SUSAN LAWRENCE

and TERRY KIRKHAM,

Grievants,

v. **Docket No. 03-45-377**

SUMMERS COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

Susan Lawrence and Terry Kirkham ("Grievants") filed separate grievances directly at level four on December 15, 2003, regarding suspensions they received in December of 2003. They seek rescission of the suspensions, with back pay and benefits. Their grievances were subsequently consolidated for hearing and decision. A level four hearing was conducted by the undersigned in the Grievance Board's Beckley office on March 4, 2004. Grievants were represented by counsel, J. W. Barringer, and Respondent was represented by counsel, Kathryn Reed Bayless. This matter became mature for consideration upon receipt of the parties' fact/law proposals on April 12, 2004.

The following findings of fact are made based upon a preponderance of the credible evidence of record.

Findings of Fact

___1. Grievant Kirkham is a guidance counselor at Summers County High School, and Grievant Lawrence is a classroom teacher at the same school. Both have beenemployed by Respondent for many years, and have no history of discipline. They are also sisters.

2. On November 19, 2003, an emergency situation developed at the high school, due to flash flooding and rising water. Accordingly, it was decided that the school should be evacuated, and the students would be transported to the middle school.

3. Grievants assisted during the evacuation, staying after the students had been taken to the middle school on buses. They helped answer numerous parent phone calls, and inspected the school to make sure everyone had been safely evacuated.

4. Grievant Lawrence suffers from irritable bowel syndrome, which causes her to experience diarrhea when she is under stress. She experienced a bout of diarrhea during the evacuation on November 19, 2003, and made several trips to the restroom during the morning's events.

5. Grievants, Principal Harry Keaton and Terry Crowder, the head teacher, were the last people to leave the high school, and they were transported on a bus together. To get to the bus, they had to walk through water that was above knee level, soaking their clothing.

6. While on the bus, Grievant Lawrence suffered another bout of diarrhea, soiling her already wet clothing. She asked Grievant Kirkham to call her husband (Ms. Kirkham's) on her cell phone and ask him to come pick them up at the middle school, so she could go home to change.

7. Grievants were seated across the aisle from Principal Keaton during the bus trip. Although the bus was somewhat noisy, they assumed that Mr. Keaton heard Ms. Kirkham's telephone conversation with her husband, asking him to pick them up. 8. After finishing the phone conversation, Grievant Kirkham turned to Mr. Keaton and told him that, when they reached the middle school, she and Grievant Lawrence were going to go home to change clothes. (See footnote 1) Mr. Keaton made no response, so Grievants assumed he had no objection.

9. Mr. Keaton did not specifically recall having this conversation on the bus with Grievant Kirkham, but he did acknowledge that, “in the midst of confusion, chaos and mayham that surrounded the flood, it was difficult for me to focus on any one conversation.” L IV, Gr. Ex. 1.

10. Upon arriving at the middle school, Grievant Lawrence looked for the students from her class, and none were present. Many of the students had already been signed out and/or picked up by parents, so she assumed they had all left. Several teachers were present in the gymnasium, supervising the students and the sign-out process. Upon ascertaining that her students had left, Grievant Lawrence left the school with her sister.

11. Two boys from Grievant Lawrence's class had left the middle school immediately after getting off the bus, without permission. This was not discovered until after the day of the flooding.

12. Grievants were away from the middle school for about 45 minutes while they went home to change clothes. When they returned, they continued to assist with the evacuation. Grievant Kirkham

transported students and teachers back to the high schoolto retrieve their vehicles, and Grievant Lawrence assisted with the remaining students in the gym.

13. It was reported to Superintendent Hinerman by another teacher that Grievants had left the middle school without permission. Therefore, the superintendent appeared at the high school on November 21, and asked Grievants if they had left. Grievants admitted they had left, and the issue of Mr. Keaton's permission was never addressed during the conversation. Grievants were not informed that discipline was being considered.

14. Pursuant to the superintendent's recommendation, Grievants were suspended for two days without pay for willful neglect of duty after a Board hearing on December 9, 2003.

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 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. at1064. 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).

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).

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 or a plea of nolo contendre to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee evaluation pursuant to section twelve of this article.

In the instant case, Respondent contends that Grievants knowingly and intentionally left school premises during working hours, without permission, constituting willful neglect of duty. 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). Although the West Virginia Supreme Court has not formulated a precise definition of “willful neglect of duty,” it does encompasssomething more serious than incompetence and imports “a knowing and intentional act, as distinguished from a negligent act.” Chaddock, supra.

The crux of Respondent's case is that Grievants deliberately left work without permission, which they knew was prohibited. In support of this contention, Superintendent Hinerman gave testimony that both Grievants freely admitted that they had done so when she met with them to discuss the matter. However, both Grievants testified credibly that the use of the word “permission” simply made no impression upon them during this meeting, because they believed Mr. Keaton had been told they were planning to leave, and he did not object. They were also both unaware that discipline was being considered, so they did not feel it was necessary to forcefully defend or explain themselves regarding the permission issue.

Also in support of Grievant's position, testimony from both Grievants and Mr. Keaton established that they have extremely positive working relationships with their principal, where mutual respect governs their actions. Mr. Keaton testified that Grievants are both valued, hardworking employees, who frequently volunteer to do work that is not required of them and perform extra tasks without being asked. It is understandable that Grievants would not necessarily have felt compelled to “ask” Mr. Keaton's permission to leave while they were on the bus under the circumstances occurring at the time. It is also obvious that, amidst the confusion of the events, Mr. Keaton may have appeared to have been listening and engaged when Grievant Kirkham informed him of their plans, but the

conversation simply did not “register” with him.

Respondent has also attempted to impress upon the undersigned the importance of Grievants staying at the middle school on the day in question until they were assuredthat their presence was no longer needed. As an example of what can go wrong when teachers are absent at crucial times, Respondent points to the fact that two boys from Grievant Lawrence's class were able to leave the middle school immediately upon arrival without following the sign-out procedure which had been implemented to insure that all students reached home safely. However, while this is a troubling event which fortunately turned out not to be a problem--the boys reached home safely and later admitted their misconduct--it does not prove that Grievants engaged in intentional misconduct. Moreover, it should be noted that, since Grievants were still assisting at the high school when Grievant's Lawrence's students were being transported to the middle school, her leaving the middle school upon her own arrival did not cause or have any bearing upon the boys' conduct.

In order for Grievants' conduct to have been of the “knowing and intentional” variety which constitutes willful neglect of duty, they would have had to have known they did not have Mr. Keaton's permission to leave, but done so anyway. Respondent has failed to prove by a preponderance of the evidence that that is what occurred here. While Mr. Keaton did not recall that the conversation on the bus regarding Grievants leaving, he intimated that it could have occurred, but he was caught up in the turmoil of the day's events, affecting his ability to focus on the conversation. Grievants gave credible testimony consistently throughout this proceeding that permission was assumed when Mr. Keaton did not object. Accordingly, the undersigned must conclude that a simple misunderstanding occurred, and Grievants cannot be found to have knowingly and intentionally committed wrongdoing. Therefore, this grievance must be granted, and Grievants' suspensions reversed. The following conclusions of law support the decision reached.

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).

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 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).

4. Respondent has failed to prove by a preponderance of the evidence that Grievants' conduct constituted willful neglect of duty.

Accordingly, this grievance is **GRANTED**, and Respondent is **ORDERED** to eradicate all reference to Grievants' suspension from their personnel files, and grant them for all back pay and benefits lost during their suspension period.

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

Date: April 21, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Because Mr. Keaton made no objection to Grievants going home to change, they did not feel it was necessary to further Grievant Lawrence's embarrassment by telling him about her health situation.