WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

RUSSELL WATTERSON,

Grievant,

v. **Docket No. 07-26-053**

Denise M. Spatafore

Administrative Law Judge

MASON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Russell Watterson ("Grievant") filed this grievance directly at level four on February 12, 2007, following the imposition of a 15-day suspension without pay by his employer, Respondent Mason County Board of Education ("the Board"). A level four hearing was conducted in Charleston, West Virginia, before Administrative Law Judge Wendy Campbell on April 19, 2007. Grievant was represented by counsel, John E. Roush of the School Service Personnel Association, and Respondent was represented by counsel, Gregory W. Bailey. Fact/Law proposals were submitted by the parties on May 7, 2007. Due to the resignation of Judge Campbell, this matter was reassigned to the undersigned for a final decision on June 21, 2007.

Synopsis

Grievant, employed by Respondent as a bus operator, also engaged in a private business involving the hauling of mobile homes. In order to attend to the mobile home business, Grievant

called off work as a bus operator, without pay, on numerous occasions over a period of years. During the 2006-2007 school year, a new assistant transportationdirector called the absences to the Board's attention, resulting in Grievant being suspended for fifteen days for willful neglect of duty. Because Grievant's supervisors knew of his practice for years and never warned him or advised him that it was not permissible, his conduct was not knowing or intentional, and therefore, willlful neglect of duty was not proven.

Findings of Fact

1. Grievant has been employed by Respondent as a bus operator for approximately 22 years.

2. For several years, Grievant has also been engaged in a private business involving the hauling/moving of mobile homes, which has necessitated that he take off frequent, unpaid days from his work as a bus operator.

3. Gary Mitchell is the Director of Transportation for the Board. Beginning with the 2005-2006 school year, Mr. Mitchell was not directly involved with the daily activities of the bus operators, because an Assistant Director was placed in charge of those issues. During 2005-2006, that person was Mr. Gary Price.

4. During the 2005-2006 school year, Betty Matheney was a secretary in the transportation department and was responsible for handling call-offs and substitutes. It became apparent to her that Grievant was frequently calling off work, without pay, so she informed Mr. Price.

5. Mr. Price did not consult Mr. Mitchell about Grievant's absences, nor did he take any action or discuss the matter with Grievant.

6. In November of 2006, Lawrence Wright replaced Mr. Price as Assistant Transportation Director. 7. Early in his tenure, Mr. Wright noticed that Grievant was frequently calling off work, sometimes for full days and often for partial days. He discussed the matter with Mr. Mitchell, who was unaware of it, and then reported it to Superintendent Larry Parsons.

8. At Superintendent Parsons' request, Mr. Wright consulted the department's records to determine how frequently Grievant had been absent without pay. During the 2005-2006 year, he had been off 27 full days and 16 half days. For the 2006-2007 year, he had been absent six full days and 27 half days, between September of 2006 and January of 2007.

9. In early January of 2007, Mr. Wright and Superintendent Parsons met with Grievant

regarding his numerous absences. Grievant explained that he took days off, without pay, to haul mobile homes. He had been doing this for several years and had never been reprimanded for it, so he did not believe it was wrong. Grievant indicated that, if this practice was not permissible, he would cease doing it.

10. By correspondence dated January 11, 2007, Superintendent Parsons informed Grievant that, at the next Board meeting, he would recommend his termination for willful neglect of duty, and he was being suspended without pay until the Board's decision.

11. At the conclusion of the Board hearing on February 8, 2007, the Board rejected the proposal that Grievant's employment be terminated, and voted to suspend him for 15 days without pay.

12. Grievant has had satisfactory performance evaluations throughout his employment.

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). An employee of a county board of education may be suspended or dismissed only 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. W. Va. Code § 18A-2-8. “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).” *Graham v. Putnam County Bd. of Educ.*, Docket No. 99-40- 206 (Sep. 30, 1999).

In the instant case, Grievant has been charged with 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 failure to perform a work-related responsibility. *Adkins v. Cabell County Bd. of Educ.*, Docket No. 89-06-656 (May 23, 1990).

Respondent contends that, because his superiors were unaware that Grievant was tending to a personal business during his absences, those absences were “unauthorized” and constituted willful neglect of duty. Grievant, however, argues that he made no effort to hide his absences, engaged in this practice openly for years, and was never told that it was wrong.

Under the facts presented, it simply is not logical to term Grievant's conduct as “intentional” or “knowing.” Granted, if there were evidence that Grievant's absences were concealed from his superiors in some way, or that he had been warned that his practices were not acceptable, this would be quite a different case. However, Grievant had undisputedly followed this practice for several years, with at least tacit approval from his supervisors. Ms. Matheney, the transportation secretary, testified that, not only was it “common knowledge” among the employees that Grievant took days off to work in this private business, she even went directly to the Assistant Transportation Director at that time and described Grievant's absences. When Grievant was never warned or disciplined for taking days off without pay, it was quite reasonable for Grievant to assume that his conduct was permissible.

Grievant has also argued that he did not have the opportunity to improve his conduct through a formal improvement plan. West Virginia Code § 18A-2-12 and Department of Education Policy 5300 provide that all school employees “are entitled to opportunities to improve their job performance . . .” However, improvement plans are onlyrequired for correctable conduct, which involves professional incompetency. *Mason County Bd. of Educ. v. State Supt. of Schools*, 165 W. Va. 732, 739, 274 S.E.2d 435, 439 (1980). In this case, it is difficult to term Grievant's conduct as a “performance” issue, because his transgression involved “breaking” an unknown rule. His competence or performance of his duties as a bus operator have not been called into question, so an improvement plan would not seem to have been indicated under the circumstances.

In the past, this Grievance Board has upheld the discipline of employees who were frequently absent and could not be relied upon to be present at work. *See Strickler v. Hampshire County Bd. of Educ.,* Docket No. 04-14-133 (Jan. 24, 2005); *Rice v. Mason County Bd. of Educ.*, Docket No. 94-

26-608 (March 31, 1995). However, those cases involved situations where employees had been warned about their conduct and had been instructed regarding proper absence and call-off procedures, yet repeated their behavior. Conversely, in the instant case, Grievant received no such warning or counseling. Although one could argue that is merely common sense for an employee to realize that it is not fair to one's employer, or to other individuals who would like to have a full-time job, to repeatedly be absent from one's position, Respondent's failure to acknowledge Grievant's misbehavior or warn him of its consequences provided a reasonable basis for Grievant's continuation of the practice.

Accordingly, the undersigned concludes that, under the facts and circumstances presented here, Respondent has failed to prove willful neglect of duty. Grievant is entitled to expungement of the suspension from his employment record, plus restoration of all applicable back pay, benefits and seniority lost during the suspension period. It isassumed that, by virtue of the events that have transpired, Grievant now realizes that he is not permitted to engage in private business activities when he is supposed to be performing his bus operator duties, so he will discontinue that behavior.

The following conclusions of law are appropriate in this matter.

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. An employee of a county board of education may be suspended or dismissed only 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. If the disciplinary action is taken for unsatisfactory performance, it must follow an employee performance evaluation. W. Va. Code § 18A-2-8.

3. “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).” *Graham*

v. Putnam County Bd. of Educ., Docket No. 99-40-206 (Sep. 30, 1999).

4. 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).

5. Respondent has failed to prove willful neglect of duty by a preponderance of the evidence.

Accordingly, this grievance is **GRANTED**, and Respondent is **ORDERED** to expunge all records of the suspension and restore to Grievant all applicable back pay, interest at the statutory rate, benefits and seniority.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Mason County. Any such appeal must be filed within thirty (30) days of receipt of this decision. *See* W. Va. Code § 18-29-7 (repealed) (*but see Executive Order No. 2-07*, May 8, 2007). 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: July 17, 2007

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DENISE M. SPATAFORE

Administrative Law Judge