J. WALTER COPLEY, JR.,

Grievant,

v. Docket No. 99-34-480

NICHOLAS COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Principal J. Walter Copley, Jr. (Grievant), grieves his ten day suspension without pay by the Nicholas County Board of Education (NCBE) for willful neglect of duty and insubordination. A Personnel Hearing was held October 14, 19, and November 10, 1999, before Jerry Wright, Esq. Grievant was represented at this hearing by Larry Losch, Esq. and NCBE was represented by Erwin Conrad, Esq. The record does not reveal the result of this hearing, although Counsel for NCBE states in his proposed Findings of Fact and Conclusions of Law that a decision upholding Grievant's suspension was issued by NCBE on December 12, 1999. A Level IV hearing was scheduled before the undersigned administrative law judge on January 19, 2000, at the Grievance Board's Beckley office. When this hearing could not be held due to snow, the parties agreed that this grievance could be submitted for decision based upon the record developed at the Grievant's Personnel Hearing. The parties were given until April 27, 2000, to submit proposed findings of fact and conclusions of law, both parties did so, and this case became mature for decision on that date.

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 has been employed by NCBE as Principal of Cherry River Elementary School (CRS) for twenty-one years, and has been a Principal with NCBE for 27 years.

2. Grievant's secretary, Peggy Sanford (Sanford), maintained funds at CRS in a way that did not comply with applicable policies, including accepting post-dated checks,
failing to cross-reference receipts to deposits, cashing personal checks from school funds, failing to make deposits in a timely manner, keeping money in a desk drawer instead of an available safe or locking cabinet, and keeping $782.53, during the period of January 29 through February 3, 1999, at her mother's house.

3. An audit for school year 1997- 98 revealed that $1,384.61 was unaccounted for.

4. As a result of this discrepancy, NCBE held a Personnel Hearing for Sanford. Grievant was subpoenaed as a witness, and testified at the hearing. NCBE later suspended Sanford for twenty days without pay.

5. Also as a result of this discrepancy, NCBE's treasurer, Gus Penix (Penix), met with Grievant and Sanford in August, 1999, and instructed them on how to improve their financial procedures.

6. Penix also wrote to Grievant on August 20, 1999, directing him to improve his financial procedures in several specified ways.

7. Grievant did not fully comply with the instructions in Penix's letter.

8. As Treasurer, Penix had the authority to establish and supervise financialprocedures at CRS.

9. The Principal's job description of NCBE provides that a Principal administers the school budget, supervises school finances, maintains and controls local funds, and provides for the security and accountability of school property.

10. The Accounting Procedures Manual of the State Board of Education provides that undeposited funds are the responsibility of the custodian of the funds and the Principal.

11. Grievant had the combination to the safe at CRS, but did not ensure that undeposited funds were secured in the safe.

12. Grievant was lax in seeing that applicable policies were applied to funds at CRS.

13. By letters dated August 13, 1999, and August 30, 1999, NCBE suspended Grievant for ten days for willful neglect of duty and insubordination.

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). Wherethe 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.

NCBE suspended Grievant for willful neglect of duty and insubordination, for his failure to enforce applicable financial policies at CRS. NCBE argues that, as Principal of CRS, he had the ultimate responsibility to see that applicable policies were followed at CRS. Grievant responds that he was not given adequate notice of the charges against him in his letter of suspension; that Penix did not have authority to order him to implement certain financial polices at CRS; that NCBE violated Policy 5300 in suspending him, and that NCBE should have granted Grievant's request that his Personnel Hearing be open.

West Virginia Board of Education Policy No. 5300 provides that an employee's promotion, demotion, transfer or dismissal must be based upon an evaluation of job performance, and that the employee be given an opportunity to improve his performance. This policy is only applicable if the actions of the employee are correctable. An offense orconduct which affects professional competency is correctable, if the conduct or offense does not "directly and substantially affect the morals, safety, and health of the system in a permanent, non-correctable manner." Mason County Bd. of Educ. v. State Supt. of Schools, 165 W. Va. 732, 274 S.E.2d 435, (1980). The provisions of Policy No. 5300 must be strictly construed in favor of the employee to insure that the employee receives the full guarantee of protection intended to be encompassed by the policy. White v. Gilmer County Bd. of Educ., Docket No. 11-87-020-3 (Nov. 20, 1987).

“Failure by any board of education to follow the evaluation procedure in West Virginia Board of Education Policy No. 5300(6)(a) prohibits such board from discharging, demoting or transferring an

employee for reasons having to do with prior misconduct or incompetency that has not been called to the attention of the employee through evaluation, and which is correctable." Syl. Pt. 3, Trimboli v. Bd. of Educ., 163 W. Va. 1, 254 S.E.2d 561 (1979); See also Holland v. Bd. of Educ. of Raleigh County, 174 W. Va. 393, 327 S.E.2d 155 (1985); Wren v. McDowell County Bd. of Educ., 174 W. Va. 484, 327 S.E.2d 464 (1985).

Examples of conduct that is not considered correctable, for which an employee can be disciplined without regard to Policy 5300, include a bus operator allowing students, including some elementary school students, to leave the bus with persons other than their parents, without a note signed by a parent, Conner v. Barbour County Bd. of Educ., Docket No. 95-01-031 (Sept. 29, 1995); 200 W. Va. 405, 489 S.E.2d 787 (1997); a physical education teacher grasping the buttock of a female student, Edwards v. McDowell County Bd. of Educ., Docket No. 93-33-138 (July 13, 1994); a bus operator fighting with another bus operator, and incidentally injuring a student, Hoover v. Lewis County Bd. of Educ.,Docket No. 93-21-427 (Feb. 24, 1994); a classroom teacher sexually stimulating himself and having an erection in class, McCroskey v. Webster County Bd. of Educ., Docket No. 51-88-116 (Oct. 31, 1988); and a classroom teacher purchasing alcohol for and performing oral sex on a student, Allison v. Kanawha County Bd. of Educ., Docket No. 20-86-273-1 (Dec. 30, 1986).

Under W. Va. Code § 18A-2-9, Grievant is ultimately responsible for the administration of his school and can be held responsible for the conduct of his subordinates. This Code section provides, in pertinent part; "[u]pon the recommendation of the county superintendent of schools, the county board of education shall employ and assign, through written contract, public school principals who shall supervise the management and the operation of the school or schools to which they are assigned." See Hoffman v. Mingo County Bd. of Educ., Docket No. 95-29-527 (May 31, 1996). Grievant also testified that he is ultimately responsible for what happens at CRS.

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 County Bd. of Educ., Docket No. 95-29-151 (Aug. 24, 1995); Hoover v. Lewis County Bd. of Educ., Docket No.93-21-427 (Feb. 24, 1994). Willful neglect of duty encompasses something more serious than incompetence. Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120, 122 (1990); Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996). 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). 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. 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).

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).

NCBE established, by a preponderance of the evidence, that Grievant failed to require compliance with applicable financial policies, particularly after being directed to make certain changes in CRS financial procedures by NCBE's Treasurer, Penix. Grievant admitted that he was lax in seeing that applicable policies were applied to funds at CRS.

A grievant who commits a continuing course of infractions may reasonably be dismissed from her position for insubordination and willful neglect of duty. Meckley v. Kanawha County Bd. of Educ., 181 W. Va. 657, 383 S.E.2d 839 (1989). However, without proof that a supervisor sanctioned a subordinate's improper practices or failed to give adequate instructions to subordinates, dismissal is improper, particularly where nothing in the record indicates that the supervisor had a history of negligent or inefficient conduct. Oakes v. W. Va. Dep't of Finance and Administration, 164 W. Va. 384, 264 S.E.2d 151(1980).

It is reasonable to conclude that Grievant sanctioned his secretary's improper financial practices, or at least failed to give adequate instructions to her concerning the improvements in CRS's financial procedures ordered by Penix, particularly where it had been brought to his attention that he had a history of allowing poor financial practices at his school. Id.

Following the discovery of the $1,384.62 discrepancy of the 1997-98 school year, Penix wrote to Grievant on August 20, 1998, directing him to improve his financial procedures in several ways:

> Develop measures for securely collecting and maintaining all funds

> Account for each receipt as it is deposited (write receipt number on deposit tickets
>
> Reconcile bank statement to ISAC (See footnote 1) monthly
>
> Send copies of your reconciled bank statement and ISAC monthly to me[.]

This letter also stated "[a]s Principal, you are responsible for the financial operations of your school. It is necessary that you monitor and oversee all financial practices and procedures of your school, as well as persons handling monies."

The record reflects that Grievant did not follow all of these instructions. Specifically, he failed to develop all of the required measures for securely collecting and maintaining all funds, and failed to prevent Sanford from keeping $782.53, during the period of January29 through February 3, 1999, at her mother's house. Accordingly, NCBE has established, by a preponderance of the evidence, that Grievant failed to obey the reasonable orders of a superior entitled to give such orders, Riddle, supra, and intentionally and inexcusably failed to perform a work-related responsibility. Adkins, supra. NCBE has established that Grievant was insubordinate and guilty of willful neglect of duty.

With respect to Grievant's argument that he was not given adequate notice of the charges against him in his letter of suspension, it is noted that Grievant, as a tenured state employee, has a property interest in his employment. Perry v. Sindermann, 408 U.S. 593 (1972), cited in Jones v. Nicholas County Bd. of Educ., Docket No. 92-34-305 (July 28, 1993), aff'd, Nos. 93-AA-213, 94-AA-76 (Kanawha County Cir. Ct. Apr. 5, 1995). "When an individual is deprived of this interest, certain procedural safeguards are merited. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985)." Jones, supra. "Where an act of misconduct is asserted in a notice of dismissal, it should be identified by date, specific or approximate, unless the characteristics are so singular that there is no reasonable doubt when it occurred. If an act of misconduct involves persons or property, these must be identified to the extent that the accused employee will have no reasonable doubt as to their identity." Syl. Pt. 2, Clarke v. W. Va. Bd. of Regents, 166 W. Va. 702, 279 S.E.2d

169 (1981), citing Syl. Pts. 4 and 5 of Snyder v. Civil Serv. Comm'n, 160 W. Va. 762, 238 S.E.2d 842 (1977).

NCBE's letter of August 30, 1999, suspended Grievant for:

> failure to properly supervise the financial management of [CRS] and your failure to require compliance with state, county and school directives and/or policies regarding safeguarding, recording and depositing of school funds as illustrated in the shortage of at least $1,384.62 from the general fund at [CRS]for the school year 1997-98 as reflected by a financial audit and for continuing inappropriate conduct with regard to school funds during the 1998-99 school term which included failure to respond to a directive from the Treasurer in a timely manner which resulted in or contributed to school funds not being appropriately held, safeguarded and deposited during the period of January 29 through February 3, 1999.

Grievant's argument is without merit. This notice provided Grievant the location of his offense, specific dates on which it occurred, the identity of the person who issued the order he disobeyed, and the specific amount of money mishandled. See Berryman v. W. Va. Div. of Corrections, Docket No. 98-CORR-377 (Mar. 3, 2000). Particularly considering that Grievant was subpoenaed as a witness, and testified, at the Personnel Hearing for Sanford, regarding the same events for which he was charged, Grievant cannot claim a reasonable doubt as to the identity of the persons and property involved in his misconduct. Clarke, supra.

With respect to Grievant's argument that NCBE violated Policy 5300, described above, in suspending him, the undersigned notes that Grievant had ample time to improve his performance with respect to financial procedures at CRS; and that he did not avail himself of courses offered by NCBE that would have helped him in maintaining and securing CRS funds. This argument is without merit.

With respect to Grievant's argument that NCBE's Treasurer, Penix, did not have authority to order him to implement certain financial polices at CRS, the undersigned concludes that the Job Description for Treasurer/School Business Official, which grants Penix the authority to “[e]stablish and supervise the accounting system necessary to provide school officials with accurate financial data,” plainly, as a matter of common sense, and in the absence of any evidence to the contrary, grants Penix such authority. Finally, with respect to Grievant's argument that NCBE should have granted his request that his Personnel Hearing be open to the public, NCBE reasonably concluded that because Sanford had requested a closed hearing, and because Grievant's hearing concerned

the same subject matter as Sanford's, his receiving an open hearing would have had the effect of revealing the contents of Sanford's hearing to the public. The undersigned declines to disturb this sensible conclusion. Grievant also failed to prove that he was harmed in any way by NCBE's decision to close his hearing.

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, theconviction 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, 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 County Bd. of Educ., Docket No. 95-29-151 (Aug. 24, 1995); Hoover v. Lewis County Bd. of Educ., Docket No.93-21-427 (Feb. 24, 1994). Willful neglect of duty encompasses something more serious than incompetence. Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120, 122 (1990); Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996). 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). 7. A Principal is ultimately responsible for the financial operations of his school. W. Va. Code § 18A-2-9.

8. NCBE has 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

-

ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated: May 12, 2000

Footnote: 1

1 The record does not reflect what this acronym means, although it refers to a financial computer program of some

sort.