LINDA D. BEATY,

Grievant,

v. **Docket No. 00-06-104**

CABELL COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Linda D. Beaty (Grievant), grieves her ten day suspension without pay by the Cabell County Board of Education (CCBE) for willful neglect of duty. A Disciplinary Hearing was held February 15 and 29, 2000, before CCBE. Grievant was represented at this hearing by John Roush, Esq., and CCBE was represented by Greg Bailey, Esq. At that hearing, CCBE rejected Superintendent David Roach's recommendation that Grievant be dismissed. (See footnote 1) The CCBE met on March 21, 2000, and approved Grievant's ten day suspension without pay.

At Level IV, the parties agreed that this grievance could be submitted for decision based upon the record developed at Grievant's Disciplinary Hearing. The parties were given until July 31, 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 beendetermined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant has been employed by CCBE for some 16 years, and is now a Secretary III who functions as a Bookkeeper assigned to Huntington High School (HHS).

2. Grievant has a heavy workload, and processes some $750,000.00 in transactions annually, exclusive of cafeteria money ranging from $17,000.00 to $28,000.00 monthly.

3. Grievant was, with permission of HHS's Principal, Leo Lake (Lake), absent on vacation from December 3 through December 13, 1999, or seven school days.

4. Grievant had never taken a vacation during the school year before, and assumed that someone would be assigned to perform her duties in her absence.

5. When Grievant returned, she discovered that no one had been assigned to perform her

duties in her absence; that bank deposits had not been made; and that a substantial backlog of unopened mail, checks, cash, and financial documents had accumulated at and around her work station. Teachers gave her money they had been holding during her absence, and 1099 forms had to be completed for sports officials.

6. Grievant thus had to process her normal heavy workload and her substantial backlog simultaneously.

7. Grievant informed Lake of the backlog and volunteered to work unpaid overtime to overcome it. Lake did not tell Grievant that the backlog needed to be eliminated at once. Grievant did not work the proposed unpaid overtime, but made daily bank deposits and worked diligently during this time period. 8. Lake contacted CCBE Treasurer Phyllis Argabrite (Argabrite) about the backlog, who went to HHS on January 20, 2000. Argabrite entered Grievant's locked office and found cash and checks on top of Grievant's desk, in her desk and credenza drawers, and in a nearby safe and vault.

9. CCBE policy requires that all financial transactions be immediately posted to a school's accounting system; that a bank deposit be made whenever more than $500.00 is present at the school; that no cash remain in the school overnight; that all financial transactions have supporting documentation; and that checks received by CCBE be stamped immediately with restrictive endorsements.

10. Argabrite reviewed Grievant's financial transactions for the previous year, discovering what appeared to be a pattern of delayed deposits, and some invoices that had not been timely paid.

11. Argabrite prepared an inventory of checks and cash found in Grievant's office, which totaled $9,655.56, of which some $2,300.00 was cash.

12. Argabrite's figure of $9,655.56 did not accurately reflect Grievant's performance as bookkeeper during the previous year, creating a false impression that she had delayed processing some financial transactions, when in fact those transactions could not have been processed any sooner, and by using the dates that some financial records were initiated, rather than the dates they were completed and given to Grievant, again creating a false impression of Grievant's performance.

13. When Grievant arrived at work on January 20, 2000, she was confronted about the backlog, ordered to leave the building, and suspended pending dismissal. 14. Grievant had received training in CCBE accounting procedures, had school accounting manuals available to her,

and was generally aware of the requirements of CCBE accounting policies, but had no formal training as a bookkeeper.

15. CCBE funds under Grievant's charge have twice been stolen by burglars.

16. Grievant was counseled on her safeguarding of funds after these incidents.

17. Grievant has received satisfactory to very good evaluations from CCBE, and often worked extra hours without compensation.

18. Grievant had not previously been disciplined by CCBE.

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.

CCBE suspended Grievant for willful neglect of duty, for her failure to follow applicable financial

policies at HHS. Grievant responds that she did not willfully neglect her duty; that when she returned from her vacation, which was authorized by CCBE, she had to process her normal heavy workload and her substantial backlog simultaneously, because no one had been assigned to perform her duties in her absence; and that CCBE violated Policy 5300 in suspending her. Grievant seeks removal of the suspension from her personnel records, lost wages, benefits, and seniority, and interest on all monetary sums.

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 her performance. This policy is only applicable if the actions of the employee are correctable. An offense or conduct 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. ofSchools, 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).

With respect to Grievant's argument that CCBE violated Policy 5300 in suspending her, the undersigned notes that, as described above, she had been instructed in proper accounting procedures; had financial procedures manuals available to her in her office, and that she has been counseled about her inadequate safeguarding of funds, giving her an opportunity to improve her performance. Furthermore, willful neglect of duty is something more than a charge of unsatisfactory job performance under Policy 5300. It is a separate offense under W. Va. Code § 18A-2-8, which does not mandate an improvement period before discipline can be imposed. This argument is without merit.

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). CCBE established, by a preponderance of the evidence, that Grievant failed to comply with applicable financial policies. However, CCBE failed to establish that, with respect to the backlog arising from her vacation, Grievant did so intentionally.

A preponderance of the credible evidence of record showed that many of the items on the list prepared by Argabrite, referred to in Finding of Fact 11, were inaccurate or misleading. For example, a teacher collecting small amounts of money over time for an extracurricular activity would keep a list of those funds for several months. Argabrite's list apparently used the dates such lists were begun, and not the dates they were completed and given to Grievant, which resulted in money appearing to be processed months late. The record is replete with other examples. A $750.00 check from Bank One for art supplies, listed as having been received on May 6, 1999, was not actually received until late August, 1999, due to error by the bank. A sheet detailing library fines was lost, then found and given to Grievant, giving the appearance that Grievant had delayed processing the library fines money for weeks. HHS wrestling coach William Archer did not give Grievant the receipts of a wrestling tournament held September 21, 1999, until the coach needed to submit a check for tickets to the state wrestling tournament on January 6, 2000, again giving the appearance that Grievant had delayed processing money. The HHS Beta Club collected dues on October 19, 1999, that were not given to Grievant until December, 1999. The company that pays CCBE a monthly commission on the pool tables in HHS's game room was late in issuing two checks dated May 26, 1999, which were apparently submitted to HHS with two checks dated November 10, 1999, which Grievant received at the end of November, 1999, giving the appearance that Grievant had delayed processingthe checks since May, 1999. HHS's cheerleading coach ordered $878.08 in equipment without a purchase order, so that Grievant could not pay that invoice in a timely manner.

At one point, an unmarked envelope with $72.33 in cash and out-of-town receipts appeared on Grievant's desk, and she had to do some “detective work” to discover that it consisted of change from a check issued by HHS to send a special education teacher and student to a distant Special Olympics event. On another occasion, a styrofoam cup containing $15.25 in quarters appeared on Grievant's desk, and she was left to discover that a HHS teacher had charged his students 25 cents each to see

a wolf. Again, these phantom funds could not have been receipted and deposited within CCBE's policies.

Principal Lake credibly testified that a $250.00 bill from the City of Huntington for a false fire alarm was not timely paid at his order, because he wanted to, and ultimately did, negotiate with the City to have it reduced. As noted in Finding of Fact 2, HHS is, in effect, a business with some $750,000.00 in transactions annually, exclusive of cafeteria money ranging from $17,000.00 to $28,000.00 monthly, and CCBE and Lake simply made no provision for these transactions to be properly made during Grievant's vacation, which they authorized. Teachers and coaches in charge of various clubs and events continued to put envelopes full of cash, checks, invoices, and financial documents on and around her desk, and her mail went unopened.

From these examples it appears that financial procedures at HHS were chaotic at best, and that Argabrite's figure of $9,655.56 did not accurately reflect Grievant's performance as bookkeeper during the previous year, creating a false impression that she had delayed processing some financial transactions, when in fact those transactions couldnot have been processed any sooner, and by using the dates that some financial records were initiated, rather than the dates they were completed and given to Grievant, again creating a false impression of Grievant's performance. It is not clear that such confusing situations could be addressed within CCBE's financial policies. For example, CCBE's policy that all financial transactions have supporting documentation cannot be reconciled with HHS's practice of allowing teachers to place envelopes of mystery money or cups filled with quarters on Grievant's desk.

It is also noted that Principal Lake could have prevented this situation by assigning someone to replace Grievant during the vacation he authorized. Under W. Va. Code § 18A-2-9, Lake 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.” Principals have been disciplined for failing to assure that county financial policies were enforced at their schools. See Copley v. Nicholas County Bd. of Educ., Docket No. 99-34-480 (May 12, 2000); Hoffman v. Mingo County Bd. of Educ., Docket No. 95-29-527 (May 31, 1996).

On her first day back from vacation, Grievant was put in the impossible position of having to do the accumulated work of her seven day absence, plus that day's work. When she failed to do eight days' work in one day, she was automatically in violation of CCBE's policies at the close of business. Although it was inevitable that it would take her asubstantial period of time to resolve her backlog, she was suspended pending her dismissal as she tried to do so. It seems unfair to the undersigned to place the blame for the situation solely on Grievant's shoulders, particularly where CCBE and Lake authorized Grievant's vacation and failed to assign anyone to do her duties in her absence, and where Grievant worked diligently to resolve her backlog, made daily bank deposits after her return, and offered to work unpaid overtime to resolve her backlog. These are not the actions of an employee who intentionally and inexcusably failed to perform a work-related responsibility. Adkins, supra. Accordingly, CCBE has not established that Grievant was guilty of willful neglect of duty with respect to the backlog arising from her vacation.

However, Grievant is not entirely blameless in this matter. (See footnote 2) CCBE established that Grievant violated its financial policies on at least two occasions. CCBE policy requires that all financial transactions be immediately posted to a school's accounting system; that a bank deposit be made whenever more than $500.00 is present at the school; that no cash remain in the school overnight; that all financial transactions have supporting documentation; and that checks received by CCBE be stamped immediately with restrictive endorsements. As noted above, a $750.00 check from Bank One was received in late August, 1999, but was still in Grievant's office when she left for her vacation in December 3, 1999. Similarly, the pool table commission checks, which were apparently submitted to HHS at the end of November, 1999, were still in Grievant's office when she left for her vacation. (See footnote 3) CCBE also established that Grievant routinely kept petty cash in her desk, with which she bought and sold stamps and made change for students, in violation of CCBE policy, and left financial documents and checks on her desk that could have been put in the safe and vault.

CCBE established that Grievant had received training in CCBE accounting procedures, had school accounting manuals available to her, and was generally aware of the requirements of CCBE accounting policies, and had been counseled on her safeguarding of funds after funds under her charge were stolen by burglars. Grievant was guilty of willful neglect of duty with respect to her pre-vacation non-compliance with CCBE financial policies, and some form of sanction is appropriate for

Grievant.

Grievant bears the burden of demonstrating that her penalty, a ten day suspension without pay, was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." Martin v. W. Va. Fire Commission, Docket No. 89-SFC-145 (Aug. 8, 1989). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history andpersonnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997).

Mitigation of a penalty is considered on a case by case basis. Conner v. Barbour County Bd. of Educ., Docket No. 95-01-031 (Sept. 29, 1995); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and include consideration of an employee's long service with a history of otherwise satisfactory work performance. Pingley v. Div. of Corrections., Docket No. 95-CORR-252 (July 23, 1996). This Grievance Board has held that “mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation.” Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

Grievant had a history of satisfactory work performance. She has been employed by CCBE for some 16 years, had received satisfactory to very good evaluations fromCCBE, and often worked extra hours without compensation. No evidence was presented by CCBE to show that she had previously been disciplined by CCBE. Grievant volunteered to work unpaid overtime to overcome her backlog, and made daily bank deposits and worked diligently during the period of time immediately following her vacation.

The undersigned concludes that CCBE, by failing to give any weight to its own role in creating Grievant's backlog, abused its discretion when it suspended her for ten days without pay, and that mitigating circumstances exist for Grievant. Accordingly, Grievant's suspension will be reduced to five days,

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. 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).

5. Willful neglect of duty is something more than a charge of unsatisfactory job performance under West Virginia Board of Education Policy No. 5300. It is a separate offense under W. Va. Code § 18A-2-8, which does not mandate an improvement period before discipline can be imposed.

6. CCBE has met its burden of proof and demonstrated, by a preponderance of the evidence, that Grievant was guilty of willful neglect of duty with respect to her pre- vacation non-compliance with CCBE financial policies.

7. When considering whether to mitigate a punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employeragainst other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved. Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997).

8. A grievant bears the burden of demonstrating that a penalty was clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action. Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

9. Grievant established, by a preponderance of the evidence, that she had a history of satisfactory work performance at HHS.

10. Grievant has met her burden of proof and established that mitigation of the clearly excessive penalty, ten days suspension without pay, assessed by CCBE against her is appropriate.

11. The West Virginia Education and State Employees Grievance Board has authority to "provide such relief as is deemed fair and equitable" in grievances arising under W. Va. Code § 18-29-1. W. Va. Code § 18-29-5; Guerin v. Mineral County Bd. of Educ., Docket No. 92-28-422/459 (Jan. 31, 1996); See Graf v. W. Va. Univ., 189 W. V. 214, 429 S.E.2d 426 (1992).

Accordingly, this grievance is **GRANTED IN PART**, and CCBE is **ORDERED** to reduce Grievants suspension without pay to five (5) days, and to restore her salary, with interest; benefits; and seniority; for the remaining five (5) day period of her suspension.

Any party may appeal this decision to the Circuit Court of Kanawha County or to theCircuit Court of Cabell 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.

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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated: August 24, 2000

Footnote: 1

At this hearing CCBE wrongly placed the burden of proof upon Grievant, with CCBE President Joseph Farrell stating "this lady had a bunch of money in her office and it's up to her to tell us that it's not her fault."

Footnote: 2

CCBE member Rik Bumgardner summarized this situation during Grievant's Disciplinary Hearing by saying "Our high schools are 'big high schools,' lots of money. We approved to let go the only bookkeeper for a seven day trip, no substitute, no policy in place, nobody really taking charge at all, and then we've got all of sudden coming back now and we've got this real stringent policy that you're being somewhat punished by. But then on the other side of the coin, I see you in a position for a long, long time, having been involved in certain situations where due caution would be number one on your part, I would think. . . you're running a million-dollar operation, and the first objection would be to get the cash in the bank. . . It seems like there's a little bit of fault on both sides. . . ."

Footnote: 3

It is impossible to be more specific with respect to other policy violations Grievant may have committed, because CCBE members halted Grievant's attorney's refutation of the items on Argabrite's list when they realized that her list was unreliable.