

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**WENDY RUSSELL,
Grievant,**

v.

DOCKET NO. 2016-0447-KanED

**KANAWHA COUNTY BOARD OF EDUCATION,
Respondent.**

DECISION

On September 30, 2015, Wendy Russell (“Grievant”) filed this grievance directly at Level Three of the grievance procedure, as authorized by W. Va. Code § 6C-2-4(a)(4), challenging the termination of her employment by the Kanawha County Board of Education (“Respondent” or “KCBE”). A Level Three hearing was held before the undersigned Administrative Law Judge on February 18, 2016, at the Grievance Board’s office in Charleston, West Virginia. Grievant was represented by John Everett Roush, Esquire, with the West Virginia School Service Personnel Association. Respondent was represented by its General Counsel, James W. Withrow, Esquire. Respondent presented testimony from Natalie Vaughan, the Principal at Sharon Dawes Elementary School, and Trooper First Class Nicholas Manolakos, with the West Virginia State Police. Grievant testified in her own behalf, and presented testimony from Jonathon Howe. The hearing transcript from a pre-termination hearing conducted by a Hearing Examiner for KCBE was also part of the evidentiary record. This matter became mature for decision on March 9, 2016, upon receipt of the last of the parties’ post-hearing arguments.

Synopsis

Grievant was employed as a Custodian at Sharon Dawes Elementary School. On March 20, 2015, it was discovered that over \$2000 in proceeds from a Book Fair at the school was missing from an unlocked safe in the Principal's Office. This apparent theft of public funds was reported to the West Virginia State Police. An investigation was launched which quickly focused on Grievant, who had unaccompanied access to the office in the course of performing her custodial duties. Under questioning by two State Troopers, Grievant made a verbal confession, which was digitally recorded. Grievant failed to establish that her confession was coerced or obtained under duress. KCBE established by a preponderance of the credible evidence of record that Grievant engaged in immorality and willful neglect of duty by wrongfully taking the school funds and converting them to her personal use. Therefore, KCBE's decision to terminate Grievant's employment was warranted in the circumstances, and this grievance must be denied.

The following Findings of Fact are made based upon the evidence and exhibits presented at the Level Three hearing and a pre-termination hearing conducted by a Hearing Examiner for KCBE on July 15 and 24, 2015.

Findings of Fact

1. Grievant was employed as a Custodian by Respondent Kanawha County Board of Education ("KCBE").
2. Grievant began working for KCBE as a substitute Custodian in 2013, becoming a regular employee in 2014. In February 2015, Grievant was transferred to

Sharon Dawes Elementary School, where her shift ordinarily ran from 1:30 PM to 10:00 PM.

3. At all times pertinent to this grievance, Natalie Vaughan was the Principal at Sharon Dawes Elementary School.

4. A Book Fair was held at the school from on or about March 10 through on or about March 16, 2015.

5. Once the Book Fair concluded, the money collected from book sales was placed in an envelope by the School Librarian and Secretary, who then stored the package in a safe in the Principal's Office. The envelope was estimated to contain approximately two thousand, three hundred dollars (\$2300.00) in cash and checks. The safe was not locked.

6. Principal Vaughan was away from the school on March 16, the day the Book Fair concluded, and did not return until Friday morning, March 20, 2015.

7. When Principal Vaughan and the School Secretary went to the safe on the morning of March 20, 2015, to get the Book Fair money so that it could be counted and deposited in the bank, the envelope containing the funds was missing. A search of the school was conducted by the staff without locating the money.

8. In addition to Principal Vaughan, the School Nurse, School Secretary, and Grievant, had regular access to the Principal's Office where the safe was situated.

9. When the missing money could not be located, Principal Vaughan began reviewing a video record from a security camera in the hallway outside the Principal's

Office. There are no security cameras inside the Principal's Office; where the safe is located.

10. Principal Vaughan observed Grievant enter the office area on Monday, Tuesday and Wednesday around 2:15 PM, with a large trash can on rollers. On Thursday, March 19, 2015, in addition to entering the office area with the large trash can around 2:15 PM, Grievant was observed returning to the office area and entering a second time around 5:00 PM.

11. When Principal Vaughan observed Grievant entering the office area for the second time on March 19, Grievant did not take the rolling trash can into the office area with her. Principal Vaughan observed Grievant coming out of the office area approximately five to six minutes later. When Grievant came out of the office area, she was carrying a large, black trash bag, which she placed in the rolling trash can.

12. Principal Vaughan observed several employees entering the area of the Principal's Office during the time frame after the envelope with the Book Fair proceeds were placed in the safe, but only Grievant's activities on March 19 appeared to be irregular.

13. Principal Vaughan subsequently reported the missing funds to the West Virginia State Police, summarizing what she had observed on the video recording. She provided the video to the investigating officers.

14. Trooper First Class ("TFC" or "Trooper") Nicholas Manolakos was assigned to investigate the missing funds. Trooper Manolakos went to Sharon Dawes Elementary School on March 23, 2016, and took recorded statements from Principal

Vaughan and other potential witnesses and suspects, including Grievant. Grievant denied any involvement in the theft during her interview on March 23.

15. On April 15, 2015, during a subsequent interview with Trooper Manolakos and another State Police Officer, Sergeant O'Bryan, after being advised of her Miranda rights, and waiving her right to an attorney, Grievant verbally admitted to taking the money. Grievant's confession was contemporaneously recorded and subsequently transcribed.

16. Grievant specifically admitted to taking the envelope during her second trip into the Principal's Office on March 19, 2015. Grievant further acknowledged using the cash to pay her mother's utility bills and at least one electric bill of her own. Grievant also described how she burned the checks from the envelope in her yard at home.

17. After Grievant confessed to taking the money from the school, KCBE suspended Grievant and thereafter dismissed her for immorality and willful neglect of duty, following a pre-termination hearing before a Hearing Examiner for the Board.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *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.” *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). “The 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 & Human Resources*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

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 and capriciously. Syl., *DeVito v. Bd. of Educ.*, 173 W. Va. 396, 317 S.E.2d 159 (1984); Syl. pt. 1, *Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975); *Lake v. Barbour County Bd. of Educ.*, Docket No. 99-01-294 (Jan. 31, 2000); *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991). W. Va. Code § 18A-2-8(a) provides:

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.

In this particular matter, KCBE charged Grievant with immorality and willful neglect of duty in regard to taking over \$2000 in cash and checks from an unlocked safe in the Principal’s Office while on duty as a Custodian at Sharon Dawes Elementary School. The term “immorality,” as used in W. Va. Code § 18A-2-8 connotes conduct “not in conformity with accepted principles of right and wrong behavior; contrary to the

moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior.” *Golden v. Bd. of Educ.*, 169 W. Va. 63, 67, 285 S.E.2d 665, 668 (1981) *citing* Webster’s New Twentieth Century Dictionary Unabridged 910 (2d ed. 1979).

While immorality is frequently used to define sexual misconduct, immorality may also encompass other forms of conduct not in conformity with accepted principles of right and wrong behavior, such as theft. *Buckley v. Kanawha County Bd. of Educ.*, Docket No. 2015-0963-KanED (May 18, 2015); *Painter v. Kanawha County Bd. of Educ.*, Docket No. 2008-0724-KanED (June 18, 2008). See *Arnold v. Monongalia County Bd. of Educ.*, Docket No. 02-30-195 (Jan. 13, 2003); *Cooper v. Kanawha County Bd. of Educ.*, Docket No. 02-20-097 (July 31, 2002).

KCBE also charged Grievant with willful neglect of duty. 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). Establishing this offense involves a fairly heavy burden in that Respondent must not only prove that the acts it alleges did occur, but also that the reason for Grievant’s neglect of duty was more than simple negligence. *Tolliver v. Monroe County Bd. of Educ.*, Docket No. 01-31-493 (Dec. 26, 2001). In order 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. *Stover v. Mason County Bd. of Educ.*, Docket No. 95-26-078 (Sept. 25, 1995); *Hoover v. Lewis County Bd. of Educ.*, Docket No. 93-21-427 (Feb. 24, 1994). See *Bd. of Educ. v. Chaddock*, 183 W. Va. 638, 398

S.E.2d 120 (1990). See also *Fox v. Bd. of Educ.*, 160 W. Va. 668, 236 S.E.2d 243 (1977).

Certain facts relating to the charges against Grievant were the subject of conflicting testimony. 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. *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); *Massey v. W. Va. Public Serv. Comm'n*, Docket No. 99-PSC-313 (Dec. 13, 1999); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). See *Harper v. Dep't of the Navy*, 33 M.S.P.R. 490 (1987). See also *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). Some factors to consider in assessing the credibility of a witness include the witness' demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the fact finder should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the witness' information. *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2009-0685-MAPS (Apr. 23, 2009); *Massey, supra*.

Grievant contends that her verbal confession to taking the Book Fair proceeds was improperly obtained through a form of coercion, and her admission was not genuine. Absent Grievant's confession, her status in this matter would be relegated to being a likely suspect regarding the missing funds. Thus, if Grievant's confession should be excluded from consideration, KCBE could not establish by preponderant

evidence that Grievant stole funds from the elementary school where she was working as a Custodian. Accordingly, weighing the testimony of the various participants becomes critical to the outcome of this grievance.

Principal Vaughan and Trooper First Class Manolakos were both credible witnesses. Grievant suggested that Trooper Manolakos' reliance on notes and his written report somehow detracted from his credibility. However, given that this officer undoubtedly investigates numerous matters in the course of a year, the undersigned Administrative Law Judge did not find this witness' reference to written records excessive or disturbing in any regard.

In her testimony, Grievant admitted to entering the Principal's Office substantially as described by Principal Vaughan in earlier testimony describing what Principal Vaughan observed on the video. Grievant claimed that she went into the Principal's Office to get a cup of coffee from a Keurig coffee maker, asserting that she placed the used K-cup and two empty creamer containers in the large trash bag she took in the office with her, while denying that she took anything from the safe. Grievant's testimony was consistent with Principal Vaughan's observation that Grievant had a coffee cup in her hand when she came out of the office with an opaque black trash bag in her other hand. In regard to her recorded confession, Grievant testified that the State Police coerced her into giving this confession, explaining that she had previously endured an abusive relationship, and thereby became conditioned to avoid confrontation. As a result; she told the police what they wanted to hear when Sergeant O'Bryan, who joined Trooper Manolakos in questioning her, yelled at her, and told her he knew she was

guilty of theft, and needed to admit what she had done. Grievant described Sergeant O'Bryan and Trooper Manolakos as engaging in a "good cop, bad cop" approach.

Jonathon Howe, Grievant's significant other, was a credible witness who testified that, while seated in the waiting room at the State Police Detachment, he could hear Sergeant O'Bryan raising his voice behind the closed door where Grievant was being questioned. Mr. Howe also corroborated that portion of Grievant's confession which stated that she used the stolen money to help her mother pay various bills, by acknowledging that Grievant did provide financial support to her mother. Although Mr. Howe had no knowledge of any stolen funds, the fact that Grievant's mother needed financial help from family members is consistent with Grievant's explanation of what she did with the stolen funds.

Grievant's testimony concerning suffering through a prior abusive relationship was credible. However, Grievant's claim that she confessed solely to placate a male authority figure who was yelling at her is only plausible, at best. Trooper Manolakos denied that any coercive tactics were employed, and Grievant indicated in her recorded confession that she understood her right to an attorney, and had not been coerced. The best available evidence of what took place when Grievant admitted to taking the money is the recording of her confession, which is about six and one-half minutes in length. See R Ex C at Level III.

A thorough review of Grievant's recorded confession lends no credence to her allegations that she was coerced. When Trooper Manolakos states that money in the Principal's safe came from a Book Fair, Grievant indicates that she doesn't know how

the funds came to be in the safe. When Trooper Manolakos asks Grievant if she had any knowledge of what happened to the money that was missing on the morning of March 20, Grievant states, “Yeah, I took it.” Under further questioning, Grievant related that she took the envelope during her second visit to Principal Vaughan’s office on March 19, and placed it in a trash bag which she carried out of the office, as shown on a video recording.¹ Grievant further related that she used the cash to pay utility bills for her mother, and even described how she burned the checks from the envelope “out in the yard.”

Grievant’s casual candor on the audio recording was inconsistent with the expected demeanor of someone who was being coerced to falsely confess to a crime they did not commit, simply to placate a male authority figure who had been yelling at her and behaving in a threatening manner. It is much more likely that, as Grievant related, Sergeant O’Bryan and Trooper Manolakos simply employed a “good cop, bad cop” strategy while questioning her, and Grievant now realizes that if she had not admitted to her involvement, she might not have lost her job and found herself facing possible criminal prosecution. Therefore, Grievant’s confession must be accepted on its face as an admission that she stole public funds while performing her custodial duties at Sharon Dawes Elementary School. This admission, combined with the other available evidence, established the allegations that Grievant engaged in immoral conduct and willful neglect of duty warranting her termination.

The following Conclusions of Law support the decision reached.

¹ This video recording was not made a part of the record or shown during the Level Three hearing.

Conclusions of Law

1. In a grievance involving a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989).

2. The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in West Virginia Code § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. See *Maxey v. McDowell County Bd. of Educ.*, 212 W. Va. 668, 575 S.E.2d 278 (2002); *Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975); *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991).

3. W. Va. Code § 18A-2-8 provides that “[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.”

4. Immorality may encompass various forms of conduct not in conformity with accepted principles of right and wrong behavior, including theft. *Buckley v. Kanawha County Bd. of Educ.*, Docket No. 2015-0963-KanED (May 18, 2015); *Painter v. Kanawha County Bd. of Educ.*, Docket No. 2008-0724-KanED (June 18, 2008). See *Arnold v. Monongalia County Bd. of Educ.*, Docket No. 02-30-195 (Jan. 13, 2003); *Cooper v. Kanawha County Bd. of Educ.*, Docket No. 02-20-097 (July 31, 2002).

5. Willful neglect of duty “is conduct constituting 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).” *Geho v. Marshall County Bd. of Educ.*, Docket No. 2008-1395-MarED (Oct. 30, 2008)(footnote omitted).

6. KCBE established by a preponderance of the evidence that Grievant took public funds from the school where she was entrusted with access as a Custodian, which conduct involved a knowing and intentional act more serious than simple incompetence or negligence, and thus constituted willful neglect of duty. See *Short v. Wyoming County Bd. of Educ.*, Docket No. 2011-1420-WyoED (Oct. 27, 2011).

7. KCBE established the charge of immorality in regard to taking over \$2000 in public funds and converting those funds to her own use, by a preponderance of the evidence.

8. Theft of state property is one of the most serious offenses an employee can commit; the value of the property is of little consequence. *Overbee v. W. Va. Dep’t of Health & Human Serv.*, Docket No. 96-HHR-183 (Oct. 3, 1996). See *Davis v. W. Va. Dep’t of Motor Vehicles*, Docket No. 89-DMV-569 (Jan. 22, 1990).

9. The proven charges support termination of Grievant's employment as a Custodian by KCBE.

Accordingly, this grievance is hereby **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. Va. Code § 6C-2-5. 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 Grievance Board. The appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. See also 156 C.S.R. 1 § 6.20 (2008).

DATE: March 21, 2016

LEWIS G. BREWER
Administrative Law Judge