THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

WILLIAM CALOCCIA,
Grievant,

v. **DOCKET NO. 2011-0743-HarED**

HARRISON COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed at level three of the grievance procedure by Grievant, William Caloccia, on November 12, 2010, against his employer, the Harrison County Board of Education ("HBOE"), contesting a five-day suspension without pay. The relief sought by Grievant is "[p]ayment of lost wages, as well as attorney fees and costs."[1]

A level three hearing was held before the undersigned Administrative Law Judge on May 20, 2011, in the Grievance Board's Westover office. Grievant was represented by Gregory H. Schillace, Esquire, Schillace Law Office, and Respondent was represented by Richard M. Yurko, Jr., Esquire, Steptoe & Johnson, PLLC. This matter became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on June 24, 2010.

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[1] It is well established that the Grievance Board does not have the authority to award attorney fees. *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996). New WEST VIRGINIA CODE § 6C-2-6 is entitled, "Allocation of expenses and attorney's fees." It specifically states: "(a) Any expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense."

Synopsis

Grievant, an Industrial Arts teacher at Liberty High School, was suspended for five days without pay for leaving the school without obtaining permission from an Assistant Principal at the school, and leaving his last class period of students to be monitored by another teacher. One of Grievant's students was struck in the head with an object by another student in Grievant's absence, and the student required stitches. Grievant had attempted to contact the one administrator who was at Liberty High School to obtain permission before he left to pick up a donated piece of equipment, but was not able to locate him. Grievant then asked the Faculty Senate President if he would cover his class if he did not return by the time his class started, and if he could leave. The Faculty Senate President told Grievant he could go, and that he would cover his class. Grievant had covered the Faculty Senate President's class the previous day when he had to leave the building, and they had covered each other's classes in this way for many years. Liberty High School has had a written practice in place which specifically states that the Faculty Senate President may grant a teacher permission to leave the school when the Principal and Assistant Principals are not available. Respondent did not prove the charges against Grievant.

The following Findings of Fact are made based upon the record developed at level three.

Findings of Fact

1. Grievant has been employed by the Harrison County Board of Education ("HBOE") as an Industrial Arts teacher at Liberty High School ("LHS") for 32 years. In all

those years he had never received a bad evaluation, and had never been disciplined.

2. During the 2009-2010 school year, the Principal of LHS retired. The two Assistant Principals, Stephen Gibson and Donna Hage, were assigned the duties of the Principal through the end of the school year.

3. Because he does not receive sufficient funding from HBOE to purchase all the supplies he believes are necessary to instruction of Industrial Arts, Grievant has, for many years, on his own time, solicited donations of scrap lumber and other materials from businesses in the region. From time to time Grievant utilizes his own truck, trailer, and gasoline to travel to various locations to pick up these donated materials. He often does this on Saturdays, but he also has made these trips during school hours, with the knowledge and permission of the administrators at LHS.

4. James Carr is also a teacher at LHS, and he is President of the Faculty Senate at LHS. He teaches vocational agriculture, and he also has for many years solicited donations from area businesses of materials he believes he needs for instruction of students, such as seeds and dirt, which are not supplied by HBOE. Mr. Carr also has in the past gone to pick up these materials during school hours, with the knowledge and permission of the administrators at LHS.

5. Grievant's instruction area consists of a classroom, a lab, and a machine shop. Mr. Carr's instruction area adjoins Grievant's, and consists of a classroom, a lab, and a greenhouse. Both teachers will often have some students in the classroom, while other students are in the lab, shop, or greenhouse. Some of the students are routinely unsupervised at times when the classes are so split.

6. Over the years Grievant and Mr. Carr have covered each other's classes

when one of them had to leave the building, either to pick up donated supplies, or for other school business.

7. Grievant had never been told that it was improper for him to leave during school hours to go pick up donated supplies, and no administrator had ever told him he could not leave during school hours to do so.

8. Assistant Principals Hage and Gibson were aware that Grievant would leave school from time to time to pick up supplies, and he was allowed to do so by both of them during his planning period. Assistant Principal Hage had also allowed Grievant and other teachers to leave the building to pick up supplies during periods when they were scheduled to provide instruction to students, as long as their class was being covered by someone. If Grievant, or any other teacher did not have anyone who could cover a class, Assistant Principal Hage would arrange for coverage, usually by paying a teacher to give up his or her planning period to cover the class.

9. Both Assistant Principals considered the trips made by Grievant and Mr. Carr to pick up donated materials for the classroom to be school business.

10. HBOE does not have a written policy in place which states that a teacher must obtain the approval of an administrator before the teacher can leave the school building.

11. During the 2008-2009 school year, LHS had a written procedure which was to be followed by a teacher who needed to leave the school grounds during business hours. There was no such procedure placed in writing for the 2009-2010 school year. The written procedure for the school year 2008-2009 was headed “Administrative Signout Sheet.” It listed “Emergency Numbers where administrators may be reached,” for then

Principal Dennis Zahradnik, and for Assistant Principals Gibson and Hage. It then stated: "Designee in Charge: 1.___Jim Carr, Faculty Senate President _____." It then listed the names Mike Smith as the # 2 designee, and Amy Howe as the #3 designee. The form stated: "Contact the principal first and then the subsequent assistant principals as indicated above. If no administrator is available, the first line of contact is the #1 designee in charge, then #2, etc." The form does not state that the designees are only to be contacted in emergency situations, nor does it state what efforts must be undertaken by a teacher to contact an administrator before going to a designee.

12. Grievant had never seen the Administrative Signout Sheet for 2008-2009, nor had either school secretary, Monica Audia and Debra Ciesla, or Mr. Carr, or Pete Amiday, another teacher at LHS.

13. On May 3, 2010, Mr. Carr was required to attend a student activity away from LHS during school hours, and during a time when both he and Grievant had students in class. He asked Grievant to cover his classes during this time, and Grievant did so.

14. On Tuesday, May 4, 2010, Grievant had the opportunity to obtain a donated laser level for LHS, which was at World Vision in Philippi, West Virginia. This was a $1000 piece of equipment.[2] In order to obtain this equipment, Grievant had to go to Philippi to pick it up. This trip would normally take about 45 minutes, one way, in a car.

15. Assistant Principal Hage was at a Principals' meeting off site on the morning of May 4, 2010, and did not return to LHS until around noon. Grievant did not see Assistant Principal Gibson when he signed in on the morning of May 4, 2010. He

[2] Grievant explained that a laser level is used in construction to create a perfect true plane. Foundations can be set from it and elevation grade.

attempted to contact Assistant Principal Gibson that morning during the time he had to do so, but the internet based telephone in his room and the internet were not working when he tried to use them. There is a second telephone in Grievant's classroom, but it is for internal use only, the numbers used to contact individuals in the building are different from the numbers used with the internet based phone, and Grievant did not have a directory for this phone. Grievant has a personal cell phone, but does not get a signal on it when he is at LHS. Grievant asked several people if they had seen Assistant Principal Gibson, and he went to the office to see if he was there, but was unable to locate him.[3]

16. Grievant did not ask either secretary at LHS to try to contact Mr. Gibson on the walkie-talkies they keep in the office to contact the Assistant Principals when they are not in their offices, or using the intercom system, as it did not occur to him to do so. Grievant was not aware that a walkie-talkie was kept in the gymnasium near his room.[4]

17. The internet and phone service at LHS often do not work.

18. Even when both Assistant Principals are on site, they stay very busy dealing with discipline issues, talking to parents and students, and talking to personnel at the Board

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[3] Respondent noted that Grievant did not try to call Assistant Principal Hage at the meeting she was attending. Grievant had no way to contact her given that the internet based telephone and the email were not working, and his cell phone does not work at LHS.

[4] Respondent also suggested that Grievant should have gone to the cafeteria to look for Assistant Principal Gibson, because he was there at lunchtime. Respondent's proposed Finding of Fact Number 23, that "[a]t the time Grievant left the building on May 4, 2010, Mr. Gibson was in the lunch room," misrepresents the evidence and is specifically rejected. The record contains absolutely no such evidence. Assistant Principal Gibson testified only that he is usually in the cafeteria at lunchtime. He did not testify as to where he was at lunchtime on May 4, 2010. Further, the record does not reflect what time lunch period is scheduled for at LHS. Accordingly, whether Grievant looked in the cafeteria is of no relevance. More importantly, however, Grievant testified that he was not aware that Assistant Principal Gibson was "usually" in the cafeteria at lunchtime.

office. It is not uncommon for a teacher to be unable to locate an Assistant Principal at LHS.

19. Grievant had two classes on the morning of May 4, 2010, from 7:37 a.m. until 10:50 a.m., which he taught that day. Grievant was scheduled to supervise detention students from 10:50 a.m. until 11:20 a.m. He asked Pete Amiday, a teacher at LHS, to supervise his detention students, and he agreed to do so. Grievant was scheduled to take lunch from 11:20 a.m. until 11:45 a.m., and then he had a planning period until 1:20 p.m. His last class started at 1:25 p.m.

20. There were 13 students in Grievant's last class, if all students were present. Mr. Carr had a class at that time as well, with 33 students in the class if all students were present. Approximately 10 students were absent that day.

21. Grievant told Mr. Carr he needed to go pick up the laser level, and that he could not find Assistant Principal Gibson. He asked Mr. Carr if he could cover his last class if he was not back by 1:25 p.m., and Mr. Carr agreed to do so. Grievant was hoping he would be back by the time his last class started at 1:25 p.m. Mr. Carr gave Grievant permission to leave.

22. Grievant left LHS around 11:00 a.m. on May 4, 2010, driving a truck. He was pulling a trailer so that he could stop at lumber yards that donate scrap lumber to LHS and pick up any donations on the way back. The trip took longer than 45 minutes because Grievant was pulling a trailer, and he stopped at a lumber yard on the way to Philippi. Had Grievant driven to Philippi and right back in a car, without any wait period at all at World Vision, he would have returned to LHS around 12:30 p.m. He did not arrive at World Vision until 12:30 or 12:45 p.m. When he arrived at World Vision, everyone was at lunch,

and then he had to wait for paperwork to be completed. Grievant stopped at other lumber yards on the return trip.

23. Grievant did not return to LHS before school was out on May 4, 2010. Mr. Carr covered Grievant's last period class. Mr. Carr did not put all the students in the same classroom. Some of the students were in a lab or shop area, and Mr. Carr was not monitoring them.

24. At approximately 1:30 p.m. on May 4, 2010, a student in Grievant's last period class struck another student in the class in the head with an object, leaving a gash that required 24 stitches. Mr. Carr was not aware that this had occurred. The injured student went to the Principal's office for medical attention.

25. When Assistant Principal Hage spoke to Mr. Carr on May 4, 2010, about this incident, he told her he was supposed to let her know that Grievant had left, and he forgot to do so.

26. HBOE Superintendent Susan Collins recommended to the HBOE that Grievant be suspended without pay for 30 days. After a hearing on November 1, 2010, HBOE suspended Grievant for 5 days without pay. Grievant was not placed on an improvement plan.

27. HBOE placed a letter of discipline in Mr. Carr's personnel file for his role in the injury of the student.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*,

Docket No. 89-41-232 (Dec. 14, 1989). A preponderance of the evidence is 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 proven is more probable than not. *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in WEST VIRGINIA CODE § 18A-2-8, 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). WEST VIRGINIA CODE § 18A-2-8 provides that "[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."

HBOE did not identify which of the statutory causes it believed applied to Grievant's behavior until on cross-examination and redirect examination, Superintendent Collins opined that Grievant's actions amounted to insubordination, incompetency, willful neglect of duty, and unsatisfactory performance. In its written proposals, Respondent characterized Grievant's actions as insubordination and willful neglect of duty, and it is those two areas of the law that will be explored in this decision. Although Grievant complained about the failure to identify the statutory basis supporting the suspension, "[i]t is not necessary for a board of education to identify an employee's offenses by the exact terms utilized in W. VA. CODE § 18A-2-8, as long as the required written notice of charges

specifically identifies the alleged acts of which the employee is accused. *Jordan v. Mason County Bd. of Educ.*, Docket No. 99-26-080 (July 6, 1999)." *Scott v. Wetzel County Bd. of Educ.*, Docket No. 06-52-289 (Jan. 3, 2007). There is no dispute in this case that Grievant was notified of the underlying reasons for his suspension.

Insubordination has been defined as 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. 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). In order to establish insubordination, the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid. *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). *See Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *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).

"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). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. *See Day v. Morgan Co. Health Dep't*, Docket No. 07-CHD-121 (Dec. 14, 2007). "An employee's belief that management's decisions are incorrect or the result of incompetence, absent a threat to the employee's health and

safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. *Vickers v. Bd. of Directors/W. Va. State College,* Docket No. 97-BOD-122B (Aug. 7, 1998). *See Parker v. W. Va. Dep't of Health and Human Resources*, Docket No. 97-HHR-042B (Sept. 30, 1997)." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003).

"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). This is a fairly heavy burden, given that Respondent must not only prove that the acts it alleges did occur, but also that the reason for Grievant's neglect of duty was more than simple negligence." *Tolliver v. Monroe County Bd. of Educ.*, Docket No. 01-31-493 (Dec. 26, 2001). Willful neglect of duty "is conduct constituting a knowing and intentional act, rather than a negligent act.[5] *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)." *Geho v. Marshall County Bd. of Educ.*, Docket No. 2008-1395-MarED (Oct. 30, 2008).

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[5]"It is not the label a county board of education attaches to the conduct of the employee . . . that is determinative. The critical inquiry is whether the board's evidence is sufficient to substantiate that the employee actually engaged in the conduct." *Allen v. Monroe County Bd. of Educ.*, Docket No. 90-31-021 (July 11, 1990); *Duruttya v. Mingo County Bd. of Educ.*, Docket No. 29-88-104 (Feb. 28, 1990).

The first issue to be addressed is Respondent's assertions that Grievant lied when he testified that the telephone and internet were not working, when he said he had no cell phone signal at LHS, and when he told Assistant Prinicipal Hage what he had gone to pick up. Respondent asserted that Grievant never made any effort to contact Assistant Principal Gibson, and that he changed his story about the reason for the trip, telling Assistant Principal Hage initially that he had gone to pick up wood. The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge 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. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999); *Perdue, supra*.

What Respondent never seemed to comprehend is the obvious fact that there was no reason for Grievant to avoid asking Assistant Principal Gibson if he could leave. It is clear from the testimony presented that **both** Assistant Principals would have given Grievant permission to go pick up materials for his class, and Grievant knew this. In fact, Assistant Principal Hage specifically testified that she would have allowed Grievant to leave to get the laser level, but she would have gotten him coverage for his class with a teacher who had a planning period, and paid that teacher for giving up their planning period. Obviously then, there was no reason for him to avoid contacting either Assistant Principal. The real issue here is not who gave Grievant permission to go, but coverage of his class.

It is clear that with two classes back to back in the morning,[6] and a long trip ahead of him, Grievant had little time to track Assistant Principal Gibson down if he was going to try to be back by 1:25 p.m., in time for his last class.

It is equally obvious that there was no reason for Grievant to lie about the reason for the trip, especially after the fact. In fact, his reason for leaving and for being gone so long is better supported by the fact that he had a one time opportunity to obtain an expensive piece of equipment for LHS for free, than that he was going to various lumber yards to see whether any scrap lumber was available, which could be done anytime. Respondent advanced no reason why Grievant would lie about or attempt to conceal the fact that he had gone to pick up a laser level. Respondent's fixation on painting Grievant as a liar finally manifested itself in mischaracterization of the witness testimony, and at one point, complete misrepresentation of the testimony (see footnote number 4, *supra*).

Overall, the undersigned found Grievant's testimony to be straightforward and entirely plausible, and his responses and attitude toward the action consistent. Grievant obviously believed this equipment would be a wonderful tool for his students, and maintained throughout that he felt there was some urgency in getting the equipment before someone else did, and that he had followed what he believed to be the correct practice; this despite being questioned during the hearing as though he were a complete liar, rather than a valued employee.

As to the specific accusations of falsehood, Respondent asserted that the internet

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[6] Superintendent Collins acknowledged that Grievant should not have left his class to go on a search for Assistant Principal Gibson.

based telephone in Grievant's room and the internet were working. Grievant said they were not working when he tried to use them. Respondent's own witnesses confirmed that there were periodic problems with both working. Mr. Carr testified that the internet and email had been down so often that he did not even try to use them. Respondent bases its assertion on the fact that no one complained to the secretaries at LHS about the phones or internet not working, the fact that the phone was working after lunch when a student was injured, and the fact that Assistant Principal Hage was checking emails while offsite that morning. None of this proves that Grievant was lying. If the email and phone went out sporadically, then it is quite possible that neither was working when Grievant attempted access; and, if it was common for them to sporadically go out, then people may have given up complaining. No evidence was presented on the latter possibility, nor was there evidence presented that it was the school secretaries to whom such complaints would be made. The fact that Assistant Principal Hage was checking emails while offsite does not provide an indication one way or the other about whether the internet was working at LHS, and specifically whether it was working at LHS without interruption that morning. Assistant Principal Gibson also identified emails submitted at the hearing that had been sent to him the morning of May 4, 2010, but he could not say that he actually received them that morning.

Respondent attempted to discredit Grievant's testimony that he did not get a signal on his cell phone with the testimony of Assistant Principal Gibson that Grievant had used his cell phone to call him while Grievant was at LHS. Assistant Principal Gibson was not asked to state when this occurred, or how he knew where Grievant was when he placed

the call. The testimony of the witnesses on this point is not contradictory without further explanation, which explanation seems sorely lacking. Assistant Principal Gibson has been at LHS for 4 or 5 years, and did not state when during this time period this had occurred, or if Grievant had the same cellular service he has now. It will be noted that Assistant Principal Hage stated she does not have cell service at LHS either, although she can send and receive text messages. The undersigned will take administrative notice that this indicates that the cell phone signal at the location of LHS is weak, may at times be stronger than at other times, and whether an individual has a signal on his cell phone may depend on who his service provider is. The undersigned will also take administrative notice that there are times when service providers contract to share cell phone towers for periods of time, which may allow an individual to receive a signal at his service location for these periods of time. Finally, the undersigned will take administrative notice that whether an individual has a signal may vary, depending on the type of cell phone he has.

The final point about which Respondent insinuated that Grievant had lied involved the reason Grievant gave Mr. Carr and Assistant Principal Hage for being off site. Assistant Principal Hage said Grievant and Mr. Carr told her Grievant was picking up wood. Grievant thought he had told Assistant Principal Hage he had gone to pick up a laser level. If it was not made clear to Assistant Principal Hage that the primary purpose of the trip was to pick up the laser level, that does not mean Grievant lied to her. Mr. Carr testified that he thought he had told Assistant Principal Hage Grievant had gone to pick up materials, not wood; but he was aware that Grievant was going to Philippi, and on to Belington. If Mr. Carr said materials, Assistant Principal Hage could have easily assumed this meant wood,

since that was what Grievant usually went off-site to get. It is also possible that during the initial telephone conference with Grievant on a cell phone that Assistant Principal Hage did not understand what she was being told, that she made the assumption Grievant was picking up wood, since that was what he usually did, or that Grievant and Assistant Principal Hage were primarily concerned about the injured student and did not communicate all the necessary facts, or were preoccupied. Again, the undersigned sees no reason for Grievant to have lied about this, nor did Respondent advance any reason for him to have done so. It seems more likely that this was a situation where the primary concern was the injured student, and the parties did not communicate clearly. Respondent is making a mountain out of a mole hill. Respondent's efforts to discredit Grievant are misplaced.

As to the merits, Superintendent Collins testified that she was concerned because so many children were left "alone" by Grievant, and a child was injured. This is not what happened. Grievant did not leave the students in his classroom unattended. Rather, he specifically arranged for Mr. Carr to cover his class, and Mr. Carr agreed to take on this responsibility. If anyone left any of the students alone, it was Mr. Carr. Superintendent Collins also testified that she was not aware of the practice of teachers obtaining donated materials and going during business hours to pick up these materials, and that teachers should not be leaving during school hours to do so. She stated that Grievant is being paid to work a full day, and he did not do so. While Superintendent Collins is certainly entitled to this opinion, if it is her desire that the employees of Harrison County not obtain donated materials for their classrooms, except on their own time, it is imperative that she not only

communicate this to teachers, but to administrators as well. Both Assistant Principals at LHS believed that teachers were allowed to leave during business hours to pick up supplies, not only during their planning periods, but also during periods when they had classes, and had specifically authorized this in the past, as long as they had someone to cover the class. Not surprisingly, Grievant no longer solicits donations of materials, even on his own time, and does not use his personal vehicle to collect donated materials either during school hours or on his own time.

Finally, Respondent asserted that Mr. Carr could only be consulted after every conceivable effort had been made to contact an administrator, and only if it were an emergency. Both of these assertions were pulled out of thin air. The only written procedure in place prior to this incident says nothing of the sort. Assistant Principal Gibson testified that the teachers are told in the group meetings at the beginning of almost every school year that Mr. Carr can give approval for a teacher to leave the building <u>only</u> in an emergency. Assistant Principal Hage also testified that the teachers are told the procedure to be used at the beginning of the school year, but her testimony was that the procedure is to contact Mr. Carr for permission to leave only after all efforts to contact an administrator have been exhausted. Assistant Principal Hage also testified that the Administrative Signout Sheet is handed out the first day of school to the teachers, but all three of the teachers who testified, as well as the two secretaries who testified, stated they had never seen this document before. Mr. Carr and Mr. Amiday further testified that no one had ever gone over it with the teachers either. Obviously, someone's recollection is incorrect.

Grievant made reasonable efforts to contact the only administrator at the school that morning, given the limited time he had to do so. No one had ever told him that he had to jump through a particular set of hoops before he could conclude that he could not find an administrator and go to Mr. Carr. The procedure says absolutely nothing about going to Mr. Carr only in an emergency. Again, the undersigned would point out that Grievant was not gaining any advantage by going to Mr. Carr rather than Mr. Gibson. He just couldn't find Mr. Gibson.

Respondent did not prove that Grievant actions amounted to insubordination or willful neglect of duty. Grievant did what he believed he was required to do, and what was set forth in the written procedure for the preceding school year. He tried to contact the administrator in charge that morning, and when he was unable to do so he told Mr. Carr he needed to leave to pick up the laser level, and asked him and Mr. Amiday to cover his class and his detention. Both Mr. Carr and Mr. Amiday said they would do so, as they had on many previous occasions, and Mr. Carr told Grievant he could go. Grievant did not intentionally fail to perform his work. He left his class in the good hands of Mr. Carr, as he had done many times before, on school business, to go pick up a donated laser level for use in the classroom. He reasonably believed that his class would be covered by another competent instructor. There was no "willful failure or refusal to obey" any type of order, rule or regulation, nor was there a failure by Grievant to perform a work-related responsibility.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the

employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. WEST VIRGINIA CODE § 18A-2-8 provides that "[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." "Although reprimands are not specifically addressed in W. VA. CODE § 18A-2-8, the Grievance Board has previously recognized that lesser penalties can be imposed for the offenses listed in this statute. *See Wahl v. Mineral County Bd. of Educ.*, Docket No. 98-28-175 (Sept. 14, 1998); *See also Blankenship v. Mingo County Bd. of Educ.*, Docket No. 97-29-486 (Apr. 17, 1998)." *Showalter v. Marshall County Bd. of Educ.*, Docket No. 07-25-165 (May 28, 2008).

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 WEST VIRGINIA CODE § 18A-2-8, 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).

4. Insubordination has been defined as 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. 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). In order to establish

insubordination, the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid. *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). *See Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *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).

5. "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). This is a fairly heavy burden, given that Respondent must not only prove that the acts it alleges did occur, but also that the reason for Grievant's neglect of duty was more than simple negligence." *Tolliver v. Monroe County Bd. of Educ.*, Docket No. 01-31-493 (Dec. 26, 2001). Willful neglect of duty "is conduct constituting a knowing and intentional act, rather than a negligent act.[7] *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

[7]"It is not the label a county board of education attaches to the conduct of the employee . . . that is determinative. The critical inquiry is whether the board's evidence is sufficient to substantiate that the employee actually engaged in the conduct." *Allen v. Monroe County Bd. of Educ.*, Docket No. 90-31-021 (July 11, 1990); *Duruttya v. Mingo County Bd. of Educ.*, Docket No. 29-88-104 (Feb. 28, 1990).

120, 122 (1990); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996)." *Geho v. Marshall County Bd. of Educ.*, Docket No. 2008-1395-MarED (Oct. 30, 2008).

6. Respondent did not demonstrate that Grievant left LHS without proper authorization, or that he left his classroom unattended. Respondent did not demonstrate that Grievant's actions amounted to insubordination or willful neglect of duty.

Accordingly, this grievance is **GRANTED.** Respondent is **ORDERED** to remove all references to the five-day suspension from Grievant's personnel file and from any other files maintained by Respondent, to restore all benefits lost as a result of the five-day suspension, and to pay him backpay for the five days. As Grievant did not request interest, none will be awarded.

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 § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: July 20, 2011