PHILIP M. CARR,

Grievant,

v. Docket No. 99-42-086

RANDOLPH COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Philip M. Carr, employed by the Randolph County Board of Education (RCBE) as a substitute bus operator, filed a grievance directly to level four, as is permitted by W. Va. Code §18A-2-8, following his dismissal on February 23, 1999. Grievant seeks reinstatement as a substitute, or to a regular position if his seniority would have entitled him to such, lost wages, and interest. An evidentiary hearing was conducted in the Grievance Board's Elkins office on July 22, 1999, at which time Grievant was represented by John E. Roush, Esq., of the West Virginia School Service Personnel Association, and RCBE was represented by Basil Legg, Esq. The matter became mature for decision with the submission of proposed findings of fact and conclusions of law by both parties on or before August 25, 1999.

The essential facts of this matter are undisputed and may be set forth as the following formal findings of fact

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Findings of Fact

1. Grievant has been employed by RCBE as a substitute bus operator since March 1996; however, due to a delay in the certification process, he did not actually begin working as a substitute until the 1996-97 school year. 2. During the 1996-97 school year, Grievant also worked part time as a maintenance employee at Aero Trailer Park. This position provided flexible hours which did not interfere with his work at RCBE.

3. In October 1997, Grievant accepted a part time job with Federal Express. This position was less flexible than his previous job at Aero Trailer Park. Grievant was normally scheduled to work from 10:30 a.m. to 5:30 p.m. Monday through Thursday.

4. Grievant wished to continue his employment as a substitute bus operator, and advised the appropriate individual at RCBE that he was only available for morning bus routes Monday through Thursday, and all day on Friday.

5. During the 1997-98 school year, RCBE was unable to contact Grievant with an offer of substitute employment on August 27, 1998. Grievant declined offers to work on September 9, October 12, and October 13, and October 27, 1998.

6. By letter dated November 5, 1998, Superintendent Glen Karlen advised Grievant that pursuant to Policy Manual file ENA - “Substitute Personnel”, RCBE had recorded five refusals or no answers when calling him to work, and that two additional refusals would result in his name being submitted to the board for removal from the substitute list.

7. Grievant declined an offer to substitute on November 6, 1998.

8. Grievant accepted an assignment which was originally scheduled only for the morning of December 4, 1998. RCBE was later informed that the absent driver would be unable to return for the afternoon run, and Grievant was requested to complete the afternoon segment of the same assignment. He refused. 9. Superintendent Karlen notified Grievant by letter dated December 15, 1998, that he would recommend the board remove Grievant's name from the substitute list.

10. Pursuant to his request, a hearing on the proposed action regarding Grievant's employment was conducted on February 23, 1999.

11. Following the hearing, RCBE voted to terminate Grievant's employment as a substitute bus operator on the grounds of willful neglect of duty.

12. RCBE employs one substitute bus operator for the Pickens area. This individual is not required to substitute in any other area of the county. RCBE has maintained no work record for this individual, documenting his refusals or no answers when called to substitute.

Argument

RCBE asserts that the termination of Grievant's employment was in compliance with its Policy ENA, which allows substitute employees seven refused assignments, after which they are subject to removal from the substitute list. RCBE also notes that Grievant was provided with a warning following his fifth refusal, as is required by the Policy. Finally, RCBE argues that a substitute employee who accepts other work, making him/her unavailable to accept assignments from the board of education over an extended period of time, is guilty of willful neglect of duty.

Grievant does not dispute RCBE's accounting of his refusals to work, but argues that his failure to accept the assignment does not constitute willful neglect of duty. In support of this claim, Grievant cites Myers v. Tucker County Bd. of Educ., Docket No. 96-47-538 (July 30, 1997). Rather, Grievant suggests that W. Va. Code §18A-4-15 does not require substitutes toaccept every assignment they are offered, and the only "penalty" for refusal of an opportunity to substitute is the loss of the opportunity for the duration of the current rotation.

Grievant also argues that he had not accumulated seven refusals. Specifically, on August 27, 1998, RCBE was not successful in contacting him. Accepting that Policy ENA defines a failure to respond to RCBE's call as a refusal, Grievant argues that it is not reasonable to do so. Additionally, Grievant argues that to count his unavailability on the afternoon of December 4, 1998, for an unanticipated offer of an assignment is extremely unfair to Grievant.

Grievant next argues that RCBE failed to properly apply Policy ENA when it did not provide him timely notification that he had recorded five refusals, and thereby deprived him of an adequate warning. Grievant explains that he did not actually receive the letter until November 13, 1998, after his sixth refusal, according to RCBE's calculations. Further, since he was unaware of the August 27, 1998, call being counted as a refusal, he could reasonably believe he still had five refusals for the year, even after he declined an assignment on November 6, 1998. Thus, Grievant asserts that he did not refuse two assignments after he *received* the warning notice. Further, Grievant notes that Policy ENA states that RCBE will provide a written warning to the employee upon his fifth refusal, and "[t]wo more opportunities to work will be afforded said employee. If the employee refuses the first and second opportunity to work after notification of the fifth refusal, the employee will be notified in writing of his/her removal from the substitute list . . . ." Grievant asserts that he did not refuse the first and second opportunity to work after notification of the fifth refusal, having accepted assignments on November 13, November 16, and December 4, 1998. Finally, Grievant appears to allege discrimination, although that term was not used,

in that RCBE does not evenly apply Policy ENA to require substitute bus operator Mike Richter to accept assignments throughout the county. It is undisputed that Mr. Richter works only in the Pickens area, and Grievant suggests that he may not have acquired any refusals had he received similar treatment, i.e., been allowed to work when available. However, Grievant states that he does not seek such consideration, but is willing to accept the reasonable consequences of his limited availability,

the loss of opportunity to work in some rotations.

Discussion

In disciplinary matters, the employer bears the burden of proving 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). RCBE has established that Grievant did not answer one call and refused six subsequent offers of employment; therefore, his employment was terminated consistent with Policy ENA, which states in pertinent part:

All substitute service employees will be afforded equal opportunities to work, based upon the rotation/seniority rule; however, upon the fifth refusal to work, the substitute will be informed by the subsearch caller that the fifth refusal (no or no answer) has occurred. The superintendent or his designee will provide written warning to said employee regarding the employee's possible removal from the substitute list.

Two more opportunities to work will be afforded said employee. If the employee refuses the first and second opportunity to work after notification of the fifth refusal, said employee will be notified in writing of his/her removal from the substitute list pending board approval, and will be afforded the right to a hearing before the board.

Although Grievant disputes that he had refused seven assignments, the evidence supports RCBE's record of seven refusals. Grievant offers no explanation why RCBE could not contact him on August 27, 1998. The very nature of substitute work is that it is generally unscheduled, and requires that the employee be available to report for duty with little notice. Particularly, bus operators may be called in the morning to cover an assignment that very morning. When an employee is not at the telephone number given to the board as the location where he may be reached, he is in effect making himself unavailable, refusing, an assignment which he may be given. It is not unreasonable for a board of education to consider an unanswered call as a refusal to accept an assignment.

Grievant's characterization of RCBE's request that he work the afternoon of December 4, 1998, as extremely unfair because it was unanticipated, is also not persuasive, for the same reasons as previously discussed. Substitute work is frequently unanticipated. Further, December 4 was a Friday, a day Grievant had advised RCBE he was available the entire day. RCBE's determination that Grievant refused an assignment on December 4 was valid.

It is not clear why the November 5, 1998, letter, sent by certified mail, was not received by Grievant until November 13, 1998; however, Grievant was also verbally advised of his precarious situation by Subsearch Secretary Kaye Kerns. In any event, the fact that Grievant refused another assignment so soon after the fifth refusal does not invalidate the notice.

Grievant correctly notes that he accepted the second opportunity to work after being notified of his fifth refusal. The language of Policy ENA is somewhat misleading in that it provides for dismissal of an employee who refuses the first and second opportunity to work after receiving notification; however, the undersigned finds the overall intent of the policy to beclearly stated in the final sentence of paragraph three, which states, “[s]even refusals will result in termination from the substitute list.”

Despite the allegations of discrimination or favoritism relating to Mr. Richter, who substitutes in a very limited geographical area, Grievant specifically states that he “does not seek such consideration”, so no further consideration of that issue is necessary.

Willful neglect of duty is defined as a knowing and intentional act constituting a failure to perform a duty or directive that the employee is obligated to perform. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). While it is true that a substitute employee is not required to accept every assignment which he is offered, it is important that a board of education employ individuals who are reliable, and available to accept assignments as needed. This situation differs from Myers, supra, in which the Grievance Board held that when a board did not make contact with the grievant on ten occasions, and subsequently dismissed her, as provided by county policy, the grievant did not engage in willful neglect of duty because she was willing to work, but had not been called at an alternative telephone number. In Myers the board failed to contact Grievant, who was nursing her ill father, at an alternative number she had made available. In the present matter, Grievant refused the assignments so that he could report to work for another employer. This reason appears to fall squarely within the definition of willful neglect of duty inasmuch as Grievant knowingly and willfully declined to perform the duties for which he had been employed. While Grievant's efforts to secure employment are commendable, these positions simply are not compatible. The undersigned understands that he advised RCBE of his limited availability, and his desire to work within those parameters; however, Superintendent Karlen testified that Grievant hadnot been employed under those restrictions, and RCBE needed substitutes who were available when needed. RCBE's actions to retain only those employees who are available to work as substitutes when called

was not improper in this case.

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

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of proving 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. Willful neglect of duty is one of the causes listed in W. Va. Code §18A-2-8 for which an education employee may be dismissed. See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

3. To prove willful neglect of duty a board of education must establish that Grievant's conduct constituted a knowing and intentional, rather than a negligent, act. Bd. of Educ. of County of Gilmer v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990); Dyer v. Lincoln County Bd. of Educ., Docket No. 95-22-494 (June 28, 1996).

4. RCBE has proven by a preponderance of the evidence that Grievant knowingly and willfully refused to accept substitute assignments, establishing a willful neglect of duty as defined under its Policy ENA. Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Randolph 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. 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 record can be prepared and properly transmitted to the appropriate circuit court.

Date: September 29, 1999 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE