GENE MOORE,

Grievant,

v. **Docket No. 00-26-360**

MASON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Gene Moore ("Grievant") filed this grievance directly at level four on November 16, 2000, pursuant to the provisions of W. Va. Code § 18A-2-8, challenging a three-day suspension without pay. He seeks as relief to have the suspension removed from his personnel file and to be restored all salary and benefits lost during the suspension period. Upon appeal to level four, the parties elected to have a decision rendered based upon the record developed at the hearing held before the Mason County Board of Education ("MCBOE") on November 6, 2000. Grievant was represented by Susan Hubbard of the West Virginia Education Association, and Respondent was represented by counsel, Gregory Bailey. Proposed findings of fact and conclusions of law were submitted by the parties on January 11, 2001, and this grievance was assigned to the undersigned administrative law judge on January 16, 2001.

The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been employed by MCBOE for approximately 29 years. He iscurrently employed as a teacher and athletic administrator at Point Pleasant High School.

2. Effective May 13, 1998, MCBOE adopted a "Tobacco Control Policy", which prohibits "the use or distribution of tobacco products in school buildings and on school grounds, in school leased or owned vehicles, and at all school affiliated functions." The policy further states that school employees are to "act as positive role models for students" by refraining from using or possessing tobacco

products in front of students. The policy specifically applies to private property used for school activities when students or staff are present and includes regular and extracurricular activities.

3. Grievant's duties as athletic administrator require him to attend all home athletic events.

4. On September 1, 2000, Grievant attended a home football game, and was seen smoking his pipe after the game was over. No students were present while Grievant was smoking on this occasion.

5. In a letter dated September 6, 2000, Grievant's supervisor, Principal Rick Northup, informed Grievant that he had been seen smoking on school property in violation of state law and the MCBOE policy. The letter further stated:

> You are hereby directed to not smoke on school property or at any school function in the future. Please remember that as a teacher and athletic director at Point Pleasant High School you are a role model not only for our students, but also for our community. The example set by you is a reflection upon our entire athletic department and school.

6. On September 15, 2000, Grievant attended another home football game and was seen smoking his pipe before the game began.

7. On September 28, 2000, Principal Northup issued a formal reprimand, informing Grievant that any further violations would result in a suspension without pay. Grievant was provided a copy of MCBOE's Tobacco Control Policy and was also placed on an improvement plan, which provided, in part, that Grievant would “[r]efrain from possessing tobacco at all times at any school building and on school grounds in school leased or owned vehicles and at all school affiliated functions.”

8. On September 29, 2000, Grievant attended a football game in Jackson, Ohio, between Point Pleasant High School and Jackson High School. Grievant was not required to perform any duties as athletic administrator at this “away” game, and he attended the game with his grandchildren.

9. During the September 29 football game, Grievant smoked in a designated smoking area in plain view of students and attendees of the game.

10. On October 16, 2000, Grievant was suspended for three days without pay for his third violation of the Tobacco Control Policy.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a

preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991), Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

The authority of a county board of education to suspend an employee must bebased upon one or more of the causes listed in W. Va. Code § 18A-2-8, and must be exercised reasonably, not arbitrarily or capriciously. Parham v. Raleigh County Bd. of Educ., 192 W. Va. 540, 453 S.E.2d 374 (1994), 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 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 suspension of a classroom teacher based upon violations of state or county policy may be upheld, but only if the employee's conduct also falls within one or more of the listed reasons set forth in the statute. Brown v. Mercer County Bd. of Educ., Docket No. 98-27-113 (July 30, 1998). The proper focus is whether the charge of misconduct is proven, not the label attached to such conduct. Gillespie v. Kanawha County Bd. of Educ., Docket No. 90-20-496 (June 6, 1991) (citing Russell v. Kanawha County Bd. of Educ., Docket No. 90-20-415 (Jan. 24, 1991)). In the instant case, Respondent suspended Grievant pursuant to the provisions of its Tobacco Control Policy, which provides for a verbal warning for an initial violation, followed by a written reprimand, then a suspension. Policy violations by school employees, resulting in discipline, are often analyzed to determine whether they constitute insubordination or willful neglect of duty, as defined in the statute.

Insubordination is the "willful failure or refusal to obey reasonable orders of a superior entitled to

give such order." Riddle v. Bd. of Directors, So. W. Va. CommunityCollege, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). It "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." Sexton v. Marshall Univ. , Docket No. BOR2-88-029-4 (May 25, 1988) (citing Weber v. Buncombe County Bd. of Educ. , 266 S.E.2d 42 (N.C. 1980)). In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ. , Docket No. 94-01-394 (Jan. 31, 1995).

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 one. 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). 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 requires "a knowing and intentional act, as distinguished from a negligent act." Chaddock, supra. Willful neglect of duty has also been defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990).

Grievant admitted that he smoked at sporting events, as alleged, on all three occasions. In addition, he testified that he knew and understood the provisions of the Tobacco Control Policy when he engaged in the conduct. However, as to the final smokingincident for which he was suspended, Grievant contends that he should not have been disciplined, because he did not believe the policy applied to “away” games, specifically one that was in another state. When he was placed on an improvement plan after the second violation of the policy, Grievant testified that Principal Northup provided him a complete copy of both the state and county anti-smoking policies, which he reviewed. Nevertheless, Grievant does not believe he violated the policy by smoking in Jackson, Ohio, on September 29, 2000.

MCBOE's Tobacco Control Policy, along with Grievant's improvement plan, explicitly state that smoking is not allowed at any school affiliated function and that it is not to occur in the presence of

students. Grievant's interpretation that this prohibition should only apply to in-state activities is simply not logical, because the policy specifically provides that school employees are to be role models to students by refraining from tobacco use when students are present. Further, the policy specifically includes private property in the tobacco prohibition if students or staff are present and a school function is taking place. It would simply make no sense to only require teachers to refrain from smoking at extracurricular activities when they occur in West Virginia, when many such activities take place at various locations outside the state.

Accordingly, the undersigned finds that Grievant's conduct was sufficiently knowing and intentional to constitute insubordination and willful neglect of duty. He was familiar with the Tobacco Control Policy and had been instructed that any further incidents would result in suspension. Nevertheless, he smoked on September 29, 2000, in the presence of students at a school-affiliated function, in direct violation of the policy and his previous warnings. Accordingly, Respondent has proven the charges against Grievant by apreponderance of the evidence.

Grievant's representative has made various arguments regarding the propriety of a written reprimand Grievant received on October 10, 2000, for insubordination. This reprimand was the result of an exchange which occurred between Grievant and a board of education member at the football game on September 1, 2000, which was also the first occasion upon which Grievant was charged with smoking. However, Grievant did not file a grievance as a result of this reprimand, nor did he grieve his initial warning and written reprimand for violating the Tobacco Control Policy. When an employee fails to file a timely grievance challenging an earlier disciplinary action, the merits of that action cannot be challenged in a subsequent grievance proceeding. Williams v. Kanawha County Bd. of Educ., Docket No. 98-20-321 (Oct. 20, 1999); See Aglinsky v. Bd. of Trustees, Docket No. 97-BOT-256 (Oct. 27, 1997); Jones. v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Nicholson v. Logan County Bd. of Educ., Docket No. 95-23-129 (Oct. 18, 1995). Accordingly, Grievant's arguments in this regard will not be addressed.

Consistent with the foregoing, the following conclusions of law are made.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ.,

Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

2. The authority of a county board of education to suspend an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, and must beexercised reasonably, not arbitrarily or capriciously. Parham v. Raleigh County Bd. of Educ., 192 W. Va. 540, 453 S.E.2d 374 (1994), 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. A board of education employee may be suspended at any time for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea of nolo contendere to a felony charge. W. Va. Code § 18A-2-8.

4. In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ. , Docket No. 94-01-394 (Jan. 31, 1995).

5. 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 one. 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).

6. Respondent has proven by a preponderance of the evidence that Grievant's third violation of its Tobacco Control Policy on September 29, 2000, constituted insubordination and willful neglect of duty.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or 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. 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.

Date: February 5, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge