THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

MARK MYERS,
Grievant,

v. **DOCKET NO. 2012-1282-MonED**

MONONGALIA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed at level three of the grievance procedure by Grievant, Mark Myers, on May 8, 2012, against his employer, the Monongalia County Board of Education, contesting a two-day suspension without pay. The relief sought by Grievant is "compensation for lost wages with interest, restoration of seniority and all other benefits lost due to the suspension, and removal of all references to the suspension from his record."

Two days of hearing were held at level three before the undersigned Administrative Law Judge, on August 20 and October 16, 2012, in the Grievance Board's Westover office. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by Denise M. Spatafore, Esquire, Dinsmore & Shohl, LLP. This matter became mature for decision on receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on November 28, 2012.

Synopsis

Grievant was suspended for two days without pay for failure to make sure his absence was properly recorded in the SmartFind Express system, as he was required to do. Grievant was aware that he was responsible for recording his absences in this system, but failed to maintain his password and identification number in a secure place where he would be able to access it if he forgot them them, which he did, and consequently did not timely record his absence in the SmartFind Express system. Grievant's failure to follow through on this responsibility constitutes willful neglect of duty.

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 Monongalia County Board of Education ("MBOE") since 2000, and is employed in the Maintenance Department as a Plumber/Heavy Equipment Operator.

2. Employees in the Maintenance Department of MBOE are required to complete three steps when they are absent from work either due to illness or when they take a personal leave day. First, they must complete an absentee form and submit it to their supervisor for his signature. Second, they must call the SmartFind Express online absence system, or sign on using the computer, and enter the data to report the absence prior to the absence. Third, they must personally report the absence to the clerk/secretary in the Maintenance Shop, Rosemary Marsh, and their supervisor, Kermit Hess, or leave a message reporting the absence.

3. It is the employee's responsibility to make sure all absences are recorded in the SmartFind Express system, and if the absence is not recorded in SmartFind Express by the end of the day of the absence, it cannot be recorded by the employee in SmartFind Express.

4. The SmartFind Express system has been used by MBOE for at least ten years. From its inception, employees were assigned an identification number, which has remained the same for this entire period for each employee, and could report their absences to the system by telephone. For several years, some Maintenance Department employees, including Grievant, did not report their absences on SmartFind Express, and Ms. Marsh would enter the absence information for them on WVEIS. This method was not ideal because SmartFind Express is connected to the payroll department, and data entered into SmartFind Express is immediately reflected in payroll records, while data entered into WVEIS does not go directly to payroll and other steps must be taken to assure that payroll records are accurate. Also, when Ms. Marsh entered the absence for the employee, she would not always be aware of whether the absence should be shown as sick leave or personal leave.

5. In approximately 2008, the SmartFind Express system was upgraded, employees were assigned a password, and employees could enter their absences either by telephone or computer.

6. In early 2011, many Maintenance Department employees, including Grievant, were still not entering their absences in the SmartFind Express system. The Maintenance Department employees received additional training on how to report absences using SmartFind Express and were assigned a password, if they did not already have a

password. Shortly after this training, employees were expected to enter their absences themselves on SmartFind Express, and it was made clear to employees that they were responsible for entering their absences themselves on SmartFind Express. Ms. Marsh was told by Mr. Hess that she was not to enter absences for employees on WVEIS, and she no longer does so.

7. Grievant was severely injured on the job, and was off work from June 8, 2011, through March 6, 2012.

8. In late March 2012, Grievant completed a leave slip to take off work on April 4 and 5, 2012, and submitted it to Mr. Hess. Grievant also told his supervisor and Ms. Marsh that he was taking leave time on April 4 and 5, 2012. Grievant did not enter his leave time into SmartFind Express for April 4 and 5, 2012, as he was required to do.

9. Grievant does not own a computer, and has had difficulty entering data into SmartFind Express using his cell phone. In late March or early April 2012, Grievant asked Ed Rancjik, Supervisor of Facilities, Environmental Services, Warehouse Services, and Custodial Services, to assist him in using the computer to access SmartFind Express to enter his absence, as Grievant was having difficulty with this process. Mr. Rancjik often assisted employees with computer problems, as he was viewed as the on-site technology person. Mr. Rancjik assisted Grievant, but ultimately Grievant could not access SmartFind Express to report his absence because Grievant could not remember his identification number or password, and had not tried to obtain this information upon his return to work.[1]

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[1] Grievant testified that he was "locked out" of the system because he had been off work. The testimony of the witnesses familiar with the computer system was that Grievant would not have ever been "locked out" of SmartFind Express. Grievant also indicated that his password may have been changed by someone, even though Respondent's records

Mr. Rancjik told Grievant he would have to contact Traci Charleton, a Secretary/Computer Operator employed by MBOE, to obtain his password and identification number. Grievant then attempted to contact Ms. Charleton, but was told Ms. Charleton had taken the week off. Grievant took no other steps to make sure his absence was entered into SmartFind Express until after April 4 and 5, 2012, and did not report to his supervisor, Mr. Hess, that he could not enter his absence on SmartFind Express. Mr. Hess became aware that the absence had not been entered on SmartFind Express when Grievant's absence did not appear on the payroll reports he receives to review.

10. When Ms. Charleton returned later in April, after the time period had passed for Grievant to record his April 4 and 5, 2012 absence on SmartFind Express, Grievant contacted her and obtained his identification number and password from her, and has been able to record his absences in SmartFind Express since this time.

11. By letter dated April 30, 2012, Grievant was notified that MBOE Superintendent Frank D. Devono would recommend that he be suspended for two days without pay for "refusal to properly report our absences. As you know, you are to report off by calling your supervisor and by entering your absence in SmartFind Express. . . . You have refused or failed to do this, specifically on April 4 and 5, 2012. Instead you call the maintenance office and expect the secretary to enter your absences. Over the last years your failure to call off properly has placed an undue burden on your secretary and our

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do not indicate that this occurred. Mr. Rancjik testified that Grievant could not remember his identification number and password, which seems to be the most logical explanation. Given that Grievant is not very computer literate, his conclusion with regard to the nature of the problem is of little value.

payroll department who have had to reconcile your attendance over the school year." MBOE approved the Superintendent's recommendation on May 7, 2012.

12. After the training in early 2011, Grievant still was not always entering his absences on the SmartFind Express system. On at least a few occasions, this was because he was not saving the data by pushing the pound key when he was finished. By letter dated June 22, 2011, Grievant was advised by MBOE Assistant Superintendent Donna Talerico that "there were some inconsistencies in the reporting of your absences with the Smart Find Absence reporting system earlier this year." Ms. Talerico considered this to be a disciplinary letter, but the letter does not indicate that it is a reprimand. Due to his injury, Grievant was not living at his home address at the time this letter was accepted by his son at his home address, and Grievant was not aware of this letter until late April 2012, however, the letter also indicates that Ms. Talerico had discussed the problem with Grievant in May 2011.

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."

MBOE argued that Grievant's failure to comply with the requirement that he record his absence using SmartFind Express constitutes insubordination and/or willful neglect of duty. Grievant argued that he made a good faith effort to record his absence in the SmartFind Express system, but essentially was unable to complete the process due to circumstances beyond his control.

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.*

"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.[2] *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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[2] "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).

Respondent characterized Grievant's noncompliance as a "blatant example of willfully defiant conduct, and pointed out that Grievant had numerous excuses. While the undersigned can certainly sympathize with Grievant's issues with using the computer, it does not appear that Grievant has taken a serious interest in assuring that he has completed his obligation to report his absences on SmartFind Express. When an employee forgets his identification number and password, and has not taken steps to either secure that information in a place where he can access it, or inquired in advance from those who would have that information, it is clear that he has no real concern about this issue. While the undersigned cannot find a defiance of authority in Grievant's attitude, his lack of regard for the importance of this requirement constitutes willful neglect of duty. Grievant had many years to master the steps required to properly report his absences, but took little interest in doing so. It is unfortunate that MBOE needed to do something to get Grievant's attention, other than provide training and tell him to report his absences on SmartFind Express.

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 "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.*

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. *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).

6. Respondent demonstrated that Grievant knew he was required to report his absences on SmartFind Express, but he failed to do so because of his own inattention to the matter. Respondent proved the charges against Grievant.

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 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: January 11, 2013