DONALD R. REGESTER,

Grievant,

v. **Docket No. 01-17-094**

HARRISON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Donald Regester ("Grievant") filed this grievance directly at level four on March 15, 2001, challenging the termination of his employment as a substitute custodian by Respondent Harrison County Board of Education ("HCBOE"). A level four hearing was held in the Grievance Board's office in Westover, West Virginia, on May 2, 2001. Grievant represented himself, and Respondent was represented by counsel, Basil R. Legg. At the conclusion of that hearing, the parties elected not to file written submissions, and this grievance became mature for a decision at that time.

The following findings of fact are made from a preponderance of the credible evidence introduced at the level four hearing.

Findings of Fact

1. Grievant was employed by Respondent as a substitute custodian until his dismissal.
2. Grievant has a full-time job in the roofing business.
3. HCBOE's Policy GCBAD "Assignment of Substitute Service Personnel," provides, in part, as follows:

> It is expected that persons named to the substitute list shall . . . be available to work when called. A log of the calls made to each substituteshall be maintained on a standardized form. No more than two efforts will be made to contact an individual substitute. The number of calls to each substitute and the number of, and reasons for, refusals to work shall be noted. If an employee is called and there is no answer, the reason for not accepting employment shall be "Not Available." Should a person decline to work nor not be available on any five offers to work, a letter shall be sent to the employee denoting dates of calls and refusals. This letter will specify that, if the employee continues to decline the offer to work, measures will be taken to remove the

> employee from the substitute list. Should the employee decline the opportunity to work or be unavailable to work for a total of ten days, from July 1 to June 30, such refusal shall be considered as willful neglect of duty and/or insubordination and a recommendation will be made to the Board of Education, . . . regarding removal of the employee from the substitute list.
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> The employee shall be contacted by certified mail of the impending action of the Board and shall be afforded an opportunity for a hearing . . . . Upon completion of the hearing, the Board shall hold ultimate authority in whether or not the employee shall be terminated, and, therefore, removed from the list.

4. Grievant's home was called by HCBOE personnel for substitute work on October 25, 2000, October 30, 2000, November 7, 2000, November 13, 2000, and November 29, 2000, and there was no answer. All of these calls were made between 8:30 a.m. and 11:00 a.m.

5. By letter dated November 28, 2000, Grievant was advised by Charles Reider, Custodial Coordinator, that he had been unavailable for work on five occasions, and that ten incidents of refusals or being unavailable would result in a recommendation that his name be removed from the substitute list.

6. Grievant's home was phoned on December 4, 2000, December 12, 2000, December 20, 2000, and January 8, 2001, and there was no answer. All of these calls, except one, were made during the afternoon and before 6:00 p.m. On January 5, 2001, Grievant was called in the evening for substitute work, and he refused, because he did nothave a babysitter.

7. By letter dated January 25, 2001, Mr. Reider advised Grievant that he had refused/been unavailable for substitute work on ten occasions, and that he would be recommending to the superintendent that Grievant be removed from the substitute custodian list.

8. Grievant's home was also called on January 11, 12, 16, and 29, 2001, along with five occasions during the month of February. There was no answer on all but one of these occasions.

9. By certified letter dated February 13, 2001, Superintendent Carl Friebel advised Grievant that his termination would be recommended for willful neglect of duty at the Board's hearing on March 6, 2001.

10. Grievant appeared at the Board's March 6 hearing and presented his case. His contract was terminated on March 7, 2001.

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 dismiss 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.

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 one. 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). Although the West Virginia Supreme Court has not formulated a precise definition of willful neglect of duty, it does encompass something more serious than incompetence and requires "a knowing and intentional act, as distinguished from a negligent act." Chaddock, supra. Willful neglect of duty has also been 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).

Grievant has not denied that he was unavailable on the occasions when he was called. He testified that his roofing jobs keep him busy and away from home during the daymost of the time, and this is why he did not answer the most of the calls made to his home. Rather, Grievant contends that he believed he would only be called for substitute work between the hours of 9:00 p.m. and 11:00 p.m., which are hours when he is normally home. Grievant bases this contention upon the information sheet provided to substitutes regarding use of the "computer call-out system." Gr. Exhibit 1. However, as explained by Mr. Reider, a decision was made long ago not to use the computer system to call substitute custodians, because custodians work shifts covering all hours of the day and night. Therefore, the computer system, which only makes evening calls for work the following day, simply is not effective for calling out substitutes for all shifts. Mr. Reider testified that all custodians were informed that they would be called manually at any hour, and Grievant did not dispute his testimony.

A virtually identical situation was presented to this Grievance Board in the case of Carr v. Randolph County Board of Education, Docket No. 99-42-086 (Sept. 29, 1999). In that case, a substitute bus operator was dismissed for willful neglect of duty after repeatedly declining offers to work, pursuant to a policy similar to Respondent's. As with Grievant in the instant case, the grievant in Carr declined offers for substitute work due to conflicts with another job. The administrative law judge upheld Grievant's dismissal for willful neglect of duty, because "Grievant knowingly and willfully declined to perform the duties for which he had been employed." Id.

As with the Grievant in Carr, supra, it is admirable that Grievant has obtained more than one job in order to support his family. However, as noted in the Carr decision, Grievant was not employed under restricted conditions, and he agreed to perform the duties of a substitute custodian, knowing that they encompass all hours of the day andnight. Although Grievant did not directly decline the offers to work on most of the occasions cited, he was unavailable to take the calls. Pursuant to Respondent's policy, there is no obligation to attempt to reach a substitute more than once, the policy merely stating that "no more than two attempts" shall be made. Grievant's repeated unavailability for substitute work, especially after being advised that continued unavailability would result in his dismissal, clearly constitutes willful neglect of duty, and his dismissal was appropriate.

Consistent with the foregoing, the following conclusions of law are made.

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

3. 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 one. 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).

4. Respondent has proven by a preponderance of the evidence that Grievant was knowingly and willfully unavailable for substitute assignments, establishing willful neglect of duty as defined under its Policy GCBAD.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Harrison 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.

Date: May 9, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge