DALE HAYS,

Grievant,

v. **Docket No. 04-14-114**

HAMPSHIRE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Dale Hays ("Grievant") filed this grievance directly at level four on March 24, 2004, following the termination of his employment as Finance Director for the Hampshire County Board of Education ("HCBOE"). After numerous continuances granted for good cause shown, a level four hearing was conducted in Westover, West Virginia, on December 3, 2004. Grievant was represented by counsel, Lawrence M. Schultz, and Respondent was represented by counsel, Norwood Bentley. This matter became mature for consideration upon receipt of the parties' final written arguments on March 8, 2005.

The following material facts have been proven by a preponderance of the evidence of record.

Findings of Fact

1. Grievant began employment with HCBOE as its Treasurer and Finance Director in March of 2002.

2. Grievant had no previous experience in the area of school finance prior to being hired by HCBOE. He had worked in the West Virginia State Auditor's office for approximately 30 years and has a bachelor's degree in accounting. 3. HCBOE's previous Finance Director, Allen Hott, was still employed during the first three months of Grievant's employment, during which time he "trained" Grievant regarding the various issues and procedures involved with school board finances.

4. Mr. Hott had been on various improvement plans during his employment with HCBOE. He did not train Grievant on WVEIS, the computer database system for school accounting, the use of

which the State Department of Education ("DOE") requires for all financial reporting by boards of education. (See footnote 1) Mr. Hott had a practice of handwriting many of the forms and information needed to keep track of board finances. At the end of Mr. Hott's employment in the spring of 2002, HCBOE was operating at a deficit.

5. In June of 2002, HCBOE hired Conrad Lucas as a consultant to assist and train Grievant. Mr. Lucas was the treasurer for Morgan County. He has often been called upon by the DOE to assist county boards of education that are in financial trouble. He has worked as a mentor, consultant, and temporary treasurer in Preston, Mingo, Lincoln and McDowell Counties.

6. HCBOE hired a new superintendent, David Friend, in June of 2002.

7. At the conclusion of the 2002-2003 school year, Grievant received a favorable evaluation from Superintendent Friend. He noted that Grievant had successfully implemented new systems for printing checks, student IDs, and a computerized substitute call-out system. He also noted that Grievant's "biggest accomplishment" was "getting the budget back in the black." Finally, he stated that "[i]n three years, I predict that Mr. Hays will be one of the top finance directors around." 8. HCBOE uses a form for approval and payment of overtime, which requires prior approval from the immediate supervisor and the superintendent, before the employee works the overtime hours. Both signatures are also required after the overtime has been worked, so that the employee can be paid for the overtime. Under the previous superintendent, payment for the overtime was sometimes made without the superintendent's signature.

9. Linda Carder and Teresa Stine have both been employed in the HCBOE finance department for numerous years. Ms. Carder serves as accounts payable clerk and bookkeeper, and Ms. Stine is the payroll supervisor.

10. Ms. Carder and Ms. Stine have routinely worked overtime hours in past years during busy times, such as when particular reports are due, or at the end of calendar and fiscal years.

11. Early in the 2003-2004 school year, it was brought to Superintendent Friend's attention by an unidentified employee that Ms. Carder and Ms. Stine had received a large amount of overtime pay during the summer of 2003. Superintendent Friend declared in September of 2003 that employees would no longer be paid for overtime.

12. Also at the beginning of the 2003-2004 school year, Superintendent Friend placed Grievant on an improvement plan, dated September 25, 2003, citing various reports and projects for

the previous school year which had not yet been completed. Mr. Friend did not formally evaluate Grievant prior to or in connection with this improvement plan. The improvement period was to be for 20 weeks, from September 27, 2003, through February 18, 2004, with weekly meetings between Grievant, the Superintendent, and the Assistant Superintendent. Also, Mr. Lucas was to continue his assistance to Grievant. 13. In early October of 2003, Superintendent Friend reviewed accounts payable records provided to him by Joe Panetta, Executive Director of School Finance for the DOE. His preliminary review led him to believe that Ms. Stine and Ms. Carder had received inappropriate overtime pay during the summer of 2003. He did not consult either of the employees to discuss the issue.

14. On October 8, 2003, Superintendent Friend brought local sheriff's deputies to the HCBOE central office, and verbally advised Grievant, Ms. Carder, and Ms. Stine that they were being suspended with pay, and that they were to leave the premises immediately. Deputies observed their exit, to insure that no documents were taken from their offices when they left. (See footnote 2)

15. On approximately October 10, 2004, HCBOE hired a private accounting firm to conduct an audit of the school board's finances, in order to investigate the possibility of improprieties by Grievant, Ms. Carder, and Ms. Stine.

16. The overtime for which Ms. Stine and Ms. Carder were paid in the summer of 2003 was pre-approved by Grievant and by Superintendent Friend, with supporting documentation for its necessity. HCBOE ultimately determined that no wrongdoing occurred with regard to the overtime work, and Ms. Carder and Ms. Stine were returned to their positions in January of 2004, under improvement plans regarding their various duties. 17. During the audit, which took place over the entirety of October, November, and much of December, 2003, Grievant, Ms. Carder, and Ms. Stine were not consulted by the auditors regarding any of the financial records involved.

18. It is common practice for accountants conducting audits to constantly consult the employees of the auditee's financial department, in order to obtain accurate and complete records and findings. Even after information was supplied by Grievant, Ms. Carder and Ms. Stine after the audit was concluded, the auditor's report was neither amended nor corrected.

19. At the conclusion of the audit, Ms. Carder and Ms. Stine were allowed the opportunity to respond to the findings of financial irregularities contained in the audit. In this regard, Ms. Carder was able to provide documentation for over $200,000 of accounts payable transactions, which the

auditors claimed had not been accounted for. Ms. Carder provided information on all of the transactions except those involving one vendor, the file for which was missing from her office after her three-month absence during the suspension period.

20. On February 20, 2004, after being provided an opportunity to meet with the Superintendent and address the findings in the audit, Grievant was advised that his termination was being recommended for willful neglect of duty, based upon the following findings contained in the audit:

> Expenditure line items in general and special revenue funds exceeded budgeted amounts, the budget was not being reviewed or updated to reflect current activity, and transfers of funds between line item appropriations were being made without prior DOE approval. In this regard, expenditures were made from transferred funds without prior approval from DOE.
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> Annual financial statements were not being prepared and submitted by the state deadline--60 days after the beginning of the fiscal year.
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> Invoices were being paid prior to the issuance and approval of a supporting purchase order.
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> The state's format for the “special project worksheet” had not been followed, because Grievant had prepared it on an “Excel” spreadsheet, due to his difficulties using the WVEIS system.
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> Quarterly reports regarding Child Nutrition were not submitted to the state.
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> Internal audits of individual schools were not conducted in accordance with required school accounting principles, and many procedures were being violated by some of Hampshire County's schools.
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> The Child Nutrition annual report was filed with errors, and had to be refiled after corrections were made.
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> Grievant, who also serves as Child Nutrition Director, failed to complete the required 15 hours of in-service training for this position.

Non-food service costs were being charged to the federal food service program.

Reimbursement requests were made for special education costs, prior to exhausting available funds allocated for that purpose, resulting in excess cash being received in the special education accounts.

21. Grievant was a hardworking and devoted employee throughout the duration of his employment with HCBOE. He usually arrived at work around 7:00 a.m. and normally worked at least a 12-hour day. He took only one day off during his employment.

22. It is not unusual for school boards to have insufficient funds for particular line items in their budgets, and more funds than needed for others. Therefore, it is a common practice for school boards to request DOE permission to move funds from one area to another to make particular expenditures. Although a written form must be sent to DOE for approval to move funds within the budget, boards can make an immediate entry in theWVEIS system to move the funds and spend them before DOE approval is actually received.

23. Grievant frequently amended HCBOE budget changes in WVEIS. After HCBOE approved movement of funds from one area to another, Grievant gave the written requests to the superintendent's secretary to forward to the DOE. For unexplained reasons, most of the requests for the 2002-2003 school year were sent to DOE at one time, and were received and approved by the DOE on May 30, 2003, after most of the expenditures had already occurred.

24. Mr. Lucas has been a school board treasurer for many years. He often follows the procedure for budget amendments described above, moving funds and recording it on the WVEIS system, and using those funds prior to formal DOE approval. Although he has also been through many audits, Mr. Lucas has never been chastised or criticized for this practice.

25. Mr. Lucas worked with Grievant almost daily during the summer of 2003 to help him get the year's final financial reports prepared. A lot of time was spent on the special projects worksheet, which is difficult to prepare in WVEIS, due to a glitch in the WVEIS system. It was Mr. Lucas who advised Grievant to prepare the information on an Excel spreadsheet, due to the problems with the WVEIS form. Grievant prepared the information accurately on the Excel form.

26. When Superintendent Friend came to HCBOE, he implemented a purchasing system

whereby any teacher, department head, or other employee who needed to make a purchase was required to contact the Coordinator of Purchasing, Nancy Biggs. Ms. Biggs was to confirm that funds were available, before approving the purchase. Because Ms. Biggs reported directly to the superintendent, Grievant often did not know about problems with purchase orders. Ms. Carder was responsible for paying invoices, and she would not always have a corresponding purchase order when the bill came to her for payment. Therefore, Ms. Carder often had to get a purchase order after-the-fact from Ms. Biggs.

27. Under the previous Finance Director, internal audits of individual schools were poorly performed and not submitted until nearly a year after they had been conducted. The purpose of these audits is to balance and reconcile the schools' various accounts with their bank accounts. Under Grievant's supervision, the individual school accounting system improved greatly, and many previous errors in the school accounts were corrected.

28. Grievant filed monthly reports for the Child Nutrition Program, pursuant to Mr. Lucas' direction. Mr. Lucas had no knowledge of any requirement of quarterly reports in this area, and he had never been cited for failing to file them, either in an audit or by the DOE.

29. Special education funding is not specifically requested by a board of education, and funds for this purpose are automatically distributed to each board and deposited in its accounts. HCBOE had extra special education funds in its accounts, but the money was not being used. Any funds remaining in the accounts at the end of the year would be available for the same projects the following school year.

30. After a Board hearing conducted on February 25 and March 18, 2004, Grievant's termination for willful neglect of duty was approved.

Discussion

Grievant is challenging his termination, a disciplinary action in which 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). The grounds upon which a Board may dismiss any person in its employment are immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance substantiated by an employee performance evaluation, or conviction on a felony charge. W. Va. Code § 18A-2-8.

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, and must be exercised reasonably, not arbitrarily and capriciously. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education." Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001). 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. 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 imports "a knowing and intentional act, as distinguished from a negligent act." Chaddock, supra.

The unrefuted evidence in this case was that Grievant was a dedicated, diligent, and hardworking employee throughout his tenure with HCBOE. He was hired into a position of extreme responsibility, involving complicated procedures, with little to no training. Yes, Grievant was provided the guidance of a mentor in Mr. Lucas, who vehemently defended every action taken by Grievant with regard to HCBOE's finances. Mr. Lucas opined that it takes approximately three to four years for a new school board treasurer to obtain a firm grasp upon the myriad of duties and complexities of his or her position, and he believed that Grievant was making strides toward achieving that goal. Moreover, many of the alleged “misdeeds” with which Grievant was charged, as set forth in the audit, were actions he took at the direction of Mr. Lucas, who had followed similar procedures in the past without consequence. Indeed, Grievant's failures can hardly be described as intentional or willful.

Willful neglect of duty has been found in cases in which an employee is given specific instructions

to do certain tasks and chooses to ignore those instructions, either engaging in prohibited conduct or not performing his or her assignments at all. See Dalton v. Monongalia County Bd. of Educ., Docket No. 04-30-185 (Sept. 15, 2004); see also Tolerv. Kanawha County Bd. of Educ., Docket No. 03-20-369 (Jan. 30, 2004). Conversely, Grievant's behavior was consistent with that of a diligent employee who was making every effort to effectively perform his duties, rather than that of one who knows what is required of him and consciously chooses to do otherwise.

It would be absurd for this Decision to conclude without discussion of the audit which led to Grievant's termination, the manner in which it was conducted, and the events which caused it to be ordered in the first place. Initially, Superintendent allegedly believed that some impropriety or illegality had occurred with regard to overtime checks paid to Ms. Carder and Ms. Stine in June of 2003. However, it was ultimately revealed that, not only had Superintendent Friend pre-approved the overtime work himself, but it was also supported by detailed explanations of the need for the work. It is highly suspicious that the mere payment of overtime to these employees resulted in the superintendent feeling the necessity to suspend the entire finance department, albeit with pay, and with deputy sheriff escorts.

In addition, the conduct of the audit itself was highly unusual, as testified to by Mr. Lucas and Mr. Panetta. Ordinarily, auditors consult with the employees of the auditee's financial department constantly over the course of the audit, in order to make sure the information is complete. In this case, these employees were not consulted until after the audit was concluded and numerous findings of alleged improprieties had been documented. Then, after the employees were allowed to address the findings, most of which were unfounded or inaccurate, the audit report was not amended, and HCBOE still felt the need to use the audit as the basis for Grievant's termination. Finally, it must be mentioned that, after the conclusion of the evidence in this case, a report of a performance audit of HCBOE conducted by the DOE was released in February of 2005. After a conference call was held with counsel for the parties to this case, the undersigned determined that the audit would be admitted into evidence in this grievance, and the parties would be allowed to make their respective arguments regarding the relevance of its contents to this matter. (See footnote 3) As to financial irregularities at HCBOE, the report only addresses some grant funding issues, which did not seem to be involved in Grievant's termination, and only briefly mentions some of the issues for which Grievant was terminated. However, the report does contain detailed discussion of irregularities in hiring practices

and various personnel issues. It was recommended that Superintendent Friend and the personnel director in particular receive additional training regarding many of the improper practices which have occurred. As far as the instant grievance is concerned, the information in the performance audit is only helpful to the extent that it confirms that HCBOE has engaged in numerous incorrect and improper practices over the past two years, and it is likely that Grievant's termination--and the audit that led to it--were the result of similar practices.

In conclusion, the undersigned finds that Respondent has failed to meet its burden of proving that Grievant's termination for willful neglect of duty was justified. The evidence has established that Grievant diligently pursued his responsibilities, and at no time did he intentionally fail to perform them or choose to perform them incorrectly. Accordingly, his termination was improper. The following conclusions of law support this decision.

Conclusions of Law

1. In a disciplinary termination case, 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 grounds upon which a Board may dismiss any person in its employment are immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance substantiated by an employee performance evaluation, or conviction on a felony charge. W. Va. Code § 18A-2-8.

3. 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, and must be exercised reasonably, not arbitrarily and capriciously. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991).

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. 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. The evidence in this case proves that Grievant diligently pursued his job responsibilities, and

Respondent has failed to establish willful neglect of duty.

Accordingly, this grievance is **GRANTED**, and Respondent is **ORDERED** to reinstate Grievant to his position as Treasurer and Finance Director, with back pay plus interest at the statutory rate, seniority, and benefits.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Hampshire 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.

Date: March 16, 2005

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant did receive some WVEIS training provided by the DOE at a later time.

Footnote: 2

The three employees sued HCBOE for defamation as a result of these events, which was recently settled by a financial payment to Grievant, Ms. Stine, and Ms. Carder.

Footnote: 3

Grievant's motion to reopen evidence and re-examine various witnesses who had previously testified was denied.