THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

PATRICIA MILLS,

Grievant,

v. **Docket No. 06-50-354**

Janis I. Reynolds

Senior Administrative Law Judge

WAYNE COUNTY BOARD

OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Patricia Mills, filed this grievance on June 22, 2006, against her former employer, the Wayne County Board of Education ("WCBOE"). Grievant asserts she should not have received a written reprimand for failure to watch her students during a field trip. The relief sought is removal of the written reprimand.

This grievance was denied at all lower levels. A Level IV hearing was held at the Grievance Board's Charleston office on February 20, 2007. Grievant was represented by her father-in-law, Patrick Mills, and Respondent was represented by David Lycan, Esq. The matter became mature for decision on March 21, 2007, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant asserts she should not have received a written reprimand for failure to watch her

students on a field trip. She avers she was entitled to a duty-free planning period and lunch while on the field trip, and she used this time to meet with her AFTrepresentative. She also maintains she was retaliated against by her principal because her principal was angry she had to go on an after-school field trip in Grievant's place. (See footnote 1)

Respondent asserts Grievant's behavior warranted the written reprimand, as she did not ask her principal for permission to be absent from her duties to meet with anyone during the field trip. Respondent notes the language of the written reprimand is basically a statement of the events that occurred, Grievant never requested a planning period or a duty-free lunch, and the purpose of a planning period is to prepare for classroom instruction, not to meet with a potential representative to discuss grievances.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was employed by WCBOE as a probationary, long-term, substitute teacher at the time of the written reprimand. Her contract was not renewed at the end of the 2005 - 2006 school year, and she is no longer an employee.

2. Bambi Cyrus, then-principal of Dunlow Elementary, requested Grievant be assigned as a teacher at her school for the 2005 - 2006 school year, because she had done a good job in the past.

3. As required by the Safe Schools Plan, Principal Cyrus posted a chain-of- command for the school. If she is not there, Shane Runyon is in charge and after him TerriRunyon is in charge. The faculty at Dunlow Elementary is aware of this chain-of-command and has been given a copy of this list. Test. Runyon, Cyrus, Meddings, Level IV Hearing.

4. On Friday, May 19, 2006, Grievant had a planning period for her next instructional day which was May 25, 2006.

5. On May 22, 2006, Grievant had a DARE field trip with her students, and on May 23, 2006, Grievant had a field trip with her students to Camden Park. Without asking Principal Cyrus' permission or informing Principal Cyrus of her plan, she told her students she would meet them at the park at 9:00 a.m. Grievant's work day starts at 8:00 a.m.

6. On May 24, 2006, the students at Dunlow Elementary, had a field trip to the Huntington

Museum of Art ("HMOA"). Grievant had made an appointment to meet with a representative from the American Federation of Teachers ("AFT") at HMOA during the field trip, to talk about the possibility of the union representing her in an appeal of a Level IV Decision.

7. Grievant did not inform Principal Cyrus of her plans, and did not have permission to leave her students during the field trip. Additionally, although Grievant has Principal Cyrus's home phone number and has called her at home approximately four to six times in the past, she also did not call her the day of the field trip to talk to her of her appointment or to ask permission to be excused from the field trip during the meeting time. (See footnote 2) 8. Grievant falsely testified she was not aware of the chain-of command, and she did not know who to call or who to talk to at HMOA to seek permission to attend this meeting during the field trip.

9. Contrary to Grievant's testimony, the bus left the school at approximately 8:00 a.m. and arrived at HMOA at approximately 9:00 a.m.

10. Principal Cyrus did not ride the bus, as she was to order and pick up the pizzas the students would have for lunch at Ritter Park after the field trip. Following Principal Cyrus's directions, Mr. Runyon followed the bus in his car with the lunch supplies and to provide transportation if an emergency arose. Ms. Runyon was on the bus.

11. Shortly before the bus left, or during the bus ride, Grievant asked another teacher, Cindy Dixon, if she would watch her students for "a few minutes" during the field trip. Ms. Dixon agreed.

12. Shortly after arriving, Grievant left her students in the care of Ms. Dixon and met with the AFT representative and her husband. She was gone for approximately 90 to 115 minutes. She did not check on her students or with Ms. Dixon at any time during the period she was absent to see if she was needed. Grievant did not go with her students to the oriental art section (10 minutes), the horticultural area (30 minutes), the art project (15 minutes), or the nature walk (60 minutes). (See footnote 3)

13. Contrary to Grievant's assertion, the total of students in Ms. Dixon's care was larger than 13. 14. During the final portion of the field trip, the nature walk, the students were broken into groups of ten. Even though Mr. Runyon waited for Grievant to appear, so she could take a group of students on the nature walk, finally, one group of students went on the tour with an HMOA guide and was not accompanied by a Dunlow Elementary teacher.

15. Although Mr. Runyon saw Grievant meeting with an individual and her husband during the

field trip, he did not say anything, because he believed Principal Cyrus may have given permission for this activity.

16. Grievant appeared when the students were loading on the bus at approximately 12:00 p.m. to 12:15 p.m.

17. When the teachers arrived at Ritter Park for lunch, several complained to Principal Cyrus about Grievant's behavior and expressed their concern for the students' safety. Principal Cyrus asked these teachers to submit something in writing. Only Ms. Dixon did so. Her written statement indicated she had agreed to watch Grievant's students "for a few minutes" which she believed would be approximately 10 to 15 minutes.

18. Contrary to Grievant's assertions, there have been no other teachers who have been absent without permission during a field trip.

19. After the field trip and receiving the information from Ms. Dixon, Principal Cyrus met with Grievant on June 2, 2006, to ask her about the events at HMOA. Following that meeting, Principal Cyrus issued Grievant a written reprimand incorrectly dated May 31, 2006. This written reprimand noted Grievant had asked Ms. Dixon to watch her students for a few minutes, she was gone for much longer, and her behavior was inappropriate fora field trip. This written reprimand was given to Grievant on June 2, 2006, by Principal Cyrus's Secretary because Principal Cyrus had to leave to attend another meeting. (See footnote 4)

20. Grievant was to take her students on a fifth grade trip after the end of the school year. Originally, this trip did not need board approval as it was after the academic year was over, and the transportation was to be by charter bus. When the charter bus fell through, the transportation had to be provided though WCBOE, WCBOE's approval was necessary, and an employee need to be present. Although Principal Cyrus would rather not have gone, she had to go, because at the time of the trip, Grievant was no longer an employee.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. 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 weightof 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. Credibility

An issue to address is credibility, as Grievant's report of the events and the times these events occurred is at odds with the other teachers and staff attending the event. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Res., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Res./Huntington State Hosp., Docket No. 93-HHR- 050 (Feb. 4, 1993). "The fact that [some of] this testimony is offered in written form does not alter this responsibility." Browning v. Mingo County Bd. of Educ., Docket No. 96-29- 154 (Sept. 30, 1996).

The Grievance Board has applied the following factors to assess a witness's testimony: 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. (See footnote 5) See Holmes v. Bd. of Directors/W. Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

"[A] [f]actor to be considered in making and explaining credibility determinations is [the] possibility that [the] witness is biased and may consciously or unconsciously shade his or her testimony for or against one of the other witnesses or parties." Chin v. Dep't of Treasury, 44 M.S.P.R. 201 (1990). The undersigned Administrative Law Judge finds Grievant's testimony to be untruthful. Her testimony was just not plausible. The times at which Grievant says events occurred are not reasonable and do not compute. She says she was gone forty-five minutes to an hour, but during Grievant's absence, the students toured the rest of the art section and the horticultural section, completed an art project and went on a sixty minute nature walk.

By contrast the testimony of the other witnesses was plausible, consistent and internally consistent. They noted the field trip had been some time ago, but their times, while approximate, basically agreed with each other.

Additionally, while Grievant made multiple allegations about others teachers through her testimony, she did not prove any of these allegations, and it was clear she was againincorrect. Further, Grievant's statements that she tried to call Principal Cyrus the morning of the field trip and did not know the chain-of-command are found to be untrue. Principal Cyrus did not have a message on her answering machine, received no phone call from Grievant, and if she had been on the phone, she has called waiting, and this mechanism was not triggered. As noted by Finding of Fact 5, this behavior was similar to the behavior exhibited by Grievant on the prior field trip just a few days previously. The undersigned Administrative Law Judge finds Grievant intentionally did not ask Principal Cyrus for permission because she did not want the possibility of a refusal.

Finally, Grievant's continuing assertion she had done nothing wrong in meeting with a union representative during a field trip because she was entitled to a planning period is not credible. Grievant had been a teacher for at least three years, and she was well aware the purpose of a planning period is to prepare for teaching. Indeed, Grievant cited this Code Section in her Statement of Grievance and Proposals

II. Merits

W. Va. Code §18A-2-8 identifies the types of conduct 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.

It is not necessary for a board of education to identify an employee's offenses by the exact terms utilized in W. Va. Code § 18A-2-8, as long as the required written notice of charges specifically identifies the alleged acts of which the employee is accused. Jordan v. Mason County Bd. of Educ., Docket No. 99-26-080 (July 6, 1999). WCBOE provided Grievant written notice of the charge in the written reprimand.

Grievant's actions can best be described as willful neglect of duty in relation to this incident. WCBOE 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.

Grievant deliberately left her students with another teacher for an extended period of time during a field trip without permission from her supervisor. This act was knowing and intentional. Respondent has met its burden of proof by a preponderance of the evidence.

Grievant's attempts to avoid blame by saying she was entitled to a planning period and duty-free lunch are ridiculous. First, as stated by W. Va. Code § 18A-4-14(2):

> Every teacher who is regularly employed for a period of time more than one-half the class periods of the regular school day shall be provided at least one planning period within each school instructional day to be used to complete necessary preparations for the instruction of pupils. Such planning period shall be the length of the usual class period in the school to which such teacher is assigned, and shall be not less than thirty minutes. No teacher shall be assigned any responsibilities during this period. . . .

Clearly, the purpose of the planning period is to prepare and plan for teaching students, not meeting with a union representative over a grievance. Grievant did not want a planning period, she wanted time to meet with the representative, and this meeting was not used to prepare for class in any way. I should be noted that this was not a typical school day, there were no lesson plans, and Grievant was not expected to provide instruction. Grievant already had a planning period for the next

instructional day on May 19, 2006.

Additionally, while it is not the norm for a teacher to have a planning period during a field trip, and indeed, Principal Cyrus, a longtime principal, had never received such a request, Grievant never even told anyone she wanted to have a planning period that day. Further, Grievant had never requested a planning period during a field trip before. Since a planning period during the middle of a field trip is uncommon, Grievant would need to tell her principal she needed this time. Of course, this requested time MUST then be spent in instructional preparation, not grievance activity.

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. 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).

2. W. Va. Code §18A-2-8 identifies the types of conduct 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.

3. It is not necessary for a board of education to identify an employee's offenses by the exact terms utilized in W. Va. Code § 18A-2-8, as long as the required written notice of charges specifically identifies the alleged acts of which the employee is accused. Jordan v. Mason County Bd. of Educ., Docket No. 99-26-080 (July 6, 1999).

4. Grievant's actions constituted willful neglect of duty on the HMOA field trip. 5. A board of education 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.

6. Respondent has met its burden of proof by a preponderance of the evidence. 7. W. Va. Code § 18A-4-14(2) states:

> Every teacher who is regularly employed for a period of time more than one-half the class periods of the regular school day shall be provided at least one planning period within each school instructional day to be used to complete necessary preparations for the instruction of pupils. Such planning period shall be the length of the usual class period in the school to which such teacher is assigned, and shall be not less than thirty minutes. No teacher shall be assigned any responsibilities during this period. . . .

8. The purpose of the planning period is to prepare and plan for teaching students, not meeting with a union representative over a grievance.

Accordingly, this grievance is **DENIED**.

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

Senior Administrative Law Judge

Dated: May 16, 2007

Footnote: 1

This issue will not be addressed further as it was not a part of the Statement of Grievance. While Grievant did assert retaliation, this was in regard to filing prior grievances, and this issue was not addressed.

Footnote: 2

Grievant asserted she tried to call Principal Cyrus the morning of the field trip, but since Principal Cyrus did not receive a call, she had call waiting and it was not activated, and there were no messages on her working answering machine, this testimony was not credited.

Footnote: 3

The times listed are approximate and are based on the testimony of several witnesses.

Footnote: 4

Grievant made much of the fact that the meeting took place nine days after the event. The undersigned Administrative Law Judge does not find a problem, as Principal Cyrus was waiting for written reports, it was at the end of the school year, and she had many meetings to attend and reports to write, and the nine days included a weekend and a holiday.

Footnote: 5

The undersigned Administrative Law Judge originally obtained this list of factors to use when assessing credibility from The United States Merit System Protection Board Handbook. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).