WAYNE RYAN,

Grievant,

v. DOCKET NO. 01-45-363

SUMMERS COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Wayne Ryan, is employed by Respondent, Summers County Board of Education ("SBOE"), as a teacher and girls' basketball coach at Summers County High School. He was advised by Superintendent Charles R. Rodes, by letter dated March 28, 2001, that he would recommend to SBOE that Grievant be suspended for two days without pay, and that his pay be docked for two additional days, for willful neglect of duty, specifically, falsification of payroll records and abuse of leave. SBOE voted on May 17, 2001, to suspend Grievant for one day without pay, and to dock his pay for two additional days, for willful neglect of duty. This grievance was filed at Level IV on May 25, 2001, as is permitted by W. Va. Code § 18A-2-8, contesting this action. As relief Grievant requested "reinstatement of pay for the two days docked and removal of the one-day suspension." (See footnote 1)

The following Findings of Fact are properly made from the record developed at Level IV.

Findings of Fact

1. Grievant has been employed by SBOE as a teacher and girls' basketball coach at Summers County High School for 14 years.

2. On February 8, 2001, Superintendent Charles R. Rodes met with Summers County principals. At that time he discussed with them abuse of sick leave by employees. He reminded them that the state basketball tournament was coming up, and employees were not to claim sick leave for

time they were attending the tournament. He specifically asked the principals to enforce the leave policies.

3. On February 16, 2001, Harry Keaton, Principal of Summers County High School, spoke to his faculty about abuse of sick leave. He reminded them that “sick days must be used for illness and not trips or cruises.” He did not discuss the upcoming state basketball tournament. However, he did discuss with his coaches that sick days were not to be used for attending the tournament.

4. On March 6, 2001, Grievant went to the doctor. He had not been feeling well for several weeks, but wanted to wait until basketball season was over before he sought treatment, and he had continued to report to work. He was suffering from back problems and he had an ear ache. The doctor prescribed antibiotics, a decongestant, and a muscle relaxant. Grievant already had a prescription for Trinalin, which he had refilled. Trinalin and the muscle relaxant make Grievant drowsy. The doctor provided Grievant with anexcuse, asking that he be excused from work from March 7 through 12, 2001. The doctor later wrote a statement in which he described Grievant's symptoms as “decreased hearing acuity, left otitis externa, Eustachian tube dysfunction, Allergic Rhinitis and Chronic Lower Back Pain with exacerbation.” He stated the “work excuse was written, because in my personal opinion with the above diagnoses he was unable to perform the duties of his job appropriately.” The doctor further stated that when Grievant returned to his office on March 12, 2001, he was “still having back pain and some ear pain and drainage.” Eventually, Grievant had an MRI which disclosed that he had a herniated disc in his lower back.

5. School was canceled on March 7, 2001, due to snow. Grievant rested during the day on March 7, then drove to Charleston by himself, a drive of approximately one hour. On March 7, 8, and 9, 2001, Grievant attended the state high school girls' basketball tournament in Charleston. He watched several games, and would return to his hotel to rest, as necessary.

6. Grievant requested personal leave due to illness for March 8 and 9, 2001. Mr. Keaton had seen Grievant at the tournament on March 7, and questioned his leave. Grievant told him he had a doctor's excuse, and showed it to him. Mr. Keaton approved the leave. Grievant later authorized his doctor to provide his medical records to SBOE, and his doctor did so. Grievant did not take any other days off work for illness during the week before March 8, the week of March 8, or the week following March 8.

7. The following week Grievant used his three personal days, which are allowed to each

employee each year to be used for any reason, to attend the state boys' basketball tournament in Charleston. Grievant was not disciplined for this use of leave.

8. SBOE's Personal Leave Policy provides that an employee may use personal leave for personal sickness or accident, illness of an immediate family member, or for a death in the immediate family. A doctor's excuse is required for five consecutive days ofabsence due to illness. In addition, an employee may use three days for any reason. Grievant was aware of this policy. The policy does not address whether an employee may engage in other activities while taking personal leave for illness.

9. SBOE suspended Grievant for one day without pay, and docked his pay for the two days he attended the state girls' basketball tournament, for willful neglect of duty. The specific charges were falsification of payroll records and abuse of SBOE's Personal Leave Policy.

Discussion

In disciplinary matters, the burden of proof is on the employer to substantiate the charges against an employee by a preponderance of the evidence. W. Va. Code § 18A-2- 8; Perkins v. Greenbrier County Bd. of Educ., Docket No. 94-13-019 (Aug. 12, 1994). The charges must be one or more of those listed in Code § 18A-2-8. Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995). A county board of education must act reasonably, not arbitrarily or capriciously. Rovello v. Lewis County Bd. of Educ., 181 W. Va. 122, 381 S.E.2d 237 (1989). Bell v. Kanawha County Bd. of Educ., Docket No. 91- 20-005 (Apr. 16, 1991). Code § 18A-2-8 provides that an employee may be suspended or dismissed 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. 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.

SBOE's stated reason for suspending Grievant was willful neglect of duty. 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). “It encompasses something more serious than 'incompetence.'” Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398S.E.2d 120, 122 (1990). Sinsel v. Harrison County Bd. of Educ.,

Docket No. 96-17-219 (Dec. 31, 1996).

Superintendent Rodes suggested that Grievant's illness was fabricated. He believed Grievant had planned all along to take sick leave to attend the tournament, and it was even suggested by Respondent's counsel that a doctor's excuse was so easy to obtain that it was worthless.

It is clear to the undersigned that Superintendent Rodes' theory about Grievant's plan is unsupported by the facts. Grievant was in fact ill on March 8 and 9, 2001, he was under a doctor's care, he was taking several medications, and he had a valid doctor's excuse to be absent from work for those two days. Grievant did not fabricate any records here, as has been charged. The question is whether, if Grievant was so sick he felt he could not attend work, how was he able to drive himself to Charleston and attend basketball games, and does this amount to abuse of sick leave? The doctor's excuse does not say it was okay to engage in these activities, and Grievant stated he felt bad. Grievant contends there is a big difference between supervising students all day, and being a spectator at a basketball game. He testified he did not watch all the tournament games, but did watch several games, and was able to leave when he needed to rest.

The undersigned concludes that the action taken by SBOE was not arbitrary and capricious, but was a reasonable response under the circumstances. SBOE's Leave Policy does not address what activities an employee may engage in when taking sick leave; nor should it have to. It would seem to be common sense that if an employee is so ill from an ear ache and back pain that he feels he cannot work, absent some unusual circumstance or absolute necessity, he should be at home recuperating. Grievant decided, however, that he wanted to attend the state basketball tournament, so he made the effort to forego resting, and drove himself to Charleston, and then sat on bleachers in an arena full of people, watching basketball games for several days. While this no doubtwas less difficult than supervising children, it certainly raises a question about what Grievant's capabilities were during this time. See Parker v. Dep't of Health and Human Resources, Docket No. 97-HHR-042B (Sept. 30, 1997). The undersigned cannot conclude that SBOE's decision that it is improper for a teacher to ask for and be granted sick leave, when he is physically capable of driving himself to Charleston and watching basketball games for several days, is wrong. The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. In disciplinary matters, the burden of proof is on the employer to substantiate the charges against an employee by a preponderance of the evidence. W. Va. Code § 18A-2-8; Perkins v. Greenbrier County Bd. of Educ., Docket No. 94-13-019 (Aug. 12, 1994). The charges must be one or more of those listed in Code § 18A-2-8. Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995). A county board of education must act reasonably, not arbitrarily or capriciously. Rovello v. Lewis County Bd. of Educ., 181 W. Va. 122, 381 S.E.2d 237 (1989). Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). That Code Section provides that an employee may be suspended or dismissed 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. 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.

2. 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). “It 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).

3. Respondent did not prove the charge of falsification of payroll records. Nonetheless, Respondent acted reasonably in finding that Grievant's actions were improper, and amounted to willful neglect of duty.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Summers County or the Circuit Court of Kanawha 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: September 26, 2001

Footnote: 1

A Level IV hearing was held on September 10, 2001. Grievant was represented by Ben Barkey, and Respondent was represented by Kathryn R. Bayless, Esquire. The parties declined to submit written argument, and this grievance became mature for decision at the conclusion of the hearing.