CONNIE MYERS,

Grievant,

v. DOCKET NO. 96-47-538

TUCKER COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Connie Myers, Grievant, submitted this grievance directly to Level IV, in accordance with W. Va. Code §18A-2-8, challenging her termination by the Tucker County Board of Education (Respondent). She alleges:

> Grievant, a substitute custodian, was dismissed from employment on the grounds of willful neglect of duty. Grievant alleges a violation of West Virginia Code §§18A- 2-8.

As relief, Grievant seeks “reinstatement to the substitute roster, back wages and benefits.”

A Level IV evidentiary hearing, scheduled for January 10, 1997, was continued for good cause shown by Grievant's counsel. The Level IV evidentiary hearing was rescheduled and held on February 23, 1997, at the Grievance Board's office in Elkins, West Virginia.

On May 1, 1997, Grievant requested that the record be reopened for additional evidence because of “new developments.” A phone conference was held on May 21, 1997, and Grievant's motion was granted. On July 14, 1997, the case became mature with receipt of Stipulations of Fact from the parties. The following Findings ofFact were derived from the record.

FINDINGS OF FACT

1. Grievant has been a substitute employee with Respondent since 1988.

2. Bradley Ramsey, Facilities Coordinator, calls out substi- tute custodians for Respondent.

3. In late August of early September 1995, Grievant provided Mr. Ramsey with her parent's phone as an alternate number where she could be reached if she was not home. Her parent's phone

number is also a local call for Respondent. Grievant's father had previously suffered a stroke, and his condition has remained the same, or gotten worse, through the date of the Level IV evidentiary hearing. Grievant's and her parent's residence are in Tucker County, and located approximately 12 miles from Respondent's office.

4. Mr. Ramsey was aware that Grievant's father was ill.

5. While helping care for her father, Grievant was often available because usually Grievant's mother and a “homemaker” were present as well.

6. During the 1995-1996 school year, Mr. Ramsey had at least one other alternate number for Grievant, and he would call the alternate number(s) to locate her when substitute work was available.

7. On September 9, 1996, Respondent revised its substitute service personnel policy, Policy 5013. Grievant received a copy of this policy. 8. During the 1996-1997 school year, Mr. Ramsey only called the residence of substitutes, and did not call alternate phone numbers which might have been supplied by a substitute. The new “practice” of not calling alternate phone numbers is not mentioned in the revised policy.

9. Grievant was not aware or informed by Respondent of the new practice of not calling alternate phone numbers.

10. On the following dates, Mr. Ramsey attempted to contact Grievant to offer her substitute custodian employment: September 5, 17, 30, October 17, 23, November 6, 15, 22, and 27, 1996. On each occasion, he would call twice and reach her answering machine. Mr. Ramsey testified he would not leave a message during any of those calls. Grievant recalls one message on her machine.

11. Mr. Ramsey called Grievant on October 28, 1996, to offer her substitute custodian employment. She declined because of illness.

12. By letter dated December 2, 1996, Mr. Ramsey notified Grievant that he would recommend to the Superintendent termination of Grievant's employment.

13. Until Grievant received Mr. Ramsey's December 2 letter, she did not know that he had attempted to offer her substitute employment on ten different occasions.

14. Mr. Ramsey attempted to contact Grievant to offer her substitute employment on December 4, and 9, 1996, but only succeeded in reaching her answering machine. Mr. Ramsey succeeded in contacting Grievant later on December 9, 1996, and she acceptedthe assignment for that date.

15. By letter dated December 9, 1996, Grievant was notified that her termination was

recommended to Respondent by Superintendent Mary Alice Klien for willful neglect of duty pursuant to W. Va. Code §18-2-8.

16. Grievant did not know her job was in jeopardy until she received the letters dated December 2, and 9, 1996.

17. Mr. Ramsey contacted Grievant and offered her substitute employment on December 13, and 16, 1996. She accepted and worked both days.

18. Grievant requested a hearing before Respondent regarding her proposed termination. The hearing was held on December 17, 1996, and Respondent approved the Superintendent's recommendation to terminate Grievant's employment.

19. Grievant produced nine satisfactory work evaluations. She was not “warned” through her evaluations that her “unavailability” for work posed a problem to her continued employment, nor did Respondent challenge her work history.

20. During the relevant times of this grievance, Respondent only had three substitutes excluding Grievant.

DISCUSSION

Grievant was charged and terminated for willful neglect of duty because she did not answer her phone on ten different days, pursuant to Respondent's policy, number 5013, section 3.3(a), which in pertinent part, provides:

> 1. Offer to work means a call to a substitute requesting that he/she substitute in a particular position.
>
> 2. No more than two efforts shall be made to contact an individual substitute.
>
> 3. A log of calls made to each substitute shall be maintained. The number of calls to each substitute and the number of, and reasons for, refusals to work shall be noted.
>
> 4. Acceptable reasons for refusals to work may include personal illness, illness in the family, death in the family, substituting in another classification of substitute employment, and other reasonable causes. The superintendent shall exercise discretion in determining other reasonable causes.

5. Unacceptable reason for refusal to work is full-time employment that prevents any substitute service.

6. Should a caller be unable to contact a substitute after 10 documented calls of an offer to work, the employee shall be notified that unavailability to work constitutes willful neglect of duty and/or insubordination.

Pursuant to West Virginia Code [§]18A-2-8, the superintendent shall make a recommendation to the Board of Education that the employee be removed from employment as a substitute in the affected classification of employment.

7. Should a person decline the offer to work five times and the reasons are unacceptable, a letter shall be sent to the employee denoting dates of calls and unacceptable reasons for refusal to work. The letter shall specify that if the employee continues to decline the offer to work for unacceptable reasons, measures will be taken to remove the substitute from the substitute list.

8. Should the employee decline the offer to work ten times from July 1 to June 30 of a given year, and such refusals are determined to be for unacceptable reasons, the employee shall be notified that such refusals constitute willful neglect of duty and/or insubordination.

Pursuant to West Virginia Code 18A-2-8, the superintendent shall make a recommendation to the Board of Education that the employee be removed from employment as a substitute in the affected classification ofemployment.

Even though Respondent reportedly wanted to contact and inform Grievant that there was an employment opportunity, it failed to leave a message on her answering machine which she might have seen a few minutes after the call(s). (See footnote 1) If Mr. Ramsey would have left a message at least Grievant would have known that she was getting close to violating the policy, and being terminated. Grievant had in previous years given Mr. Ramsey alternate phone numbers to try if she could not be reached at home, and he would call the alternate phone numbers. Again, if Mr. Ramsey would have left a message so that Grievant would have known that he was calling her repeatedly, she may have called him to re-advise him of alternate phone numbers, and found out that he was not

calling alternate phone numbers anymore.

According to the undisputed facts in this case, Grievant did not know that Mr. Ramsey had attempted to offer her substitute employment on ten different occasions until she received his letter dated December 2, 1996. Moreover, Grievant did not know her job was in jeopardy until she received the letter dated December 2, 1996.

Willful neglect of duty is one of the causes listed in W. Va. Code §18A-2-8 for which an education employee may be disciplined. See Beverlin v. Bd. of Educ., 158 W.Va. 1067, 216 S.E.2d 554(1975). To prove willful neglect of duty under W. Va. Code §18A-2- 8, Respondent must establish that Grievant's conduct constituted a knowing and intentional act, rather than a negligent act. Bd. of Educ. of County of Gilmer v. Chaddock, 183 W.Va. 638, 398 S.E.2d 120 (1990); Hoover v. Lewis County Bd. of Educ., Docket No. 93-21- 427 (Feb. 24, 1994).

Respondent failed to prove that Grievant was unwilling to work, or was avoiding its calls. To the contrary, Grievant testified that she needed the money, and is still willing to work. Other than substituting for Respondent, Grievant's only other employment of record is another substitute position with a paving company which usually offers her employment in the summer, and maybe as late as September. There is no evidence is the record which indicates that her part-time position interfered with her substitute custodian position with Respondent. Given Respondent's past practice of calling alternate phone numbers of substitute custodians, it is not unreasonable to infer that Grievant believed that Mr. Ramsey would use one of the alternate numbers if she was not home.

Merely because Respondent instituted a policy which states that an employee will be charged with a particular offense if certain circumstances occur, does not mean that the employee is guilty of the alleged offense. Respondent failed to prove, by a preponderance of the evidence, that under W. Va. Code §18A-2-8 Grievant performed (or failed to perform) a knowing and intentional act which constituted willful neglect of duty as a substitutecustodian. Because Respondent failed to prove, by a preponderance of the evidence, its allegation of willful neglect of duty, the undersigned did not consider whether, in this case, Respondent acted arbitrarily and capriciously by changing an established practice without notice.

Concerning relief, Grievant failed to prove, by a preponderance of the evidence, that she would have been available to work any specific day upon which other substitutes were called- out after her termination. Therefore, her request for backpay is denied. In addition to the foregoing findings of fact

and narration, it is appropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

1. The employer must establish the charges in a disciplinary matter by a preponderance of the evidence. W. Va. Code §18-29-6; Bierer v. Jefferson County Bd. of Educ., Docket No. 95-29-558 (Apr. 8, 1996).

2. Wilful neglect of duty is one of the causes listed in W. Va. Code §18A-2-8 for which an education employee may be disciplined. See, Beverlin v. Bd. of Educ., 158 W.Va. 1067, 216 S.E.2d 554 (1975).

3. To prove willful neglect of duty under W. Va. Code §18A-2- 8, Respondent must establish that Grievant's conduct constituted a knowing and intentional act, rather than a negligent act. Bd. of Educ. of County of Gilmer v. Chaddock, 183 W.Va. 638, 398 S.E.2d 120 (1990); Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994).

4. Respondent failed to prove, by a preponderance of the evidence, that Grievant's conduct was willful.

Accordingly, the grievance is **GRANTED IN PART** and **DENIED IN PART**. Respondent is Ordered to reinstate Grievant as a substitute custodian, and to place her name on the substitute custodian roster in accordance with her seniority. It is also Ordered that Grievant be credited with seniority back to the date of her termination (December 17, 1996) so that her seniority will not be interrupted because of the improper termination. Respondent is also Ordered to remove any record of this termination from her personnel file. Grievant is not awarded any backpay.

Any party may appeal this DECISION to the Circuit of Kanawha County or to the Circuit Court of Tucker 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 are 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.

DATED: 7/30/97 _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1

Mr. Ramsey testified he always called twice, but the record is not clear whether he would call back immediately, call back after he completed calling the other three substitute custodians, or called back after waiting a certain amount of time.