JOHN CLUTTER,

Grievant,

v.

Docket No. 04-51-429

WEBSTER COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

The grievant, John Clutter ("Clutter"), challenges disciplinary action taken against him by his employer, the respondent Webster County Board of Education ("BOE"). In his statement of grievance, Clutter states as follows:

> I was wrongfully suspended for 10 days without pay from my duties as a bus operator for Webster County Board of Education. I had a valid Drs [sic] excuse to not work from 10-12-04 to 10-21-04 as prescribed by D.O. Cindy Osborne.

For relief, Clutter asks "to be reinstated for the 10 days I was wrongfully suspended without pay."

This grievance was filed directly at Level Four on or about December 10, 2004. A Level Four evidentiary hearing was held at the Charleston office of the West Virginia Education and State Employees Grievance Board ("the Grievance Board") on May 3, 2005. Clutter was represented at the Level Four hearing by attorney Daniel Dotson, III. BOE was represented by attorney Richard Boothby. This grievance matured for decision on June 27, 2005, by which date both parties had submitted proposed findings of fact and conclusions of law. After careful review of the entire

record, the undersigned finds that the following dispositive facts were proven by a preponderance of the credible and relevant evidence:

FINDINGS OF FACT

1 1. Clutter has been employed by BOE as a bus operator for a total of eleven years, eight of which have been full-time.

2 2. Clutter went to Colorado on a hunting trip from October 14, 2004, through October 21, 2004. This trip had been planned since at least January 2004. Certain of the hunting licenses for this trip had to be purchased before April 2004.

3 3. Clutter has an employee handbook. Testimony of Clutter at Level Four.

4 4. Clutter did not have a clear memory of whether he had seen documents such as the personal leave policy because, as he testified at Level Four, he “sees so many papers from this job” he could not be certain what he had seen and what he had not. Testimony of Clutter at Level Four.

5 5. BOE's leave policy provides that “[l]eave shall be paid to the full-time employee who is absent from assigned duties due to,” among other things, personal illness or accident. Resp.Exh.6. The policy further provides that “[a]n employee shall qualify to use any or all leave if absence is due to personal sickness or accident.” Resp.Exh.6.

6 6. An employee is required to submit a “physician's statement form” along with the “certification for personal leave form” upon returning from three or more consecutive days of personal leave. Resp.Exh.6.

7 7. The definitional section of the personal leave policy states that a “Physician's Statement Form” is “a certification from a licensed physician which indicates the nature ofthe illness, the date the employee or family member became incapacitated, and the date the employee will be able to return to work[.]” Resp.Exh.6.

8 8. Prior to his hunting trip, Clutter never gave any indication to his supervisor, or any other witnesses for the administration, that he was suffering from any medical condition or that the hunting trip was in any way related to Clutter's health.

9 9. Due to the hunting trip, Clutter was absent from work from October 13, 2004, through October 22, 2004. Not only was Clutter paid for those days, but a substitute bus operator was also paid for each working day of Clutter's absence.

10 10. Although there were leave slips bearing Clutter's signature for the days he was on his hunting trip [Resp.Exh.5], Clutter claimed he never submitted any sort of leave slip for that period. Clutter admitted that the signature appeared to be his signature but he could not recall having signed the leave slips that were introduced as Respondent's Exhibit 5 at Level Four.

11 11. Clutter claimed that the only paperwork he submitted regarding his absence for the hunting trip was a note from Dr. Cynthia Osborne, D.O., dated October 13, 2004, which read “Please excuse from work Oct 13 to Oct 22 will return to work on Oct 25 he's under my care.” (See footnote 1) Gr.Exh.1. He did not submit this note until November 5, 2004.

12 12. Clutter was aware that an employee who is absent for a certain number of days due to illness or injury is required to present a physician's statement form upon returning to work.

13 13. Clutter was unable to explain why he did not turn in the above-quoted note from Dr. Osborne until November, stating in his Level Four testimony that he did not have a good reason for waiting.

14 14. On November 5, 2004, Clutter's use of sick leave for his hunting trip in Colorado was reported to L. Kay Carpenter, Superintendent of the Webster County Schools (“Superintendent Carpenter”), by the treasurer. Superintendent Carpenter arranged to meet with Clutter and the new transportation supervisor, A.J. Rogers (“Rogers”) on November 9, 2004. (See footnote 2)

15 15. During the November 9 meeting, Superintendent Carpenter asked Clutter why he requested sick leave when he had, in fact, been hunting in Colorado. Clutter made a statement to the effect that, “maybe he should not have done what he did but he was sick and tired of how the bus drivers were being treated and he had the means to get a doctor's slip any time he wished.” Testimony of Superintendent Carpenter at Level Four. In particular, Clutter was upset that bus operators were being required to use a time clock.

16 16. Rogers reported the conversation in substantially similar terms. In response to Superintendent Carpenter's question about why he used sick leave when he was hunting in Colorado, Clutter said he wouldn't have done it but he was upset about the way the bus drivers were being treated. This meant the time clock. Rogers also corroborated the fact that Clutter said he could get a doctor's excuse any time he needed it.

17 17. With respect to his hunting trip absence, Clutter told Superintendent Carpenter and Rogers during that November 9 meeting that he had turned in a doctor's excuse and that was all he

was going to say about it.

18 18. Twice during that same meeting Superintendent Carpenter offered Clutter the chance to withdraw his request for sick leave without consequence. He declined both times. She made a third offer, and it was agreed that Clutter would consider that offer over the weekend.

19 19. Subsequently, Clutter called a secretary at the central office and reported that he was not withdrawing his sick leave request.

20 20. By correspondence, dated November 18, 2004, L. Kay Carpenter, Superintendent of the Webster County Schools, informed Clutter that she would be recommending to BOE that he be suspended ten days without pay. This was based upon his admission during their meeting on November 9 that he had “untruthfully claimed 8 days of paid sick leave” when he was “indeed hunting in Colorado.” Resp.Exh.1.

21 21. Clutter exercised his right to be heard on the proposed discipline by participating in a hearing before BOE on December 1, 2004. Resp.Exh.3.

22 22. By correspondence, dated December 2, 2004, Superintendent Carpenter informed Clutter that BOE voted to suspend him for “10 days without pay.” Resp.Exh.2. He was further informed that “the suspension was due to your abuse of the Webster County sick leave policy when you utilized 8 days of personal illness [sic] when you were indeed hunting in Colorado.” Resp.Exh.2.

23 23. Clutter acknowledged that he was paid for the eight days that he was absent from work for his hunting trip. BOE did not attempt to recover the payments for those days. Therefore, Clutter only lost two days of pay as a result of the ten-day suspension.

24 24. Since August 2004, Clutter had been experiencing episodes of shortness of breath, chiefly at night. He was insistent that these episodes involving shortness of breath did not prevent him from performing his regular, everyday tasks, either before or after he took the trip to Colorado. In particular, they did not prevent Clutter from operating a school bus. Testimony of Clutter at Level Four.

25 25. Clutter did not bother to seek medical attention for these episodes until shortly before he was to leave for his hunting vacation in Colorado. Clutter explained that he returned to Dr. Osborne on October 6, 2004, because he was concerned about the effect the high altitudes at which he would be hunting might have on his problem. Specifically, he was concerned about whether there would be life-threatening consequences. Testimony of Clutter at Level Four.

26 26. Dr. Osborne had been Clutter's doctor since 1996, when he began seeing her for panic attacks.

27 27. According to Dr. Osborne's notes, the reasons for Clutter's office visit on October 6 were personal problems and high blood pressure.

28 28. No tests were ordered or performed as a result of the October 6 appointment with Dr. Osborne. Clutter was given samples of Prevacid for acid reflux but was not placed on any other medication at that time. Testimony of Dr. Osborne at Level Four.

29 29. During the October 6 appointment, Dr. Osborne told Clutter that if the symptoms persisted she would recommend some time off from work. Testimony of Dr. Osborne at Level Four.

30 30. Dr. Osborne does not recall, and her notes do not reflect, that Clutter told her about his planned hunting trip during his October 6 appointment with her. Testimony of Dr. Osborne at Level Four.

31 31. On October 12, 2004, Clutter telephoned Dr. Osborne. As a result of their telephone conversation, Dr. Osborne prepared the October 13 note that covered the exact days Clutter had planned to be absent from work on his long-awaited hunting trip. Gr.Exh.1. Dr. Osborne did not “prescribe” a hunting trip for Clutter. Testimony of Dr. Osborne at Level Four.

32 32. The October 13 note prepared by Dr. Osborne in response to Clutter's telephone call has been treated by Superintendent Carpenter and BOE as a physician's statement form, within the meaning of the Personal Leave Policy, despite the fact that it does not technically conform to the definition contained in that policy. (See footnote 3)

33 33. Clutter's ex-wife (See footnote 4) brought a letter from Dr. Osborne, dated April 26, 2005, to Superintendent Carpenter's office on Monday, May 2, 2005, which was the day before the Level Four hearing. Gr.Exh.2. The salutation incorrectly refers to “Ms. Clutter.” Dr. Osborne clarified that her letter was directed to Superintendent Carpenter. Although thecorrespondence leaves the impression that it is in response to any inquiry from Superintendent Carpenter, she denied having requested any information from Dr. Osborne.

34 34. In her April 26 correspondence, Dr. Osborne refers to Clutter's “inability to work due to an illness.” Clutter's own testimony controverts this characterization because he insisted that he was able to engage in all of his normal activities, including driving a bus. Accordingly, the April 26 correspondence is afforded little credence.

DISCUSSION

Burden and Standard of Proof

This grievance arises out of a disciplinary action. Therefore, BOE bears the burden of proving, by a preponderance of the evidence, that the ten-day suspension was justified. W. Va. Code St. R. § 156-1-4.21(2004), 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). "The generally accepted meaning of preponderance of the evidence is 'more likely than not.' *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004)." *Cobb v. W. Va. Human Rights Comm'n ex rel. Wattie*, 2005 W. Va. LEXIS 112, *49 n.26 (July 7, 2005).

Credibility

Clutter's claim that he was entitled to sick leave for the period when he was hunting in Colorado is not supportable. The claim was actually most effectively controverted by Clutter's own statements to Rogers and Superintendent Carpenter during the November9 meeting. Their testimony regarding the statements made by Clutter during that meeting are accepted as true for several reasons.

The events of the meeting, as reported by both Rogers and Superintendent Carpenter, were consistent. Neither Rogers nor Superintendent Carpenter appeared to have any motive to falsify their testimony. To the contrary, Superintendent Carpenter in particular seemed to be genuinely concerned by Clutter's conduct, offering him several opportunities to correct the problem without incurring any adverse consequences. In addition, Clutter's boast about his ability to obtain a medical excuse at will was corroborated by the manner in which he obtained the October 13 note from Dr. Osborne. Finally, Clutter's own assertions that his breathing problems did not impinge upon his ability to perform his routine tasks, including driving a bus, undercut the validity of his request for sick leave.

Statutory Predicates for Discipline

West Virginia Code section 18A-2-8 provides, in pertinent part, that a board of education may suspend an employee at any time for "[i]mmorality, 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 disciplinary action, such as a suspension, must be predicated upon one or more of the listed grounds. In making a decision to take disciplinary action against an employee, the employer must act "reasonably, not arbitrarily and capriciously." *Bell v. Kanawha County Bd. of Educ*., Docket No. 91-20-005 (Apr. 16, 1991).

BOE is not required to use the statutory language in advising Clutter of the basis for the disciplinary action. It is sufficient for BOE to identify the conduct or actions that fallwithin one or more of the grounds for discipline identified in West Virginia Code section 18A-2-8. *Jordan v. Mason County Bd. of Educ*., Docket No. 99-26-080 (July 6, 1999). In this case, Superintendent Carpenter identified Clutter's conduct as abuse of the leave policy, which BOE characterizes as willful neglect of duty.

The Supreme Court of Appeals of West Virginia has acknowledged that, although our jurisprudence lacks a precise definition for the term willful neglect of duty, it “encompasses something more serious than 'incompetence,' which is another ground for teacher discipline under W. Va. Code, 18A-2-8. The term 'willful' ordinarily imports a knowing and intentional act, as distinguished from a negligent act.” *Bd. of Educ. v. Chaddock*, 183 W. Va. 638, 640, 398 S.E.2d 120, 122 (1990)*(per curiam*)(citing *Fox v. Bd. of Educ*., 160 W. Va. 668, 672, 236 S.E.2d 243, 246 (1977)). The pertinent question is, thus, whether BOE has proven leave abuse and, if so, whether such abuse is properly characterized as willful neglect of duty.

Abuse of Sick Leave

The pivotal facts in this case are that Clutter had a long-standing plan to go hunting in Colorado in October 2004. He had some symptoms that did not interfere with his ability to function on a daily basis. In fact, the only reason Clutter even bothered to see a doctor about his night-time shortness of breath was that he wanted to make sure the high altitudes he would experience while hunting in Colorado would not exacerbate the problem.

When Clutter returned to work, he waited a significant period of time before claiming that his absence for his hunting trip was attributable to sick leave. He could not offer agood excuse for this delay, even though Clutter admitted that he knew he was required to submit a doctor's statement immediately upon his return to work.

Clutter claims that he submitted a doctor's statement and that his employer is foreclosed from looking behind the validity of that statement. This might hold true were it not for Clutter's statements and conduct during the November 9, 2004, meeting with Rogers and Superintendent Carpenter. Clutter made statements that were indicative of knowledge on his part that he had engaged in at least questionable conduct. When asked by Superintendent Carpenter why he had claimed sick leave when he was hunting in Colorado, Clutter responded with remarks about being upset about the way

bus operators were being treated. This type of justification would not have been necessary if, in fact, Clutter's time off had been medically necessary.

Clutter's assertion that he could get a medical excuse whenever he wanted was a red flag that the administration could not properly ignore. Superintendent Carpenter stands as a guardian against unwarranted expenditure of public school funds. Once an employee has as much as said that he could dupe the school system by obtaining a medical excuse at will, Superintendent Carpenter is obligated to inquire further into any such excuse submitted by that employee.

This is precisely the position in which she was placed by Clutter during the November 9 interview. Therefore, Clutter has no one to blame but himself to the extent that his employer now questions his credibility in these circumstances.

A similar argument regarding the unassailability of a doctor's excuse was rejected in a grievance involving a state employee. *Parker v. W. Va. Dep't of Health & Human Res./Welch Emergency Hosp.*, Docket No. 97-HHR-042B (Sept. 30, 1997), *quoted inWilson v. W. Va. Bureau of Employment Programs/Legal Serv. Div.*, Docket No. 02-BEP- 241 (Apr. 22, 2003). The grievant in *Parker* “argued she cannot be guilty of leave abuse if she has a doctor's certificate stating she is ill.” The Grievance Board did not find this argument persuasive because,

> [a]lthough in a perfect world this assertion would be true, in this instance, whether Grievant abused sick leave must be decided based on all the facts in evidence. Unfortunately, it is possible to obtain an excuse from work without being sick or without being sick enough to stay home from work, as much of the data upon which a doctor or other health care professional makes his/her assessment is based on patient report or subjective data.

Parker v. W. Va. Dep't of Health & Human Res./Welch Emergency Hosp., Docket No. 97-HHR-042B (Sept. 30, 1997).

Clutter testified at Level Four that he saw Dr. Osborne for what he called anxiety attacks. Dr. Osborne's notes reflected that she saw Clutter on October 6, 2004, in relation to personal problems and high blood pressure. The only medication Clutter received was Prevacid for acid reflux. During the October 6 appointment, Dr. Osborne told Clutter that if his symptoms did not improve, she would recommend some time off. She did not prescribe a hunting trip. In fact, she testified that higher altitudes could cause an increase in his blood pressure.

On October 12, 2004, Clutter telephoned Dr. Osborne and, as a result, she wrote the note

introduced at Level Four as Grievant's Exhibit 1. Because this was a telephone discussion, it is obvious that Dr. Osborne did not take an additional reading of Clutter's blood pressure. It is equally obvious that Clutter provided Dr. Osborne with the dates hewould be out-of-state for his hunting trip. Dr. Osborne's note did not indicate that Clutter's absence from work as a bus operator (See footnote 5) was medically necessary.

The ease with which Clutter could present unverified symptoms of anxiety attacks and obtain a note from Dr. Osborne appears to corroborate his boast that he could obtain a medical excuse whenever he wished. This is not to suggest that Clutter did not have high blood pressure on October 6, 2004. However, it was not so high as to require medication. The other symptoms were merely reported by Clutter and could undoubtedly be trotted out again whenever he wants time off. (See footnote 6) As noted by Dr. Osborne, Clutter had presented with panic attacks in 1996. Thus, he was familiar with the symptoms he would need to report to invoke a similar diagnosis.

While taking time off for hunting may be a time-honored tradition, such time must be taken in conformity with the employer's leave policies. Clutter had accumulated a large number of leave days. However, leave that is made available to an employee in times of illness or injury is not intended to be used as a mechanism for an employee to thumb his nose at BOE, which is what happened in this case. Clutter took sick leave to cover his hunting trip as a way of expressing his displeasure with BOE for requiring bus operators to use a time clock. This constitutes an abuse of sick leave.

Willful Neglect

The second part of the inquiry is whether such abuse of sick leave can properly be described as willful neglect of duty. As discussed above, willful neglect of duty encompasses conduct that is knowing and intentional.

Clutter's action in claiming sick leave to cover his absence on his hunting trip was both knowing and intentional. To the extent that there could have been even the slightest question on this point, it was resolved when Clutter repeatedly rejected Superintendent Carpenter's offers to allow him to withdraw his request for sick leave without any adverse consequences.

The Grievance Board has previously noted that “[s]ick leave is a benefit provided to employees for their use when they or a family member are sick . . . . It is not just additional vacation time.” *Wheeler v. Kanwaha County Bd. of Educ*., Docket No. 01-20- 090 (May 22, 2001). In *Wheeler*, a school bus operator took sick leave so that he could drive for another employer. The grievant in *Wheeler* did not

dispute that his conduct constituted leave abuse. His sole issue was whether his three-day disciplinary suspension should have been reduced.

Interestingly, the suspension in *Wheeler* had the effect of "recouping the one day of pay Grievant received for his sick leave time when he was not sick, and the two additional days were punishment." This is the same effect the ten-day suspension has in this case. Eight days of sick leave for which Clutter was paid are recouped. Only two days are punitive in that Clutter will not be paid for them. In explaining why it did not find the three-day suspension excessive, the Grievance Board observed that Wheeler "knew what he was doing was wrong, and he signed a leave request form on which he lied, stating hewas sick when he was not. It is not surprising that KBOE determined that a suspension was the appropriate punishment."

In this case, Clutter's awareness of wrong-doing on his part was evidenced by his words and conduct at the November 9 meeting. He abused BOE's leave policy and, in so doing, engaged in willful neglect of duty. His employer did not abuse its discretion in imposing a sanction on this behavior. The suspension imposed, which actually only resulted in a two-day loss of pay, is not arbitrary and capricious.

Accordingly, BOE has met its burden of proof. The challenged suspension is, therefore, upheld.

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

CONCLUSIONS OF LAW

1 1. Because this is a disciplinary action BOE bears the burden of proving, by a preponderance of the evidence, that the ten-day suspension was justified. W. VA. CODE ST. R. § 156-1-4.21(2004), 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 2. "The generally accepted meaning of preponderance of the evidence is 'more likely than not.' *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004)." *Cobb v. W. Va. Human Rights Comm'n ex rel. Wattie*, 2005 W. Va. LEXIS 112, *49 n.26 (July 7, 2005).

3 3. West Virginia Code section 18A-2-8 provides, in pertinent part, that a board of education may suspend an employee at any time for "[i]mmorality, 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." The disciplinary action in this grievance was predicated upon Clutter's abuse of leave, which constitutes willful neglect of duty.

4 4. In deciding to suspend Clutter, BOE acted "reasonably, not arbitrarily and capriciously." *Bell v. Kanawha County Bd. of Educ*., Docket No. 91-20-005 (Apr. 16, 1991).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Webster 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 West Virginia Code section 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:

October 18, 2005

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

The punctuation and grammatical errors are in the original.

Footnote: 2

The former transportation supervisor, Henry Given, had gone on the same Colorado hunting trip as Clutter. Given's retirement took effect within about a week of returning from the hunting trip.

Footnote: 3

The note does not identify the nature of the illness or the date of Clutter's "incapacitation."

Footnote: 4

Clutter's ex-wife works at Webster County Memorial Hospital, albeit not exclusively with Dr. Osborne.

Footnote: 5

Clutter testified that he worked several jobs.

Footnote: 6

This is not to suggest that Clutter did not, or does not, have some health issues. Nor is there any intention to suggest that Dr. Osborne was being dishonest. Unfortunately, Clutter's own statements indicate that he thought he could manipulate Dr. Osborne to obtain medical excuses whenever he liked.