tucker County High School until April 16, 1999, when he was notified by Superintendent Mary Alice Klein that she planned to recommend that his contract as Athletic Director be terminated. The recommendation was made to the Board on May 11, 1999, and after a pre-termination hearing on the matter, the Board voted to terminate Grievant's contract. Grievant filed this grievance on May 14, 1999, protesting his dismissal as Athletic Director by the Board. Grievant filed his grievance directly at level four of the grievance process, in accordance with W. Va. Code § 18A-2-8. Following several continuances for good cause, a hearing was conducted in the Grievance Board's Elkins, West Virginia, office on September 13, 1999. Grievant was represented by Jessica M. Baker, Esq. and Stephen G. Jory, Esq., Jory & Smith, and the Board was represented by Gregory W. Bailey, Esq., Bowles, Rice, McDavid, Graff & Love.

SUMMARY OF EVIDENCE

Board Exhibits

Ex. 1 -

Tucker County High School Purchase Order No. 8573 to Spartan

Sporting Goods, undated.

Ex. 2 -

Invoice from Spartan Sporting Goods for Purchase Order 8573, dated December 31, 1998.

Ex. 3 -

Tucker County High School Purchase Order No. 8574 to Spartan Sporting Goods, undated.

Ex. 4 -

Invoice from Spartan Sporting Goods for Purchase Order 8574, dated December 31, 1998.

Ex. 5 -

Tucker County High School Purchase Order No. 8616, undated.

Ex. 6 -

Invoice from Spartan Sporting Goods for Purchase Order 8616, dated December 31, 1998.

Ex. 7 -

Tucker County High School Purchase Order No. 8617, undated.

Ex. 8 -

Invoice from Spartan Sporting Goods for Purchase Order 8617, dated December 31, 1998.

Ex. 9 -

Invoice from Circle System Group, dated October 1, 1997.

Ex. 10 -

Invoice from Sunset Graphics, LLC, dated August 27, 1998.

Ex. 11 -

Invoice from G.E. Maier Company, dated July 31, ___, for transaction rendered on August 4, 1995.

Ex. 12 -

Purchase Order Sign-out Sheets.

Ex. 13 -

Undated memorandum from Jeanne Bonner to Teachers.

Ex. 14 -

Accounting Procedures Manual for Public Schools: Purchase Orders.

Ex. 15 -

Tucker County High School Purchase Order No. 8421 to Spartan Sporting Goods, dated October 23, 1998; Invoice from Spartan Sporting Goods for Purchase Order No. 8421, dated October 29, 1998.

Ex. 16 -

August 26, 1999 letter from Larry Foster, Vice-President, Spartan Sporting Goods, to Mrs. Cole, Superintendent.

Ex. 17 -

Performance Evaluation for William Rosenau, dated October 27, 1998.

Ex. 18 -

Improvement Plan for William Rosenau, from November 6, 1998 to May 1, 1999.

Ex. 19 -

Position Description for Athletic Director.

Ex. 20 -

April 16, 1999 dismissal letter from Mary Alice Klein, Superintendent, to William Rosenau.

Grievant's Exhibits

None.

Testimony

The Board presented the testimony of Joe Michael, William Haddox, Jeanne Bonner, John Smith, and Tauna Cole. Grievant testified in his own behalf.

BACKGROUND

Grievant is a teacher with the Board, and also was employed under an extracurricular contract as Athletic Director at Tucker County High School. When the 1998-1999 school year began, Jeanne Bonner, the financial secretary at Tucker County High School, received an invoice from Sunset Graphics for two plywood signs in the amount of $477.00, made to the attention of Grievant. R. Ex. 10. A purchase order had not been approved for the signs, therefore Ms. Bonner informed Principal Tauna Cole of the outstanding invoice.

Grievant was evaluated in his capacity as Athletic Director on October 27, 1998, by Principal Cole. R. Ex. 17. Ms. Cole noted two specific deficiencies in his performance, namely failure to obtain insurance for the football team, and failure to follow the purchase order policy. R. Ex. 17. The Accounting Procedures Manual for Public Schools requires that “all purchase orders must be approved in writing by the school principal or his/her designee . . . “. R. Ex. 14. It is the Board's policy that purchases are not to be made until a purchase order has been approved in accordance with R. Ex. 14.

On October 27, 1998, because of the above noted problems, Grievant was placed on an improvement plan aimed at correcting those deficiencies. R. Ex. 18. On November 9, 1998, Grievant met with Ms. Cole and Ms. Bonner to go over the final draft of the improvement plan. Ms. Bonner was present to go over the purchase order procedures withGrievant, and to ensure that he understood that no purchases were to be made without an approved purchase order.

At that meeting, Mrs. Cole asked Grievant if there were any other outstanding unauthorized invoices or purchases that did not have an approved purchase order. Grievant advised her that, at that time, he was not aware of any outstanding unauthorized purchases. (See footnote 1)

During the time of Grievant's improvement plan, unauthorized purchases were made by Joe Michael, Assistant Football Coach at Tucker County High School, from Spartan Sporting Goods (“Spartan”). The invoices from Spartan referenced purchase order numbers from Tucker County High School. Specifically, one invoice in the amount of $4,043.18 referenced Purchase Order No. 8573. R. Exs. 1, 2. A second invoice in the amount of $1,480.87 referenced Purchase Order No. 8574. R. Exs. 3, 4. A third invoice in the amount of $484.50 referenced Purchase Order No. 8616. R. Exs. 5, 6. A

fourth invoice in the amount of $1,950.00 referenced Purchase Order No. 8617. R. Exs. 7, 8.

The purchase order numbers on the invoices from Spartan coincided with four purchase orders which had been signed out by Grievant. Purchase Order Nos. 8573 and 8574 were signed out on December 2, 1998, and Purchase Order Nos. 8616 and 8617were signed out on December 10, 1998. R. Ex. 12. None of the purchase orders were approved by Principal Cole.

Upon learning of these outstanding invoices, Mrs. Cole conducted an investigation into the matter. Based upon that investigation, Superintendent Klein recommended that Grievant's contract as Athletic Director be terminated. R. Ex. 20. The Board approved that recommendation, and Grievant was terminated as Athletic Director on May 11, 1999.

POSITIONS OF THE PARTIES

It is undisputed that Grievant signed out the four purchase orders referenced above, and did not himself get those purchase orders approved by Principal Cole. It is also undisputed that unauthorized purchases were made from Spartan by Joe Michael prior to the time Grievant was placed on an improvement plan. The four invoices for those purchases were all dated December 31, 1998, and coincided with the purchase orders signed out by Grievant on December 2 and 10, 1998.

The Board alleges Grievant was aware of the unauthorized purchases at the time he was placed on an improvement plan on November 2, 1998, and thus was untruthful to Principal Cole when he denied knowing of any other outstanding unauthorized purchases at that time.

Grievant denies any knowledge of the unauthorized purchases, and blames the whole incident on Joe Michael and Coach Bill Haddox. He contends he did not become aware of those purchases until December 1998, after he was placed on the improvement plan, and thus was not being untruthful when he told Principal Cole that he was unaware of any other purchases at that time. Grievant maintains he was afraid of Principal Cole,and knew if he brought the purchases to her attention after he discovered them in late December, early January, that she would undoubtedly terminate him immediately. Grievant further maintains it was not his responsibility to bring this matter to Principal Cole's attention, as he did not make the unauthorized purchases.

ISSUE

The issue to be decided in this case is a factual one. Was Grievant aware of the unauthorized

purchases made by Joe Michael prior to being placed on his improvement plan in October 1998. If so, he lied to Principal Cole and violated his improvement plan before it even started. If not, was Grievant's conduct, in withholding the information from Principal Cole once he found out about the purchases in late December or early January, such that would support termination under W. Va. Code § 18A-2-8.

In a disciplinary matter, the burden of proof rests with the employer to prove the charges against the employee by a preponderance of the evidence. 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 or capriciously. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

W. Va. Code § 18A-2-8 provides, in pertinent part:

> 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 contendre to a felony charge. A charge of unsatisfactoryperformance shall not be made except as the result of an employee evaluation pursuant to section twelve of this article.

Although not specifically stated, it appears Grievant is being charged with willful neglect of duty. His dismissal letter states, “[t]his conduct constitutes a violation of the Teacher Code of Conduct. Specifically, your conduct violated that provision requiring teachers to: 'Maintain a caring, honest, and professional attitude.'” R. Ex. 20.

In addition, Grievant has been charged with unsatisfactory performance following a plan of improvement, in accordance with the provisions of W. Va. Code § 18A-2-12, which states, in pertinent part:

> A professional whose performance is deemed to be unsatisfactory shall be given notice of deficiencies. A remediation plan to correct deficiencies shall be developed by the employing county board of education and the professional. The professional shall be given a reasonable period of time for remediation of the deficiencies and shall receive a statement of the resources and assistance available for the purposes of correcting the deficiencies.

. . .

> Any professional personnel whose performance evaluation includes a written improvement plan shall be given an opportunity to improve his or her performance through the implementation of the plan. If the next performance evaluation shows that the professional is now performing satisfactorily, no further action shall be taken concerning the original performance evaluation. If such evaluation shows that the professional is still not performing satisfactorily, the evaluator shall either make additional recommendations for improvement or may recommend the dismissal of such professional in accordance with the provisions of . . . § 18A-2-8. . . .

Based upon the testimony of Grievant and all the witnesses, as well as the documentary evidence, the undersigned was able to piece together the following chronology of events leading up to Grievant's dismissal. Joe Michael, the Assistant Football Coach at Tucker County High School, is responsible for scheduling, organizing the billboard campaign, and ordering football equipment and supplies. In the Fall of 1998, prior to the football season, Coach William Haddox, Head Football Coach, told Mr. Michael to order equipment for the football team. Mr. Michael and Coach Haddox were aware at that time of some old unpaid invoices charged to the athletic department, and agreed that when purchase orders were submitted for the new equipment, they would incorporate the old invoices into those purchase orders as a way to get them paid. LIV Michael Test.; LIV Haddox Test.

On August 7, 1998, Mr. Michael called Larry Foster at Spartan about ordering football equipment and supplies. Mr. Foster came to the football field in early August, and went over the orders with Mr. Michael. LIV Michael Test.; R. Ex. 16.

After some discussion on the field, Mr. Michael and Mr. Foster went inside the field house to order equipment, including game pants, shoulder pads, and practice equipment. R. Ex. 16. Mr. Michael told Mr. Foster to order the equipment now, and that a purchase order would be provided for the order at a later date. Mr. Foster placed the orders and shipped the equipment to Mr. Michael on August 10, 1998. R. Ex. 16.

Mr. Michael and Mr. Foster remember that Grievant was present for some of that meeting. LIV Michael Test.; R. Ex. 16. Mr. Michael and Mr. Foster recall Grievant being present during the discussion outside on the field, and that Mr. Michael told Grievant they were going to order football equipment. Grievant did not accompany Mr. Michael and Mr. Foster into the field house where they actually placed the orders. LIV Michael Test.; R.Ex. 16. Grievant denies being present during any of the discussion on August 7, 1998, and denies any knowledge about the equipment orders placed that

day.

In mid to late-October, towards the end of the football season, Mr. Michael spoke to Grievant over the telephone about the purchases. He told Grievant he was up to about $5,000 in orders, and wondered whether there would be more money for additional orders if the football team made the playoffs. If the team made the playoffs, they would need new pants and other equipment. Grievant told Michael it would be no problem, but to watch what he ordered. Michael testified he and Grievant also discussed the old invoices which had never been paid, and agreed that when they submitted the purchase orders to Spartan for the purchases made in the 1998 season, they would incorporate the old invoices into those purchase orders in order to pay for them. LIV Michael Test.

On or about October 13, 1998, Grievant presented Principal Cole with a Purchase Order No. 8421, made out to Spartan, and explained he needed her approval to purchase additional game pants, as the football team had made the playoffs. Principal Cole approved that purchase order, and the additional pants were shipped from Spartan on or about October 29,1998. R. Ex. 15.

On October 27, 1998, Principal Cole evaluated Grievant in his capacity as Athletic Director. R. Ex. 17. As noted above, Principal Cole noted two deficiencies and placed Grievant on an Improvement Plan. One of the deficiencies noted in that Improvement Plan was Grievant's failure in the past to obtain the Principal's approval on the purchase orders before ordering equipment and supplies. R. Ex. 17. The Improvement Plan was finalized on November 9, 1998, between Grievant and Principal Cole. R. Ex. 18. In early December, 1998, Mr. Michael told Coach Haddox they needed to submit purchase orders for the equipment purchased in the Fall from Spartan. At that time, they discussed the fact that the total amount of purchases, including the past due invoices, was quite large. They decided to split the purchases up onto four purchase orders, so they could pay for them at different times.

Coach Haddox went to Grievant in early December and requested four purchase orders to pay for the football equipment. Coach Haddox testified he explained the plan to Grievant regarding splitting up the purchases onto four purchase orders. Grievant denies being aware of this plan. Nevertheless, Grievant went to the financial office and signed out four purchase orders, two on December 2, 1998, and two on December 10, 1998. R. Ex. 12. Those purchase order numbers were 8573, 8574, 8616, and 8617. R. Exs. 1, 3, 5, 7.

Grievant gave Coach Haddox the blank purchase orders and told him to get them approved by

Principal Cole, and to be careful to do it correctly, because he was currently on an improvement plan because of failure to correctly handle purchase orders. LIV Haddox Test.; LIV Rosenau Test. Coach Haddox did not have Principal Cole approve the purchase orders. He gave them to Joe Michael, and told Mr. Michael he needed to get Principal Cole's approval on the purchase orders. LIV Haddox Test. Mr. Michael did not get the purchase orders approved by Principal Cole. Mr. Michael testified he knew purchase orders were supposed to be approved before purchases were made, but that he himself had never gotten the Principal's approval, because he knew Grievant would takecare of that. LIV Michael Test. There is no dispute the equipment was ordered before the purchase orders were issued from the financial office.

On December 18, 1998, Mr. Foster from Spartan came to the school, and he and Joe Michael sat down and split the bills up into four categories. Mr. Michael had received the four blank purchase orders from Coach Haddox with numbers 8573, 8574, 8616, and 8617. Mr. Foster took the purchase orders with him, split them up into four invoices, and returned the invoices and purchase orders to Mr. Michael.

Sometime in late December, Mr. Michael took the four purchase orders with attached invoices to Grievant. LIV Michael Test. Grievant testified he was teaching a class when Mr. Michael brought in the purchase orders and invoices, and so he did not talk to him about the documents. LIV Rosenau Test.

Grievant took the blank purchase orders and invoices and placed them on his desk in the Athletic Department. He saw the purchase orders had not been approved by Principal Cole, but decided it was not his responsibility anymore, as he had told Coach Haddox specifically to get her approval. LIV Rosenau Test. The total amount of the invoices was approximately $7,000 plus. Grievant did not inform Principal Cole these purchases had been made without her approval, because he believed she would terminate him immediately, as he was on an improvement plan over this very issue. The purchase orders and invoices stayed on his desk until March 1999. LIV Rosenau Test. Grievant believed it was not his responsibility as it was the coaches who did the ordering.

In March 1999, Jim Tanner from Spartan called Mr. Michael and asked when they were going to pay their bills. Mr. Michael called Coach Haddox and told him to talk toGrievant about the bills. Later that month, after the State basketball tournament, Principal Cole called Grievant and Mr. Michael to her office to discuss the unpaid bills from Spartan. A representative from Spartan had called the

school and spoken to Jeanne Bonner, the financial secretary, about the unpaid bills. Principal Cole asked Grievant when he had received the bills from Spartan, to which he replied approximately three to five weeks earlier. He told her Mr. Michael had given him the purchase orders and invoices around Christmas break, but he could not remember the exact date. Present at that meeting were Grievant, Principal Cole, Mrs. Bonner, and Assistant Principal John Smith. LIV Cole Test.; LIV Bonner Test.; LIV Rosenau Test.; LIV Smith Test.

Grievant's testimony that he was unaware of the purchases made by Joe Michael from Spartan prior to receiving the invoices in late December 1998, conflicts with the testimony of Mr. Michael, Coach Haddox, Principal Cole, and Assistant Principal Smith, requiring a determination as to which testimony is truthful. In assessing the credibility of witnesses, some factors to be considered . . . are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher and William C. Jackson. Representing the Agency before the United States Merit Systems Protection Board 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id., Jarvis v. W. Va. Dept. of Health and Human Services, Docket No. 97-HHR-318 (July 22, 1999); Burchell v. Bd. of Trustees, Marshall Univ., Docket No. 97-BOT- 011 (Aug. 29, 1997).

Grievant denies knowing anything about the purchases made in the fall football season. He testified Coach Haddox and Joe Michael were trying to “slip something through the backdoor” regarding the past due invoices, and he would not have approved that scheme had he known. There is no dispute that, once he realized the purchases had been made without authorization from Principal Cole, he did not at any time inform her of the matter on his own initiative.

Joe Michael and Coach Haddox both testified they told Grievant early in the Fall of 1998 about their plan to consolidate the past due accounts with recent purchases, and to split the equipment up into four different purchase orders. Mr. Michael also testified Grievant was present in early August when Mr. Foster from Spartan came to the playing field to take orders for the equipment. Mr. Foster recalled in a letter to Principal Cole that Grievant was present during a discussion of the equipment that needed ordering on that day, although he did not go into the field house with Mr. Michael and himself when they actually placed the orders. R. Ex. 16.

Assistant Principal Smith and Principal Cole testified Grievant told them in March 1999, that he became aware of the purchases when Joe Michael gave him the invoices in late December. All of the invoices from Spartan are dated December 31, 1998. There is some confusion as to whether Grievant received the invoices from Joe Michael in late December, or early January, after the Christmas break. In any event, the latest he wouldhave received the invoices was early January, still nearly three months before his meeting with Principal Cole on March 22, 1999.

Principal Cole testified Grievant told her he did not come to her with the invoices when he received them, because he knew he was supposed to have them signed, and that she would not sign them after the fact.

Principal Cole recalled Grievant had presented her with a purchase order in October for additional football pants for the playoff season. She inquired how they were going to get the pants in time for the game, and Grievant assured her that Joe Michael would pick up the pants in time for the game. That Purchase Order is dated October 23, 1998, which she approved, and the corresponding invoice indicates the pants were shipped on October 29, 1998. R. Ex. 15. This transpired before Grievant was placed on an improvement plan, and Principal Cole testified that Grievant mentioned to her at the time they would have to be making some more purchases for football. She told him absolutely not, because football season was over, and she wanted to be sure there was money left in the budget for Spring sports.

Subsequently, Principal Cole received a letter from Larry Foster at Spartan. Mr. Foster told Principal Cole that game pants, as well as other equipment, were ordered in early August, the evening when he, Joe Michael, and Grievant, were at the football field. Mr. Foster indicated that all three of them discussed the purchases, but that Grievant did not come into the field house with he and Joe Michael when the actual orders were placed. R. Ex. 16. At the time Principal Cole placed Grievant on the improvement plan in November, she asked him specifically if there were any more unauthorized purchases that she should be aware of. He replied there were not. She told him at that time that, even though he delegated the purchasing aspect of his job, he was ultimately responsible for making sure things were done correctly. She testified that, with regard to Joe Michael, even though Coach Haddox was his immediate supervisor on the field, Grievant was his superior when it came to purchasing duties.

Grievant's testimony is incredible for several reasons. First, as Athletic Director at Tucker County

High School, it is incredible that Grievant was totally unaware of the purchase of new equipment for the football team. Even if he did not place the orders himself, he would certainly have witnessed the equipment at some time or another during the football season. He would have known that he had not signed out purchase orders for that equipment, and should have inquired where the equipment came from.

Second, Principal Cole and Assistant Principal Smith testified that, once the Spartan invoices were discovered in March 1999, Grievant told them he had been aware of the purchases from the beginning. Later, Grievant changed his testimony to say he was not aware of the purchases until he received the invoices from Joe Michael.

The undersigned concludes Grievant was aware the purchases had been made prior to his being placed on an improvement plan in October 1998. When he submitted a purchase order in October to Principal Cole for additional game pants, and told her that they would be needing to purchase additional equipment, he knew the purchases had already been made. When Principal Cole told him she absolutely would not approve anymore purchases for the football team because the season was over, he was caught between a rock and a hard place. He knew the purchases had been made, and had not anticipated that Principal Cole would refuse to authorize any more purchases that season.

Based on this knowledge, when he did receive the purchase orders and invoices from Joe Michael, he chose to just lay them on his desk, rather than go to Principal Cole with the documents. He knew she had refused any more purchases for the football team, and he had no explanation to give her for these additional purchases.

Later, Grievant offered the explanation that he was unaware of the purchases, and the whole thing was a scam cooked up by Joe Michael and Coach Haddox as a way to cover up the past due unpaid invoices.

Finally, and most importantly, Principal Cole had advised Grievant when she placed him on his improvement plan that, as Athletic Director, he was ultimately responsible for all purchases made through his department. Grievant's decision to withhold the purchase orders and invoices from Spartan from Principal Cole from December through March was inexcusable, despite Grievant's “fear” of Principal Cole. It was his responsibility to take those purchase orders to her, and offer some explanation as to how they came about, even if it meant he would get in trouble. As it turned out, Grievant added insult to injury by concealing the purchases and lying to Principal Cole. Even if

Grievant really had been unaware of the purchases when they were made in the Fall, once he became aware of them in December, he had an absolute responsibility for taking care of the matter, rather than just letting the purchase orders sit on his desk until they were discovered by other means. Consequently, the undersigned finds the Board has proven its charges againstGrievant: that he violated the terms of his improvement plan by failing to follow proper purchase order procedures, and that his conduct in failing to disclose the invoices to Principal Cole constitutes willful neglect of duty.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following material facts.

1. Grievant was evaluated in October 1998, and placed on an Improvement Plan by Principal Cole on November 9, 1998, for failing to follow proper purchase order procedures.

2. On August 8,1998, Grievant and Joe Michael discussed with Larry Foster of Spartan the need to order football equipment for the upcoming Fall season.

3. Joe Michael and Larry Foster placed the orders on that day, and the equipment was shipped on August 10, 1998.

4. In October 1998, Grievant approached Principal Cole with a purchase order for additional game pants for the playoff season. Principal Cole approved this purchase order, but told Grievant that she would not approve any more purchases for equipment for the football team that season.

5. At the time Grievant was placed on his Improvement Plan, Principal Cole asked Grievant if there were any other outstanding unauthorized purchases that she needed to be aware of, and he replied there were not, to his knowledge, any other unauthorized purchases. 6. Grievant was aware of the purchases made by Joe Michael in August, without an approved purchase order, and withheld that information from Principal Cole at the time of his improvement plan.

7. Grievant received the purchase orders and invoices from Joe Michael in late December or early January 1999. He saw that the purchase orders were not approved by Principal Cole, and did not forward them to her for approval. Rather, he placed them on his desk and did nothing with them until they were discovered in March 1999.

8. In March 1999, a representative from Spartan called the financial office, asking when the invoices were going to be paid. Mrs. Bonner, the financial secretary, looked up the purchase order numbers given her by Spartan and found they had been signed out by Grievant on December 2 and

December 10, 1998. She conveyed this information to Principal Cole.

9. On March 22, 1999, Principal Cole, Assistant Principal John Smith, Joe Michael and Grievant met in Principal Cole's office to discuss the unauthorized purchase orders. At that meeting, Grievant admitted he was aware of the purchases made by Joe Michael as early as August 1998. Grievant later changed his story and denied any knowledge of the purchases until late December or early January 1999.

10. Principal Cole determined Grievant had lied to her about outstanding unauthorized purchases during their meeting on his improvement plan in November, 1998. She further determined Grievant had been derelict in his duty as Athletic Director, when he did not bring the purchase orders and invoices to her attention once Joe Michael gave them to him. 11. Based on Principal Cole's investigation into this matter, Superintendent Klein recommended Grievant's Athletic Director contract be terminated, and the Board voted to approve that recommendation on or about May 11, 1999.

CONCLUSIONS OF LAW

1. In a disciplinary matter, the burden of proof rests with the employer to prove the charges against the employee by a preponderance of the evidence.

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 W. Va. Code § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991); See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

3. The Board proved by a preponderance of the evidence that Grievant knew of unauthorized purchases made prior to his placement on the improvement plan, and denied any knowledge of those purchases to Principal Cole.

4. 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. Graham v. Putnam County Bd. of Educ., Docket No. 99-40-206 (Sept. 30, 1999); Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990).

5. “Willful neglect of duty” encompasses something more serious than incompetence and imports a “knowing and intentional act, as distinguished from a negligent act.” Chaddock, supra. 6. The Board proved by a preponderance of the evidence that Grievant's conduct in not

informing Principal Cole of the unauthorized purchases after he received the purchase orders and invoices from Joe Michael constitutes “willful neglect of duty.”

7. The Board followed proper statutory procedure in notifying and terminating Grievant from his employment.

Accordingly, this grievance is **DENIED**.

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

_____

MARY JO SWARTZ

Administrative Law Judge

Dated: October 28, 1999

Footnote: 1

At the level four hearing, Grievant attempted to show that he was erroneously placed on the improvement plan. However, Grievant did not initiate a grievance or otherwise contest the evaluation or the resulting plan of improvement at the time of its issuance. Therefore, the assessment of Grievant's performance must be accepted as accurate in this proceeding. Taylor v. Mercer County Bd. of Educ., Docket No. 93-27-534 (Aug. 22, 1994); Simmons v. Greenbrier County Bd. of Educ., Docket No. 91-13-470 (Jan. 19, 1993).