OKEY TRIBBLE, .

Grievant, .

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v. . Docket Number: 94-40-248

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PUTNAM COUNTY BOARD OF EDUCATION, .

Respondent. .

DECISION

Okey Tribble (hereinafter Grievant) was employed by the Putnam County Board of Education (hereinafter Board) as a Bus Operator until his indefinite suspension which was approved by Board vote on June 6, 1994, for alleged gross incompetency and willful neglect of duty. Grievant filed this grievance challenging the Board's action pursuant to West Virginia Code §18A-2-8 on June 13, 1994. He had previously appeared before the Board on June 6 and replied to the charges leveled against him. A level four evidentiary hearing was held at this Grievance Board's office in Charleston, West Virginia on July, 22, 1994. Thereafter, the case became mature for decision upon the Undersigned's receipt of the parties' post-hearing briefs submitted on or about August 17, 1994.

The material facts are not in dispute in this matter and will be set forth below as the Undersigned's required findings.

Findings of Fact

1. Grievant had been employed by the Board as a full-time Bus Operator for approximately

thirteen years.

2. In February 1994, Grievant was assigned a special education bus route.

3. Karen Cottrell was the Aide officially assigned to Grievant's bus.

4. On May 25, 1994, the day at issue, Ms. Cottrell was absent from work and Peggy Silvester, a substitute Aide, was assigned to Grievant's bus.

5. Grievant's morning bus run takes him to Winfield Elementary School to drop-off his assigned students, one of whom is Farrah Harrison, a severely mentally and physically impaired child who is incapable of both speech and ambulatory activity.

6. Once Grievant and Ms. Silvester arrived at the school, they proceeded to unload the children. Grievant stood outside of the bus to receive the children while Ms. Silvester guided them out of the bus from inside. After Grievant believed that all of the students had exited the bus, he got back in the driver's seat and backed the bus into its designated parking place. He then secured some equipment in the front of the bus, opened a couple of windows directly behind his seat, and exited the bus to go inside the school to use the restroom. He did not look back through the bus to determine whether any students were still in their seats.

7. Before Grievant had backed the bus into its designated parking spot, he excused Ms. Silvester so that she could go home because her car was parked at the school.

8. Grievant typically left his bus at Winfield Elementary and rode back to the bus garage with another bus driver. On this day, as Grievant returned from the restroom, he noticed that his ride was waiting so he boarded this bus and returned to the bus garage without making a final check of his bus.

9. Bus Operators are required by Board policy to make a post-run inspection and clean-up of their bus after each run. On the night before, Grievant had made arrangements with a substitute Bus Operator to have that person clean his bus after his morning run.

10. As a result of Grievant's and Ms. Silvester's actions on this day, F.H. (initials) was left unattended on the bus until sometime in the early afternoon. Neither individual was aware of this fact until contacted by Jack Coyner, the Board's Transportation Director. Both employees believed that no students had been left on the bus at the time they finished their respective duties.

11. Generally, it was Ms. Cottrell's responsibility to remove F.H. from her seat and take her either to her classroom or to her teacher who would be waiting outside of the bus.

12. Ms. Cottrell testified that Aides are trained by the Board to be responsible for bringing students on and taking students off of the buses. Normally, she would check the bus tomake sure that the students had not forgotten anything after they had departed the bus.

13. Because Grievant usually rode back to the bus garage with another driver, he did not perform the required post-run inspection or cleaning of his bus on days when his ride was waiting for him. He did perform these tasks if time permitted.

14. As a result of her actions on the day in question, Ms. Silvester was suspended from work for the remainder of the 1993-1994 school year.

15. The Board terminated Grievant from his position as a Bus Operator as a result of the student having been left on his bus. According to the Board, Grievant is still an employee of the Board but has been suspended indefinitely.

Discussion

Grievant does not deny that the extremely unfortunate event occurred on his bus on May 25, 1994. Further, he does not place blame for that incident on Ms. Silvester. However, he contends that at no time did his actions rise to the level of willful neglect of duty because he did not **willfully** refuse to perform his assigned duties, i.e., clean his bus after the morning run, because he had made prior arrangements for that to occur. Further, he contends that he cannot be fired for incompetency because he was never placed upon an improvement plan pursuant to the applicable State Board of Education Policies. Finally, he avers that the penalty imposed was too severe given the fact that this unfortunate event was merely the result of an accident or mistake. The Boardmaintains that Grievant's actions endangered the life of the student and that his failure to adequately perform his job duties was inexcusable and grossly incompetent, thereby warranting his indefinite suspension or dismissal. (See footnote 1) It contends that Grievant had a duty to insure the safety of all of his passengers and that he willfully violated that duty when he left the student on the bus. W. Va. Code §18A-2-8 states, in pertinent part,

> Notwithstanding any other provisions to the contrary, 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 a result of an employee performance evaluation pursuant to section twelve of this article.

In order for the Board's decision in this case to be upheld, it must prove the facts supporting the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Bailey v. Logan Co. Bd. of Educ., Docket No. 93-23-383 (Jun. 23, 1994). Further, the appropriateness of an adverse action, while depending upon the resolution of questions of fact, is by no means a mere factual determination. Such a decision involves the application of administrative judgment. Douglas v. Veteran's Administration, 5 M.S.P.B. 280 (1981). Accordingly. a county board of education is authorized to dismiss an employee under W. Va. Code §18A-2-8, solong as it exercises its authority in a reasonable manner. Hoover v. Logan Co. Bd. of Educ., Docket No. 93-23-383 (Jun. 23, 1994). However, a county board of education may only suspend or dismiss an employee if said employee's behavior can be found to fit into one of the categories listed in Code §18A-2-8. DeVito v. Board of Educ., 317 S.E.2d 159 (W.Va. 1984); Blake v. Cabell Co. Bd. of Educ., Docket No. 92-06-150 (Dec. 10, 1992). The fact that a board of education does not correctly classify the misconduct does not operate to invalidate the adverse action if the misconduct can be found to fit within one of the first six charges above.

As noted, Grievant does not contest the facts at issue in the case, he only maintains that the Board's interpretation of those facts is unreasonable. Therefore, it is determined that the Board has met is burden of proof in establishing the facts used to support its adverse action taken. The issue becomes whether the facts as presented by the Board can support a finding that Grievant was either grossly incompetent or whether he willfully neglected his duty.

Under W. Va. Code §18A-2-8 (1969), a county board was authorized to dismiss an employee for incompetency but only after the employee was given benefit of the State Board of Education's Policy 5300 which sets forth procedures dealing with, among other things, employee job performance evaluations and subsequent improvement plans and periods. See, Mason Cty. Bd. of Ed. v. State Supt. of Sch., 274 S.E.2d 435 (W. Va. 1980). The Court's focus in Mason, and in other similar cases, was whether the conductcomplained of involved professional incompetency or whether it directly and substantially affected the morals, safety and health of the education system in a permanent, non-correctable manner. Id., p. 439.

Code §18A-2-8 has since been amended to include an additional charge for which an employee may be suspended or dismissed which is for unsatisfactory performance. Currently, a county board of

education may only suspend or dismiss an employee for unsatisfactory work performance after that employee has been given the protection afforded him/her by Policy 5300. Therefore, given the amendments to Code §18A-2-8, a Board is not limited to disciplining an employee for incompetency after having been required to follow the policies and procedures of State Board of Education Policy 5300. In other words, the term "incompetency" may relate to acts of misconduct unrelated to professional job performance which is deemed correctable. A board may find incompetence in one or more scenarios: i.e, the employee's job performance over a period of time is below acceptable standards and his/her performance can be corrected; or an employees conduct may be of the nature that the employer determines that he/she is not suitable for the position held. (See footnote 2)

W. Va. Code §18A-5-1, establishes that school bus operators have the responsibility to "stand in the place of the parent or guardian" in exercising authority and control over the studentswhile they are being transported from one destination to another. Inherently, a school bus operator has the primary responsibility to ensure that all of his/her students are properly picked-up at the various stops and to ensure that they depart the bus at the ultimate destination. This responsibility falls upon the bus operator and, regardless of statutory mandates, is the operator's only basic obligation given the inherent nature of the job.

In the instant case, Grievant's failure to have assured that F.H. was removed from her seat in the bus, at her usual destination, was not in keeping with his responsibilities, especially given the nature of the children which he has been assigned to transport. This failure can be deemed incompetence for the purpose of classifying his misconduct under Code §18A-2-8. At least on the day in question, Grievant failed to insure that F.H. was picked-up and delivered to her proper destination and his failure to do so was indicative of his inability to perform the most basic function of his position. Grievant failed comply with the duty he had as a bus operator; therefore, he conduct could properly have been viewed as incompetence by the Board. The question as to whether he willfully neglected any duty which he might have had need not be addresse given this holding.

Upon questioning by the Undersigned, the Board stated that Grievant was not fired but rather suspended indefinitely from his duties as a Bus Operator. The testimony was that Grievant is never to be allowed to assume the duties of a Bus Operator for the Board. Neither W. Va. Code §18A-2-8 nor any other provisions within that article contemplate that a county board of education employee may be suspended indefinitely. It is recognized that employees are often suspended for extended periods

awaiting the result of investigations or litigation, but at some point these suspensions also become final. The suspension in this case will never become final. Therefore, it is determined that the Board abused its discretion in suspending Grievant indefinitely. In light of theUndersigned's findings and conclusions on the merits, the appropriate remedy is to remand the case to the Board for reconsideration of an appropriate penalty under Code §18A-2-8.

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusions of law.

Conclusions of Law

1. A county board of education may only suspend or dismiss an employee if said employee's behavior can be found to fit into one of the categories listed in Code §18A-2-8. DeVito v. Board of Educ., 317 S.E.2d 159 (W.Va. 1984); Blake v. Cabell Co. Bd. of Educ., Docket No. 92-06-150 (Dec. 10, 1992).

2. Under W. Va. Code §18A-2-8 county boards of education have the authority to suspend or dismiss any employee for incompetence or willful neglect of duty.

3. Grievant's misconduct at issue herein can be classified as incompetence given the nature of his misconduct.

4. W. Va. Code §18A-2-8 does not authorize a county board of education to suspend an employee indefinitely if the suspension will not, at some point in time, become final. Therefore, the Board's decision to indefinitely suspend Grievant was an arbitrary and capricious exercise of its discretionary decision-making authority.

Accordingly, this grievance is hereby **GRANTED IN PART**. It is hereby **ORDERED** that the Board of Education of Putnam County reevaluate the facts as established in this case in order todetermine a more appropriate action to take with respect to Grievant's conduct on May 25, 1994, consistent with the discussion herein.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Putnam County and 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 party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so

that the record can be prepared and transmitted to the appropriate court.

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ALBERT C. DUNN, JR.

Administrative Law Judge

December 30, 1994

Footnote: 1 The Board also made reference to other traffic accidents Grievant had experienced during his tenure as a Bus Operator. Given the nature of the events which occurred on May 25, the undersigned is of the opinion that a discussion of these other unrelated accidents is not warranted in this case.

Footnote: 2 Arguable, incompetence may encompass forms of negligence being that that term is not seperately included within Code §18A-2-8.