SCOTT ARNOLD,

Grievant,

v. **Docket No. 02-30-195**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Scott Arnold, employed by the Monongalia County Board of Education (MCBE or Respondent) as an Electrician II, filed a grievance directly at level four following the termination of his employment. Grievant alleges the dismissal was in violation of W. Va. Code §§ 18-2-8 and 18A-2-7, and requests reinstatement with back pay, benefits, seniority and interest. He additionally requests the removal of any records pertaining to this suspension and dismissal from all records maintained by Respondent. An evidentiary hearing was conducted at the Grievance Board's Morgantown office on October 24, 2002, at which time Grievant was represented by John E. Roush, Esq., of WVSSPA, and MCBE was represented by Harry M. Rubenstein, Esq., of Kay Casto & Chaney. The matter became mature for decision upon receipt of final post-hearing submissions on November 21, 2002.

The essential facts of this matter are undisputed and may be set forth as the following formal findings of fact.

Findings of Fact

1. Grievant has been employed by MCBE since December 28, 1996, and has held the classification of Electrician II at all times pertinent to this grievance.

2. In Spring 2002, Grievant was summoned to appear before the Circuit Court of Marion County to serve as a juror. This was Grievant's first experience serving on a jury. 3. Grievant requested and received paid leave for jury service from MCBE for March 5, 6, 7, 13, 20, 21, 22, and 28, April 3, 4, 5, 10, 17, 18, 24, and 29, and June 5, 2002.

4. Grievant was only required to report for jury service on March 7, 13, 20, 27, April 3, and June 5, 2002.

5. Grievant received $690.30 in salary, plus accrued all benefits, for the days he claimed to be on jury duty, but was not.

6. MCBE administrators indirectly learned that Grievant was not serving on jury duty all the days he reported off. Maintenance Foreman Kermit Hess, Manager of Human Resources Dan McGinnis, and Treasurer Terry Hawkins, met with Grievant on April 30, 2002, at which time he admitted to not serving on the jury all the days he submitted. Grievant stated that he would reimburse MCBE for the salary he was improperly paid, but did not do so.

7. By letter dated May 20, 2002, MCBE Superintendent, Dr. Michael Vetere notified Grievant that he was suspended effective May 22, 2002, and that he would recommend to MCBE that Grievant be terminated.

8. A hearing was conducted by MCBE on June 11, 2002, after which the recommendation that Grievant's employment be terminated was accepted.

9. In July 2001, Grievant filed a grievance over the promotion of another employee to Foreman. That matter was denied at level four, and remains pending in the Circuit Court of Kanawha County.

Discussion

In disciplinary matters, the employer bears the burden of proving the charges by a preponderance of the evidence. W. Va. Code §§18-29-6; 18A-2-8; Perkins v. Greenbrier County Bd. of Educ., Docket No. 94-13-019 (Aug. 12, 1994). The charges must be one or more of those listed in Code § 18A-2-8. Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995). A county board of education must act reasonably, not arbitrarily or capriciously. Rovello v. Lewis County Bd. of Educ., 181 W. Va. 122, 381 S.E.2d 237 (1989). Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991).

MCBE argues that Grievant engaged in willful neglect of duty, immorality and fraud by reporting to be on jury duty when he was not. Grievant asserts that he was unfamiliar with the jury system, and was unsure whether he was entitled to any compensation from MCBE on days he served on a jury. He explained that his spouse is the money manager in the family, and he did not make particular note of whether he received pay for the days in question. Grievant additionally explains that he was under the impression from Circuit Judge Fred Fox that on those days he was not selected to serve on a jury he could stay and watch trials and be excused from work. Grievant testified that he did “peek in on” trials for fifteen to thirty minutes a day, but was particularly interested in cases involving WalMart, Bunny's Bar, and the Hubble murder trial. Grievant additionally claims that he unnecessarily

appeared for duty one day when the court's telephone system malfunctioned. Finally, Grievant argues that the decision to terminate his employment is inconsistent with measures of discipline imposed upon other employees, and was, in fact, the final in a series of incidents of reprisal for his filing of a prior grievance. W. Va. Code § 18A-2-8 provides that an employee may be suspended or dismissed at any time by a county board of education 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. MCBE has proven that Grievant engaged in actions which constitute immorality and willful neglect of duty. (See footnote 1)

An employer asserting willful neglect of duty "must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act." Jones v. Mingo County Bd. of Educ., Docket No. 95-29-151 (Aug. 24, 1995). "It 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). This is a fairly heavy burden, given that Respondent must not only prove that the acts it alleges did occur, but also that the reason for Grievant's neglect of duty was more than simple negligence." Tolliver v. Monroe County Bd. of Educ., Docket No. 01-31-493 (Dec. 26, 2001).

Grievant called the MCBE telephone answering system, and pressed a key which specifically indicated that he would be absent from work due to jury duty. This action was an intentional act, not simple negligence, and was an inexcusable failure to perform hiswork-related responsibilities. Therefore, MCBE has proven that Grievant engaged in willful neglect of duty.

"'Immorality' is defined as '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.' Golden v. Bd. of Educ. of County of Harrison, 285 S.E.2d 665 (W. Va. 1981)." Hayes v. Kanawha County Bd. of Educ., Docket No. 94-20-1143 (June 28, 1995). "'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, [supra], citing Youngman v. Doerhoff, 890 S.W.2d 330 (Mo. 1994)." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). (See footnote 2)

Although immorality is frequently asserted in cases involving sexual misconduct, other conduct may also not be in conformity with accepted principles of right and wrong behavior. For example, theft was found to be immoral conduct in Cooper v. Kanawha County Board of Education, Docket No. 02-20-097 (July 31, 2002). In the present case Grievant's actions were similar, in that he reported to be on jury duty when he was not, and was paid for time he did not work. Grievant's conduct may be equated with theft. In any event, Grievant's conduct was not in conformity with acceptable standards of behavior, and constituted immorality.

Grievant concedes he was not called for jury duty all of the days he reported, and his alleged reliance upon a comment from Judge Fox to the effect that “the rest of day isyours” was not reasonably interpreted to mean that he was excused from work. Grievant's testimony as a whole is found to lack credibility.

In assessing credibility, some factors to be considered are: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; (4) attitude toward the action; and 5) admission of untruthfulness. 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. Rosenau v. Tucker County Bd. of Educ., Docket No. 99-47-192 (Nov. 1, 1999); Jarvis v. W. Va. Dep't of Health and Human Serv., Docket No. 97-HHR-318 (July 22, 1999); Burchell v. Bd. of Trustees, Docket No. 97-BOT-011 (Aug. 29, 1997).

Misty Wilt, Deputy Clerk of the Marion County Circuit Court, testified that the WalMart and Bunny's Bar cases were settled without trials, and there were no other trials scheduled on those days. Ms. Wilt also testified that she was in the courtroom throughout the Hubble trial, and that few people outside the family attended. She was certain that Grievant was not present as a spectator. Addressing the malfunctioning telephone system, Ms. Wilt stated that she personally called all the jurors that day to advise them whether they were to report the following day. The automated system was repaired that day. Ms. Wilt has no motive or interest in this matter to cause her to falsely testify. By comparison, Grievant's interest in retaining his employment is significant. (See footnote 3) In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law. (See footnote 4)

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of proving the charges by a preponderance of the evidence. W. Va. Code §18-29-6; §18A-2-8; Perkins v. Greenbrier County Bd. of Educ., Docket No. 94-13-019 (Aug. 12, 1994). The charges must be one or more of those listed in Code § 18A-2-8. Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995). A county board of education must act reasonably, not arbitrarily or capriciously. Rovello v. Lewis County Bd. of Educ., 181 W. Va. 122, 381 S.E.2d 237 (1989). Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991).

2. W. Va. Code § 18A-2-8 provides that an employee may be suspended or dismissed at any time by a county board of education 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.

3. An employer asserting willful neglect of duty "must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act." Jones v. Mingo County Bd. of Educ., Docket No. 95-29-151 (Aug. 24, 1995). "Willful neglect of duty may be defined as an employee's intentional and inexcusable failure toperform a work-related responsibility. Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990).

4. "'Immorality' is defined as '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.' Golden v. Bd. of Educ. of County of Harrison, 285 S.E.2d 665 (W. Va. 1981)." Hayes v. Kanawha County Bd. of Educ., Docket No. 94-20-1143 (June 28, 1995). "'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, [supra], citing Youngman v. Doerhoff, 890 S.W.2d 330 (Mo. 1994)." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

5. In assessing credibility, some factors to be considered are: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; (4) attitude toward the action; and 5) admission of untruthfulness. 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. Rosenau v. Tucker County Bd. of Educ., Docket No. 99-47-192 (Nov. 1, 1999);

Jarvis v. W. Va. Dep't of Health and Human Serv., Docket No. 97-HHR-318 (July 22, 1999); Burchell v. Bd. of Trustees, Docket No. 97-BOT-011 (Aug. 29, 1997).

6. Grievant's testimony was not credible. 7. MCBE has proven by a preponderance of the evidence that Grievant engaged in immorality and willful neglect of duty when he claimed and received salary and benefits for days he reported to be on jury duty, when he was not.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia 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: January 13, 2003 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

W. Va. Code §18A-2-7 gives the county superintendent the authority to suspend employees for as long as thirty days pending action by the board of education.

Footnote: 2

Although fraud was stated as a reason for the dismissal, it is not included in Code § 18A-2-8, and will not be separately addressed.

Footnote: 3

Although not directly related to the charges, Grievant's lack of credibility was further demonstrated through his testimony regarding the fact that he had taken all of his annual leave for the school year, plus additional time without pay. His explanation for the use of leave is that he is a disabled veteran. Grievant did not offer any explanation of hisdisability, and it appears to be inconsistent with his later testimony that he routinely works sixteen to eighteen hours per day for MCBE and two other businesses.

Footnote: 4

Claims of unequal treatment and reprisal which were not included in the grievance statement, and were first raised at hearing, will not be addressed.