WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ROBERT CLINE,

Grievant,

v. **Docket No. 2015-0904-BraED**

BRAXTON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Robert Cline, was employed by Respondent, Braxton County Board of Education ("Board"), as a science teacher and football coach. Mr. Cline filed an expedited level three grievance form[1] dated February 20, 2015, alleging, among other things, that the administration did not have good cause for terminating his employment, and did not follow progressive discipline, nor provide Grievant with an opportunity to improve.[2] As relief, Grievant seeks "[r]einstatement to all positions, back pay for all time suspended without pay and post-termination, and attorney fees and costs."[3]

A predetermination hearing was held before the Board on February 12, 2015. Grievant was present and represented by Daniel R. Grindo, Esquire. The Respondent

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[1] *See* W. VA. CODE § 6C-2-4(a)(1).

[2] The entire statement of grievance is part of the record of the Board hearing and is incorporated herein by reference.

[3] It is well established that the Grievance Board does not have the authority to award attorney fees in the absence of a finding of extreme bad faith. *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); *See Ferrell, et al. v. Reg. Jail & Corr. Facility Auth./Western Reg. Jail*, Docket No. 2013-1005-CONS(A) (June 12, 2014). WEST VIRGINIA CODE *§ 6C-2*-6 titled, "Allocation of expenses and attorney's fees," 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." *Cosner v. Div. of Highways,* Docket No. 2008-0633-DOT (Dec. 23, 2008). Accordingly, the issue of attorney fees will not be addressed further herein.

was represented by Rebecca M. Tinder, Esquire, Bowles Rice LLP. Following the hearing the Board voted to approve the recommendation of the superintendent and terminate Grievant's employment with the Board as a teacher and coach. Mr. Cline filed a timely grievance contesting the action of the Board and a level three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on June 11, 2015. The parties appeared and were represented by the same counsel as in the Board hearing. This matter became mature for decision on July 14, 2015, with receipt by the Grievance Board of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Respondent terminated Grievant's teaching and coaching contracts after an investigation after a complaint was lodged by a local resident. Respondent alleged that Grievant was guilty of insubordination for violating rules and policies, and willful neglect of duty by spending large amounts of time texting while he was supposed to be teaching. Respondent failed to prove that Grievant intentionally violated policies and rules related to leaving school, but did prove Grievant was guilty of willful neglect of duty.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter, including but not limited to the record of the hearing before the Board.

Findings of Fact

1. Grievant, Robert Cline, has been employed by Respondent, Braxton County Board of Education ("Board"), as a science teacher and coach since June 24, 1996.

2. During the time leading up to the termination of Grievant's employment, he was assigned to teach biology and physical science at Braxton County High School, and served as the coach of the high school football team.

3. On October 28, 2014, the husband of the high school athletic trainer met with Tony Minney, Principal of Braxton County High School, and alleged that Grievant had been in an inappropriate relationship with the athletic trainer which regularly interfered with Grievant's teaching responsibilities. Principal Minney reported the allegations to Superintendent of Schools, David Dilley.

4. By letter dated October 29, 2014, Superintendent Dilley suspended Grievant's employment with the Board pending an investigation into allegations of "inappropriate behavior during school hours."[4] The investigation into the allegations was initiated by Superintendent Dilly the same day. The investigation focused on the time period between the end of September, through the month of October 2014. (Respondent's Exhibit 2, Bd. Hearing)

5. By letter dated December 11, 2014, Superintendent Dilly again suspended Grievant pending Board action upon the Superintendent's recommendation to terminate Grievant's employment. Superintendent Dilly expressed his intention to make that recommendation at the Board meeting scheduled for December 18, 2014. He also

[4] *See* Respondent Exhibit 1, Bd. Hearing.

intended to ask the Board to ratify Grievant's prior suspension. Superintendent Dilly stated that the allegations against Grievant had been substantiated during the investigation. He specifically found that Grievant had neglected his duties as follows:

1. Left [his] classroom of students unsupervised;
2. Provided false information on the school sign-in sheet;
3. Failed to report an absence; and,
4. Engaged in ongoing text messages, unrelated to work, during your work day.

(Respondent's Exhibit 2, Bd. Hearing)

6. During the months of September and October 2014, Principal Minney received anonymous telephone calls complaining that Grievant was leaving his classroom during class time. During the investigation three specific instances were discovered during the month of October 2014.[5]

7. On October 16, 2014, Grievant left his second period class from 9:35 a.m. through 9:55 a.m. (Respondent's Exhibit 10, Bd. Hearing; Faculty/Staff Sign-Out Sheet). There was no adult supervising Grievant's students during this time period.

8. At the level three hearing Grievant testified that he left work early on October 16, 2014, because he was sick when he came to school and by lunch he realized that he could no longer work effectively. He stated that he specifically remembered this day because it was his birthday. When he was shown the sign-out sheet showing that he had signed out at 9:35 a.m. for the "fieldhouse" and at 12:30 p.m. for "lunch," Grievant indicated that he might be mistaken and went home ill on a different day.

[5] Closed circuit cameras are used to record the parking lot of the high school. The footage from those cameras was used during the investigation. The time period of the investigation is limited because the footage is only maintained for two weeks and then recorded over.

9. On October 24, 2014, Grievant left his sixth period science class for fifteen minutes and signed out to go to the athletic building. (Respondent's Exhibit 10, Bd. Hearing). There was a special education teacher assigned to the classroom during that time period. Her responsibility was to provide assistance to specific special needs students in the classroom with understanding the curriculum as set out in the students' IEP.[6] She was not responsible for preparing or providing material, instruction, or supervision to the entire class. Her attention was to be specifically focused on the special needs students.

10. On October 27, 2014, Grievant signed out for the day at 1:05 p.m. as "sick".[7] (Respondent's Exhibit 10, Bd. Hearing). Grievant did not notify an administrator that he was leaving and his students were left unattended in the school commons area.[8] Grievant told the school secretary that he was going home because neither administrator was in the office when he was preparing to leave. Grievant was assigned to teach three periods of physical science that afternoon, and the special education teacher was assigned to the first of the three. (Respondent's Exhibit 3, Bd. Hearing;

[6] Individual Education Plans.

[7] This may be the day that Grievant was thinking of when he testified that he went home ill on his birthday. However, there is no specific testimony to that effect, and it does not explain Grievant's insistence that he specifically remembered that day because it was his birthday.

[8] Superintendent Dilly testified that Grievant had left students unattended in the commons area six to ten other times. This testimony was based upon information told to him by the school secretary and two teachers. Superintendent Dilly could not identify the specific number of incidents, when the alleged incidents took place, nor how long the students may have been left on each occasion. None of the employees testified or gave written statements to Superintendent Dilly. This hearsay evidence is simply too unreliable to be given any weight. *See, Kennedy v. Dep't of Health & Human Res.,* Docket No. 2009-1443-DHHR (Mar. 11, 2010).

High School Class Schedule) No adult supervised those classes during the last two periods.

11. Respondent's Exhibit 10 is the "Braxton County High School Faculty/Staff Sign-Out Sheet". It covers twelve working days from October 13, 2014, through October 28, 2014. During the covered days, Grievant signed out during his planning period for either the "athletic field house" or "laundry" on nine days. He signed out during his assigned lunch period for "laundry" or "lunch" on eight days.

12. During the same time period, other faculty members signed out for "lunch" nearly twenty times, and numerous other locations including: Subway, Go-Mart, Foodland, Bank, Post Office and the Department of Motor Vehicles.[9] No other employee was disciplined for leaving the school premises. Principal Minney had not looked closely at the sign-out sheets until the investigation of the complaint against Grievant. Grievant received no prior warning about signing out regularly to go to the athletic facility or to get lunch.

13. The Braxton County High School Teacher Handbook requires teachers to be at the school prior to 8:00 a.m. and stay until 4:00 p.m. Teachers may leave early in emergency situations, but must let Principal Minney know they are leaving as early as possible. (Respondent's Exhibit 6, Bd. Hearing, Braxton County High School Teacher Handbook). Principal Minney interpreted this to mean that teachers could only leave the High School campus for emergencies. If that interpretation was correct, it was not enforced. (*See* FOFs 11 & 12, *supra,* and Respondent's Exhibit 10, Bd. Hearing.)

[9] There are a number of fast food businesses and convenient stores within a very short distance of the high school. One employee signed out for "jail" on two occasions for thirty minutes each time; an irrelevant curiosity for which no explanation was offered.

14. The Braxton County High School Teacher Handbook states the following regarding teacher planning periods:

> Planning periods are for the purpose of planning, collaborative planning, grading papers, preparing tests, copying materials, and contacting parents. It is "NOT" a FREE period for running, shopping, errands etc. Teachers are to remain on campus during their planning period and should be in the classroom or in the faculty planning area. If an occasion should arise that would necessitate a teacher having to leave school during their planning period, they must sign out in the office and sign in when they return. (Emphasis in original).

(Respondent's Exhibit 6, Bd. Hearing). Grievant has been provided with a copy of the Teacher Handbook each year that he has been employed at the High School.

15. Grievant regularly left the school building during his planning period, either to check on football team laundry in the athletic building or to go to get a sandwich for lunch. He also used that time to send texts ostensibly related to treatment progress of injured football players.

16. Braxton County Board of Education policy number 1950, *Cellular Phone and Electronic Communication Device Usage Policy,* states the following:

> 6.1. Employees of Braxton County Schools may possess a cellular phone or other ECD at work. However, when the individual is engaged in work for which the individual was hired, usage of such device is to be limited to job-related responsibilities. Violations by employees may result in disciplinary action. Use of the phone is to be out of the view of any and all students. (Respondent's Exhibit 8, Bd. Hearing).

17. Grievant's wife provided to the Board's administrators with a copy of the telephone bills for Grievant's cellular telephone during the period of September 2, 2014, through October 27, 2014. From that invoice a document was compiled reflecting text

messages sent by Grievant during specific class periods on twenty-one school days from September 29, 2014, through October 27, 2014. During that twenty-one day timeframe, Grievant sent text messages during his class periods as follows:

1st Period	Physical Science 9	192 texts
2nd Period	Physical Science 9	217 texts
3rd Period	Biology	106 texts
4th Period	Planning	157 texts
5th Period	Physical Science 9	119 texts
6th Period	Physical Science 9	130 texts
7th Period	Physical Science 9	127 texts
8th Period	Physical Science 9	128 texts

During the same twenty-one day period, Grievant sent 400 texts while he was conducting football practice as the head coach. On October 16, 2014, Grievant sent twenty-seven texts during 1st Period, thirty texts during 2nd Period and only eight texts during his planning period. Virtually all of these texts were sent to the Braxton County High School athletic trainer. (Respondent's Exhibit 9, Bd. Hearing).

18. During the investigation, Principal Minney compared Grievant's sign-out sheet entries with the video that was available for an eleven-day period to see if the video confirmed that Grievant accurately recorded where he went.

19. On nine of the eleven days Grievant signed out during his planning period. On all but one of those days he listed "laundry" as his destination. This meant that Grievant was going to the athletic building to check on the laundry for the football team. This activity is related to Grievant's extracurricular contract as a coach and not his teaching duties.

20. Everett Wine is a classroom teacher and a volunteer Assistant Athletic Director ("AAD") at Braxton County High School. One of the duties Mr. Wines performs as the AAD is to take care of the laundry for the football team. He washes and dries the

uniforms after the Friday night games and finishes them on Sunday if necessary. On week days Mr. Wine arrives at the athletic building around 4:45 a.m. for his daily workout and launders the practice apparel from the previous day before he reports to his teaching duties.

21. On October 13, 2014, Grievant signed out from 10:50 a.m. to 11:35 a.m. (his planning period) for "Laundry Ath. Add'n". The video revealed that Grievant left campus in his truck rather than go to the athletic addition. (Respondent's Exhibits 10, 16, & 17).

22. On October 16, 2014, Grievant signed out from 9:35 a.m. to 9:55 a.m. for the "Fieldhouse". The video footage showed Grievant leaving campus in his truck rather than going to the athletic addition. (Respondent's Exhibits 10, 16, & 17).

23. On October 27, 2014, Grievant signed out from 11:30 a.m. to 11:40 a.m. for "laundry". However the video revealed that Grievant sat in his truck in the parking lot instead. (Respondent's Exhibits 10, 16, & 17). Grievant signed out for the rest of the day as "sick" at 1:05 p.m. *See* FOF 10, *supra*.

24. At approximately 4:45 a.m. October 27, 2014, Mr. Wine found Grievant asleep in the coaching office area of the athletic building. Grievant had been locked out of his home that night, went to the athletic facility in the predawn hours and fell asleep. Grievant used the athletic facility clothes dryer to get the wrinkles out of his shirt and pants before wearing them to work that morning. Mr. Wine was concerned about Grievant and reported what he had seen to the Athletic Director. The Athletic Director took no action.

25. Grievant had the following prior disciplinary record:

- A letter dated March 15, 2007, from the school principal expressing that he felt deceived and embarrassed when he was questioned about the presence of wrestlers that Grievant had allowed to go to the State Basketball tournament without prior approval from the principal. (Respondent's Exhibit 12).
- A letter to Grievant and 4 other coaches from the principal dated March 22, 2007, raising 2 issues: Leaving locker room doors propped open after hours; and admonishing coaches to stay with all the kids on their teams and not to leave students at the high school to board buses unless the coach is with them. (Respondent's Exhibit 13).
- A note from the principal dated June 9, 2009, to Grievant stating *inter alia* "You need to call the system when you are going to be absent, If not that, I need to know in writing. I had no knowledge that you were going to be absent today. This has occurred before." (Respondent's Exhibit 14).
- On October 5, 2009, Grievant received a written reprimand by the Athletic Director for missing a week of practice with the football team while Grievant was an assistant coach. Grievant was participating in a Regional Bass Fishing Tournament that week. Grievant was required to apologize to the team and was suspended from coaching at a subsequent football game. This reprimand was related solely to Grievant's extracurricular contract as a coach. (Respondent's Exhibit 15).

Grievant did not contest any of these actions.[10]

26. By letter dated February 16, 2015, Superintendent Dilly informed Grievant that the Board had voted at the February 12, 2015, meeting to terminate his contracts as coach and teacher at Braxton County High School. The reasons for the Board's

[10] There was significant contention as to whether the documents from the principal were truly reprimands since that word was not specifically used. Regardless of the title given to these documents, they reflect that Grievant was notified in writing that he had failed to follow specified rules and admonished to do so in the future.

actions were "the same as those outlined in [Superintendent Dilly's] letter to [Grievant] dated December 11, 2014." *See* FOF 5, *supra.*

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

> . . . *See* [*Watkins v. McDowell County Bd. of Educ.,* 229 W.Va. 500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education,* 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). *See also Hovermale v. Berkeley Springs Moose Lodge,* 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

W. Va. Dep't of Trans., Div. of Highways v. Litten, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision).

W. VA. CODE § 18A-2-7 provides that "[t]he superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter." W. VA. CODE § 18A-2-8 goes on to state, in part, that:

> (a) 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.

Respondent contends that Grievant was guilty of insubordination because he knowingly and intentionally violated specific policies and rules set out in the *Employee Code of Conduct*,[11] and the Braxton County High School Teacher Handbook, among others.[12] Additionally, Respondent argued that Grievant willfully neglected his duties as a teacher and a coach by leaving his students unattended when class was supposed to be in session, and by failing to provide appropriate instruction and supervision by spending significant time participating in personal text messaging while he was supposed to be teaching and coaching.

Grievant counters that most of the rules Respondent points to are routinely unenforced and it is not reasonable to arbitrarily hold Grievant accountable when others are not. Grievant also argues that he was engaged in legitimate job related pursuits while he was texting in class and that it mostly took place during his planning period or when the students were engaged in completing assignments, and that he always did it in a way that the students could not see what he was doing.

The West Virginia Supreme Court of Appeals has held that, for there to be "insubordination," the following must be present: (a) an employee must refuse to obey

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[11] West Virginia Board of Education Policy 5902.

[12] Respondent alleges that Grievant violated W. VA. CODE § 6B-2-5(b)(1) which prohibits a public employee from using his office for private gain, but spending the night in his office and running his shirt and pants through the school's clothes dryer to get the wrinkles out before reporting to class. The evidence showed that it was not unusual for the coaches to use the athletic facility during odd hours and for long periods. Additionally, the single use of the dryer for this limited purpose is such a *de minimis* use of public resources that it can hardly be what the legislature envisioned when passing this act. Accordingly, this was not a legitimate reason for disciplining Grievant and will not be addressed further herein.

an order (or rule or regulation); (b) the refusal must be willful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd./Shepherd Coll.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (per curiam). The disobedience must be willful, meaning that "the motivation for the disobedience [was] contumaciousness or a defiance of, or contempt for authority." *Id.*, 212 W. Va. at 213, 569 S.E.2d at 460.

"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). 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." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *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).

A number of Grievance Board decisions have held that an employer can establish insubordination by demonstrating 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 authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995); *Domingues v. Fayette County Bd. of Educ.*, Docket No. 04-10-341 (Jan. 28, 2005); *Breck v. Putnam County Bd. of Educ.,* Docket No. 2011-

1542-PutED (February 13, 2012); *Robinette v. Boone County Bd. of Educ.,* Docket No. 2014-1437-BooED (Feb. 10, 2015).

The term "willful neglect of duty" encompasses something more serious than incompetence. The term "willful" ordinarily imports a knowing and intentional act, as distinguished from a negligent act. *Bd. of Educ. of the County of Gilmer v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120 (1990); *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 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). The Supreme Court noted in *Chaddock, supra,* that, “a continuing course of lesser infractions may well, when viewed in the aggregate, be sufficient” to constitute willful neglect of duty. *Hilton v. Wood County Bd. of Educ.,* Docket No. 2014-0140-WooED (May 16, 2014); *Williams v. Lincoln County Bd. of Educ*., Docket No. 2012-0669-LinED (Oct. 23, 2012).

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. *Moore v. Brooke County Bd. of Educ.,* Docket No. 2012-0741-BroED(R) (Nov. 27, 2013); *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).

Respondent makes much of the fact that Grievant left the High School grounds on occasion during his lunch and planning period and that he regularly reported on the sign-out sheet that he was going to the athletic building during his planning period to

check on the team laundry. The Teacher Handbook specifically states that planning periods are for activities related to a teacher's instructional duties including such things as preparation, collaboration and grading. The Handbook emphasizes that, It is "NOT" a FREE period for running, shopping, errands etc.[13] Additionally, the Handbook indicates that employees are expected to be at school for their entire work day unless required to leave for an emergency. Grievant's regular use of his planning period for coaching duties or fetching lunch was not consistent with the policy and Grievant was aware of the policy.

However, Grievant correctly points out that a large portion of the faculty regularly sign out for errands to such places as the bank or post office, as well as to pick up lunch from the nearby fast food emporiums. Clearly, the rules related to leaving campus and use of planning periods were not enforced and the employees believed they could run their various errands with impunity. Under those circumstances, it is arbitrary and capricious to single out Grievant for punishment without some indication that the enforcement practices had changed.[14] Additionally, given the pattern of non-enforcement, Grievant's failure to comply was not "sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination." *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995).

Respondent's contentions that Grievant gave false statements about where he was going during these periods are equally ineffective. Mr. Wine gave convincing

[13] Respondent's Exhibit 6,(Emphasis in original).
[14] For example, *See Farr v. Reg. Jail & Corr. Facility Auth./Southern Reg. Jail,* Docket No. 2009-0532-MAPS (Jan. 2, 2009), Where it was held that the employer could not dismiss a correctional office for improperly releasing an inmate where it had a fifteen year history of giving a two-day suspension for the same offense without first giving some prior notice to employees of this drastic change in enforcement.

testimony that he came to the athletic building at approximately 4:45 a.m. every morning and took care of the team's laundry while he worked out before school. He had finished the laundry for the team before he left to start his work day of teaching. Therefore, there was little reason for Grievant to be checking out each day to go to the athletic building for laundry. Grievant pointed out that the team had started with three washers and dryers, but due to malfunctions they were down to one set. He stated that he went to the athletic building to make sure the laundry was ready. It is plausible that Grievant may have been getting the last load from the dryer for folding. More to the point, with eleven days of video surveillance footage, Respondent discovered that, on two days when Grievant signed out to go to the athletic building, he left the campus instead. On a third such day he sat in his truck and talked on the phone. On the remaining eight days observed, it can be assumed that Grievant went to the athletic building. Grievant testified that on the two days he went to pick up a sandwich instead of going to the where he had indicated on the sign out sheet. The third day he was sitting in his truck. On only one of these occasions did Grievant miss class time. *FOFs* 7 & 8, *supra.* Grievant is obviously guilty of sloppy reporting but there is no indication that he was sneaking off for nefarious purposes. Given the overall circumstances, as well as the generally accepted practices evidenced by the sign-out sheet, Grievant's actions in this respect were neither fraudulent nor insubordinate.

The issue of neglect of duty is another matter altogether. Respondent proved that during a twenty-one day period Grievant sent more than 1,100 texts during the teaching workday and 400 texts during football practices. Virtually all of these texts were sent to the athletic trainer with whom Grievant was suspected to be engaged in an

extramarital affair.[15] Grievant's first defense to this charge is that the majority of the texting was done during his planning period or lunch. An examination of Respondent's Exhibit 9 reveals that the texts were fairly evenly distributed throughout the school day with the highest percentages occurring during Grievant's 1st and 2nd Period Physical Science classes. *See* FOF 17, *supra.*

Grievant then argues that the vast majority of the texts were "job-related." He notes that several football players had suffered injuries during the season and these texts to the athletic trainer were attempts to keep track of their treatment. This explanation defies credulity. It was not unusual for Grievant to send a score of texts during a single class period. For example, on October 16, 2014, Grievant sent a total of fifty-eight texts during his first two class periods alone. It is hard to imagine that many texts would be necessary if his entire offense had been hospitalized.

Additionally, even if Grievant's explanation is true, these texts were not related to the job he was being paid to perform at the time he made them. At best, they all would have been related to his coaching duties, but were made while he was supposed to be teaching science. Grievant testified that coaching a high school football team has become a twenty-four hour a day job which necessitated him spending class time and his planning periods attending to those responsibilities. Undoubtedly, sports have become a multi-billion dollar industry with around the clock media coverage. High school football games are televised on regional networks and young athletes are

[15] To be clear, whether Grievant was actually engaged in an affair was not proven and was not the stated reason for his dismissal. The existence or nonexistence of an affair has no relevance to this grievance except for the very limited purpose that it provides an alternative explanation for the proliferation of Grievant's texting activity beyond his checking on the progress of injured players.

competing for full scholarships to major universities. This enormous social pressure can, and does, force skewed priorities. However, WEST VIRGINIA CODE § 18A-4-16 (1) states that coaching jobs, like other extracurricular assignments, are responsibilities that occur on a regularly scheduled basis "at times other than regularly scheduled working hours." *Id.* Regardless of the significant community pressure to produce winning teams, it remains the public policy of the State of West Virginia, as expressed through its statutory law, that teachers who have extracurricular contracts as coaches must devote the time they are employed as teachers to instructional duties. Grievant did not do that. Grievant intentionally and willfully left his classes unattended, and devoted a great deal of time he was paid to be focused on the education of students, on, most likely, his personal pursuits, or at best, his secondary employment. In either case, he was willfully neglecting his duty to teach as contemplated by WEST VIRGINIA CODE 18A-2-8. His actions were not related to his competence to teach, which has not been brought into question. Rather they constituted an intentional failure to perform a work-related responsibility. *Adkins v. Cabell County Bd. of Educ.*, Docket No. 89-06-656 (May 23, 1990).

However, that is not the end of the inquiry. The West Virginia Supreme Court has held that "where the underlying complaints regarding a teacher's conduct relate to his or her performance . . . the effect of West Virginia Board of Education Policy 5300 is to require an initial inquiry into whether that conduct is correctable. *Maxey v. McDowell County Bd. of Educ*., 212 W. Va. 668, 575 S.E.2d 278 (2002). The provisions of Policy 5300 referred to by the Court have since been codified in W. VA. CODE § 18A-2-12a which states the following:

> (6) All school personnel are entitled to know how well they are fulfilling their responsibilities and should be offered the opportunity of open and honest evaluations of their performance on a regular basis and in accordance with the provisions of section twelve of this article. All school personnel are entitled to opportunities to improve their job performance prior to the termination or transfer of their services. Decisions concerning the promotion, demotion, transfer or termination of employment of school personnel, other than those for lack of need or governed by specific statutory provisions unrelated to performance, should be based upon the evaluations, and not upon factors extraneous thereto. All school personnel are entitled to due process in matters affecting their employment, transfer, demotion or promotion. . .

W. VA. CODE § 18A-2-12a (b)(6). The Court discussed this provision of Policy 5300 in detail in *Mason County Bd. of Educ. v. State Superintendent of Sch*., 165 W. Va. 732, 739; 274 S.E.2d 435 (1980) where it wrote:

> Our holding in *Trimboli, supra*, requires that a dismissal of school personnel be based on a § 5300(6)(a) evaluation after the employee is afforded an improvement period. It states that a board must follow the § 5300(6)(a) procedures if the circumstances forming the basis for suspension or discharge are "correctable." The factor triggering the application of the evaluation procedure and correction period is "correctable" conduct. What is "correctable" conduct does not lend itself to an exact definition but must, in view of the nature of the conduct examined in *Trimboli, supra*, and in *Rogers, supra*, be understood to mean an offense or conduct which affects professional competency.

Concerning what constitutes “correctable” conduct the Court noted that “it is not the label given to conduct which determines whether § 5300(6)(a) procedures must be followed but whether the conduct forming the basis of dismissal involves professional incompetency and whether it directly and substantially affects the morals, safety, and health of the system in a permanent, non-correctable manner.” *Mason County Bd. of*

Educ., supra. See Williams v. Lincoln County Bd. of Educ., Docket No. 2012-0669-LinED (Oct. 23, 2012).

The misconduct in this case was not related to professional competency. As stated previously, Grievant's competency was never questioned. Rather, he made an intentional choice to occasionally leave classes unattended, and devote nearly all of his planning time and large chunks of his instructional time to matters unrelated to his teaching job. Importantly, he seemed to believe he was justified in doing so because of the perceived expectations related to his extracurricular coaching assignment. Such conduct had the potential to directly and substantially affect the students he was charged with teaching and is not correctable. *Mason County Bd. of Educ., supra; Maxey v. McDowell County Bd. of Educ., supra.*

Respondent proved by a preponderance of the evidence that Grievant was guilty of willful neglect of duty as contemplated in WEST VIRGINIA CODE § 18A-2-8. Respondent also proved that Grievant's misconduct was unrelated to professional competence and therefore not correctable. Accordingly, the grievance is DENIED.

Conclusions of Law

1. As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

2. W. VA. CODE § 18A-2-7 provides that "[t]he superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or

suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter."

3. "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." W. VA. CODE § 18A-2-8 (a).

4. The West Virginia Supreme Court of Appeals has held that, for 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 willful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd./Shepherd Coll.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (per curiam). The disobedience must be willful, meaning that "the motivation for the disobedience [was] contumaciousness or a defiance of, or contempt for authority." *Id.*, 212 W. Va. at 213, 569 S.E.2d at 460.

5. An employer can establish insubordination by demonstrating 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 authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995); *Domingues v. Fayette County Bd. of Educ.*, Docket No. 04-10-341 (Jan. 28, 2005); *Breck v. Putnam County Bd. of Educ.,* Docket No. 2011-1542-PutED (February 13, 2012); *Robinette v. Boone County Bd. of Educ.,* Docket No. 2014-1437-BooED (Feb. 10, 2015).

6. Given the totality of the circumstances and the school administration's pattern of non-enforcement Grievant's failure to comply with the policies and rules cited by Respondent was not "sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination." *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995).

7. "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). "[A] continuing course of lesser infractions may well, when viewed in the aggregate, be sufficient" to constitute willful neglect of duty. *Bd. of Educ. of the County of Gilmer v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120 (1990); *Hilton v. Wood County Bd. of Educ.,* Docket No. 2014-0140-WooED (May 16, 2014); *Williams v. Lincoln County Bd. of Educ*., Docket No. 2012-0669-LinED (Oct. 23, 2012).

8. The term "willful neglect of duty" encompasses something more serious than incompetence. The term "willful" ordinarily imports a knowing and intentional act, as distinguished from a negligent act. *Bd. of Educ. of the County of Gilmer v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120 (1990); *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).

9. Respondent proved, by a preponderance of the evidence, that Grievant intentionally and willfully neglected his duty as contemplated by WEST VIRGINIA CODE 18A-2-8 by leaving some classes unattended and spending large portions of time he

was supposed to be teaching to texting matters unrelated to instruction. His actions were not related to his competence to teach, but rather constituted an intentional failure to perform a work-related responsibility. *Adkins v. Cabell County Bd. of Educ.*, Docket No. 89-06-656 (May 23, 1990).

10. "[W]here the underlying complaints regarding a teacher's conduct relate to his or her performance . . . the effect of West Virginia Board of Education Policy 5300 [now W. VA. CODE § 18A-2-12a] is to require an initial inquiry into whether that conduct is correctable." *Maxey v. McDowell County Bd. of Educ*., 212 W. Va. 668, 575 S.E.2d 278 (2002).

11. "What is "correctable" conduct does not lend itself to an exact definition but must . . . be understood to mean an offense or conduct which affects professional competency. "[I]t is not the label given to conduct which determines whether § 5300(6)(a) procedures must be followed but whether the conduct forming the basis of dismissal involves professional incompetency and whether it directly and substantially affects the morals, safety, and health of the system in a permanent, non-correctable manner." *Mason County Bd. of Educ. v. State Superintendent of Sch*., 165 W. Va. 732, 739; 274 S.E.2d 435 (1980). *See Williams v. Lincoln County Bd. of Educ*., Docket No. 2012-0669-LinED (Oct. 23, 2012).

12. The misconduct in this case was not related to professional competency. The proven misconduct had the potential to directly and substantially affect the students Grievant was charged with teaching, was not related to professional competence, and therefore, was not correctable. *Mason County Bd. of Educ. v. State Superintendent of*

Sch., 165 W. Va. 732, 739; 274 S.E.2d 435 (1980); *Maxey v. McDowell County Bd. of Educ*., 212 W. Va. 668, 575 S.E.2d 278 (2002).

Accordingly, the 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).

DATE: SEPTEMBER 23, 2015

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE