FLOYD FRIEND,

Grievant,

v. **Docket No. 98-34-140**

NICHOLAS COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Floyd Friend (Grievant), grieves his two day suspension without pay and his separate one day suspension without pay by the Nicholas County Board of Education (NCBE) for insubordination and willful neglect of duty. A Level II hearing was held April 21, 1998, before NCBE President Karen Roberts. Grievant was represented at this hearing by Henry Hills, Esq., and NCBE was represented by Erwin Conrad, Esq. A Level III decision was issued by NCBE on April 27, 1998. (See footnote 1) A Level IV hearing was held before the undersigned administrative law judge on June 30, and October 8, 1998, and January 21, 1999, at the Grievance Board's Beckley office. Grievant was again represented at this hearing by Henry Hills, Esq., and NCBE was again represented by Erwin Conrad, Esq. The parties were given until February 18, 1999, to submit proposed findings of fact and conclusions of law, and both parties did so. This grievance became mature for decision at that time.

The following Findings of Fact pertinent to the resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant is employed by NCBE as a fifth grade teacher at Summersville Elementary School. At all times pertinent to this grievance, Grievant was also employed by NCBE as head baseball coach at Nicholas County High School (NCHS).

2. On March 19 and 20, 1998, the NCHS baseball team was scheduled to practice. Grievant attended the state basketball tournament instead of supervising these practices.

3. Grievant did not inform his superiors at NCHS that he would be unavailable for the practices. A candidate for the position of assistant baseball coach, Leon Thomas (Thomas), was present for the practices, but could not officially supervise the students, as he had not yet been hired by NCBE. Because baseball practice took place simultaeously both in the gym, and at a baseball field some distance away, one person can not supervise baseball practice unaided.

4. As a result of Grievant's absence, students were left unsupervised. Some students engaged in horseplay in the gym, damaging its floor. Other students made obscene gestures to nearby female students. When NCHS's principal and athletic director learned that the baseball team was unsupervised, they supervised the students.

5. By letter of March 26, 1998, NCBE Superintendent William Grizzell (Grizzell) notified Grievant that he was being suspended from his position as baseball coach without pay for two days as a result of this incident. Grizzell's letter mis-identified the dates of the missed practices as March 18 and 19, 1998, and did not specify when Grievant's suspension was to be served. 6. On March 30, 1998, the NCHS baseball team was scheduled to leave NCHS by bus, at approximately 2:00 p.m., to play a game against Herbert Hoover High School in Kanawha County. Grievant arrived approximately 45 minutes late for the departure.

7. Although Thomas had, by that time, been hired by NCBE, he could not leave with the team for Herbert Hoover High School at 2:00 p.m., because Grievant had the team's equipment with him in his truck.

8. The baseball game was canceled.

9. By letter of March 31, 1998, Grizzell sent a corrected version of his letter of March 26, 1998, to Grievant. This new letter correctly identified the dates of the missed practices, but still failed to specify when Grievant's suspension was to be served.

10. By letter of April 3, 1998, Grizzell notified Grievant that he was being suspended from his position as baseball coach without pay for one day as a result of the team bus incident.

11. Grievant is an excellent baseball coach, who has received numerous awards, with a record of 104 - 32.

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). A preponderance of the evidence is defined as “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 proved is more probable than not.” Black's Law Dictionary (6th ed. 1991). Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486

(May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

The authority of a county board of education to suspend an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, and must be exercised reasonably, not arbitrarily or capriciously. Parham v. Raleigh County Bd. of Educ., 192 W. Va. 540, 453 S.E.2d 374 (1994), 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, incompetency, 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 unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article.

Insubordination is 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. CommunityCollege, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). Insubordination may also be found when an employee shows a willful disregard for the implied directions of an employer. Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988), citing Weber v. Buncombe County Bd. of Educ., 266 S.E.2d 42 (N.C. 1980).

To prove 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). An employer also has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . ." McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992)(citing In re Burton Mfg. Co., 82 L.A. 1228 (Feb. 2, 1984)). (See footnote 2)

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. Williams v. Cabell County Bd. of

Educ., Docket No. 95-06-325 (Oct. 31, 1996); Jones v. Mingo CountyBd. 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). Willful neglect of duty may be defined as an employee's intentional and unexcusable failure to perform a work-related responsibility. Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990).

Grievant first argues that his two day suspension without pay for insubordination and willful neglect of duty, based upon his failure to supervise the baseball practices of March 19 and 20, 1999, was improper. Grievant asserts that NCBE policy allows coaches to attend the state basketball tournament on professional leave, and that he attended the tournament on personal leave after notifying NCHS Athletic Director William Dobbins on March 18, 1998. (See footnote 3) Neither of these positions was supported by a preponderance of the evidence.

NCBE proved that its policy is to grant professional leave for the high school head coach of a given sport to attend the state tournament of that sport. Under this policy Grievant, as high school head coach of baseball, can attend the state baseball tournament on professional leave, but would need to take personal leave to attend the state high school basketball tournament.

Grievant maintains that he took such personal leave, after notifying NCHS AthleticDirector William Dobbins. However, Mr. Dobbins denies ever being notified by Grievant. Thus, Grievant's credibility is at issue. Unfortunately for Grievant, his credibility was effectively discredited at the Level IV hearing.

At that hearing, Grievant raised numerous instances of what he felt to be his poor treatment by NCBE, and of a confrontational relationship with Grizzell. These included Grievant being denied family leave, Grievant being asked by Grizzell to resign from a teaching position at Panther Creek Elementary School he had been awarded, Grievant having been given a bad evaluation by an allegedly unqualified evaluator, Grievant having been subjected to retaliation for filing more grievances than most teachers, (See footnote 4) Grievant not receiving NCBE's cooperation in administering a grant Grievant secured to rebuild the baseball field, NCBE not turning on the water to the baseball field, and Grizzell making negative comments about Grievant's ability to coach at the high school level. NCBE alleged that 14 umpires of the New River Valley Officials Association had refused to officiate at Grievant's baseball games because of his outbursts at the games, which

Grievant denied. Grievant attributed his alleged bad treatment by NCBE and Grizzell to retaliation for his union activity, and for a mandamus action that he filed in a selection matter, calling these events a conspiracy.

While it was apparent that abundant ill-will exists among Grievant andNCBE/Grizzell, (See footnote 5) Grievant's version of these events was roundly discredited by NCBE's witnesses. For example, what Grievant characterized as being asked by Grizzell to resign from a teaching position at Panther Creek Elementary School he had been awarded would have been more accurately characterized as Grizzell recommending Grievant for a vacant position, NCBE accepting Grizzell's recommendation, Grievant withdrawing his application, and Grizzell requesting a letter to that effect from Grievant, so that the position could be awarded to another candidate. What Grievant characterized as Grizzell making negative comments about Grievant's ability to coach at the high school level would have been more accurately characterized as Grizzell explaining to Grievant NCBE's policy of granting professional leave only to the high school head coach of a given sport to attend the state tournament of that sport. What Grievant characterized as not receiving cooperation in administering a grant Grievant secured to rebuild the baseball field would have been more accurately characterized as Grizzell's concern that Grievant had contracted work on the ballfield without the paperwork, contracts, and insurance forms required by state purchasing procedures.

NCBE's allegation, that 14 umpires of the New River Valley Officials Association had refused to officiate at Grievant's baseball games because of his outbursts at the games, which Grievant denied, was also shown to be true. NCBE produced a letter,signed by the 14 umpires, to that effect. Grievant's claim that NCBE had not turned on the water to the baseball field was contradicted by several witnesses.

It is clear from the transcript of the Level II hearing, and from the Level IV hearing, that Grievant perceives and remembers events differently than other witnesses. Under these circumstances, Dobbins' testimony that Grievant never told him that Grievant would be absent from his duties as baseball coach of NCHS is deemed more credible than Grievant's testimony to the contrary. Grievant's failure to attend and supervise two days of baseball practice, without notice to NCBE, represents the sort of willful disregard for the implied directions of an employer inherent in a charge of insubordination, and demonstrates the intentional and unexcusable failure to perform a work-related responsibility inherent in a charge of willful neglect of duty. NCBE has met its burden of proof with

respect to the two-day suspension.

Grievant next argues that his one day suspension without pay for insubordination and willful neglect of duty, based upon his failure to arrive on time for the departure of the team bus on March 30, 1998, was improper. Grievant asserts that he did not arrive on time for the departure of the team bus because he was uncertain as to the dates on which he was to serve his two-day suspension, discussed above. Grievant argues that Grizzell's letter of March 26, 1998, which notified him of that suspension, was so vague as to place him in a double-bind situation on March 30, 1998: he could have traveled with the team and risked further disciplinary action for violating his suspension, or he could have served his suspension and risked further disciplinary action for missing the team bus. This argument must fail, because there was a third course of action open to Grievant: he could have asked. Although Grizzell's letter of March 26, 1998, was not a model of clarity, in that it failed to tell Grievant that he had been suspended for the two days he was at the state tournament, (See footnote 6) it was clear from the letter that Grievant was suspended for some two-day period. This was sufficient to put Grievant on inquiry notice or, in plain English, to alert him that it was time to either ask or risk the consequences of not asking. See Whitt v. Mingo County Bd. of Educ., Docket No. 97-29-419 (Jan. 30, 1998)(issue raised in grievance statement held to place respondent on inquiry notice), Silva & Silva v. Boone County Bd. of Educ., Docket No. 96-03-527 (July 3, 1997)(notice of transfer and termination of vocational runs contract tendered to bus operator held to create inquiry notice of termination of Grievant's vocational bus runs).

NCBE established that Grievant had four days to seek clarification of Grizzell's letter. Two of these days, Friday, March 27, 1998, and Monday, March 30, 1998, were work days for Grievant. NCBE established that Grievant could have telephoned NCHS or Grizzell, during his planning periods or duty-free lunches, from his job at Summersville Elementary School. Grievant could have driven from Summersville Elementary to NCHS, a drive of some five or ten minutes, or called Grizzell during the weekend. However, he did not, electing instead to ask his question of NCHS's principal almost one hour after the team bus was to have left. Grievant has shown such nonchalance towards vital employment matters before. Amick & Friend v. Nicholas County Bd. of Educ., Docket No. 96-34-354/357 (June 9, 1997). Grievant's failure to arrive on time for the departure of the team bus again represents the sort of willful disregard for the implied directions of anemployer inherent in a charge of insubordination, and again demonstrates the intentional and unexcusable failure to perform a work-

related responsibility inherent in a charge of willful neglect of duty. Under these circumstances, NCBE has also met its burden of proof with respect to the one-day suspension.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. 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).

2. The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, and must be exercised reasonably, not arbitrarily or capriciously. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

3. W. Va. Code § 18A-2-8 states that a board of education 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 of nolo contendere to a felony charge.

4. 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). Insubordination may also be found when an employee shows a willful disregard for the implied directions of an employer. Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988), citing Weber v. Buncombe County Bd. of Educ., 266 S.E.2d 42 (N.C. 1980).

5. 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).

6. To prove willful neglect of duty, an employer must establish that the employee's conduct constituted 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).

7. 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). Willful neglect of duty may be defined as an employee's intentional and unexcusable failure to perform a work-related responsibility. Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990).

8. NCBE met its burden of proof and demonstrated, by a preponderance of the evidence, that Grievant was guilty of insubordination and willful neglect of duty.

Accordingly, this grievance is **DENIED**. Any party may appeal this decision to the Circuit Court of Kanawha County or to the
Circuit Court of Nicholas 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.

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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated: March 3, 1999

Footnote: 1 *It is unclear from the record how this could have occurred.*

Footnote: 2

See Maxey v. McDowell County Bd. of Educ., Docket No. 97-33-208 (Apr. 30, 1997) (Grievant held insubordinate for stomping on her evaluation and threatening to blow her principal's head off with a shotgun); Dilley v. Cabell County Bd.

of Educ., Docket No. 97-06-164 (Sep. 19, 1997)(Grievant held insubordinate for falsifying student records); Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996)(Grievant held insubordinate for grabbing, threatening, and cursing student); Thompson v. Logan County Bd. of Educ., Docket No. 95-23-127 (July 17, 1995)(Grievant held insubordinate for refusing to meet with his supervisor and refusing to acknowledge his refusal); Arbaugh v. Putnam County Bd. of Educ., Docket No. 90-40-437 (May 22, 1991)(Grievant held insubordinate for refusing to work).

Footnote: 3 *Grievant took personal leave from his duties as a fifth grade teacher at Summersville Elementary School to attend the tournament. The issues pending before the Grievance Board concern his duties as high school baseball coach.*

Footnote: 4 *Grievant has received five Level IV grievance decisions. Amick & Friend v. Nicholas County Bd. of Educ., Docket No. 96-34-354/357 (June 9, 1997), Friend v. Nicholas County Bd. of Educ., Docket No. 90-34-504 (Aug. 30, 1991), Friend v. Nicholas County Bd. of Educ., Docket No. 91-34-304 (July 31, 1991), Friend v. Nicholas County Bd. of Educ., Docket No. 34-884-053-4 (Apr. 28, 1988), Friend v. Nicholas County Bd. of Educ., Docket No. 34-87-286-4 (Jan. 19, 1988).*

Footnote: 5 *Several of Grievant's allegations of mistreatment by Grizzell and NCBE, as well as the ill-will that exists among them, were discussed in Amick & Friend v. Nicholas County Bd. of Educ., Docket No. 96-34-354/357 (June 9, 1997), in which ALJ Wright wrote:*
"It is clear that there is a certain amount of animosity between Grievant Friend and Superintendent Grizzell. It it is necessary, the evidence establishes that more of the blame for the friction lies with the grievant."

Footnote: 6 *This turned out to be the case.*