ALBERT L. WISE,

Grievant,

v. DOCKET NO. 95-40-296

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Albert L. Wise, filed this grievance on June 5, 1995, protesting his suspension and dismissal by Respondent Putnam County Board of Education for "insubordination, intemperance, and willful neglect of duty." A level four hearing was held on August 11, 1995, and the parties were invited to submit proposed findings of fact and conclusions of law by August 25, 1995, at which time this case became mature for decision.

Background

Grievant was employed by Respondent as a substitute bus driver in May 1995. Prior to becoming employed, Grievant participated in a six-week training session for bus operators. Grievant's superior was Jack Coyner, Assistant Superintendent for Student Services. Throughout Grievant's training and initial employment with the Board, Grievant visited the Board office, specifically, Mr. Coyner's office, on several occasions.

On at least two separate occasions prior to May 30, 1995, Grievant visited Mr. Coyner's office. Mr. Coyner's secretary, Betty Barnett and a secretary-in-training, Irene Sullivan, were both present on those occasions. Both women smelled a strong odor of alcohol, coupled with a minty smell, on Grievant. LIV, Sullivan; Barnett Dep., p. 11. (See footnote 1) On these two occasions, Mr. Coyner entered the room shortly after Grievant left and smelled the alcohol odor. He inquired of the women who had been in the office and they identified Grievant. LIV, Coyner. (See footnote 2) After the first incident, Mr. Coyner informed the Superintendent of his concerns regarding Grievant, but did not take any action at that time.

After the second incident, Mr. Coyner called Grievant into his office and inquired whether Grievant

drank, and used breath mints or aftershave. Grievant was still in training at that time. LIV, Coyner; Barnett Dep., p. 13. Grievant recalls being asked about whether he used breath mints or aftershave, but does not recall any mention of alcohol. LIV, Wise.

Finally, on May 30, 1995, Grievant, now an employee of the Board, came into the substitute caller's office around 8:30 a.m. June Polk, the substitute caller, testified that Grievant inquired where he was on the substitute roster and whether she believed he would be called out that day. She responded he was number four onthe roster and would probably be called to drive. LIV, Polk. Grievant testified that he did not see Ms. Polk at 8:30 a.m., but was merely in the office to pick up an application for a regular employment position. LIV, Wise.

Grievant returned to the office around 9:30 a.m. Ms. Polk and another employee, Mary Davies, were both present in the substitute caller's office. Both women testified that Grievant told Ms. Polk that he was available to drive. They also testified that Grievant smelled strongly of alcohol. LIV, Polk; Davies. Grievant testified that he did go into Ms. Polk's office at 9:30 a.m., but told Ms. Polk that he was not going to be driving that day. LIV, Wise.

At that point, Ms. Polk called Ms. Barnett (Mr. Coyner's secretary) and informed her that Grievant had come into the office smelling of alcohol and wanting to drive a bus. LIV, Polk. The Board was meeting at that time, and Ms. Barnett interrupted to speak with Mr. Coyner about Grievant. Mr. Coyner left the Board meeting, asked Ms. Barnett to call EMSI, a firm in Huntington with which the Board contracted to perform drug and alcohol testing, to see if someone could be there within the hour. LIV, Coyner. EMSI responded that someone could be there shortly, at which point Mr. Coyner called Grievant at home and asked him to come into the office. Mr. Coyner informed the Superintendent that he was calling Grievant in for an alcohol test.

Mr. Coyner told Grievant that he wanted the alcohol issue resolved once and for all and asked him to submit to an alcoholbreathlyzer test. At first, Grievant refused, but then agreed to submit to the test. Michael Day, from EMSI, conducted two separate breathlyzer tests, at 10:51 a.m. and at 11:07 a.m., both of which resulted in a reading of 0.102. R Ex. 1.

Mr. Coyner sent Grievant home and informed Ms. Polk not to call Grievant for service until further notice. LIV, Coyner; Polk. Mr. Coyner then went back into the Board meeting and informed the Superintendent and the Board President that he would be recommending Grievant be terminated based upon the results of the alcohol test. LIV, Coyner.

The Board acted that day, May 30, 1995, to suspend Grievant as a substitute bus operator for insubordination, intemperance and willful neglect of duty, and Superintendent Sam P. Sentelle notified Grievant of the action by letter dated May 30, 1995. Superintendent Sentelle also informed Grievant in that letter that he would recommend Grievant's dismissal, pursuant to W. Va. Code § 18A-2-8 and Board Policy T.4.4., the Board's drug and alcohol policy. Specifically, Superintendent Sentelle stated:

> These charges are made in that on this date you personally reported availability for duty as a bus operator. A breath alcohol test was administered at 10:51 a.m. and again at 11:07 a.m. Both tests indicated a breath alcohol concentration of 0.102 percent. Board Policy provides that any employee "with a breath or blood alcohol concentration of 0.04 percent or greater is to be removed from covered service immediately."

The Board acted to dismiss Grievant for insubordination, intemperance and willful neglect of duty on June 9, 1995, and Grievant was duly notified of the Board's action on that day. The Board contends that Grievant was guilty of insubordination andwillful neglect of duty for reporting that he was available to work while intoxicated.

Discussion

Grievant does not deny that he had been drinking on the morning of May 30, 1995. Rather, Grievant alleges that he was not "on duty" on May 30, 1995, and that the Board violated its drug and alcohol policy with respect to the manner in which he was tested and subsequently dismissed from employment.

The only major factual discrepancy to be decided is whether Grievant was "on duty" on the morning of May 30, 1995. Grievant testified that he told June Polk that he was not driving that day. Ms. Polk and Ms. Davies both testified that Grievant reported that he was available to drive that day.

While Grievant presented himself in a credible manner, the undersigned cannot disregard the testimony of the two women who were present in the office that day. Mr. Coyner testified that Ms. Barnett called him out of a Board meeting to inform him that Grievant had reported to work smelling of alcohol. The undersigned concludes that this chain of events and subsequent action by Mr. Coyner in having Grievant tested for alcohol is consistent with Ms. Polk's testimony that Grievant reported available to work that day while intoxicated. Therefore, Grievant was "on duty" as a substitute driver that day.

We turn next to Grievant's allegation that the Board violated its drug and alcohol policy in the manner in which Grievant wastested and subsequently dismissed from employment. The Board's policy T.4. states, in pertinent part:

> **T.4.1. Prohibitions.** Alcohol and drug use is prohibited and use will result in disciplinary action, up to and including dismissal for any employee performing safety-sensitive service.
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> . . .
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> No employee may report for covered service, go on duty or remain on duty while (1) under the influence of alcohol or impaired by its use, (2) having an alcohol concentration of 0.02 or greater, or (3) under the influence of any controlled substance or impaired by its use.
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> Covered employees include bus drivers.
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> Breath and alcohol tests may be given while on duty for covered service, before going on duty, or immediately after coming off duty.
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> . . .
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> Any employee with a breath or blood alcohol concentration of 0.04 percent or greater is to be removed from covered service immediately. The employee is to be referred to a substance abuse professional. After the nine-month period, if still in active employment, the employee must meet the conditions set forth in the follow-up testing provisions of this policy. (See footnote 3)

There are two exceptions in the policy to the mandate that employees who test positive be removed from covered service immediately. Section T.4.5. specifies that if an employee voluntarily seeks treatment through a substance abuse professional,that employee "may maintain an employment relationship with the Board prior to being charged with conduct that is in violation of these drug and alcohol testing rules." (Emphasis added). Grievant did not voluntarily seek professional assistance, so this exception does not apply.

Section T.4.6. provides that an employee may maintain an employment relationship with the Board if the alleged violation comes to the attention of the Board as a "result of a co-worker reporting that an employee was apparently unsafe to work with or appeared to be in violation of the established workplace drug and alcohol rules." This section further provides that "no disciplinary action will be taken on a first offense of this nature (reported by a co-worker), but a disciplinary action, up to and including dismissal, will be taken in regard to any subsequent violation." In this instance, the employee is required to meet with a substance abuse professional and undergo treatment, after which his status will be re-evaluated by the Board.

Grievant maintains that the Board violated this section of the policy, in that the May 30, 1995, incident was the first violation reported by co-workers, he was not referred to a substance abuse professional for treatment, and disciplinary action was taken against him after a first offense.

The undersigned finds that Respondent did not violate this section of the Policy, inasmuch as Mr. Coyner met with Grievant at least one other time prior to May 30, 1995, to discuss Grievant's use of alcohol. As noted above, Grievant visited Mr. Coyner'soffice several times during which the secretaries smelled a strong alcohol odor and reported the same to Mr. Coyner. The informal conference Mr. Coyner had with Grievant, while not documented, certainly served as notice to Grievant that his supervisor was aware of his drinking. No disciplinary action was taken against Grievant at that time. It wasn't until the second time Mr. Coyner met with Grievant on May 30, 1995, after being informed by his secretary that Grievant smelled of alcohol, that a test was given and Grievant was disciplined.

The Board's policy states in Section T.4.9. that "[b]ased upon affirmative evidence of signs or symptoms of drug abuse or alcohol misuse, employees may be subject to drug or alcohol testing for reasonable cause." Further, "[s]pecific personal observations by a supervisor of appearance, behavior, speech, or body odors of an employee may give rise to a reasonable suspicion that the

employee is under the influence or impaired by drug use or alcohol misuse. Such suspicion constitutes reasonable cause for testing. An employee may be tested only if such determination of suspicion is made by at least two (2) supervisory employees." Grievant alleges the Board violated this portion of the policy, because the only supervisory employee to observe his condition was Mr. Coyner.

The EMSI Breath Alcohol Testing Form (R Ex. 1) states that the reason for the test was "Reasonable suspicion/cause". Mr. Coyner testified that he had reasonable suspicion that Grievant was under the influence of alcohol on May 30, 1995, which caused him to request that Grievant submit to the alcohol test. LIV, Coyner. Mr. Coyner advised the Superintendent and the Board President that he was going to have Grievant tested that day. Mr. Coyner had also discussed Grievant's drinking with the Superintendent while Grievant was still in training. The undersigned does not believe that the intent of the Policy was that two supervisory personnel must personally observe an employee's condition before action can be taken. The Policy merely requires that at least one other supervisory personnel be advised of the situation, perhaps to minimize the risk of an overly-zealous supervisor. This was done in Grievant's case and the Board did not violate this portion of the Policy.

Based upon the foregoing discussion and evidence of record, it is appropriate to make the following findings of fact.

Findings of Fact

1. Grievant was employed by Respondent as a substitute bus operator in May 1995.

2. On at least three occasions, during his training period and after becoming an employee, Grievant was observed by Board personnel with a strong smell of alcohol on his breath.

3. During Grievant's training period, Jack Coyner, Grievant's supervisor, held an informal conference with him to discuss the reported alcohol smell. Mr. Coyner also personally observed the smell of alcohol on Grievant.

4. On May 30, 1995, Grievant again was observed by Board personnel with a strong smell of alcohol when he reported that he was available to drive that day.

5. Mr. Coyner notified the Superintendent that he was going to have Grievant submit to a breath alcohol test that day.

6. The EMSI breath alcohol test revealed an alcohol concentration on Grievant of 0.102 percent.

7. Grievant was dismissed from covered service immediately pursuant to the Board's drug and alcohol policy, and W. Va. Code § 18A-2-8.

Conclusions of Law

1. The burden of proof shall rest with the employer in disciplinary matters. W. Va. Code § 18-29-6.

2. 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. W. Va. Code § 18A-2-8.

3. Respondent has proven by a preponderance of the evidence that Grievant was intemperate or intoxicated on May 30, 1995.

4. Respondent has proven by a preponderance of the evidence that Grievant was insubordinate and was willfully negligent when he reported that he was available to drive that day while under the influence of alcohol.

5. Respondent complied with the terms of its own drug and alcohol policy in administering a breath alcohol test and removing Grievant from covered employment immediately upon learning the results of the test.

Accordingly, this Grievance is **DENIED.**

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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MARY JO SWARTZ

Administrative Law Judge

Dated: September 18, 1995

Footnote: 1 *Ms. Barnett was unavailable to testify at the Level IV hearing. The parties agreed that a transcript of her deposition could be admitted in lieu of her testimony.*

Footnote: 2 *References to testimony in the Level IV hearing are designated as LIV, [Name of witness].*

Footnote: 3 *A previous paragraph dealing specifically with drug testing provides that any employee testing positive for presence of illegal substances, who remains in active employment, cannot return to a covered, safety-sensitive duty for at least nine (9) months after removal from the covered position.*