WILLIAM THORNTON

Grievant,

v. **Docket No. 06-27-008**

MERCER COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, William Thornton, is a custodian at Princeton Senior High School. He filed this grievance on January 9, 2006, grieving his unpaid eight day suspension. He alleges harassment and an inequitable work load at the school. For relief he seeks "compensation for lost wages, restoration of lost seniority, expungement of all references to the suspension from his personnel file, cessation of harassment, and equalization of work load for custodians at Princeton Senior High School." (See footnote 1)

Grievant bypassed all lower levels. A Level IV hearing was held at the Grievance Board's Beckley office on March 14, 2006. Grievant was represented by John Roush, Esq., and Respondent was represented by John Shott, Esq. This case became mature for decision on April 7, 2006, upon the parties' submission of proposed findings of fact and conclusions of law.

Issues and Arguments

Respondent asserts Grievant was suspended for insubordination, willful neglect of duty and intemperate behavior. Grievant asserts he was a good employee until the 2005-2006 school year when Mr. Bailey, his direct supervisor, began to leave him notes containing false accusations that he was not performing his duties properly. (See footnote 2) Based on a preponderance of the evidence adduced at Level IV, I find the following material facts have been proven:

Findings of Fact

1. Grievant is employed by Respondent as a custodian at Princeton High School. Mr. Bailey is Grievant's direct supervisor and head custodian.

2. Grievant's work schedule during the school year is from 3:00 p.m. to 11:00 p.m.

3. The day before school started, Grievant called Mr. Bailey and told him that he felt there were too many duties on the 3:00 p.m. to 11:00 p.m. shift. Mr. Bailey removed some duties from that shift.

4. Grievant routinely sat in his car until 3:30 p.m. or later before entering the school to begin working.

5. On December 15, 2005, school was canceled due to inclement weather, but service personnel were still required to report for work. Grievant failed to come to work and did not call to explain his absence. When Principal Akers asked Grievant if he had worked on December 15th, Grievant refused to answer him regarding whether he had reported for work that day. 6. It was common practice for Mr. Bailey to leave notes for all custodians providing them with directives for their shift.

7. On the evening of October 20, 2005, Mr. Bailey drove by the school and saw Grievant sitting in a window sill. Grievant remained there for some time, not working.

8. On October 21, 2005, Mr. Bailey left a note for Grievant which read:

> Please clean window in locker area. This is the windows [sic]
> you were sitting in last night. You should have cleaned them.
> Also you need to clean restroom better and scrub the floors.

9. Grievant became offended by this note, and disregarded all future notes from Mr. Bailey, doing only those tasks he believed needed to be completed during his shift.

10. On December 20, 2005, Principal Akers noticed Grievant was still in his car a little after 3:15 p.m. Principal Akers approached Grievant and asked Grievant to accompany him and Mr. Bailey to the office to discuss Grievant's work habits and performance.

11. Principal Akers questioned Grievant about remaining in his car well after his shift had started, and Grievant responded it was none of his business. After a short time, Grievant lost his temper, raised his voice and left the meeting.

12. Grievant then called 911 and claimed he was being harassed. A policeman was sent to the school to investigate the allegation. Eventually the officer had to escort Grievant off school property for causing a disturbance.

13. On December 21, 2005, a conference was conducted between Grievant and Superintendent Deborah Akers. At that time, Superintendent Akers questioned Grievant about the

allegations regarding his work habits and performance. Grievant refused to answer her questions. 14. After the conference, Superintendent Akers suspended Grievant for eight days without pay for insubordination, willful neglect of duty and intemperate behavior.

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. 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 Res.*, 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).

I. Merits The grounds upon which a Board may dismiss any person in its employment are immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance substantiated by an employee performance evaluation or conviction on a felony charge. *W. Va. Code* § 18A-2-8. The authority of the board to discipline an employee must be based upon one or more of the causes listed in *W. Va. Code* § 18A-2-8, and must be exercised reasonably, not arbitrarily and capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991).

II. Insubordination, Willful Neglect of Duty and Intemperate Behavior

Respondent suspended Grievant for insubordination, willful neglect of duty and intemperate behavior. Clearly, Grievant's behavior can be labeled as insubordination. Insubordination "includes,

and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(*per curiam*). *See Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts, supra*. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). Grievant admitted telling Principal Akers it was none of his business when questioned about sitting in his car some 30 minutes after his shift had started. He also testified that he became angry and left the meeting with Mr. Bailey and Principal Akers.

By his own admission, Grievant refused to read Mr. Bailey's notes. As a result, some of the duties which needed to be accomplished on his shift were not completed. Principal Akers received complaints about the bathrooms and some classrooms Grievant was to have cleaned. (See footnote 3) Grievant testified at the Level IV hearing that he would not do anything his immediate supervisor asked him to do because he did not want to do it. Grievant felt he was accomplishing the work that needed to be done. Each of these acts in and of itself show insubordination.

Grievant's behavior can also be labeled 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. *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 failureto perform a work-related responsibility. *Adkins v. Cabell County Bd. of Educ.*, Docket No. 89-06-656 (May 23, 1990).

As stated previously, Grievant refused to begin work at the appropriate time. He refused to perform the tasks left for him by his immediate supervisor. As a result, the bathrooms and several classrooms that were Grievant's responsibility were not cleaned appropriately. Grievant intentionally

neglected his duties, performing only those tasks he deemed necessary.

Lastly, Respondent asserts Grievant's suspension was also as a result of intemperate behavior. Intemperance is frequently defined as an immoderate indulgence in a form of conduct. It is usually associated with drinking or drug abuse, but it does not require substance abuse. Behavior that is an immoderate indulgence is intemperance. It is clearly the best word to describe Grievant's behavior. *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092, n. 12 (June 30, 2003). Grievant, by his own admission, left the conference with his immediate supervisor and Principal Akers and immediately called 911 which prompted a policeman arriving at school. Clearly, this behavior is extreme and created a disturbance at the school. While it is recognized Grievant has the right to express his opinions, his behavior was excessive and ungoverned.

III. Harassment

Grievant testified that he was doing the required tasks, and he felt his supervisor was harassing him by leaving him notes with specific duties to accomplish.

W. Va. Code § 18-29-2(n) defines harassment as “repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to thedemeanor expected by law, policy and profession.” “Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96- BOT-462 (Aug. 29, 1997).” *Pauley v. Lincoln County Bd. of Educ.*, Docket No. 98-22-495 (Jan. 29, 1999). A single incident does not constitute harassment. *Id.*; *Metz v. Wood County Bd. of Educ.*, Docket No. 97-54-463 (July 6, 1998).

Grievant complained to Principal Akers that Mr. Bailey was harassing him. Grievant said Mr. Bailey had called his home and had driven around the school during Grievant's shift. Upon receiving the complaint, Principal Akers conducted an investigation. After the investigation was complete, the Principal did not feel there was anything improper. Principal Akers determined the phone call Mr. Bailey made to Grievant was to determine if Grievant was coming to work. Principal Akers also felt that when Mr. Bailey drove past the school and saw Grievant sitting and not working, Mr. Bailey did not mean any harm to Grievant. He had just seen Grievant not working for an extended period of time and brought it to his attention in the note for the next day.

Grievant has not demonstrated he has been subjected to harassment. Employers are expected to

inform employees about their problems in the work area, and employees are entitled to receive fair and honest feedback and evaluations. This feedback may not always be positive. Just because Grievant did not like the information he received, does not mean it was inappropriate or constituted harassment. *Rider v. Bd. of Trustees/Marshall Univ.*, Docket No. 99-BOT-348 (Apr. 7, 2000). Grievant's response to constructive criticismand direction was anger. The information and corrections Grievant received were proper and warranted, and Grievant has not demonstrated he was subjected to harassment.

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).

2. The grounds upon which a Board may dismiss any person in its employment are immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance substantiated by an employee performance evaluation or conviction on a felony charge. *W. Va. Code* § 18A-2-8. The authority of the board to discipline an employee must be based upon one or more of the causes listed in *W. Va. Code* § 18A-2-8, and must be exercised reasonably, not arbitrarily and capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991).

3. This Grievance Board has previously recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988) (citing *Weber v. Buncombe County Bd. of Educ.*, 266 S.E.2d 42 (N.C. 1980)). In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply wassufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995). Insubordination can be shown through an employee's "blatant disregard for the authority" of

his second-level supervisor. *Sexton*, *supra* at 10; *Graham v. Putnam County Bd. of Educ.*, Docket No. 99-40-206 (Sep. 30, 1999).

4. Respondent proved Grievant was insubordinate.

5. *W. Va. Code* § 18-29-2(n) defines harassment as “repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.” “Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96- BOT-462 (Aug. 29, 1997).” *Pauley v. Lincoln County Bd. of Educ.*, Docket No. 98-22-495 (Jan. 29, 1999). A single incident does not constitute harassment. *Id.*; *Metz v. Wood County Bd. of Educ.*, Docket No. 97-54-463 (July 6, 1998).

6. Grievant was not subjected to harassment. Just because Grievant did not like the information he received, does not mean it was inappropriate or constituted harassment. *Rider v. Bd. of Trustees/Marshall Univ.*, Docket No. 99-BOT-348 (Apr. 7, 2000).

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. *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).

6. Respondent proved Grievant willfully neglected his duties.

7. Respondent proved Grievant exhibited intemperate behavior when he got angry and left the meeting with Principal Akers and Mr. Bailey.

Accordingly this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mercer County. Any such appeal must be filed within thirty 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: May 10, 2006

_____

Wendy A. CampbellAdministrative Law Judge

Footnote: 1

During the Level IV hearing, Grievant testified that he discussed the work load with Dwight Bailey, head custodian, prior to school starting. At that time, the work load for his shift was decreased. Based on this information, Mr. Roush amended the relief sought to exclude the equalization of work load, as it had already been accomplished.

Footnote: 2

In Grievant's findings of fact and conclusions of law, he indicates this case turns on credibility. However, Grievant admitted to sitting in his car well after his shift had started, walking out of the meeting with Principal Akers, and refusing to read notes left by Mr. Bailey. Given these admissions, the undersigned does not feel credibility is an issue.

Footnote: 3

One of Grievant's witnesses, a teacher at the school where he worked, testified that her room had been very clean in the previous years and had even complimented Grievant. Yet, in the 2005-2006 school year, her room had not been swept and the trash had not been taken out on a daily basis.