MARTHA FLOYD,

Grievant,

v. **Docket No. 00-06-230**

CABELL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Martha Floyd, filed this grievance against the Cabell County Board of Education ("CCBOE" or "Board") over her termination for insubordination and willful neglect of duty. Her Statement of Grievance says:

> Violations of WV Code 18A-2-8 with regard to grievant['s] termination as a teacher at Huntington High School.
>
> RELIEF SOUGHT: Relief sought is to be reinstated with a teaching contract for the 2000-2001 school year.

As this was a termination, the grievance was filed directly to Level IV. A Level IV hearing was held on August, 24, 2000, and this case became mature for decision on September 18, 2000, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Respondent argues it has demonstrated Grievant engaged in the alleged acts and refused to comply with her supervisor's reasonable and repeated directions. Respondent notes Grievant has received counseling, oral and written warnings, an Improvement Plan, and a 30-day suspension for the same type of behavior. Respondent asserts Grievant's behavior did not improve and termination was finally required. Respondent

maintains Grievant was monitored on her Improvement Plan, and no wrong doing was noted, but noone followed Grievant every minute of the day, and it is possible Grievant did not always follow the proper procedures and was not caught. Respondent notes Huntington High School is a large school, and it is possible an employee could leave the building without permission and without being seen. Respondent notes Grievant's principal did not know Grievant had discussed a possible grievance against him or a possible leave of absence at the time he requested further disciplinary action against Grievant.

Grievant argues she was not insubordinate and did not willfully neglect her duty. Grievant argues she engaged in the same behavior for which she was terminated while she was on her Improvement Plan, and this behavior was deemed to have met the goals of the Improvement Plan. At one point in her termination, Grievant seemed to argue her termination was an act of reprisal for telling another administrator that she was going to file a grievance against her principal, and that she was going to ask for a leave of absence.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed by CCBOE for approximately 12 years. At the time of her termination, she was a Special Education teacher working with behaviorally disordered ("B. D.") high school students, in a self-contained classroom at Huntington High School.

2. Mary Perdue was assigned as an aide to assist Grievant in this classroom, but she was considered a supervisory aide and could not lawfully provide instruction inGrievant's absence. Ms. Perdue watched the students during Grievant's planning period and lunch.

3. Huntington High School is a very large school, and it is a quarter of a mile from one end to the other. Jerry Lake was assigned as the principal. There is also an associate principal and several assistant principals assigned to Huntington High School. The school contains approximately 1,800 students and between 150 and 200 faculty members and other employees.

4. Because of the number of employees, faculty are assigned to different administrators for supervision and evaluation. Grievant was assigned to Principal Lake for evaluations.

5. All faculty are to report to work by 7:15 a.m. If they are ill, they are to call the substitute system ("TSSI") as soon as possible so a substitute can be obtained.

6. Contrary to Grievant's belief, all faculty have only a thirty minute, duty free lunch. The time they are to go to lunch is assigned at the first of each semester and should be strictly adhered to, as variation from the schedule will interfere with the lunch of other students and teachers.

7. If a teacher leaves the building they are to sign out on a sheet in their supervisor's office and indicate the reason for their trip. They are also to sign in upon their return.

8. Beginning in February 1999, Principal Lake issued verbal and written warnings to Grievant for leaving school without permission. 9. Grievant was having medical problems during this time, but because Grievant was not cooperative with CCBOE in gathering information from her doctors, CCBOE did not know what type of problem Grievant had and how serious it was. CCBOE did know Grievant was frequently absent and required her to obtain a doctor's excuse for each absence. In July 24, 1999, Grievant's doctor thought Grievant might have some type of breathing problem related to poor ventilation at work. (See footnote 2) Grievant was referred to Dr. William Beam for further assessment. (See footnote 3)

10. Grievant finally signed release of information forms on April 18, 2000. A letter

from Grievant's family physician, Dr. Thomas Dannals, was received on or about May 9, 2000. He indicated Grievant had severe reflux and asthma, both of which "may" cause Grievant to miss work with little warning.

11. CCBOE also received outpatient notes from Dr. S. K. Lahiry. He diagnosed a hiatal hernia and believed surgery would help, but it would first be necessary for Grievant to first lose 80 to 100 pounds. He has continued to see Grievant, but noted she has not lost weight; thus, the surgery was not currently an option.

12. No information was received from Dr. Beam, although it was requested.

13. On April 6, 1999, Principal Lake wrote Grievant and asked her to explain where she was on March 26, 1999, and why she did not sign out or return to school. He also informed Grievant she had not given him the required doctor's excuse, and she had not turned in a report that another staff member needed. 14. Grievant responded on April 6, 1999, stating she did not know she was to turn in the excuses into Principal Lake, but thought he would come by her room and pick them up. She had an excuse, had put it in his mailbox slot, and didn't what know had happened to it. Grievant stated she had turned in the requested report on February 22, 1999. Additionally, Grievant also wrote she did not recall leaving school on March 26, 1999, although she did go outside to move her car.

15. Grievant met with Principal Lake, her representative, and Assistant Principal Webb on April 29, 1999. Multiple issues were discussed and Principal Lake wrote a letter dated May 1, 1999, detailing the problems. Principal Lake noted Grievant did not answer four all call pages on March 26, 1999, so he did not believe she was in the building; she had not gone where indicated on April 21, 1999, and then failed to sign in upon her return; and on April 23, 1999, she did not sign in upon her late arrival to work, and did not know what time she had gotten there. He also noted the faculty member still did not have her report. He informed Grievant he was going to request disciplinary action from Superintendent David Roach. In this letter, among other things, Grievant was

directed to "[n]ever leave school property without signing out unless instructed to do so by an administrator or a building emergency situation," and to "[n]ever leave your classroom unattended".

16. During the Spring semester, Principal Lake had directed Security Guard, Linda Tabor, to inform him when Grievant left Huntington High School. As this information was broadcast over the walkie-talkies, Grievant was known by the code name, thePackage. Security Guard Tabor set her watch with the school bell in the morning and checked it during the day.

17. The Superintendent did not take disciplinary action as recommended by Principal Lake, but decided to place Grievant on an Improvement Plan for the Fall 1999 semester. This plan was prepared at the end of the 1998-1999 school year and is dated June 8, 1999. Resp. Exh. 8, at pre-termination hearing.

18. This Improvement Plan had four areas of deficiency. The two that pertain to this grievance are: 1) "Ms. Floyd has exhibited difficulty in reporting to work on time, staying for the full day, signing in and out of the building [in]appropriately, and calling the TSSI in a timely manner"; and 2) "Ms. Floyd has disregarded general school policy on occasion." Resp. Exh. 8, at pre-termination hearing.

19. The Improvement Plan also listed what was expected of Grievant for her to complete it successfully. She was to report to work on time, stay for the entire day, sign out only with administrative approval, and when she was ill, she was to call a substitute from a preapproved list of teachers who were familiar with her classroom. (See footnote 4) Resp. Exh. 8, at pre-termination hearing.

20. The Improvement Plan also stated Grievant was to adhere to all published school policies, and this would include policies relating to her lunch period. Principal Lake went over the policies in the handbook at the start of school. Resp. Exh. 8, at pre-termination hearing. 21. The Huntington High School Faculty Handbook directs teacher to "follow the lunch bell schedule", "[u]se their instructional time wisely", "[n]ever

leave your classroom unsupervised", and "[a]ll teachers are to be at their doorway between classes".

22. Grievant had been directed to call TSSI as soon as possible if she were going to be late.

23. Grievant had been directed that she was not to be late anymore, and that she was expected to be at Huntington High School during her planning period.

24. This Improvement Plan also stated that, "[a]ny deviation from published plan of improvement will result in administrative request for employee discipline." Resp. Exh. 8, at pre-termination hearing.

25. Grievant was assigned first lunch for 1999-2000, which runs from 11:15 a.m. to 11:45 a.m. Grievant's planning period was first period, from 7:50 a.m. to 9:24 a.m.

26. Contrary to Grievant's belief, she does not have a flexible lunch time, and she is to abide by the same rules applied to all teachers at Huntington High School.

27. Grievant's Aide confirmed at the pre-disciplinary hearing, that the class always goes to lunch at the same time, per the schedule.

28. Principal Lake believed Grievant completed the Improvement Plan successfully. He noted Grievant had worked hard during the semester to improve in the area of "Professional Work Habits." He believed Grievant had received administrative approval every time she left Huntington High School, and she had signed in and out appropriately. Grievant had asked him for permission to leave several times. Resp. Exh. 9, at pre-termination hearing. 29. When the 1999 Fall semester started, Security Guard Tabor did not know if Principal Lake still wanted her to tell him when Grievant had left Huntington High School grounds. She did not clarify this issue with Principal Lake until October of 1999. After that time, Security Guard Tabor would tell Principal Lake when Grievant left the building.

30. Security Guard Tabor was off from the end of November to the first of February with surgery, and the substitutes in her position did not know to inform

Principal Lake when, and if, Grievant left Huntington High School.

31. Shortly after Grievant completed the Improvement Plan, she asked Principal Lake to leave early. He discussed the reasons with Grievant, noted she had just come off the Improvement Plan, and denied her request.

32. Again, shortly after she had successfully completed the Improvement Plan, Grievant left school early without permission on January 19, and February 10, 2000. (See footnote 5)

33. Grievant also failed to call off for an absence on February 7, 2000.

34. At a conference on these issues on February 11, 2000, Grievant admitted she left school early without permission on the dates identified in Finding of Fact 33. Grievant also admitted she had repeated this behavior at least six times in the recent past. Her response to questions about this issue was, "I didn't know it was that important."

35. By letter dated February 14, 2000, Superintendent Roach informed Grievant she would be suspended for 30 days for her continuing pattern of insubordination and willful neglect of duty. The letter notifying Grievant of her suspension stated: "any re-occurrence will cause me to recommend to the Board termination of your employment. . . . "

36. A follow-up letter dated March 8, 2000, was sent to Grievant notifying Grievant of CCBOE's approval of Superintendent Roach's recommendation.

37. Upon Grievant's return from suspension, Security Guard Tabor was directed to keep a record of Grievant's comings and goings and report these to Principal Lake.

38. On May 5, 2000, Grievant left school without permission. Contrary to Grievant's assertion, leaving a sticky note with the substitute payroll clerk did not constitute administrative approval. Grievant did fill in the sign out sheet, but her times differ from Security Guard Tabor times. On the sign out sheet, Grievant recorded she left at 11:25 a.m. and she returned at 11:50 a.m. Security Guard Tabor's records note

Grievant as leaving at 11:15 a.m. and returning at 11:55 a.m. (See footnote 6)

39. Contrary to her assertion, Grievant either knew or should have known, after all the warnings and discipline, that the payroll clerk could not give her administrative approval to leave Huntington High School.

40. Grievant was away from Huntington High School on May 5, 2000, for at least 40 minutes without administrative approval, and her students did not receive the expected instruction during this time. 41. On May 12, 2000, Grievant left school without permission. Grievant informed the permanent payroll clerk that she was leaving, but did not receive administrative approval as required.

42. The sign out sheet shows Grievant being gone from the school from 11:15 a.m. to 11:55 a.m.. (See footnote 7) Security Guard Tabor's records show Grievant as being gone from 12:05 p.m. to 12:53 p.m. By either calculation, Grievant's time away from school exceeded her lunch hour and deprived her students of instructional time.

43. On May 15, 2000, Grievant became ill before leaving for work. She called the TSSI line at 7:13 a.m., from her house, two minutes before she was expected to be in the classroom. It takes at least 15 to 25 minutes, at that time of the day, for Grievant to get from her home into the school building.

44. Contrary to Grievant's "belief", the undersigned Administrative Law Judge finds Grievant did not attempt to call any of the prearranged substitutes prior to calling TSSI. This finding is based on the evidence that Grievant informed TSSI that no substitute was needed, and she planned to be in by 9:30 a.m. As Grievant is aware, substitutes are arranged for either a half or a whole day, not for just a couple hours. Additionally, when Director of Personnel, Linda Curtis called Grievant, Grievant stated she had become ill very quickly, but she would be in by 9:30 a.m. Resp. Ex. No. 17, at pre-termination hearing; Test. of Ms. Curtis; Test. of Grievant. 45. Even if Grievant had not been sick that day, it was obvious she was going to be late as she had not left the house at the time of her call. Additionally, she had not followed the

appropriate procedures for calling off.

46. On May 16, 2000, Grievant left work during her planning period to go home and get her medicine. Principal Lake did not give Grievant permission for this trip. She believed Assistant Principal Lucas may have given her permission for this trip, or she may have informed Assistant Principal Lucas' Secretary she was leaving. Assistant Principal Lucas remembered he had given her permission to go home for medication some time during the year. He stated it could have been earlier, but he was unsure. Again, the times in and times out do not match the notes of Security Guard Tabor.

47. On May 17, 2000, Grievant again left school without permission. The sign out sheet indicated Grievant left at 11:22 a.m. and returned at 11:55 a.m. Security Guard Tabor's records indicate Grievant passed by her station at 11:22 a.m. and returned at 12:04 p.m. Although Grievant disagrees with the times in and out, she does agree she was away for longer than the thirty minutes for her assigned lunch.

48. Where the times of Grievant and Security Guard Tabor differ, the times written by Security Guard Tabor are accepted as true.

49. During the time Grievant was absent, her students did not receive instruction.

50. On that same day, at approximately 1:10 p.m., Principal Lake saw Grievant in the lunch room getting something to eat. He questioned Grievant about how many lunch periods she planned to take, as he was aware Grievant had left Huntington High School during her lunch. Grievant informed Principal Lake she had not had lunch yet. Grievantwas very upset by this confrontation, placed the tray on the table, and started to leave. Principal Lake informed her he did not want to deprive her of food and told her she could take the tray to her classroom. Grievant stated she did not to want to eat in front of the students. (See footnote 8)

51. At the pre-disciplinary hearing, Grievant testified she had a hiatal hernia which required her to eat to relieve the distress. Although Principal Lake knew Grievant had health problems, Grievant had never informed him of her diagnosis or the possible

need to eat at different times.

52. The May 17, 2000 events were the final straw for Principal Lake. He went to his office and began composing a letter requesting Superintendent Roach to instruct him on what direction to take, as nothing he had tried seemed to work. Principal Lake identified the dates of the most recent violations. (See footnote 9)

53. Later on that same day, Grievant went to see Director Curtis to discuss the possibility of filing a grievance against Principal Lake for harassment and taking leave of absence.

54. Principal Lake called Director Curtis to inform her that his letter was coming. During this call, Principal Lake found out about Grievant's discussion with Director Curtis. 55. After receiving Principal Lake's letter, Superintendent Roach met with Grievant, her representative, and Director Curtis on June 21, 2000, to discuss the issues outlined in Principal Lake's letter.

56. By letter dated June 22, 2000, Superintendent Roach informed Grievant he would recommend her termination to the Board on July 6, 2000. The grounds were insubordination and willful neglect of duty. Superintendent Roach also discussed the specific incidents leading up to this recommendation.

57. Grievant asked for and received a pre-disciplinary hearing on July 6, 2000, and after this hearing, the Board voted to terminate Grievant's employment.

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 evidence 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. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he preponderance standard generally requires proof that areasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.; See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

The issues and charges raised by Grievant will be discussed one at a time, but first the question of credibility will be examined.

I. Credibility

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR- 066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses that appear before her. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

The United States Merit System Protection Board Handbook (“MSPB Handbook”) is helpful in setting out factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984). Some factors to consider in assessing a witness's

testimony are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission ofuntruthfulness. Id. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id.

The undersigned Administrative Law Judge had an opportunity to observe the majority of the witnesses. I find the testimony of Principal Lake to be credible. His demeanor was appropriate, his testimony was supported by the testimony of others, his testimony was consistent with his prior statements, and he was concerned that the initial errors in his letter were corrected. Security Guard Tabor was also found to be a credible witness. As a non-employee she had no stake in the matter and can be seen as a neutral witness. She did what she was told and recorded the comings and goings of Grievant. She was clear in her testimony, and her testimony at Level IV was consistent with her testimony at the pre-disciplinary hearing.

However, the credibility of the Grievant is another matter. It is implausible that she did not know what was expected of her. She was given warnings, an Improvement Plan, a suspension, and had meetings with Principal Lake, Director Curtis, and Superintendent Roach. She read the Handbook. How she could still maintain she had a flexible lunch time, how could she not know the procedure for signing in and out, and how could she not know when to use the TSSI? The majority of Grievant's testimony was just not plausible or believable.

II. Merits of the case The next issue to decide is whether CCBOE has proven the charges of insubordination and willful neglect of duty. 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 identifies the types of action that can result in disciplinary action and 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 or a 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.

A. Insubordination

One of the charges against Grievant is insubordination. 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). This Grievance Board has previously recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for 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)). 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).

An employee's belief that management's decisions are incorrect or should not apply to them, absent a threat to the employee's health or safety, does not confer upon her

the right to ignore or disregard the order, rule, or directive. Lilly v. Fayette County Bd. of Educ., Docket No. 97-10-084 (Feb. 11, 1998). See Parker v. W. Va. Dep't of Health and Human Resources, Docket No. 97-HHR-042B (Sept. 30, 1997). See generally, Meckley v. Kanawha County Bd. of Educ., 181 W. Va. 657, 383 S.E.2d 839 (1989) (per curiam). "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) (citing Meads v. Veterans' Admin. 36 M.S.P.R. 574 (1988)). Additionally, an employer 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)).

"Few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first[,] and expresses his disagreement later." Hundley v. W. Va. Div. of Corrections, Docket No. 96-CORR-399 (Oct. 27, 1997). See Maxey v. W. Va. Dep't of Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995). "Generally,an employee must obey a supervisor's order and then take appropriate action to challenge the validity of the supervisor's order." Reynolds, supra. "An employee may not disregard a direct order of a superior based upon the belief that the order is unreasonable." McKinney, supra. "Essentially, an employer can meet its burden [of proof] by showing that the person giving the order had the authority to do so, and that the order did not require the employee to act illegally or place himself or co-workers at unnecessary risk." Surber v. Mingo County Bd. of Educ., Docket No. 96-29-15 (Dec. 12, 1996). See Hundley, supra; Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995).

Grievant developed a pattern of leaving Huntington High School without permission and without properly signing in and out. She continued this pattern even in the face of counseling, written reprimands, an Improvement Plan, and a 30-day suspension.

Grievant indicated she was totally unaware of what the rules were and still maintained some of them do not apply to her. Even at the Level IV hearing, she said she had a flexible lunch schedule, it was O.K. for her to take longer than 30 minutes for lunch, and the payroll clerk was the appropriate person to give permission for leaving Huntington High School.

Additionally, Mr. Lake was Grievant's supervisor, and as such, he had the authority to give Grievant reasonable orders which she was expected to follow. He also had the right to expect Grievant to follow Huntington High School policies and regulations.

Grievant's failure to follow Principal Lake's instructions to receive prior administrative approval before leaving Huntington High School is difficult to understand. It is a normal expectation that an employer will know where employees are. This is especially true when there is a roomful of Special Education students who are in need ofinstruction and guidance. Grievant did not offer a reasonable excuse for her behavior. See English v. Div. of Corrections, Docket No. 98-CORR-082 (June 28, 1998).

While it is possible Grievant may have initially believed she could change her schedule or leave Huntington High School without prior approval, for Grievant to continue in such a belief, after clear instructions by her supervisor to the contrary, and subsequent disciplinary action, is implausible. Accordingly, the undersigned Administrative Law Judge finds Grievant knew what type of behavior was expected of her in regard to her professional work habits, but did not ever appear to realize the seriousness of the situation and the necessity for following the rules. Grievant appeared to believe the rules did not apply to her. Respondent has tried progressive discipline, and any lack of understanding by Grievant appears to be her own fault. See Floyd v. Bd. of Trustees, Docket No. 00- BOT-192 (Aug. 31, 2000).

Grievant's defense, that because she engaged in this inappropriate behavior during her Improvement Plan, and no one caught or corrected her, and that this means there was tacit approval to continue her behavior, is illogical and unreasonable.

B. Willful Neglect of Duty

Respondent must also prove a charge of willful neglect of duty by a preponderance of the evidence. Arbaugh v. Putnam County Bd. of Educ., Docket No. 90-40-437 (May 22, 1991). Although the West Virginia Supreme Court of Appeals 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). Hence,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.

The same reasoning stated in the insubordination discussion applies to this charge. Grievant clearly knew what behavior was expected, and what behavior was in need of change. She either knew or should have known that by her behavior, she was putting the students in her care at risk. Grievant's actions were knowing and intentional. See Brown, supra.

C. Reprisal

Grievant has alleged Principal Lake engaged in reprisal when he wrote his May 17, 2000 letter to Superintendent Roach. Reprisal is defined in W. Va. Code § 18-29-2(o) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it."

To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;

2) that he/she was subsequently treated in an adverse manner

by the employer or an agent;

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989) and Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Gruen v. Bd. of Directors/Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997).

If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

Grievant has not met her burden of proof and demonstrated a prima facie case of reprisal. Although it is clear Grievant went to discuss her situation with Director Curtis and discussed the possibility of a leave of absence or a grievance against Principal Lake, it is also clear Principal Lake did not know about this conversation until after he called Director Curtis to tell her she would be getting a letter from him about Grievant's most recent inappropriate behavior.

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

Conclusions of Law

1 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. 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 and Human Respondent., 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.

3. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR- 371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95- HHR-066 (May 12, 1995).

4. 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).

5. 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.

6. 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).

7. Insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for 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)).

8. An employee's belief that management's decisions are incorrect or do not or should not apply to them, absent a threat to the employee's health or safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. See Parker v. W. Va. Dep't of Health and Human Resources, Docket No. 97-HHR-042B (Sept. 30, 1997). See generally, Meckley v. Kanawha County Bd. of Educ., 181 W. Va. 657, 383 S.E.2d 839 (1989) (per curiam).

9. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-CharlestonHealth Dep't, Docket No. 90-H-128 (Aug. 8, 1990) (citing Meads v. Veterans' Admin. 36 M.S.P.R. 574 (1988)).

10. "Few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later." Hundley v. W. Va. Div. of Corrections, Docket No. 96-CARR-399 (Oct. 27, 1997). See Maxey v. W. Va. Dep't of Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995); McKinney, supra; Reynolds, supra.

11. 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).

12. 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, 398 S.E.2d 120 (1990).

13. "Willful neglect of duty," encompasses something more serious than incompetence and imports "a knowing and intentional act, as distinguished from a negligent act." Chaddock, supra.

14. Respondent 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. 15. Reprisal is defined in W. Va. Code § 18-29-2(o) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it."

16. To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

> 1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;
>
> 2) that he/she was subsequently treated in an adverse manner by the employer or an agent;
>
> 3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

> 4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or
>
> 5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989) and Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Gruen v. Bd. of Directors/Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997).

17. If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may thenestablish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

20. Grievant has not established a prima facie case of reprisal. Principal Lake did not know Grievant was considering filing a grievance against him when he decided to request help from Superintendent Roach on how to resolve Grievant's continuing pattern 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 the Cabell County. Any 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.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: September 27, 2000

Footnote: 1

Grievant was represented by Attorney Jason Poling, and CCBOE was represented by Attorney Howard Seufer.

Footnote: 2

This diagnosis and request were written while Grievant was out of school.

Footnote: 3

At hearing, Grievant did not allege this was an issue.

Footnote: 4

Because Grievant was absent so frequently, it was hoped that having the same substitutes would be helpful to her students' learning.

Footnote: 5

It was unclear whether January 19, 2000, was the date Grievant was denied permission to leave early, or if this was a later date.

Footnote: 6

Of course, the times listed by Security Guard Tabor are when Grievant drove by the guard shack, not when Grievant arrived in her classroom. The time of Grievant's arrival in her classroom would be later than the times noted by Security Guard Tabor.

Footnote: 7

On the sign out sheets submitted by Grievant's attorney, the sign in time has been changed to 11:40 a.m. Although the exhibit was a copy, it appears the previous time was whited out, and the new time was written in. No explanation was

offered for this discrepancy, nor did it appear the parties were aware of this change.

Footnote: 8

Apparently, Grievant had intended to take her lunch to the faculty room to eat, and this would mean her students would not receive instruction during this time as well, as the time Grievant had been late returning from her prior lunch break.

Footnote: 9

There was originally some confusion on the dates, but this was corrected before the pre-termination hearing.