WILLIAM HEAVNER,

Grievant,

v. Docket No. 04-19-065

JEFFERSON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

William Heavner ("Grievant") filed this grievance directly at level four on February 16, 2004, following the termination of his employment by the Jefferson County Board of Education ("JCBOE") on January 20, 2004. A hearing was conducted in Westover, West Virginia, on April 28, 2004, at which time Grievant represented himself, and JCBOE was represented by counsel, David Camilletti. This matter became mature for consideration upon receipt of the parties' fact/law proposals on June 3, 2004.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant was employed by JCBOE as assistant principal at Charles Town Middle School at the time of his termination. He had been employed by Respondent since 1995.

2. In April of 2002, Grievant was experiencing health problems due to a cardiac condition. He was on extended sick leave until the end of the school year.

3. On August 9, 2002, Grievant informed JCBOE that, due to his continued health problems, he would be unable to return to work for the 2002-2003 school year. A one-year leave of absence was approved by the Board on August 21, 2002. 4. Grievant was advised by Dr. John Prohaska, Human Resources Director, that he would have to provide a physician's release prior to being allowed to return to work. JCBOE has no specific policies regarding the duration of or conditions for a medical leave of absence.

5. In August of 2003, Grievant was still unable to work, and he had applied for long-term disability benefits.

6. By letter dated August 18, 2003, Dr. Prohaska informed Grievant that his one-year leave of absence had expired, and that Grievant's termination would be recommended if he could not return to

work.

7. In September of 2003, Grievant was granted an additional period of unpaid leave, pursuant to the Family Medical Leave Act. At its expiration, Grievant was still unable to return to work, and the period of his continued disability had not been determined by his physician.

8. On January 6, 2004, Grievant was informed in a letter from Dr. Prohaska that his termination was being recommended, due to his inability to return to work after his medical leave of absence.

9. At a JCBOE hearing on January 20, 2004, at which Grievant appeared and represented his interests, the Board voted to terminate his employment, due to his inability to return to his position.

Discussion

Grievant is challenging his termination, a disciplinary action in which the employer bears the burden of establishing 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). The grounds upon which a Board may dismiss any person in its employment are immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance substantiated by an employee performance evaluation, or conviction on a felony charge. W. Va. Code § 18A-2-8. Although Respondent maintains that Grievant's termination was not “disciplinary,” but only “procedural,” the provisions of the statute apply to terminations of tenured school employees.

The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, and must be exercised reasonably, not arbitrarily and capriciously. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). Generally, an action is considered arbitrary and capricious if the agency 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 was so implausible that it cannot be ascribed to a difference of opinion. Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge

may not simply substitute [his] judgment for that of a board of education." Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001). Although GCBE did not make reference to W. Va. Code §18A-2-8 as the basis for Grievant's dismissal, it appears to be a termination for "incompetency" within the meaning of W. Va. Code §18A-2-8. Rogers v. Kanawha County Bd. of Educ., Docket No. 93-20- 447 (Mar. 23, 1994). The proper focus in a dismissal case is whether the charge of misconduct is proven, not the label attached to such conduct, so this grievance will be addressed as a termination for incompetency. Gillespie v. Kanawha County Bd. of Educ., Docket No. 90-20-496 (June 6, 1991)(citing Russell v. Kanawha County Bd. of Educ., Docket No. 90-20-415 (Jan. 24, 1991)).

"Incompetency" is defined to include "lack of ability, legal qualification, or fitness to discharge the required duty." Black's Law Dictionary 526 (Abridged Sixth Ed. 1991). It has been previously held by this Grievance Board that the inability to perform one's duties, for reasons such as lack of required certification, is sufficient justification for termination. See Hunter v. Greenbrier County Bd. of Educ., Docket No. 99-13-229 (Oct. 14, 1999). Moreover, the termination of an employee who had been off work for an extended period of time due to an injury and was still unable to work after being released by his physician has also been upheld. In Phillips v. Summers County Board of Education, Docket No. 96- 45-146 (Mar. 27, 1997), the administrative law judge noted that “a permanent physical inability to perform the duties for which one was hired is incompetence within the meaning of W. Va. Code § 18A-2-8.”

Although the undersigned certainly sympathizes with Grievant's situation, Respondent has proven by a preponderance of the evidence that Grievant was incompetent to perform his job duties. Grievant's physician has not released him to return to work, and Grievant testified at his level four hearing that he continues to receivetreatment for his cardiac problems, which still prevent him from working. Although Grievant contends that he should be allowed to remain on unpaid leave indefinitely, W. Va. Code § 18A-2-2a only provides that teachers returning from a leave of absence of one year or less are entitled to be returned to their previous position. The statute is silent regarding how long a leave of absence may extend, or under what conditions one may be granted, which obviously leaves such decisions in the discretion of the school board. JCBOE allowed Grievant to remain off work for over 1½ years, and the undersigned cannot find any abuse of the Board's discretion in its determination that it could no longer continue to employ Grievant under these

circumstances. Grievant has noted that, since he is no longer entitled to return to his previous position and is not receiving any pay or benefits, his continued leave would have no consequences for JCBOE. Nevertheless, it is within Respondent's discretion to determine that Grievant is no longer competent to continue his employment.

Grievant also contends that, pursuant to provisions of the Americans with Disabilities Act ("ADA"), continued unpaid leave would be a reasonable accommodation for his disability. However, this Grievance Board has determined that it does not have authority to determine liability for claims that arise under the ADA, (42 U.S.C. §§ 12111, et seq.). Bowman v. W. Va. Educ. Broadcasting Auth., Docket No. 96-EBA-464 (July 3, 1997); Rodak v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-536 (June 23, 1997). Nevertheless, the Grievance Board's authority to provide relief to employees for "discrimination," as that term is defined in W. Va. Code § 18-29-2, includes jurisdiction to remedy discrimination that would also violate the ADA. In other words, the Grievance Board does have subject matter jurisdiction over handicap-based discrimination claims.Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996). *See* Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995); Bowman, *supra*. However, Grievant has not compared himself to any other similarly-situated employees in order to establish a claim of discrimination. (See footnote 1)

The following conclusions of law support the decision reached.

Conclusions of Law

1. In a disciplinary case, the employer bears the burden of establishing 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. The grounds upon which a Board may dismiss any person in its employment are immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance substantiated by an employee performance evaluation, or conviction on a felony charge. W. Va. Code § 18A-2-8.

3. The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, and must be exercised reasonably, not arbitrarily and capriciously. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16,

1991). 4. "[A] permanent physical inability to perform the duties for which one was hired is incompetence within the meaning of W. Va. Code § 18A-2-8." Phillips v. Summers County Bd. of Educ., Docket No. 96-45-146 (Mar. 27, 1997).

5. Respondent has proven by a preponderance of the evidence that Grievant's employment was properly terminated for incompetency.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Jefferson 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 GrievanceBoard. 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: June 28, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Moreover, pursuant to the provisions of the ADA, a qualified "disabled" employee is able to perform his duties, albeit with or without accommodation. Grievant is completely unable to perform his job duties, and no accommodation is possible. Furthermore, the purpose of accommodating an employee's handicap is to permit the employee to remain employed, not to allow the employee to remain on an indefinite unpaid leave of absence.