THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

MELISSA A. CORNELL,
Grievant,

v. **DOCKET NO. 2013-1289-BroED**

BROOKE COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed by Grievant, Melissa A. Cornell, at level three of the grievance procedure, on February 12, 2013, contesting her suspension and the subsequent termination of her employment by the Brooke County Board of Education for failure to report to work as required. The relief sought by Grievant is:

> Reinstated to my job. All my seniority and building seniority. My pay from 1-17-13 until the results of my level 3 hearing. My insurance from 1-17-13 until the results of my level 3 hearing. The job I bid on at Milsop Primary because I have more seniority than the custodian that was placed in the job.

A level three hearing was held before the undersigned Administrative Law Judge on June 7, 2013, in the Grievance Board's Westover office. Grievant was represented by Daniel L. McCune, Esquire, Sellitti, Nogay & McCune, P.L.L.C., and Respondent was represented by David F. Cross, Esquire, Brooke County Assistant Prosecuting Attorney. This matter became mature for decision on July 8, 2013, the deadline for submission of Proposed Findings of Fact and Conclusions of Law. Grievant declined to submit written proposals.

Synopsis

Grievant was terminated from her employment as a Custodian after she failed to report to work from December 18, 2012, through January 16, 2013, did not call to report off work, and the absences were unpaid and unapproved. Grievant also attempted to report to work on one of these days with her grandchild in tow, after she had specifically been told by the Superintendent that she could not bring her grandchild to work with her. Respondent demonstrated that Grievant abandoned her job, constituting willful neglect of duty, and that her actions further constituted insubordination. Grievant did not demonstrate that the punishment imposed was clearly disproportionate to the offense.

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

Findings of Fact

1. Grievant was employed by the Brooke County Board of Education ("BBOE") as a Custodian at Follansbee Middle School. Prior to her dismissal, she had been employed at Follansbee Middle School since 2006, and was classified as a Custodian IV. She had been employed by BBOE since February 1998, as a substitute for three years, and then as a full-time Custodian.

2. Grievant's daughter became addicted to drugs, and in November 2012, Grievant was designated as the legal guardian of her daughter's two children, ages three and five. The three-year-old stayed with his paternal grandmother during the week, who was not the five-year-old's grandmother. Grievant's five-year-old granddaughter had to be at school at 8:00 a.m. Grievant's work hours were 6:00 a.m. to 2:00 p.m., and Grievant

had no family member to watch her granddaughter from 6:00 a.m. to 8:00 a.m., and then take her to the school she had been attending. Had Grievant moved her granddaughter to a different school close to where she resided in Pennsylvania, she could have left her granddaughter with a family member, but she did not believe it was in the child's best interest to change schools at that time. Grievant did not look for day care for her granddaughter. Grievant began taking leave time to care for her granddaughter.

3. On November 26, 2012, Grievant spoke with BBOE Superintendent Kathy Kidder-Wilkerson about requesting a leave of absence from BBOE until January 1, 2013, hoping that her daughter would be able to assist with care of the children by that time. A BBOE meeting was scheduled for that evening, and Superintendent Kidder-Wilkerson told Grievant that, despite the fact that the agenda had already been finalized, she would submit her request to the Board that evening, and she did so. Grievant did not attend the Board meeting. BBOE denied Grievant's request for a leave of absence, and Grievant was advised of this by letter dated November 27, 2012.

4. At the time of Grievant's request for a leave of absence she still had personal days and vacation days that she could use to report off work, and she did so. On December 18, 2012, Grievant ran out of vacation days and personal days. Grievant then inquired about whether she would be eligible to receive leave donations from other employees, and was told that her situation did not qualify for this program.

5. Grievant did not report to work from December 18, 2012, through January 11, 2013, and those days were unapproved, unpaid absences.

6. On January 10, 2013, Superintendent Kidder-Wilkerson sent Grievant a letter of reprimand for unapproved personal leave on December 18, 19, and 20, 2012. The letter

stated that “future absences of unapproved personal leave may result in suspension, with or without pay, and/or termination of your employment with Brooke County Schools.

7. Grievant called Superintendent Kidder-Wilkerson on Friday, January 11, 2013, regarding the reprimand, and became angry with the Superintendent during the conversation. She told Superintendent Kidder-Wilkerson that the only way she could report to work was if she brought her granddaughter to work with her. Superintendent Kidder-Wilkerson told her she could not bring her granddaughter to work with her, and Grievant hung up on her.

8. BBOE Assistant Superintendent Marty Bartz called Grievant on January 11, 2013, after Grievant’s conversation with Superintendent Kidder-Wilkerson. Assistant Superintendent Bartz discussed with Grievant the problems she was having getting to work and getting her granddaughter to school, and he asked her if she had checked into day care for her granddaughter in the mornings. Assistant Superintendent Bartz believed that he and Grievant had a good conversation and had resolved the situation.

9. Sometime that same day Grievant spoke with Kim Johnson, Principal of Follansbee Middle School, and asked if she could come to work on Monday. Principal Johnson told her she could, but she could not bring her granddaughter with her. Grievant reported to work on Monday, January 14, 2013, with her granddaughter. Ms. Johnson was already at school, and Grievant called her from the parking lot. Principal Johnson advised Grievant again that she could report to work, but she could not bring her granddaughter to work with her. Grievant told her she had her granddaughter with her, and Grievant left and did not return to work that day.

10. Grievant did not report to work on January 15 or 16, 2013, nor did she call any BBOE personnel to report that she would not be coming to work.

11. At some point on January 16, 2013, Grievant spoke with Principal Johnson, who advised Grievant of a day care close to the school, and that the school bus would stop at the day care and the personnel there would put her on the bus. Grievant contacted the day care that day, and was advised that they could take her granddaughter the next day, but that she could not drop her off until 6:15 a.m. Grievant spoke with Principal Johnson about this problem, and Principal Johnson told her she could come to work late after dropping her granddaughter at day care, and work late to make up the time. Grievant did so on January 17, 2013, reporting to work around 6:15 a.m.

12. By letter dated January 17, 2013, Superintendent Kidder-Wilkerson advised Grievant that she was being suspended without pay for 20 days, beginning January 18, 2013, and that she was recommending that her employment be terminated. The stated reasons were insubordination and willful neglect of duty for failure to report to work from December 21, 2012, through January 16, 2013, and for bringing her grandchild to work with her after being told not to do so. Assistant Superintendent Bartz gave Grievant this letter at Follansbee Middle School on the afternoon of January 17, 2013.

13. At a meeting of BBOE on February 5, 2013, Grievant's employment was terminated.

14. During the 2012-2013 school year, through January 16, 2013, Grievant did not report to work on 55 1/2 days, using 3 personal days, 15 ½ sick days, 18 vacation days, 1 "legal" day, and 18 days of unapproved, unpaid days.

15. From 2010 through 2013, Grievant received four point of reference letters noting deficiencies in her performance which required correction. Grievant corrected all the deficiencies and received good performance evaluations. Other than the point of reference letters and the written reprimand in January 2013, Grievant had no prior disciplinary record.

16. Prior to January 2012, BBOE allowed employees to take an unlimited number of "dock days." An employee who did not wish to report to work could take a day without pay by calling in to report off work. Grievant had taken many dock days prior to January 2012. In January 2012, BBOE placed a limit on the number of dock days an employee could take.

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 on 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 contendere to a felony charge." In the instant case, Respondent dismissed Grievant for insubordination and willful neglect of duty.

"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.[1] *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,

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[1] "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).

1996)." *Geho v. Marshall County Bd. of Educ.*, Docket No. 2008-1395-MarED (Oct. 30, 2008).

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.*, 212 W. Va. 209, 569 S.E.2d 456 (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). "[F]or there to be '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, supra.* In other words, there must be not only a refusal to obey a reasonable and valid order, but the refusal must be wilful. *Id.* "[F]or a refusal to obey to be 'wilful,' the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." *Id.*

Respondent demonstrated that Grievant willfully abandoned her position after her request for a leave of absence was denied, constituting both willful neglect of duty and insubordination. She also brought her granddaughter to work with her after being specifically told that she could not do so, also constituting insubordination. While Grievant was undoubtedly in a very difficult situation, the solution to the problem she faced was not to abandon her job and defy the clear instructions of the Superintendent and Principal Johnson.

Grievant asserted that she should have been allowed to bring her granddaughter to work with her, comparing her situation to that of teachers who bring their children to work with them on days when school is on a two-hour delay. While the difference between the duties of a Custodian and those of a teacher before students are in class is painfully obvious, this issue is not properly before the undersigned. Grievant was told she had to report to work and did not do so, and she was told she could not bring her grandchild to work with her, yet did so anyway. Regardless of whether she should have been allowed to bring her grandchild with her, her blatant disregard of clear instructions constitutes insubordination. "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).

Grievant stated that she never thought her employment would be terminated, and that she did what she had to do to take care of her grandchild. As soon as Principal

Johnson told her that a local day care facility would put the child on the bus, she contacted the facility and found out that they would take her grandchild the next day. Principal Johnson approved Grievant to come in as soon as she dropped her grandchild off, and work late, and she did so on January 17, 2013, having resolved the problem. That same day she was advised of her suspension, and recommendation of termination. Grievant sought to have the punishment at least reduced.

"The argument a disciplinary action was 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)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995)(citations omitted). The 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). "Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall not substitute her judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997)." *Meadows, supra.*

Respondent's personnel were well aware of Grievant's situation, her minimal efforts to resolve the situation, and that she had finally, after two months, resolved the problem of how to get her granddaughter to school in the mornings. Respondent found it all to be too little, too late. While Grievant's commitment to her granddaughter's well-being is certainly to be commended, she did not show any commitment to her job, abandoning her responsibilities to Respondent for a month, and seemed to think that Respondent's personnel owed her something. She seemed to blame Assistant Superintendent Bartz and Principal Johnson for this situation because they did not mention the day care to her earlier. She became angry at Superintendent Kidder-Wilkerson over the written reprimand that she brought on herself. At some point, Grievant needed to take some responsibility for her own choices, which she never did. It is unfortunate that Respondent's personnel determined that Grievant's employment should be terminated, but the undersigned is not going to second-guess this determination. Grievant abandoned her job, and she did not demonstrate that the penalty imposed was clearly excessive. *See, Bachman v. Potomac State College of WVU*, Docket No. 07-HE-198 (Jan. 17, 2008).

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. 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).

3. 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 contendere to a felony charge."

4. "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. *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)(footnote omitted).

5. 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.*, 212 W. Va. 209, 569 S.E.2d 456 (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). "[F]or there to be '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, supra.* In other words, there must be not only a refusal to obey a reasonable and valid order, but the refusal must be wilful. *Id.* "[F]or a refusal to obey to be 'wilful,' the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." *Id.*

6. Respondent demonstrated that Grievant willfully neglected her duty by abandoning her job, and was insubordinate.

7. “The argument a disciplinary action was 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).” *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

8. In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995)(citations omitted). The 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). “Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall not substitute her judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12,

1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997)." *Meadows, supra.*

9. Grievant did not demonstrate that the penalty imposed was clearly excessive.

Accordingly, this grievance is **DENIED.**

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: August 15, 2013