SHERRY BARKER,

Grievant,

v. **DOCKET NO. 02-03-092**

BOONE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

On March 27, 2001, Sherry Barker filed this grievance directly at level four, stating:

> Grievant is regularly employed as a Cook II and has been employed by the Respondent for 17 years. The Respondent terminated the Petitioner for cause using West Virginia Code § 18-2-6. Grievant contends that the Respondent committed the following errors: (a) Respondent improperly terminated the Grievant's employment utilizing the wrong procedure; (b) The "cause" for which Respondent terminated Grievant, "failure to fulfill her contract" is not authorized as a reason for termination by the appropriate statute; (c) Grievant has not failed to fulfill her contract; and (d) Despite the correctable nature of Grievant's "misconduct" she was not afforded an opportunity for an improvement plan nor was the problem area called to her attention in her evaluations. Grievant alleges a violation of West Virginia Code § 18A-2-8, 18A-2-6 and West Virginia Board of Education Policy No. 5300.

As relief, she seeks reinstatement to her position and compensation for all lost wages and benefits, plus interest. She was represented at the hearing by WVSSPA Attorney John E. Roush, Esq., and Respondent was represented by its attorney, Timothy R. Conaway, Esq. The parties agreed to submit written proposed findings of fact and conclusions of law by July 18, 2002, whereupon the matter became mature for decision.

I find the following facts have been proven by a preponderance of the evidence:

FINDINGS OF FACT

1. Grievant was regularly employed as a full-time Cook II at Madison Middle School, with approximately 17 years seniority.

2. On March 7, 2002, Superintendent Steve Pauley notified Grievant that on March 27, 2002, he would "recommend to the Board of Education of the County of Boone that [her] continuing service personnel contact be terminated." Respondent's Exhibit No. 1. He further stated, "The cause for my recommendation that your contract be terminated is that you have not fulfilled your contract of

employment in that you have missed an excessive number of work days." The letter advised Grievant she had the right to a hearing before the Board prior to its taking any action on the recommendation.

3. Grievant requested a hearing, and it was held on March 27, 2002, after which the Board voted to approve the Superintendent's recommendation.

4. By letter dated April 22, 2002, Superintendent Pauley notified Grievant that "the Board voted by a majority vote of the full membership of the Board to terminate your continuing contract of employment. The Board terminated your continuing contract of employment because you have not fulfilled your contract of employment in that you have missed an excessive number of work days." Respondent's Exhibit No. 5 (See footnote 1) .

5. As of the March 27, 2002, hearing, Grievant had missed 76 of 150 school days. Forty-three of those absences occurred after Grievant had exhausted all of her available paid leave. 6. Throughout her tenure, Grievant received good performance evaluations, rating her as "meeting standards."

7. Dr. Richard Adkins, Assistant Superintendent of Boone County Schools, is also the personnel director. Sometime in December, 2001 he received a call from Food Services Director Martha Hill, who had received complaints from Grievant's head cook and principal that Grievant's absences were causing problems. Dr. Adkins called the principal, who confirmed the problem, and who said Grievant was close to running out of leave.

8. On January 11, 2002, Dr. Adkins sent Grievant a memorandum about her "Excessive Absences from Work." Respondent's Exhibit No. 2. The memorandum stated in part:

> As of January 10, 2002 you have been docked eighteen (18) days due to absence from work following the exhaustion of your annual sick leave days.
>
> As a regular employee of Boone County Schools, you have a contractual obligation to attend to your work duties as a cook. Your absences have caused a hardship on the food services staff at the school and have resulted in an increased work load for the cooks. Although a substitute cook is called to the school, excessive absences create a regular and re-occurring disruption that is detrimental to efficient food preparation and meal service. It is unfair to the county, the staff and the students.
>
> You must make an effort to improve your attendance. *Continued absences, without the benefit of sick leave days, may result in disciplinary action and/or termination.*

[Emphasis added.] Dr. Adkins gave the letter to Grievant in person and discussed the problem with her. Grievant stated she knew it was a problem and promised she would do better.

9. At the beginning of the 2001-2002 school year, Grievant had 34½ sick leave days available. 10. Grievant's attendance did not improve. Grievant was absent from work on January 15, 16, 17, 18, 29 and 30, ten days in February, and ten days in March. Respondent's Exhibit No. 3.

11. According to County policy, a doctor's excuse is needed for absences exceeding two consecutive days. Respondent's Exhibit No. 4. Grievant did present a doctor's excuse for her absence of March 11-13, 2002. The excuse presented by Grievant stated, “She could return to work on 3-18-02.” On the form submitted by Grievant it is obvious to the untrained eye that she had altered the return to work date. Respondent's Exhibit No. 8. The original form, as written by the doctor, had a return to work date of 3-14- 02. Respondent's Exhibit No. 7. (See footnote 2) Grievant lied under oath about her alteration at her pre- termination hearing before the board, until she was confronted with the doctor's copy of the original document.

12. Ms. Hill spoke to Grievant about her absences in early December, 2001. She advised Grievant that she had options such as getting additional leave from the sick leave bank, or requesting a leave of absence. Grievant explained she was having personal problems, and Ms. Hill advised her to apply for a leave of absence. Grievant did not request a leave of absence.

13. Grievant called Ms. Hill after she received the letter referred to in Finding of Fact No. 2 above, and asked for another chance, stating she was “doing better.” However, it had only been two days since she was warned, and she never did begin to attend work faithfully.

14. Keith Phipps is Principal of MMS. He had at one point instructed Grievant to call him at home if she was going to be absent, but then told her not to after she called him in the middle of the night. He met with Grievant at least three times to counsel her about her absences, and on one occasion told her explicitly she would get fired if she did not come to work. Grievant agreed and said she would do better. On some occasions, she would report to work for an hour and then leave.

DISCUSSION

Under W. Va. Code § 18A-2-6, tenured service personnel maintain their continuing contract of employment from year to year, “unless and until terminated with written notice, stating cause or

causes, to the employee . . . The affected employee shall have the right of a hearing before the board, if requested, before final action is taken . . . " The stated cause or causes may be disciplinary or not, and if the termination is disciplinary, the burden of proof is on the employer, who must meet that burden by proving the charges against Grievant by a preponderance of the evidence. Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). But if the termination is not disciplinary, the burden of proof is on Grievant, whose allegations must be proven by a preponderance of the evidence. See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21.

The parties in this case differed as to whether Grievant's termination was disciplinary. Respondent argued it was simply a breach of contract issue, but Grievant contended the termination was for cause and was therefore disciplinary. Respondent's counsel suggested that this may be a case of first impression on the issue of whether atenured school employee's contract may be terminated by the board on the ground that the employee failed to fulfill the contract. At the start of the level four hearing, the Undersigned Administrative Law Judge assigned the burden of proof to Respondent.

After review of the evidence presented at the hearing, I find that the initial assignment of the burden of proof was correct, as Grievant's termination was disciplinary, and Respondent's novel theory on grounds for contract termination is rejected.

Grievant's continuing contract of employment is an instrument the terms of which are unilaterally dictated by W. Va. Code § 18A-2-5. By signing the contract, the parties mutually agree, among other things, that:

> (3) The services to be performed by the Employee shall be such services as are prescribed for the job classification set out above in paragraph (1) and as defined in [W. Va. Code § 18A-4-8] as amended.
>
> (4) The Employee may be dismissed at any time for immorality, incompetency, cruelty, insubordination, intemperance or willful neglect of duty pursuant to [W. Va. Code § 18A-2-8] as amended.

W. Va. Code § 18A-2-5 (1997). However, the contract itself does not contain the complete terms of every provision relating to the employment relationship. Conspicuously missing is a promise by the employer not to terminate a contract for reasons other than those listed in paragraph (4) of the contract. For example, service personnel may be released from employment for a reduction in force of a particular classification pursuant to W. Va. Code § 18A-4-8b. However, the only provision

relating to termination of a contract for cause is the one cited in the contract itself, W. Va. Code § 18A-2-8. Of the allowable reasons for termination of a contract contained in Chapter 18A, all of those mentioned outside § 18A-2- 8 are for reasons beyond the control of the employee, such as economics or scheduling logistics. Grievant was terminated for cause attributable to her own misconduct, andwhether the cause may also be characterized as a breach of contract or not, Respondent is still obligated to comply with the terms it agreed to in the contract, specifically the due process provisions of W. Va. Code § 18A-2-8. Although Grievant's representative characterizes these issues as “a virtual Gordian Knot,” W. Va. Code § 18A-2-8 cleaves the Gordian Knot like Alexander the Great's sword, as it is the sole procedure for terminating the continuing contract of employment of a service employee for cause. *See* Green v. Bd. of Educ., 133 W. Va. 356, 56 S.E.2d 100 (1949). Terminating an employee for cause is disciplinary.

Respondent asserts that this conclusion would prevent an employer from terminating the contract of an employee who is legitimately unable to perform her duties, regardless of the frequency or duration of the employee's absences, because under § 18A- 2-8, “neglect of duty” must be proven to be “willful.” However, this argument ignores the additional ground of “unsatisfactory performance.” That ground does impose additional procedural conditions, such as proper performance appraisals and improvement plans, but does not foreclose entirely the possibility of termination for performance reasons beyond the control of the employee. It is a willful and intentional act to not go to work, and it can also be characterized as insubordination, so the issue is not as difficult as Respondent would make it. *See* Beverlin v Bd. of Educ. of the County of Lewis, 158 W. Va. 1067, 216 S.E.2d 564 (1975).

Respondent terminated Grievant for excessive absenteeism. West Virginia Code § 18A-2-8 does not require an employer to use the exact language in that section to describe the misconduct alleged, and in this case Respondent did not do so. “Respondent's burden is to prove the misconduct it charges, but it is not required to alwaysidentify the conduct in terms of one of the terms used in W. Va. Code § 18A-2-8. The proper focus is whether the charge of misconduct is proven, not the label attached to such conduct. Gillespie v. Kanawha County Bd. of Educ., Docket No. 90-20-496 (June 6, 1991), citing Russell v. Kanawha County Bd. of Educ., Docket No. 90-20-415 (Jan. 24, 1991); Brown v. Mercer County Bd. of Educ., Docket No. 98-27-113 (July 30, 1998).” Koontz v. Marshall County Bd. of Educ., Docket No. 01-25-480 (Nov. 29, 2001). *See* Syl Pt. 1, Mason County Bd. of Educ. v

State Superintendent of Schools, 165 W. Va. 732, 274 S.E.2d 435 (1980).

The actual cause of Grievant's termination - her excessive absenteeism - could be labeled willful neglect of duty, insubordination, or unsatisfactory performance. Unless the label applied is unsatisfactory performance which imposes additional due process requirements, the exact category is not material.

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). Grievant failed to report for work to perform her duties as Cook II 75 out of 150 days. She was repeatedly counseled about the unacceptable nature of her absences and warned of the consequences of continuing her pattern of behavior. “When an employee has been repeatedly chastised for not performing specific duties, then proceeds to ignore those duties, this is clearly willful neglect of duty. Chaddock, [*supra*]; *See* Jones, [*supra*].” Potoczny v. Marion County Bd. of Educ. Docket No. 99-24-344 (June 12, 2000).

Grievant's failure to report to work was inexcusable. Although she articulated various and sundry reasons for her absences and testified as to her efforts to improve, she was not believable. Many of the reasons appear to be fabrications, such as her calling in at 4:30 a.m. on October 2, saying she had to be in court that day, something that it is highly unlikely she had such short notice of. Respondent's Exhibit No. 6. Further, her credibility is reduced to nil by her forgery of a doctor's excuse and her lying under oath before the Board in her pre-termination hearing. In addition, the empirical evidence of her attendance records shows she did not begin coming to work every day, much less make an effort to reduce the frequency of her absences. Respondent's Exhibit No. 3.

Grievant's contract also requires Respondent, as part of her due process rights, to follow the State Board of Education's evaluation policies prior to termination. The West Virginia State Board of Education's evaluation policy for service personnel, Policy 5300, is rather laconic on the issue,

stating:

> 2.6. Every employee is entitled to know how well he/she is performing his/her job, and should be offered the opportunity of open and honest evaluation of his/her performance on a regular basis. Any decision concerning promotion, demotion, transfer or termination of employment should be based upon such evaluation, and not upon factors extraneous thereto. Every employee is entitled to the opportunity of improving his/herjob performance, prior to the terminating or transferring of his/her services, and can only do so with the assistance of regular evaluation.

> 2.7. Every employee is entitled to "due process" in matters affecting his/her employment, transfer, demotion or promotion.

126 C.S.R. 141 (1993).

Despite her acceptable formal performance evaluations, Grievant knew that her frequent absences were unacceptable, knew she had to improve, knew what the consequences of failing to improve were, and knew about the availability of a formal leave of absence to mitigate the harm to Respondent of her unreliability. She was warned time and again by different people that her absences were excessive and continued failure to report to work would lead to her dismissal. She was given options of requesting additional leave from the leave bank or requesting a leave of absence, and she failed to take advantage of either option. She knew she was in a hole, but she just kept digging. Grievant was given due process in the form of a clear notice of the nature of her misconduct, a meaningful opportunity to be heard (which she squandered by lying to the Board), an explanation of the evidence against her, and a considered decision by the Board.

Although Respondent attempted an end-run around the due process requirements contained in the contract to which it was a party, an action that is not recommended as a future course of conduct, Grievant suffered no prejudice from the actions. She was afforded meaningful due process, and the outcome was exactly the same as if Respondent had followed the letter of the law. For these reasons, as supported by the following conclusions of law, Grievant's termination must be upheld.

CONCLUSIONS OF LAW

1. If a school employee's termination is disciplinary, the burden of proof is on the employer, who must meet that burden by proving the charges against the employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6,

1988). But if the termination is not disciplinary, the burden of proof is on Grievant, whose allegations must be proven by a preponderance of the evidence. See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21.

2. West Virginia Code § 18A-2-8 is the sole procedure for terminating the continuing contract of employment of a service employee for cause. Terminating an employee for cause is disciplinary.

3. Grievant's termination was disciplinary.

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. Respondent's failure to faithfully report to work after the exhaustion of her sick leave was willful neglect of duty. 6. "[U]nder W. Va. Code § 18A-2-8, due process requires a pre-termination hearing of a tenured employee . . . . It is not necessary for a pre-termination hearing to be a full adversarial evidentiary hearing; however, an employee is entitled to a written notice of the charges, an explanation of the evidence, and an opportunity to respond prior to a Board of Education's decision to terminate the employee." Wines v. Jefferson County Bd. of Educ., Docket No. 00-19-394 (July 9, 2001), citing Bd. of Educ. v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994).

7. "'However, an allegation that an employer failed to follow a specific procedural requirement in accomplishing a disciplinary action is an affirmative defense, and Grievant has the burden of establishing the facts to support such allegation by a preponderance of the evidence.' Bradley v. Cabell County Bd. of Educ., Docket No. 99-06- 150 (Sept. 9, 1999). In addition, a grievant must show the procedural error, more likely than not, influenced the outcome. Otherwise, if the same result would have inevitably been reached, the procedural violation will be considered as 'harmless error.' Bradley, *supra*; Dadisman v. W. Va. Div. of Rehabilitation Serv., Docket Nos. 98-RS-023/040 (Mar. 25, 1999)." Wines, *supra*.

8. Grievant was given due process in the form of a clear notice of the nature of her misconduct, a meaningful opportunity to be heard, an explanation of the evidence against her, and a considered decision by the Board.

9. The procedural error of Respondent did not prejudice Grievant.

For the foregoing reasons, this grievance is hereby DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Boone County. Any such appeal must be filed within thirty (30) days ofreceipt 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: August 26, 2002 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

This letter erroneously states the date of the Board meeting as March 22, 2002.

Footnote: 2

Respondent's Exhibits No. 7 and 8 were admitted as evidence of Grievant's lack of credibility over the objection of Grievant's attorney, although it was ruled that acts that occurred after March 7, 2002, were not relevant as evidence of misconduct for which Grievant was terminated.