WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

MATT FARLEY Jr.,

Grievant,

v. Docket No.: 05-23-379

LOGAN COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Matsman (Matt) Farley, Jr., initiated this grievance on October 11, 2005, challenging the termination of his employment with the Logan County Board of Education. Pertinent sections of the grievance allege:

> **Statement of Grievance: I have been accused of not calling in or letting my supervisors know I was going to be off. First in January, this is false. Second in August, also a lie. I called in and talked to supervisor in person.**
>
> **Relief Sought: (1) Employment reinstated (2) back pay (3) retain my sick and vacation pay taken by supervisor (4) the repayment of unemployment and welfare (5) Legal Fees.**

This matter came on for a Level IV hearing on September 18, 2006, before Administrative Law Judge Wendy Campbell. Grievant appeared in person and by legal counsel, Dwight J. Staples. Respondent, Logan County Board of Education, appeared through its Superintendent, David Godby, represented by legal counsel, Leslie Tyree. Due to the resignation of Administrative Law Judge Campbell, this matter was reassigned to the undersigned. The undersigned was provided with and reviewed the entirety of the record,

including exhibits, deposition transcript, and the recordings of prior proceedings. After an additional day of hearing conducted at the GrievanceBoard's Charleston, West Virginia, office on October 9, 2007, before the undersigned, this case became mature for decision on November 9, 2007, the deadline for the parties' submission of proposed findings of fact and conclusions of law.

Synopsis

Grievant was terminated from his position with Respondent for unscheduled absences and his failure to report off work, after the behavior was not corrected by progressive discipline. Grievant contends the disciplinary action taken was unwarranted, and that it was executed improperly because he was dismissed for an offense he did not commit. Grievant had a documented history of unscheduled absences without contacting his supervisor and had been given multiple warnings, reprimands, and suspensions. His dismissal was justified.

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

Findings of Fact

1. Grievant worked in the bus garage of Respondent's Transportation Department as a mechanic, having first been employed on January 17, 1983. Grievant was a good mechanic and assisted in training others as mechanics for Respondent. In 1995 he was promoted to crew leader mechanic.

2. Dr. Pat White was the Director of Respondent's Transportation Department during all relevant times pertinent to this grievance. The two supervisors in the bus garage were Jeff Swanner and Berel Scarberry. 3. It is the recognized and undisputed policy of the Logan County Board of Education Transportation Department that an employee is to call their direct supervisor in order to secure time off, such as sick days, vacation days, and other personal time off from work. See Section XIII, Disciplinary Rules and Regulations of the Logan County Transportation Manual.

4. Grievant had an option of contacting either Supervisor Scarberry or Swanner to secure days off. Further, the phone system at the garage was equipped with voice mail (answering system).

5. Grievant had been disciplined numerous times in the two and a half to three (2½ - 3) years preceding termination for his failure to report to work or properly inform Respondent of his absences. Disciplinary action included:

a. Numerous verbal communications.

b. Written Reprimands: In October 2003, February 2004, October 2004, and December 2004, Grievant was issued reprimand letters after he had been off work for several days without proper authorization or contact with Respondent.

c. 3 Day Suspension: On October 6, 2004, Grievant received another reprimand letter for missing work. Grievant was suspended for three days.

d. 30 Day Suspension: On January 14, 2005, Grievant was suspended for thirty days without pay for his absence from work.

6. Grievant did not file a grievance about any of the prior formal disciplinary actions taken against him by Respondent.

7. In 2003, Grievant was diagnosed with depression and sought help from medical providers. Documents submitted verify Respondent was aware Grievant was having psychological problems and seeking help in 2003 and 2004. 8. As a result of several conferences with Bus Supervisors Scarberry, and Swanner, Director White, and Superintendent Godby, Grievant was unequivocally aware that his failure to call the garage when he was unable to work, was a significant problem.

9. Grievant's supervisor, Jeff Swanner, was convicted of two counts of third degree sexual assault in the Circuit Court of Logan County for sexual acts with an under age girl during November 2004 through September 20, 2005. At the time of the hearing, Jeff Swanner was incarcerated (unavailable for testimony).

10. In January 2005, as a result of Grievant's absences from work, disciplinary proceedings were initiated against Grievant. Respondent seriously considered dismissing Grievant in January 2005. Because Grievant was seeking help and had been hospitalized for his psychological problems, Respondent gave Grievant another chance, that is a thirty (30) day suspension instead of termination. (See footnote 1) **Testimony Transportation Director**

White and Superintendent Godby.

11. Proper maintenance of county school buses is serious business. Not reporting to work as scheduled creates problems with other mechanics and complicates the logistics of proper maintenance. When a mechanic appropriately calls in, rescheduling of activities or securing a substitute mechanic is an option.

12. Grievant was aware that the consequences of future absences without proper notice or approval included termination of his employment. Citing Testimony of Transportation Director White, Superintendent Godby, Grievant and Grievant's wife. Seealso various exhibits of record which previously informing Grievant that future disciplinary measures included suspension and/or termination of employment.

13. After a mutually acknowledged period of scheduled and approved leave, Grievant missed work on August 15, 16, and 17, 2005. (See footnote 2)

14. The first paragraph of the August 26, 2005, termination letter provided that Grievant was being discharged from employment as a mechanic with the Respondent for missing work and failing to notify his supervisor:

> **Your termination is a result of your continued failure to report to work at the scheduled time and for your continued failure to alert your supervisors when you fail to report to work. You have been counseled on numerous occasions regarding the necessity for you to call your supervisor when you intend to miss work. You are a mechanic responsible for the maintenance of school buses that transport our children. It is simply not acceptable for you to fail to appear at work, and fail to even call so that a substitute could be placed in your position. Your unreported work absences have created a disruption for the entire transportation department.**

15. Further, the termination letter of August 26, 2005, stated that Grievant was being discharged for missing work during "the first two weeks of August, 2005." Paragraph five of the termination letter states:

> **During the first two weeks of August, 2005 you once again missed work for several days and failed to notify your supervisor . Again you caused disruption for the entire transportation department by your failure to follow a very simple rule. An employer should be able to expect an employee to have enough courtesy to call when they do not appear for work. In addition the policy regarding reporting absences is very clear.**

16. Grievant introduced a calendar of August 2005, and noted the first two weeks of August 2005, includes only the work days of August 1, 2, 3, 4, 5, 8, 9, 10, 11, and 12.

17. At hearing, Respondent agreed/stipulated that all days Grievant took off during the first two calendar weeks of August 2005, were approved pursuant to applicable policy of the Logan County Board of Education. See footnote 2.

18. Respondent's pay periods for the month of August 2005, slightly differ from the calendar dates of the month. The first two pay periods for the month of August 2005, are for the period of August 2 through August 16, and the first two calendar weeks of August 2005 are August 1 through August 14.

19. Grievant missed work on August 15 and 16, 2005, which was during Respondent's first two pay periods of August 2005. Grievant also missed work on August 17, 2005 and these three absences resulted in Grievant's termination.

20. Respondent terminated Grievant for missing work on August 15, 16, and 17, 2005, and his continued failure to alert Respondent of absences prior to his failure to report to work.

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; (See footnote 3) *Hoover v. Lewis CountyBd. 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).

Procedural Issue

The dismissal notice in this matter indicates that Grievant was terminated for missing work

and failing to notify his supervisor of such absences. Grievant's counsel asserts that an inaccuracy of the document is of sufficient issue to undermine the legitimacy of Respondent's disciplinary action. The undersigned disagrees. At hearing Respondent stipulated that all days off taken by Grievant during the first two calendar weeks of August 2005, were approved or sanctioned leave in accordance with relevantpolicy. However, Respondent explained that Grievant missed work on August 15, and 16, which is during the first two pay periods of Respondent's August calendar. Also Grievant failed to report to work on August 17, 2005. It is this time period, all three days, which is the basis for Respondent's disciplinary actions.

While the August 26, 2005, dismissal correspondence (paragraph five) may be technically flawed in providing that Grievant missed work during the first two weeks of August, 2005, such grammatical flaw is not fatal to Respondent's position that it is justified in terminating Grievant for missing work and failing to call in prior to his absences. The charges against Grievant were of a serious nature, recognized and acknowledged by Grievant.

The West Virginia Supreme Court of Appeals in *Board of Education of the County of Mercer v. Wirt*, 453 S.E.2d 402 (W. Va. 1994), determined what due process is required to terminate a continuing contract of employment. A tenured employee is entitled to a pre-termination hearing, not a full adversarial hearing. An employee is also entitled to written notice of the charges and an explanation of the evidence. *Id*. at Syl. Pt. 3; W. Va. Code §18A-2-8. Additionally, *Wirt* found an employee is entitled to an opportunity to respond to the charges. Grievant was provided all these protections by Respondent. As indicated by the statement of grievance, Grievant was aware that the dates of August 15, 16, and 17, 2005 were in part, at issue. At the pre-disciplinary meeting of August 25, 2005, Grievant was aware of the charges, the evidence, and given an opportunity to respond. (Testimony of Director White). Provided with an opportunity to present any information, which could or would explain his actions, Grievant stated that "I thought I called in, but maybe I didn't". The first paragraph of the August 26, 2005, termination letter clearly provided that Grievant was being discharged from employment as a mechanic with the Respondent for missing work and failing to notify his supervisor. The imprecise language of paragraph five does not constitute surprise. The information received by Grievant was sufficient to place him on notice of the charges. Grievant was aware of the days he did or did not work in August and the reason for his

discharge. Grievant's due process rights were not violated. In the context of this case, Grievant was clearly on notice of Respondent's basis for disciplinary actions.

Credibility

Notwithstanding his objection to the wording of the dismissal notice, Grievant professes innocence of the offense. Grievant does not dispute he was scheduled to work, or that he failed to show up for work. Grievant maintains he contacted Respondent and was granted approved leave. 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 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 Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999); *Perdue, supra*.

Respondent terminated Grievant for missing work on August 15, 16, and 17, 2005, and his continued failure to alert Respondent of absences prior to his failure to report to work. Grievant asserts he contacted Respondent. In support of this contention Grievant offers self-serving explanations of events which conveniently exonerate him of any wrongdoing. While Grievant's version of events is plausible, it is not convincing.

Grievant's family had a planned vacation to New York City, scheduled during portions of the first and second weeks of August 2005. Grievant testified he did a lot of walking while in New York. Grievant returned to work on August 12. Grievant testified he was unable to go to work on August 15, 2005 because his feet were hurting. Grievant asserts he called his job site several times and could not get Supervisor Swanner. Grievant stated he talked to Brady

McCleese, shop foreman, and told him he couldn't come to work. Mr. McCleese testified by deposition several months later that he could not say whether the Grievant called him on August 15, 2005, or not. He simply did not recall. Pursuant to Grievant's testimony, on August 16, 2005, he called work and spoke directly with Supervisor Swanner, informing him of his inability to come to work. Grievant avers that he was then granted an additional personal leave day. The calendar (Grievant's Exhibit 2) kept in the garage, offered by Grievant to support this contention, is not sufficiently persuasive to conclude Grievant was granted personal leave on August 15, or 16, prior to his failure to report to work. Credible testimony of Supervisor Scarberry provided it was common practice to indicate personal days on the calendar when an employee did not show for work, so that such employee would not lose a day's pay. Grievant and other employees had been past benefactors of this practice. (Testimony Director White and Supervisor Scarberry). Grievant's rendition of events while superficially possible is not supported by corroborating evidence. The fact that the calendar indicates "pers" on August 15 and 16 does not establish Grievant called in prior the absence.

On August 17, 2005, pursuant to Grievant's testimony, he was granted another personal leave day for an appointment with a foot doctor. Uniquely aware of the consequences, Grievant does not dispute he was scheduled to work, or the fact he failed to show for work. Grievant offered the explanation that he called in and reported his intended absence.

It was Supervisor Scarberry's testimony that he and Supervisor Swanner specifically discussed Grievant's absences of August 15, 16, and 17, 2005. Supervisor Scarberry testified that Supervisor Swanner inquired about Grievant's failure to show for work and conveyed that he [Mr. Swanner] had not heard from Grievant, either. Transportation Director White testified that during this time period he inquired of the supervisors regarding Grievant's whereabouts and both indicated Grievant had not called in. The testimony of Grievant's daughter was offered to substantiate Grievant's contention that he contacted Respondent prior to the absences in question, but her statements were vague and did not establish that Grievant called Respondent on the specific dates in issue. Further, while Grievant's wife testified the Farley family was acutely aware Grievant needed to call his employer if he wasn't going to work, and that she routinely prompted Grievant to call Respondent, her testimony regarding Grievant's specific communication with Respondent on August 15, or 16, 2005, was not

persuasive. Ms Farley testified she saw Grievant using the phone early in the morning, yet could not verify time, date certain or contents of the communication with any reliable specificity. Grievant's testimony that he called in on August 15, 16, and 17, 2005, is not credible in the circumstances of this case.

Merits

An employee of a county board of education may be suspended or dismissed 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 (Sept. 30, 1999). Grievant was terminated from his position with Respondent for unscheduled absences and his failure to report off work as required by applicable Disciplinary Rules and Regulations of the Logan County Board of Education. See Section XIII, Disciplinary Rules and Regulations of the Logan County Transportation Manual. Grievant's actions constituted a willful neglect of duty.

Respondent 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*.

Respondent readily admitted that there was nothing wrong with Grievant missing August 15, 16, or 17, 2005, to take a personal or sick day, as long as he followed procedure. However, the facts do not support Grievant's contention that he properly contacted Respondent prior to

his absences from work on August 15, 16, and 17, 2005. Respondent has carried its burden. Grievant had been counseled on numerous occasions and was aware of the consequences of future absences without proper notice. Grievant's willful neglect of duty is proper cause for termination. It is noted that Grievant was liked and respected by co-workers. Superintendent Godby testified he knew Grievant's family and it was a heart wrenching decision to terminate Grievant. Transportation Director White opined, in view of Grievant's history and the lengths Respondent had gone to, it was the appropriate disciplinary action to terminate Grievant's employment. Given the considerable deference afforded to employers in disciplinary situations, the disciplinary action imposed was not disproportionate to the offense committed.

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. "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).

3. 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 (Sept. 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. *Hoover v. Lewis County Bd. of Educ.*, Docket No. 93-21-427 (Feb. 24, 1994). *Also see, Bd. of Educ. v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120 (1990).

5. Respondent has proven Grievant established a disruptive pattern of unsatisfactory attendance without proper notice of absence during his tenure of employment.

6. Respondent terminated Grievant for failing to report to work on August 15, 16, and 17, 2005, coupled with his failure to properly alert Respondent of said absences prior to his failure to report to work.

7. Grievant was terminated for good cause after his willful neglect of duty was not corrected by progressive discipline.

8. The West Virginia Supreme Court of Appeals in *Board of Education of the County of Mercer v. Wirt*, 453 S.E.2d 402 (W. Va. 1994), determined what due process is required to terminate a continuing contract of employment. A tenured employee is entitled to a pre-termination hearing, not a full adversarial hearing. An employee is also entitled to written notice of the charges and an explanation of the evidence. Id. at Syl. Pt. 3; W. Va. Code §18A-2-8. Additionally, *Wirt* found an employee is entitled to an opportunity to respond to the charges.

9. The August 26, 2005 Dismissal Notice given to Grievant in the circumstance of this case did not constitute a violation of Grievant's due process rights.

10. Grievant failed to demonstrate the penalty imposed was unwarranted or excessive given the numerous disciplinary actions previously taken against him for unauthorized absences (absences without notice).

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the "circuit court of the county in which the grievance occurred." 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 Public 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 GrievanceBoard. 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.

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Landon R. Brown

Administrative Law Judge

Date: January 4, 2007

Footnote: 1

It is disputed whether Respondent was informed in December that Grievant would be hospitalized in January.

Footnote: 2

August 4,5,8,9, and 10 were pre-approved vacation days. August 11, 2005 was a pre-approved paid professional day.

Footnote: 3

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes and rules, which continue to control the proceedings in this case.