WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

JESSIE KIMMINS KESSEL,

Grievant,

v. **Docket No. 06-20-438**

Sue Keller

Senior Administrative Law Judge

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Jessie Kimmins Kessel ("Grievant"), employed by the Kanawha County Board of Education ("KCBE") as a teacher, filed a grievance directly to level four on November 30, 2006, as is permitted by *W. Va. Code* § 18A-2-8, following the termination of her employment. An evidentiary hearing was conducted in the Grievance Board's Charleston office on May 3, 2007. Grievant was represented by Rebecca E. Mick, Esq., of Pyles Haviland Turner & Mick, LLP., and KCBE was represented by James W. Withrow, Esq. Proposed findings of fact and conclusions of law were filed by the parties on May 16, 2007, and the case was reassigned on June 7, 2007, following the resignation of Administrative Law Judge Wendy A. Campbell.

Synopsis

KCBE terminated Grievant's employment for insubordination and willful neglect of duty after she failed to properly report her absence on August 24 and 25, 2006. Grievant argued that the action was arbitrary and capricious because it was based on a newly- enacted regulation she had not been provided, which required employees to call their school in addition to the automated system. Grievant further argued that she had actedin good faith by calling the Director of Human Resources, and that the measure of discipline was excessive.

Grievant failed to contact the school, as she was directed by the HR Director, but termination was excessive in light of a number of factors. The dismissal was reduced to a ten-day suspension.

The following facts have been derived from a preponderance of the evidence made part of the level four record.

Findings of Fact

1. Grievant is a certified English teacher with fifteen years of experience. She has been employed by KCBE since January 2000. Grievant's residence has been in Huntington, West Virginia, at all times pertinent to this grievance.

2. Grievant was assigned to George Washington High School ("GWHS") the first semester of the 2005-2006 school year, and was transferred to Tyler Middle School during the second semester. Shortly before the beginning of the 2006-2007 school year, Grievant was informed that she was again assigned to GWHS.

3. Teachers employed by KCBE returned to work for the 2006-2007 school year on Wednesday, August 23, 2006. A countywide staff development program was held on Wednesday, and teachers did not report to their schools. Thursday and Friday, August 24 and 25, 2006, were school workdays for teachers and staff in preparation for the return of students the following Monday, August 29, 2006.

4. Grievant reported to work on Wednesday, August 23, 2006, as expected.

5. While en route to work on Thursday, August 24, 2006, Grievant's vehicle broke down on the expressway, approximately ten miles from her residence, and fifty milesfrom GWHS.

6. Grievant telephoned Kanawha County Schools Director of Human Resources, Bill Buchanan, at 9:30 a.m., to report her situation and absence. Grievant did not comply with Mr. Buchanan's instruction to call her supervisor, GWHS Principal James Vickers.

7. For some time unspecified in the record, Kanawha County has utilized an automated call-in system for reporting absences, referred to as the TSSI system. Effective August 10, 2006, KCBE implemented KCS Administrative Regulation G72A, which states in part:

72.02 TSSI System. Any employee reporting an absence <u>must</u> call their immediate supervisor or designee, as well as calling the TSSI system.

Teachers had not been given notice of this change prior to the beginning of the 2006-2007 school year.

8. Grievant did not call the TSSI system based on her belief that it did not yet reflect her

assignment to GWHS. Neither did Grievant contact her immediate supervisor, James Vickers, Principal at GWHS.

9. On Friday, August 25, 2006, Grievant returned to collect her vehicle. The mechanic advised Grievant to buy another car, and she proceeded to a dealership to investigate the possibility of securing financing for such a purchase.

10. Grievant was unsuccessful in her attempts to contact Mr. Buchanan on Friday. She did not call the TSSI system, or Mr. Vickers, to report her absence that day.

11. William H. Courtney, KCBE Director of Employee Relations, notified Grievant by telephone on August 25, 2006, that she was suspended, with pay, for failure to report her absence. 12. KCBE Superintendent, Dr. Ronald E. Duerring, notified Grievant by certified letter dated August 28, 2006, of the suspension, “pending a hearing on the question of whether disciplinary action should be recommended against you.”

13. On November 8, 2006, Grievant was suspended, without pay, and on November 17, 2006, was discharged for insubordination and willful neglect of duty.

Discussion

KCBE asserts that Grievant's termination was properly based on the failure to report her absence from work to the TSSI system on August 24 and 25, 2006, which constituted insubordination and willful neglect of duty. Grievant argues that KCBE has acted in an arbitrary and capricious manner to terminate her employment because she did, in fact, report her absence on August 24 to the Director of Human Resources, and attempted to do so on August 25, 2006. She further argues that the regulation cited by KCBE had only been implemented days before, and she had not been provided notice of the change in procedure. Grievant concludes that the punishment is excessive.

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 evidence 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. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner

oftestifying[; this] determines the weight of the testimony." *Petry v. Kanawha County Bd. of Educ*., Docket No. 96-20-380 (Mar. 18, 1997). *See Black's Law Dictionary*, 5th ed. at 1064. In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

W. Va. Code §18A-2-8 identifies the types of conduct that can result in disciplinary action and 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 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.

Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Butts v. Higher Educ.Interim Governing Bd.*, 569 S.E.2d 456 (W. Va. 2002)(per curiam). *See Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ*., Docket No. 26-89-004 (May 1, 1989). Insubordination involves the “willful failure or refusal to obey reasonable orders of a superior entitled to give such order.” *Riddle, supra; Webb, supra*. In order to establish insubordination, an employer must demonstrate 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 authorityinherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990).

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. *Williams v. Cabell County Bd. of Educ.*, Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ.*, Docket No. 95-29-151 (Aug. 24, 1995); *Hoover v. Lewis County Bd. of Educ.*, Docket No.93-21-427 (Feb. 24, 1994). 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). Willful neglect of duty may be 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).

It is undisputed that when an employee does not intend to report for work, she must comply with applicable procedures to report her absence. The failure to properly report absences may result in dismissal for job abandonment. In the present matter, Grievant understood that she was to report her absence to the TSSI system. She also knew that her transfer had not been updated on the system, and that calling in would report her absence to the wrong school.

It is true, as Grievant argues, that she had not been notified of the recently-enacted regulation directing employees to call their schools to report an absence, but it would bethe next logical step to have taken. Instead, Grievant telephoned the Director of Human Resources. She did not comply with his directive to notify the principal of her school. (See footnote 1) Thus, any belief that she had properly reported her absence on August 24, 2006, was totally erroneous. Grievant did not speak with anyone to report her absence on August 25, 2006. While the record reflects some indication that the relationship between Grievant and Mr. Vickers was strained, she knew very well that she could have called and spoken to his secretary, which she indicated she would have done had students been scheduled to attend that day. Grievant's failure to contact the school after being directed to do so constitutes insubordination and willful neglect of duty.

The remaining issue for review is whether the discipline was so excessive that it should be mitigated. The argument Grievant's suspension is excessive given the facts of the situation is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

"When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers CountyBd.of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994). *See*

Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997).

Mitigation of a penalty is considered on a case by case basis. *Conner v. Barbour County Bd. of Educ.*, Docket No. 95-01-031 (Sept. 29, 1995); *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. *Pingley v. Div. of Corr.*, Docket No. 95-CORR-252 (July 23, 1996).

This Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.,* Docket No. 96-HHR-183 (Oct. 3, 1996).

Several factors support mitigation in this case. First, Grievant was under considerable stress on August 24, when her vehicle left her stranded. Second, Grievant could have simply called the TSSI system, and would have been in compliance with the standard procedure, but did not because she knew it would not report to the correct school. In an alternative attempt to notify her employer of her absence, she called Mr. Buchananon the 24th, and attempted to contact him on the 25th. It is also noted that Grievant has been subject to no other disciplinary measures during her six-year tenure with KCBE. While neither party made any direct mention of prior difficulties in their relationship, both Grievant and Mr. Vickers made comments indicating that it was strained, which may have influenced her actions. Finally, there were no students in attendance on the days in question, and no substitute employee was required. Although Grievant was expected to attend scheduled meetings, and complete various duties, there was no loss of service on the days in question. While by no means condoning Grievant's actions, dismissal was excessive under the facts of this case, and the discipline is accordingly reduced to a ten- day suspension.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

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. 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 contendere* to a felony charge. *W. Va. Code* §18A-2-8.

3. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] anadministrative superior." *Butts v. Higher Educ.Interim Governing Bd.*, 569 S.E.2d 456 (W. Va. 2002)(per curiam). *See Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ*., Docket No. 26-89-004 (May 1, 1989). Insubordination involves the “willful failure or refusal to obey reasonable orders of a superior entitled to give such order.” *Riddle, supra; Webb, supra*.

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. *Williams v. Cabell County Bd. of Educ.*, Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ.*, Docket No. 95-29-151 (Aug. 24, 1995); *Hoover v. Lewis County Bd. of Educ.*, Docket No.93-21-427 (Feb. 24, 1994).

5. KCBE has established that Grievant engaged in insubordination and willful neglect of duty when she failed to report her absence to her immediate supervisor.

6. Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

7. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. SummersCounty Bd.of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994). *See Austin v. Kanawha County Bd. of Educ*., Docket No. 97-20-089 (May 5, 1997).

8. Grievant has established that the discipline imposed, termination of her employment, was clearly disproportionate to the offense proven under the specific facts of this case.

Accordingly, the grievance is **GRANTED**, to the extent that KCBE is ORDERED to reinstate Grievant will all back pay, less any appropriate set off, with interest, and benefits to which she is entitled, and to substitute the termination with a ten-day, unpaid suspension.

Any party may appeal this decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this decision. *See W. Va. Code* § 18-29-7 (repealed) (*but see Executive Order No. 2-07*, May 8, 2007). 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 circuit court.

DATE: JULY 16, 2007

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Grievant disputes Mr. Buchanan's testimony that he directed her to call Mr. Vickers. While she may not recall the statement due to her anxiety regarding her car, such a direction would be entirely reasonable, since Mr. Buchanan could not be expected to relay such messages throughout the county.