RANDOLPH WHEELER,

Grievant,

v. DOCKET NO. 01-20-090

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Randolph Wheeler, is employed by Respondent, Kanawha County Board of Education ("KBOE"), as a regular bus operator. He was advised by Superintendent Ronald E. Duerring, by letter dated March 6, 2001, that KBOE had approved his recommendation that he be suspended for three days without pay, effective March 13, 2001. Superintendent Duerring had made the recommendation after finding that Grievant had driven a bus transporting West Virginia State College athletic teams on trips on September 1, 2, 22, and 23, 2000, when he had used a half day of sick leave on September 1 and 22, 2000. This grievance was filed challenging the severity of the discipline imposed on the grounds that, “the discipline levied upon [Grievant] was greater than that levied against other persons for similar violations.” Grievant admitted the charges were true. As relief Grievant requested that the discipline be reduced to “a written reprimand without loss of pay.” (See footnote 1)

The following Findings of Fact are properly made from the record developed at Level IV.

Findings of Fact

1. Grievant has been employed by KBOE as a regular bus operator for 10 years.

2. On September 1 and 22, 2000, both Fridays, Grievant told his supervisor, Alice Foster, KBOE's Supervisor of Transportation of the South Charleston Bus Garage, that he needed the afternoon off. On both occasions he turned in a sick leave request form the following Monday for a half day of sick leave, checking the box which indicated he had been ill, and signing the forms. His

supervisor approved the requests. Grievant used the sick leave so that he could drive a bus for West Virginia State College on those days, as he was saving his personal days for spring break.

3. KBOE's sick leave policy defines sick leave as “absence from assigned duties due to personal injury or illness or due to immediate family injury or illness.” Grievant was aware of this policy. Bus operators have been told since 1994 at the in- service training each year that absenteeism is considered a problem by KBOE, and a reward system has been put in place to encourage attendance and reduce the abuse of sick leave by employees.

4. Grievant had never been disciplined before this.

5. Other employees who have a pattern of using sick leave only on Mondays or Fridays, and are suspected of sick leave abuse, have received verbal warnings.

6. Two drivers who were fighting while on duty were suspended. The details of the fight, and the length of the suspension imposed upon the drivers, were not made a part of the record.

Discussion

Grievant did not contest the charges against him. The only issue presented is whether the discipline he received was too severe for his acknowledged abuse of sick leave. “The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was 'clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action.' Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).” Meadows v. Logan County Bd. of Educ., Docket No. 00-23-202 (Jan. 31, 2001).

"Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995) (citations omitted). “[T]he appropriateness of a penalty, while depending upon resolution of questions of fact, is by no means a mere factual determination. Douglas v. Veterans Administration, 5 M.S.P.B. 280 (1981). Such a decision 'involves not only an ascertainment of the factual circumstances surrounding the violations but also the application of administrative judgement and discretion.' Id. citing Kulkin v.Bergland, 626 F.2d 181, 185 (1st Cir. 1980); Beall Const. Co. v.

OSHRC, 507 F.2d 1041, 1046 (8th Cir. 1974). Because the imposition of a penalty results from an employer's administrative exercise of its discretion, said action may be the result of arbitrary and capricious decision-making or an abuse of discretion. See, Thompson v. U.S. Postal Service, 596 F. Supp. 628 (D.C. Va. 1984)." Feicht v. W. Va. Bureau of Employment Programs, Docket No. 93-BEP-253 (Dec. 9, 1993). "[M]itigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particulardisciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996). "Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall not substitute her judgement for that of the employer. Tickett v. Cabell County Bd. of Educ., Docket No. 97-06-233 (Mar. 12, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997)." Meadows, supra.

Grievant argued KBOE has in place a progressive discipline system, and he should have received a verbal or written reprimand at most. Grievant testified he was never told that if he took sick leave when he was not sick and was caught, he would be disciplined; and if he had been told not to do this, he would not have done it, and will not do so in the future. He stated he had never tried to hide what he was doing. He testified other bus operators have driven for other employers, his supervisor knew this, and he believed the other drivers used their sick leave when they took time off to drive for other employers. Grievant did not indicate how he would know whether a co-worker used sick leave or personal leave, and it is clear that leave forms are not submitted to or approved by Grievant. He declined to reveal the name of any other driver who had abused his or her sick leave. Although Grievant's supervisor was called as a witness at Grievant's disciplinary hearing, she was not asked whether she knew Grievant was taking sick leave to drive for another employer, whether she knew other drivers were doing the same, or why she signed Grievant's leave request.

KBOE argued that its administrators have certainly had suspicions that abuse of sick leave is widespread, but it is difficult to prove. In this case, there was proof of sick leave abuse. The punishment imposed basically resulted in recouping the one day of payGrievant received for his sick leave time when he was not sick, and the two additional days were punishment.

While Grievant's commitment to act appropriately in the future is commendable, this does not excuse his behavior. Sick leave is a benefit provided to employees for their use when they or a family member are sick, and KBOE's policy makes this clear. It is not just additional vacation time. It is not necessary for KBOE to state that an employee who uses sick leave improperly will be disciplined, or warn him not to do so again when he is caught. It is sufficient to tell the employee what sick leave may be used for. When an employee who is made aware of the circumstances under which sick leave may be used then intentionally uses it so he can drive a bus for another employer, and checks on the form requesting sick leave that he was sick, he has not only acted in violation of the policy, he has abused sick leave and lied.

While the undersigned may have imposed a lesser penalty, Grievant has not demonstrated that the three day suspension without pay was clearly excessive or an abuse of discretion. KBOE has used warnings with employees who are suspected of abusing sick leave. Grievant was not suspected of abuse; there was proof. Further, Grievant knew what he was doing was wrong, and he signed a leave request form on which he lied, stating he was sick when he was not. It is not surprising that KBOE determined that a suspension was the appropriate punishment.

The only other comparison offered by Grievant was that two employees were suspended for fighting. Grievant testified one employee punched the other, and one of the employees told him he had been suspended for four and a half days without pay, and one day with pay. No further details of the circumstances surrounding the fight were disclosed. George Beckett, KBOE's Administrative Assistant for Pupil Transportation, testified it was his understanding that both employees were suspended for the same amount of time, andboth suspensions were without pay, but he did not know the length of the suspensions. This hearsay is inconclusive, and is not useful for comparison.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. “The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was 'clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action.' Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).” Meadows v. Logan County Bd. of Educ., Docket No. 00-23-202 (Jan. 31, 2001).

2. "Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995) (citations omitted). "[M]itigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996). "Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall not substitute her judgement for that of the employer. Tickett v. Cabell County Bd. of Educ., Docket No. 97-06-233 (Mar. 12, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997)." Meadows, supra. 3. Grievant has not demonstrated that the discipline imposed upon him was clearly excessive, or an abuse of discretion.

Accordingly, this grievance is **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. 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: May 22, 2001

Footnote: 1

This grievance was filed at Level IV on March 14, 2001, as is permitted by W. Va. Code § 18A-2-8. A Level IV hearing

was held on May 7, 2001. Grievant was represented by Michael J. DelGiudice, Esquire, and Respondent was represented by James W. Withrow, Esquire. The parties declined to submit written argument, and this grievance became mature for decision at the conclusion of the hearing.