WILLIAM K. BROWNING,

Grievant,

v. Docket No. 96-29-154

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, William Browning, grieves his ten day suspension stating the Mingo County Board of Education ("MCBOE") failed to prove its charges of insubordination and willful neglect of duty. He requests as relief that he be paid for the time he was suspended, and that his record be cleared of the suspension. A hearing on this suspension was held before MCBOE on April 4, 1996, at which time MCBOE reduced the suspension recommended by Superintendent Everett Conn from fifteen days to ten days. The case was appealed directly to Level IV, and a hearing was requested. Subsequently, the parties submitted the case on the record developed at the hearing before the Board, with the additional submission of an affidavit from an employee of the Central Office. This case became mature for decision on August 1, 1996, the extended deadline for the parties' proposed findings of fact and conclusions of law.

The record below is somewhat sparse and the evidence presented is contradictory. At times, Grievant even contradicts his own prior testimony. Even thoughthe parties did not appear before the undersigned, it will be necessary, in this case, to make a judgment from the record on the parties' credibility.

Background

On February 6, 1996, Superintendent Conn wrote Grievant explaining he was recommending Grievant's suspension to MCBOE and identifying Grievant's rights. This letter stated in pertinent part:

> This suspension is made on the grounds of insubordination and willful neglect of duty in that you failed to perform your duties as custodian and to report for duty on November 27, 28, December 20, 22, 1995 and February 4, 5, 1996, although directed to do so by your principal and Central Office Personnel.

At the April 4, 1996 MCBOE board meeting, Superintendent Conn recommended Grievant receive a fifteen-day suspension for insubordination and willful neglect of duty. A pre-suspension hearing was held, and MCBOE upheld the suspension, but reduced the length to ten days, instead of fifteen.

Mr. James Williamson, principal at Williamson High School ("WHS"), stated he had difficulty with Grievant before, and had "a hearing or meeting" with him during the summer to talk with him about his areas of deficiency. It does not appear that any disciplinary action was taken as a result of this meeting. He stated Grievant started the school year with a somewhat improved performance from the prior year.

Principal Williamson testified that on November 27 and 28, 1995, Grievant did not report to work, and the building was closed when he arrived. Grievant is supposed toarrive at 7:00 a.m. to open the building and check the heat before the students arrive. (See footnote 1) Grievant did not call Principal Williamson prior to the principal's arrival at school. Principal Williamson arrived around 7:15 a.m. When Grievant did call in, he stated he was sick and requested sick leave for these two days. (See footnote 2) Presented into evidence was a sick leave request, with his name, for both of these days. This form requires a signature below a statement reading: "I hereby certify I was absent on date indicated for the reason stated and I am entitled under Board of Education regulations to be paid for such leave." Grievant signed this form.

Principal Williamson had heard Grievant was also employed by the RJ Coal Company at Thacker. He called a company employee and confirmed Grievant had reported to work on both the afternoons of the 27th and 28th after he had requested the sick days. Principal Williamson did not approve Grievant's leave request.

Principal Williamson further testified that on December 20, 1995, Grievant did not report to work or call in. After two hours, he requested a substitute from the Central Office, and then went to a scheduled meeting outside the school. He received a phone call from his secretary while he was at this meeting informing him that he now had a substitute and Grievant working at the school. Superintendent Conn arrived at the school shortly thereafter and resolved the problem by telling both individuals to work only four hours. December 22, 1995, was the day before faculty were dismissed for Christmas break. Principal Williamson stated he had planned to release his staff early, at 2:00 p.m. He testified Grievant left the building at 1:00 p.m., did not inform him, but told the office

staff he had to report to his other job; he could not stay any longer.

Due to a snow storm, schools were closed the week prior to February 5, 1996, the next identified incident. (See footnote 3) Grievant was expected to report at 6:00 a.m., his identified starting time. Principal Williamson had called Grievant at home on the previous Sunday evening, February 4, and told his mother, who answered the phone, he was expected to work the following day. She assured Principal Williamson he would get the message. By 8:00 a.m., Grievant had not reported to work nor had he called in to report off. Principal Williamson attempted to contact Grievant, but Grievant was not at home. Grievant never told Principal Williamson why he had not reported to work, but Principal Williamson "heard through the grapevine that he said the roads were to[o] bad." Trans. Board hearing at 6. (See footnote 4) Principal Williamson discussed this situation with Superintendent Conn. He suggested or recommended to the Superintendent that Grievant receive a suspension.

Under cross-examination, Principal Williamson stated he had a conversation with Grievant's representative, Mr. Angel, sometime in December, about these problems. In response to Mr. Angel's question, "all through January, you did not have any problem, he was there?" Principal Williamson's reply was, "He was there, but he was late."

Superintendent Conn decided a fifteen day suspension would be fair, as that was the same discipline given to two other custodians. Mr. Conn also testified that he had instructed Principal Williamson not to sign the sick leave request for November 27 and 28, 1995, as an employee could not receive sick pay while working at another job. Superintendent Conn also stated Principal Williamson informed him that when Grievant did not report to work on February 5, 1996, because his car broke down, (See footnote 5) Grievant had driven his four-wheeler to work at the coal company. Superintendent Conn also stated, that during the year, he had driven by the school and noted that students were present, the building was dark, and "kids were running around outside with no lights or anything on."

Ms. Pam Varney is a Clerk II employed in MCBOE's Central Office. She reports to work at 5:00 a.m., and it is her job to monitor the switchboard and receive the phone calls from employees who will not be able to report to work. In her affidavit, submitted at Level IV by the agreement of both parties, she states she received phone calls from Grievant in November and December, 1995, and February 1996. Grievant told her he could not report to work because his truck was broken, and he had no other way to getto WHS. Since she had known Mr. Browning and his family for many years,

she offered to pick him up and drive him to work when he needed transportation. Grievant repeatedly refused this free assistance.

Grievant testified on his own behalf. As previously stated, Grievant's testimony was frequently contradictory and confusing. When asked about calling in sick on November 27 and 28, 1995, his first response was, "I did call in sick. My truck was tore up and I could not make it to work . . . . I could not take sick days because I did not have sick days to take." Later in his testimony Grievant testified, "Yes. I may have taken a couple of sick days or personal days, I don't know." Then in response to a question as to whether Grievant took sick leave to work at the coal company, Grievant stated, "Not unless they changed it at the Board office." When asked again if he did not claim a sick day at this time Grievant stated, "Like I told you, I don't remember dates, if I took a sick day I might have said a sick day but I meant personal day is what I am saying." (See footnote 6)

These exchanges resulted in further questions about Grievant's leave request dated November 27, 1995. In his leave request he asked for sick leave for November 27 and 28, and personal leave for November 29 and 30 and December 1. When handed the leave request Grievant responded, "Like I said you all could have changed it." Grievant then admitted it was his signature at the bottom of the page, but that he did not fill in the other spaces. The following exchange then took place.

> Mr. Smith: Mr. Browning, are you saying that somebody changed this after you signed it?
>
> Grievant: I am not saying that nobody done nothing.
>
> Mr. Smith: Your answer to my question is no?
>
> Grievant: I don't know.

Grievant did not testify about the December 20, 1995 incident, but did respond to the charges about leaving early on December 22, 1995, without permission. He testified that he believed Principal Williamson had instructed the staff to come in at 7:00 a.m., and he came in at 6:00 a.m. He also stated, "I never ask to leave early," and that he left at 1:45 p.m. Grievant stated, "I had worked my hours." Grievant also testified he frequently adjusts his hours by staying later if he comes in late or thinks he may need to leave early another day. There was no evidence that he had anyone's permission to change his schedule in this way, or made other arrangements for opening the school when he arrived late.

About the February 5, 1996 incident, Grievant stated he was on his way to work when he slid into a ditch. He walked to his brother's house to get him to pull him out and then drove home. He stated that when he got there he found out the school had called at 8:00 a.m., and wanted to know where he was. Grievant said then he tried to call the school, but his phone was out. Apparently his phone was working a little later on, because the school called again at approximately 1:30 p.m., and asked why he had not reported to work or called to report his absence. It appears that Grievant did not attempt to call WHS from his brother's house. When asked if he went to work at the coal company on February 5, 1996, the following exchange took place:

Mr. Smith: [D]id you go to work at RJ Coal Company that evening?

Grievant: No I sure did not.

Mr. Smith: You are telling me that you did not.

Grievant: Let me think, I don't know.

Mr. Smith: Take your time.

Grievant: I probably did work.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Kitzmiller v. Webster County Bd. of Educ., Docket No. 90-51-352 (Dec. 28, 1990), citing Dillon v. Bd. of Educ., 351 S.E.2d (W. Va. 1986); Albani v. Mineral County Bd. of Educ., Docket No. 90-28-016 (Nov. 30, 1990). Moreover, the authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code §18A-2- 8, as amended, 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).

W. Va. Code §18A-2-8 provides, in pertinent part:

> Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompe tency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea of nolo contendere to a felony charge. A charge of unsatisfactoryperformance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article.

The suspension letter from Superintendent Conn indicates that Grievant was suspended for insubordination and willful neglect of duty. Insubordination involves 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, an employer must demonstrate that 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). (Cf. Rogliano v. Fayette County Bd. of Educ., Docket No. 94-10-164 (Oct. 25, 1994), where it was determined that "Grievant was given ample opportunity and notice that disciplinary action would be taken against him . . . ."). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha- Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990).

When an employee is discipline for willful neglect of duty, the respondent must also prove its case by a preponderance of the evidence. Arbaugh v. Putnam County Bd. of Educ., Docket No. 90-40-437 (May 22, 1991). 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. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398S.E.2d 120 (1990). Although the West Virginia Supreme Court has not formulated a precise definition of "willful neglect of duty", it does encompass something more serious than incompetence and imports "a knowing and intentional act, as distinguished from a negligent act." Chaddock, supra.

Additionally, an Administrative Law Judge is responsible for determining the credibility of the testimony before her. Perdue v. Dept. of Health and Human Resources/Huntington State Hosp.,

Docket No. 93-HHR-050 (Feb. 4, 1994). The fact that this testimony is offered in written form does not alter this responsibility. Determinations of credibility in this case were based on consistency of prior statements, corroboration of testimony, responsiveness to questions, plausibility of the witnesses' testimony, and admissions of untruthfulness. Grievant's testimony was confusing and conflicting on key points. He frequently changed a definite answer of "no" to "yes" or "I probably did". At times his statements were implausible; for example, his testimony about his phone that did and did not work.

A review of Grievant's statements requires a finding that the majority of his testimony was untruthful. It is clear from the record that Grievant did go to work at the coal company on the same days he reported he was unable to perform his assigned tasks at WHS either because he was sick, unable to travel on the roads, or his car was in need of repair. Grievant requested sick leave on November 27 and 28, 1995, when he was not ill. Grievant further admitted that he did not comply with the schedule outlined by Principal Williamson for December 22, 1995, and left early without prior permission. Grievant did not respond to the charges of December 20, 1995, and sincethe Administrative Law Judge found Principal Williamson was credible, this unrebutted testimony is taken as true.

Additionally, the undersigned finds Grievant's testimony about his phone on February 5, 1996, to lack credibility. The record reflects that this same phone worked the evening of February 4, 1996, the morning of February 5, 1996, at 8:00 a.m., and later that same afternoon, when school personnel called him, at 1:30 p.m. If the phone was working, and the undersigned finds that it was, Grievant had a duty to report to his employer that he was unable to work. It must also be noted he could have called from his brother's house, and did not.

Inherent in this finding is the understanding that employees are not expected or required to engage in dangerous activities. Although not well pled, the undersigned finds that Grievant's failure to come to work on February 5, 1996, could fall under the affirmative defense of the "safety exception."

The "safety exception" is a well-established deviation from the "obey now - grieve later" doctrine in American employment law. See Frank Elkouri & Edna A. Elkouri, How Arbitration Works 671 (3rd Ed. 1973). Arbitrators treat this exception as an affirmative defense, and this Grievance Board has previously determined that grievants have the burden of establishing such defenses by a preponderance of the evidence. Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131

(Nov. 7, 1991), aff'd, 192 W. Va. 540, 453 S.E.2d 374 (1994); Young v. W. Va. Dept. of Health & Human Resources, Docket No. 90-H-541 (Mar. 29, 1991). This Grievance Board has previously sanctioned the "safety exception" in Stover v. Mason County Board of Education, Docket No. 95-26-078 (Sept. 25, 1995). Accordingly, a public school employee may not be disciplined for insubordination or willful neglect of duty under W. Va. Code § 18A-2-8 if the employee establishes that his or her refusal to comply with an order or to perform assigned duties was based upon a reasonable and good faith belief that such compliance would jeopardize the employee's health or safety or the health or safety of others. See Perry v. Rutledge, 355 S.E.2d 41 (W. Va. 1987). See also Chaddock, supra. Although Grievant testified at hearing that the roads were too bad to drive on, he never told Principal Williamson why he did not report to work. He did not call in at any time to report he could not get to work because of the roads. The "safety exception" is an affirmative defense that must be proven by a preponderance of the evidence. Grievant has failed to carry this burden.

This same defense would not apply to Grievant's failure to report to his employer that he was unable to come to work. The record reflects Grievant had a continuing problem communicating with his employer in general, and Principal Williamson, in particular, that he was not coming to work, or would be late. This problem had been discussed with Grievant on numerous occasions. Grievant's failure to notify WHS on February 5, 1996, of his whereabouts is clearly an example of insubordination and willful neglect of duty.

As to the charges for November 27 and 28, 1995, and December 20 and 22, 1995, MCBOE has met its burden of proof and demonstrated Grievant was on notice that he was expected to report to work, or report his inability to work; to obtain permissionbefore leaving early or changing his schedule; to fill out his leave requests in an honest manner; and to not work at another job on the same day he requested sick pay and sick leave time from MCBOE. These acts constitute insubordination and willful neglect of duty.

The above-discussion will be supplemented by the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. Grievant has been a custodian at Williamson High School for several years.
2. Grievant has been counseled several times about his inappropriate work habits.

3. On November 27 and 28, 1995, Grievant did not report to work and requested sick leave because his car was broken, and he was unable to report to work. On these same days, in the afternoon, he reported to work at his other job with a coal company.

4. On December 20, 1995, Grievant did not report to work in a timely fashion. He also did not report that he would be late and by the time he came to work, MCBOE had already called another custodian to replace him.

5. On December 22, 1995, Grievant left work early without permission.

6. Grievant was not expected to work on February 4, 1996.

7. Grievant did not report to work on February 5, 1996, because his car slid into a ditch on the way to work. Grievant did not call his employer to inform him that hewould be absent. Grievant did report to work at his other job the afternoon of that same day.

8. Grievant signed his name to his November 27, 1995 leave request, indicating he was entitled to sick leave when he was not.

Conclusions of Law

1. An employer must establish the charges in a disciplinary matter by a preponderance of the evidence. W. Va. Code §18-29-6; Nicholson v. Logan County Bd. of Educ., Docket No. 95-23-129 (Oct. 18, 1995); Froats v. Hancock County Bd. of Educ., Docket No. 91-15-159 (Aug. 15, 1991).

2. “Insubordination encompasses more than an explicit order and refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer.” Nicholson, supra; Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 20, 1988); aff'd 387 S.E.2d 529 (W. Va. 1989).

3. Although the West Virginia Supreme Court has not formulated a precise definition of "willful neglect of duty", it does encompass something more serious than incompetence and imports "a knowing and intentional act, as distinguished from a negligent act." Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990). To prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Chaddock, supra.

4. “Employees are expected to respect authority and do not have the unfettered discretion to

disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990), citing Meads v. Veterans Admin., 36 M.S.P.R. 574 (1988); Daniel v. U.S. Postal Serv., 16 M.S.P.R. 486 (1983); Davis v. Smithsonian Inst., 13 M.S.P.R. 77 (1983)).

5. A county board of education possesses the authority to suspend an employee, but this authority cannot be exercised in an arbitrary and capricious manner. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995).

6. MCBOE established by a preponderance of the evidence that Grievant neglected his duty and acted insubordinately.

7. MCBOE's imposition of a ten-day suspension for insubordination and willful neglect of duty was not such an excessive penalty as to be arbitrary and capricious or an abuse of discretion. See Lanehart, supra; Nicholson, supra; Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994); Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: September 30, 1996

Footnote: 1

Grievant's starting time changed sometime after the first of the year, according to his testimony.

Footnote: 2

According to Exhibit 2, Grievant also requested personal leave for November 29, and 30, and December 1, 1995, at that same time.

Footnote: 3

The suspension letter stated both February 4 and 5, 1996, as days Grievant was guilty of insubordination and willful neglect of duty. The evidence at the pre-suspension hearing demonstrated that the February 4, 1996 date was in error as this was a Sunday, and Grievant was not expected to report. It is noted Grievant's suspension was decreased from fifteen days to ten days at that hearing.

Footnote: 4

The transcript was not numbered, but the undersigned numbered the pages for her own convenience.

Footnote: 5

Grievant's testimony indicates he did not report to work because the roads were bad.

Footnote: 6

Employees of MCBOE are allowed only three personal leave days a year. It would have been impossible for Grievant to take five personal days for the five days he requested off for that week.