DAVID KENNARD,

Grievant,

v. **DOCKET NO. 01-47-591/628**

TUCKER COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

David Kennard filed a grievance on September 6, 2001, stating, “I was suspended temporarily. I was to attend two (2) counseling sessions set up by the Board but only attended one. The Board only set up one. I was to return to work after the temporary suspension.” As relief, he sought, “to be placed back in my job plus back pay.” This grievance was placed in abeyance based on an agreement by the parties to allow Grievant to attend a second counseling session. After the second session, Tucker County Schools Superintendent Cynthia Phillips Kolsun recommended to the Tucker County Board of Education that Grievant be dismissed from employment. After a pre-termination hearing, the Board voted to terminate Mr. Kennard's employment. Respondent's counsel then forwarded the first grievance to the Grievance Board.

Grievant then filed a second grievance directly to Level IV on December 20, 2001, stating, “I was terminated unjustly. I wish to have the WV Education and State Employees Grievance Board to review my case surrounding my termination with the Tucker Co. Bd.of Education.” As relief, he sought, “to be placed back to work and compensation for lost wages during my temporary suspension and ultimate termination.”

Grievant's counsel, Patrick A. Nichols, Esq., withdrew as Grievant's representative on December 20, 2001, and Grievant represented himself thereafter. Respondent has at all times been represented by Harry M. Rubenstein, Esq. of Kay Casto & Chaney, PLLC. Following the Level IV hearing held in the Grievance Board's Elkins office on February 15, 2002, the parties agreed to submit their proposed findings of fact and conclusions of law by February 25, 2002, and any reply or rebuttal briefs by March 4, 2002, on which date the matter became mature for decision.

Based on a preponderance of the evidence contained in the record and adduced at the Level IV hearing (See footnote 1), the undersigned Administrative Law Judge makes the following factual

findings:

FINDINGS OF FACT

1. Respondent employed Grievant for the 2000-2001 school year as a custodian at Thomas-Davis Elementary/Middle School. He has been employed there for six years, and worked by himself on the 3:00 p.m. to 11:00 p.m. shift.

2. On or about February 20, 2001, the Principal of that school called Superintendent Kolsun and stated that two students at that school had delivered a hand- written letter, signed “two people,” alleging that the previous evening while they were at theschool waiting for their parents to finish a G.E.D. class, they had seen Grievant using a computer in one of the classrooms to view pornography.

3. Superintendent Kolsun immediately began an investigation that included having a teacher interview the students and having the county technical coordinator look at the specific computer involved.

4. The technical coordinator discovered evidence in the computer's “Temporary Internet Files” directory that the computer had been used on February 19, 2001, during the hours that Grievant was working, to access Internet sites with domain names such as “fetishhotel.com,” “hotanalsex.com,” “pussy.com,” “latinvirgins.com,” and “teen- pleasure.net,” among others. “Last Accessed” times range from 7:45 p.m. to 10:53 p.m. on February 19, 2001, but the files do not identify who was using the computer at those times. The students alleged they saw Grievant at about 7:50 p.m.

5. When confronted with the evidence gathered from the computers, Grievant admitted using the computer to view pornographic material, but denied having done so at the time the students claimed to have seen him.

6. On advice of his counsel, Grievant agreed to be suspended for the remainder of the school year. As part of the agreement, Grievant was to attend two evaluation sessions with licensed counselors of Superintendent Kolsun's choosing. Ms. Kolsun reserved the right to make further recommendations to the Board after receiving the reports of those evaluations.

7. Allan L. LaVoie, Ph.D., of Elkins Family Counseling Center conducted a clinical interview with Grievant on May 1, 2001, and an evaluation on May 7, 2001. By letter dated March 9, 2001 but presumably written on May 9, 2001, he provided a writtenpsychological evaluation to Ms. Kolsun. [Respondent's Exhibit 4.7] Based on Dr. LaVoie's conclusions (See footnote 2), Superintendent

Kolsun informed Grievant she would recommend dismissal.

8. Grievant then filed his first grievance as referred to above, and was granted a second evaluation at The Appalachian Community Health Center by Clifford T. Goddin, a licensed psychologist. Mr. Goddin met with Grievant on October 4, 2001,and provided his findings to Superintendent Kolsun on November 6, 2001. [Respondent's Exhibit 4.8] This second report did not change Superintendent Kolsun's opinion.

9. On November 16, 2001, Superintendent Kolsun sent a letter to Grievant, stating in part, “Please be advised that I will recommend to the Tucker County Board of Education that you be dismissed from your duties based upon the report that I received from Elkins Family Counseling Center and Appalachian Community Health Center.” She further stated, “Your behavior that lead to the suspension was willful neglect of duty and immoral [sic] under West Virginia Code §§ 18-4-10, 18A-2-7 and 18A-2-8, are causes for dismissal.”

10. A hearing was held before the Board on November 27, 2001, at which Grievant appeared represented by his counsel. Following the hearing, the Board voted unanimously to dismiss Grievant.

11. Grievant did use a computer at Thomas-Davis Elementary-Middle School during his regular work hours to access pornographic material on the Internet on February 19, 2001. 12. Respondent has enacted its Policy Number 2030, Technology/Acceptable Use Policy, which establishes regulations for acceptable use of electronic communications for employees and students of Tucker County Schools. Although this policy incorporates an “Adult Consent and Waiver Form” to be signed by adult users, no adult users, including Grievant, had been required to sign the form. Section 5.10.A. of that policy states: “Users will not use the Tucker County School System to access material that is profane or obscene; that advocates illegal acts; or that advocates violence or discrimination towards other people.” Section 5.10.D. states: “If a user inadvertently accesses such information, they [sic] should immediately disclose the inadvertent access in a manner specified by their [sic] school. This will protect the users against an allegation that they have intentionally violated the Acceptable Use Policy.”

13. Although Grievant claimed he found the obscene material inadvertently, he did not report to anyone that the material was on the computer.

14. There was no content filter active on the computer in question that would prevent Grievant or any other user from viewing the images contained on the Internet sites Grievant accessed.

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. Grievant's termination was a disciplinary action, so Respondent must prove its allegations of willful neglect of duty and immorality, both of which are grounds for dismissal in the discretion of Respondent under W. Va. Code § 18A-2-8. The willful neglect of duty charge arises from the fact that Grievant was using the computer for personal reasons when he should have been working. 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).

Although Grievant challenges the legitimacy of how Respondent found out about his activities and the accuracy of the anonymous students' account, he did ultimately admit to the behavior in question. While Grievant's performance evaluations consistently rate him in the “meets standards” category, it is beyond question that Grievant is not paid to look at pornography at the school. The “Last Accessed” times in the computer's log file are not consistent with Grievant's assertion that he may have viewed the sites briefly at an earlier time and then simply left the computer on with the monitor turned off. Instead, the Temporary Internet Files directory shows a pattern of successive views at different sites, at various times starting around 7:27 p.m., and then almost continuously from around 9:30 p.m. to 10:55 p.m. Based on these files, Grievant spent at minimum an hour and a half onthe evening of February 19 deliberately viewing pornographic Internet sites while neglecting his assigned duties.

Further, Respondent had a properly-enacted policy that made it the duty of adult computer users to report inadvertent access to improper materials. Although Grievant did not sign a form indicating he agreed to comply with the policy, he was still bound by its terms. If, as Grievant stated, he simply looked at sites that were already on the History file of the computer, he had a duty to report this to the

principal. Even absent a written policy, it is reasonable to expect that an adult finding inappropriate material on a computer in a classroom would have a moral duty to report the offending material to those in charge of the computer. Grievant's failure to disclose the discovery of these sites supports an argument that he intended to conceal his computer use, a willful and improper act that neglected his duty to his employer.

Respondent's second charge is that Grievant's conduct was immoral. Grievant suggests that immorality can mean different things to different people, and that what Superintendent Kolsun thinks is immoral someone else may not. Rather than choose one person's opinion over another, the undersigned must instead rely on what the law says is immoral. The Supreme Court of Appeals of West Virginia has attempted to define "immorality" within the meaning of W. Va. Code § 18A-2-8. The Court stated: “Immorality is an imprecise word which means different things to different people, but in essence it also connotes conduct 'not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior.' [Citation omitted.]” Golden v. Board ofEducation of County of Harrison, 169 W. Va. 63, 67, 285 S.E.2d 665, 668 (1981); Harry v. Marion County Bd. of Educ., 203 W. Va. 64; 506 S.E.2d 319 (1998). Further, “'Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires at least an inference of conscious intent.' [citations omitted]” Wahl v. Mineral County Bd. of Educ., Docket No. 98-28-175 (Sep. 14, 1998).

Grievant suggested at the pre-termination hearing that the conduct he admitted to was no worse than a person watching a movie on HBO at home. However, Grievant's conduct must be placed in context. While it may be acceptable under the moral code of the community for an adult to view HBO or even legal Internet pornography in his own home, nowhere would it be acceptable for the same adult to engage in the same activity while he is supposed to be working, especially at a school, and especially when his activity raises the probability that a child may access the same material. What Grievant did is always wrong and inexcusable, therefore it is immoral, and W. Va. Code §18A-2-8 justifies Respondent's decision to dismiss Grievant for what he did.

A further question raised by Grievant is whether his singular indiscretion, in light of his work performance, should be the basis for dismissal rather than a less harsh punishment. Superintendent Kolsun testified that her concerns with Grievant's continued employment, despite his past

performance, were based on his attitude toward his behavior. The evidence suggests that her concerns are not unfounded. Grievant shows little remorse for his behavior, and only seems to be concerned with how it affected him. Two separate psychological evaluations support Superintendent Kolsun's decision. Although Grievant is an adult with several years experience in the school system, he does not accept any responsibility for his own actions. Instead, he blames the students who should not have been roaming the halls after school hours, the teacher for not having monitored the computers in his classroom, the Principal because she did not require him to sign the Acceptable Use form or monitor the computers, and the Superintendent because she did not arrange to have content filters on the computers. None of these people forced Grievant to sit down at a computer, turn it on, and navigate to Internet sites with such obviously inappropriate names as “www.teeny-sluts.com.” No one forced him to stay at the computer, or to return to the computer, after he first saw that there was pornography at those sites. Based on these concerns, it is reasonable for Respondent to prefer a cautious stance in the interest of protecting its students, to a more lenient stance in the interest of protecting Grievant's job.

The following conclusions of law are made in support of the above findings:

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, 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).” Graham v. Putnam County Bd. of Educ., Docket No. 99-40-206 (Sep. 30, 1999). 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.

3. "Immorality is an imprecise word which means different things to different people, but in essence it also connotes conduct 'not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior.' [Citation omitted.]" Golden v. Board of Education of County of Harrison, 169 W. Va. 63, 67, 285 S.E.2d 665, 668 (1981); Snodgrass v. Wetzel County Bd. of Educ., Docket No. 97- 52-384 (Dec. 15, 1997); Harry v. Marion County Bd. of Educ., 203 W. Va. 64; 506 S.E.2d 319 (1998).

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., DocketNo. 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. "'Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires at least an inference of conscious intent.' *See* Hayes v. Kanawha County Bd. of Educ., Docket No. 94-20-1143 (June 28, 1995), citing Youngman v. Doerhoff, 890 S.W.2d 330 (Mo. 1994)." Wahl v. Mineral County Bd. of Educ., Docket No. 98-28-175 (Sep. 14, 1998).

6. A school employee's use of a school computer to access pornographic materials is immoral and, if such conduct occurs on work time, it is willful neglect of duty.

7. A school employee's failure to properly report the discovery of pornographic materials on a school computer is a willful neglect of duty.

8. Respondent met its burden of proving that Grievant engaged in immoral conduct while at work and that he willfully neglected his duty, and reasonably dismissed Grievant from employment for willful neglect of duty and immorality.

Accordingly, this grievance is hereby **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Tucker 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 GrievanceBoard. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

DATED: March 12, 2002 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Grievant elected not to testify in his own behalf at the Level IV hearing. Although Respondent has objected to certain statements of fact referred to by Grievant in his argument at the hearing and in his brief, it is noted that Grievant did provide sworn testimony on most of these issues at the pre-termination hearing, a transcript of which is part of the record as Respondent's Exhibit 4.11.

Footnote: 2

To protect Grievant's privacy, the undersigned has issued a protective order sealing the contents of these reports, which were introduced as part of Respondent's Exhibit 4. Having reviewed the specific conclusions, I see no need to refer to them other than generally.