PAUL E. RICE,

Grievant,

v. **Docket No. 98-30-296**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Paul E. Rice, employed by the Monongalia County Board of Education (MCBE) as the Attendance Director, filed a grievance on July 28, 1998, after being suspended without pay for ten days. A level four hearing was conducted on October 14, 1998, at which time Grievant was represented by Charles Johnson, Esq., and MCBE was represented by Harry M. Rubenstein, Esq. The matter became mature for decision at the close of the hearing when b oth parties waived the opportunity to submit proposed findings of fact and conclusions of law.

Background

By letter dated June 17, 1998, Dr. Edward M. Warnick, Superintendent of MCBE, advised Grievant that he would be suspended from his position as Director of Attendance for ten days, without pay. Dr. Warnick noted that six of the days would occur during the 1997-98 school year, and the remaining four days would occur during the 1998-99 school year. He also confirmed that Grievant had agreed to work throughout the suspension.

The letter continued:

The reason for this discipline is the fact that you admittedly failed to take steps to adhere to state laws and local board policy that dictates mandatory attendance for students within a specific age range. In particular, you permitted a severely handicapped child to remain home for most of the 1997-98 school year although the Board of Education did not have appropriate documentation to justify home schooling andthe request for home schooling was specifically denied in October of 1997. Your misbehavior constituted willful neglect of duty and may have also constituted insubordination because it violated laws concerning attendance and was otherwise conduct unbecoming an attendance director.

Grievant found the language of this letter so objectionable that he withdrew his agreement to accept the ten day suspension. Lacking Grievant's cooperation, Dr. Warnick recommended the suspension to MCBE. Following a hearing on July 28, 1998, MCBE upheld the suspension; however, the July 16, 1998, letter was removed from Grievant's personnel file and replaced with a letter dated July 31, 1998. In this letter, Dr. Warnick notified Grievant that MCBE had affirmed the recommended suspension, and stated:

The reason for this disciplinary action is that you admittedly failed to take steps to adhere to WV attendance laws and local board policy that dictates mandatory attendance for school age students. During the 1997-98 school year you allowed a severely handicapped child to remain home. You were aware in October of 1997, that the Monongalia County Schools (Mrs. Jenifer Snider, Assistant Superintendent) had denied home schooling. This denial was precipitated by the lack of appropriate documentation to justify home schooling. Your professional handling of this situation constituted negligence of duty and a violation of state attendance laws not to mention the federal regulation for special education students . . . .

Grievant found the language of the second letter also to be offensive, and filed a grievance at level four. At hearing, Grievant stated that he found the letter much more punitive than the suspension. Grievant also noted that the child's's foster mother indicated in testimony given before MCBE, that she had already determined not to enroll the child in school during the 1997-98 school year, therefore, there had been no harm, no foul, in this case. Grievant explained that his objection to the July 31, 1998, letter is that itindicates that he should have immediately prosecuted the foster parents. He opined that it is within his discretion when to prosecute, and he had chosen not to pursue that course while he was trying to help the mother obtain approval for home schooling. Grievant noted that the child is severely handicapped, and that foster homes are “hard to come by”. Grievant stated that he would now accept a three day suspension.

Dr. Janice Christopher, Assistant Superintendent, testified that the request to have the child home schooled had been denied on October 12, 1997, and while she understood that Grievant was attempting to assist the parents in obtaining approval for home schooling, he failed to follow statutory guidelines for truant students. In April 1998, a group known as the West Virginia Advocates notified MCBE that a lawsuit was impending because the child's Individual Education Plan required that he be

provided an in-school education. Dr. Christopher opined that Grievant appeared to have a philosophical viewpoint that the child was “better off” at home, but that his failure to ensure the child's attendance was negligence and insubordination.

Dr. Warnick testified that he was made aware of the possible lawsuit in May 1998. He met informally with Grievant and Dr. Christopher, and recalled that Grievant admitted he knew the student was to be in school, but home schooling was the right thing to do. Based upon the information available to him, Dr. Warnick opined that the student was not being home schooled, he was just at home. After exploring a number of options, including a thirty day suspension, Dr. Warnick concluded a ten day suspension was the appropriate disciplinary measure in this instance.

In disciplinary matters, the employer bears the burden of proving the charges by apreponderance 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). A preponderance of the evidence is defined as “evidence which is 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.” Black's Law Dictionary (6th ed. 1991), Leichliter v. W. Va. Dept. of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

W. Va. Code §18A-2-8 provides that a board may suspend an employee 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 contendre to a felony charge.

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W. Va. Code §18-8-4 provides that the county attendance director “shall ascertain reasons for inexcusable absences from school of pupils of compulsory school age . . . and shall take such steps as are, in their discretion, best calculated to correct attitudes of parents and pupils which results in absences from school . . . .” After five consecutive, or ten total unexcused absences of a child during a school year, the attendance director is to serve written notice to the parent, guardian or custodian of such child at school is required. If the parent, guardian or custodian does not meet with the principal or other designated representative of the school in order to discuss and correct the circumstances causing the inexcusable absences of the child within ten days of receipt of the notice, the attendance director “shall make complaint against the parent, guardian or custodian before a

magistrate of the county." It is unclear to the undersigned whether Grievant substituted his own judgment to allow the child to remain home, or simply lost track of this student. In either case, Grievant failed to ensure the attendance of a student who had been evaluated and directed to attend school. This failure to perform the duties of his position as Attendance Director justifies some level of discipline, as Grievant himself has admitted. The sole issue is the appropriate level of discipline. Grievant does not allege that the ten day suspension violated any statute, rule, regulation, or policy.

Neither can it be determined that the suspension was arbitrary and capricious. An action is arbitrary and capricious if the agency making the decision did not rely on criteria intended to be considered; explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp., 769 F.2d 1017 (4th Cir. 1985). An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of facts. Black's Law Dictionary, at 55 (3d Ed. 1985). Arbitrary is further defined as being "synonymous with bad faith or failure to exercise honest judgment." Id, Trimboli v. W. Va. Dept. of Health and Human Servs./Div. of Personnel, Docket No. 93-HHR-322 (June 27, 1997). Considerable deference must be afforded the professional judgment of those who made the decision. Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995). The facts of this case do not support a finding that the level of discipline imposed upon Grievant was arbitrary and capricious.

In addition to the foregoing narration, it is appropriate to make the following formal findings of fact and conclusions of law.

Findings of Fact

1. Grievant has been employed by the Monongalia County Board of Education for twenty-three years, and presently serves as Director of Attendance.

2. In October 1997, Grievant was made aware that a request for home schooling had been denied. The child in question is severely handicapped, and had been home-schooled during the 1996-97 school year.

3. Grievant contacted the foster parents in October 1997 to assist in obtaining approval for home schooling, but made no further contacts, and took no further action after that time.

4. In April 1998, the West Virginia Advocates threatened to file a lawsuit against the Monongalia County Board of Education for its failure to comply with the student's Individual Education

Plan, which provided for an in-school education.

Conclusions of Law

1. Grievant failed to fulfill his duties of Attendance Director when he did not ensure that a student received an in-school education as provided in the student's Individual Education Plan.

2. Grievant has failed to prove that a ten day suspension was contrary to statute, rule, regulation, or policy, or was arbitrary and capricious.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia 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 tosuch 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.

Date: October 30, 1998 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE