MICHAEL LILLY,

Grievant,

v v.

Docket No. 03-41-068

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Michael Lilly, filed this grievance on March 10, 2003, against his employer, the Raleigh County Board of Education ("RCBOE"). His Statement of Grievance indicates he contests RCBOE's decision to treat his failure to return to work as a voluntary resignation. The relief sought is reinstatement to his substitute custodial position, the return of his sick days, seniority, and a return to the substitute position he held at the time of his resignation.

This grievance was filed directly to Level IV, and a Level IV hearing was held on May 5, 2003. This case became mature for decision on that same day, as the parties elected not to submit proposed findings of fact and conclusions of law. (See footnote 1)

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact. (See footnote 2)

Findings of Fact

1. Grievant was employed by RCBOE as a substitute custodian.

2. On or about August 19, 2002, Grievant received an on-the-job injury and subsequently received Workers' Compensation for this injury.

3. Grievant was off because of a work related injury from August 19, 2002, to October 15, 2002.

4. Grievant was released to return to work on or about October 15, 2002. (See footnote 3) Grievant knew he was released to return to work, and he did not contact RCBOE to inform it of his status.

5. RCBOE did not learn of Grievant's release until December 11, 2002.

6. On December 19, 2002, Emily Meadows, Personnel Director for RCBOE, wrote Grievant informing him she had just received notice of his ability to return to work and noted Grievant should have contacted RCBOE about his status. Dr. Meadows informed Grievant he had been reactivated on the computer substitute list, and she expected him to begin work immediately, as there were few substitute custodians. Grievant was given until Friday, January 17, 2003, to accept substitute opportunities. If Grievant had not accepted any substitute positions by that time, he would be "considered to have voluntarily relinquished [his] employment with Raleigh County Schools" pursuant to its policy. Resp. No. 2.

7. Grievant was called five times during this time frame. The first three times resulted in two no answers and one hang up. 8. On December 23, 2002, Grievant declined employment stating he had a personal illness with a doctor's excuse.

9. On January 2, 2003, Grievant again declined employment stating the reason as personal illness with a doctor's excuse.

10. On January 21, 2003, Dr. Meadows wrote Grievant informing him she had checked the substitute records and found he had not accepted any positions as required by her December 19, 2002 letter. She noted the two refusals were for illness, and Grievant was to produce those doctors' excuses immediately after declining positions. Dr. Meadows directed Grievant to submit the excuses upon receipt of her letter.

11. Grievant called the office on January 22, 2003, and informed Dr. Meadow's Secretary, Judy Chapman, he had no new doctor's excuses, only excuses from his Workers' Compensation doctor, he was not released for all his duties, and he was afraid the positions would "hurt" his arm. Grievant indicated he would talk to his doctor. Resp. No. 5.

12. There was no further contact from Grievant.

13. On February 6, 2003, Dr. Meadows again wrote Grievant and told him she had notification from his doctor that he had been released to return to work on full duty on October 15, 2002. She indicated Grievant was seen by his actions to have voluntarily relinquished his employment, and his resignation would be presented to RCBOE on February 25, 2003. Resp. No. 6.

14. Grievant ceased to receive Temporary Total Disability ("TTD") benefits on October 14, 2002. 15. Grievant received Non-award Partial payments ("NAP") from mid-October 2002 to

January 26, 2003.

16. NAP payments are given to employees who do not have a job to return to, and this money covers the time from the cessation of TTD's to the receipt of the Permanent Partial Disability ("PPD") award. Claimants who have a position are expected to return to work. The amount of the NAP payment is deducted from the PPD award.

17. Dr. Meadows neglected to take Grievant's name off the substitute register after her January 21, 2003 letter. Grievant accepted a position on February 5, 2003, and worked four days in this position.

18. On February 13, 2003, Dr. Meadows met with Grievant and his wife at their request. Dr. Meadows directed them to bring any applicable doctor's excuses to this meeting. Although Grievant brought several excuses to this meeting, they were all outside the time frame outlined in Dr. Meadows' December 19, 2002 letter.

19. On February 25, 2003, RCBOE noted Grievant's failure to return to work after his release by his doctor, his failure to accept work despite multiple opportunities, and saw this an abandonment of his employment. Accordingly, pursuant to its prior practice, RCBOE accepted these behaviors as Grievant's resignation.

20. Grievant received a 1% PPD on March 6, 2003. He received $2,817.43 more in NAP payments than the amount of his award.

Issues and Arguments

RCBOE asserts Grievant knew he was released to return to work, did not inform the administration, and when RCBOE found out and gave him clear directions to return to work by a date certain he did not. Additionally, RCBOE noted Grievant indicated he had therequired doctor excuses when he did not. Grievant asserts that although he knew he was released to return to work, he did not understand if he could work and also receive the NAP benefits.

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 question could arise as to whether RCBOE actually took a disciplinary action, as it considered Grievant to have abandoned his position through his failure to return to work and accepted his resignation. The Grievance Board has typically assigned the burden of proof to the employer in these situations as it does in disciplinary actions. See Baisden v. Higher Educ. Policy Comm'n/S. W. Va. Community and Techinical College, Docket No. 02-HEPC-428, (Mar. 11, 2003). "A preponderance of the evidence is evidence 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. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.; See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

If the events that led up to Grievant's removal from his position are seen as a resignation an/or job abandonment, then Respondent's has met its burden of proof. Grievant presented only limited evidence and this evidence was not on point. The testimony and documents presented by Respondent were unrebutted. This testimony and these documents did indeed prove Grievant failed to return to work when released by his treating doctor, and did misrepresent to RCBOE that he had medical excuses for the days he refused to work when he did not. Given the clarity of the facts and evidence presented, Respondent has met its burden of proof and demonstrated it had good cause for Grievant's dismissal and did not violate any rules, regulations, or statues. Baisden, supra.

If the events that led up to Grievant's removal from his position are seen as worthy of the disciplinary action of termination, then 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.

Although not specified by the parties, the undersigned Administrative Law Judge finds the behavior of Grievant can be viewed as willful neglect of duty.

Respondent must prove a charge of willful neglect of duty by a preponderance of the evidence. Arbaugh v. Putnam County Bd. of Educ., Docket No. 90-40-437 (May 22,1991). Although the West Virginia Supreme Court of Appeals has not formulated a precise definition of "willful neglect of duty," it does encompass something more serious than incompetence and imports "a knowing and intentional act, as distinguished from a negligent act." Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990). Hence, 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. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Chaddock, supra.

Given the facts of this case, it is clear Grievant knew he was released to return to work and did not tell his employer. Then when his employer became aware of Grievant's release to return to work and set some time requirements for the acceptance of work, Grievant still did not return to work. Grievant's "conduct constituted a knowing and intentional act." Grievant also was untruthful in his communications with his employer as he indicated he had not been released for full duty, and he turned down positions stating he had a doctor's excuse when he did not. What does appear to be true is Grievant did not want to return to work while he was receiving NAP payments, and he did not. Accordingly, Grievant received overpayments of almost three thousand dollars. RCBOE has met its burden of proof and demonstrated Grievant did not return to work although released by his physician to do so.

The above-discussion will be supplemented by the following Conclusions of Law.

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). "A preponderance of the evidence is evidence 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. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR- 486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.; See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

2. Respondent had met its burden of proof and demonstrated Grievant abandoned his position. See Baisden v. Higher Educ. Policy Comm'n/S. W. Va. Community and Techinical College, Docket No. 02-HEPC-428, (Mar. 11, 2003).

3. A county board of education possesses the authority to terminate an employee, but this authority cannot be exercised in an arbitrary and capricious manner. W. Va. Code §18A-2-8. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23- 235 (Dec. 29, 1995).

4. Willful neglect of duty is one of the causes listed in W. Va. Code §18A-2-8 for which an education employee may be disciplined. See Rovello v. Lewis County Bd.of Educ., 181 W. Va. 122, 381 S.E.2d 237 (1989); Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975); Woo v. Putnam County Bd. of Educ., Docket No. 93-40-420 (June 2, 1994), aff'd 202 W. Va. 409, 504 S.E.2d 644 (1998); Jones v. Mingo County Bd. of Educ., Docket No. 95-29-151 (Aug. 24, 1995).

5. 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. 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).

6. RCBOE has met its burden of proof by a preponderance of the evidence and demonstrated Grievant was guilty of willful neglect of duty under W. Va. Code § 18A-2-8, when he failed to return to work after his release by his physician.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court

of Raleigh 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 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: June 9, 2003

Footnote: 1

Grievant represented himself, and RCBOE was represented by Attorney Kay Bayless.

Footnote: 2

Grievant submitted an additional exhibit on May 20, 2003. A copy of this exhibit was faxed by the Grievance Board to RCBOE, as Grievant did not send Respondent a copy. Another document covering this same time period had previously been submitted. The time period covered in both documents was not the time frame identified in Dr. Meadows' December 19, 2002 letter, so the admission of the new document did not affect the outcome of this grievance.

Footnote: 3

Another statement from Grievant's doctor dated September 30, 2002, indicated Grievant could return to work on that date.