JACK P. RICHARDSON,

Grievant,

v.

Docket No. 04-35-123

OHIO COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Jack P. Richardson ("Grievant"), employed by the Ohio County Board of Education ("OCBE") as a teacher, filed a grievance directly to level four, as is permitted by W. Va. Code § 18-29-4(c), upon receiving a thirty day suspension. Grievant asserts the disciplinary action was the result of "prolonged prejudicial and corrupt treatment by school officials," and requests that the suspension be rescinded and "certain school officials to be disciplined." An evidentiary hearing was conducted in the Grievance Board's Wheeling office on May 26, 2004. Grievant was represented by Owens Brown, a WVEA Uniserv Consultant, and OCBE was represented by Kathy Finsley, Esq. (See footnote 1) **The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on June 17, 2004.**

The following findings of fact are derived from a preponderance of the evidence made part of the record at the hearing held by OCBE prior to voting for the suspension, and at level four.

Findings of Fact

1. Grievant has been employed by OCBE as a teacher for approximatelytwenty-nine years, and was assigned to Triadelphia Middle School (TMS) at all times pertinent to this grievance.

2. During the 2001-2002 school year Grievant refused to meet with TMS Principal

Christine Carder to discuss a parent issue, and his evaluation. In June 2002, Principal Carder recommended that Grievant be suspended for insubordination for his refusal to attend meetings, and his written and verbal comments concerning the competency of the administrators.

3. Principal Carder subsequently transferred to another school, and Dr. Mary Lee Porter was appointed Principal of TMS for the 2002-2003 school year. In an attempt to start fresh with the TMS staff, Dr. Porter's request that the suspension not be implemented was granted by Superintendent Lawrence Miller.

4. During the 2003-2004 school year, Grievant and two other faculty members were assigned seventh grade lunch duty on a permanent basis. They are responsible for approximately one hundred sixty students for a period of thirty minutes. In February 2004, Grievant began stating concerns to Dr. Porter regarding disciplinary issues in the cafeteria. Specifically, Grievant wanted one student removed from the school, and did not want other students to be allowed to eat lunch outside the cafeteria. Dr. Porter advised Grievant that the student could not be expelled from school, and that the other students were moved to resolve their disciplinary issues. By letter dated February 19, 2002, Grievant notified Dr. Porter that [t]he administration of this school has repeatedly failed to support my efforts to instill and maintain order during seventh grade lunch. This egregious neglect has rendered me impotent to enforce daily discipline. Consequently, self-respect compels me to inform you that I will no longer report to lunch duty.

5. Dr. Porter met with Grievant that day to discuss his concerns. During the meeting Grievant became angry, and referred to the principal as a “dumb broad with a Ph.D.” The following day, February 20, 2004, Dr. Porter sent Grievant a letter in which she acknowledged his “concern that the behavior of some students is extremely disrespectful and [his] fear [of] being provoked into resorting to corporal punishment.” She counseled Grievant to control his emotions and discipline judiciously, and advised him that failure to report to lunch duty would be willful insubordination.

6. By letter of February 25, 2004, Dr. Porter notified Grievant that his refusal to report to his assigned lunch duty on February 20, 23, and 24, constituted willful insubordination, and that she would recommend the superintendent take disciplinary action. That same date, Dr.

Porter recommended to Superintendent Miller that Grievant be suspended five days ,"or other disciplinary measures that may be necessary."

7. Grievant was notified by letter dated March 8, 2004, that a meeting would be held with Superintendent Miller and Dr. Porter on March 10, 2004, to address his actions, and her recommendation of suspension.

8. Grievant responded in writing that he would not attend the meeting because the date was not convenient, and because Superintendent Miller had previously threatened him with physical harm, and appeared at a meeting unprepared. "These events raise legitimate questions concerning the competency of our superintendent." Grievant stated that he would agree to a meeting with Assistant Superintendent George Krelis, at a mutually convenient time. 9. Superintendent Miller notified Grievant by certified letter of March 10, 2004, that he would recommend a five day suspension or other disciplinary action that the Board would deem appropriate at the meeting to be held on March 22, 2004. The stated basis of this recommendation was Grievant's recent refusal to report for cafeteria duty, and his disrespectful behavior toward school administrators, including his refusal to meet with administrators during both the 2001-2002 and the 2002-2003 school years.

10. Grievant exercised his right to a hearing before the Board prior to a vote being taken on the recommended discipline. Grievant advised the members that he was a teacher, not an administrator or a lunch monitor, but he would continue with the duty if Dr. Porter would meet his conditions, otherwise, "she can either do it or get somebody else to do it." He further opined that every principal he has worked for has been "arrogant, . . . obnoxious and they consider themselves to be unaccountable." For the first time, Grievant indicated that he was suffering from stress due to the situation.

11. Following an executive session, the Board returned and voted to suspend Grievant for thirty days, without pay, effective March 23, 2004.

Discussion

OCBE argues that the suspension was appropriate for the cited acts of insubordination, and was neither excessive nor an abuse of its discretion. As with all disciplinary actions, 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 orsuspend 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.

Grievant is accused of insubordination which "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." Butts v. Higher Educ. Interim Governing Bd., 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). See Riddle v. Bd. of Directors, So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle, supra; Webb, supra.

In order to establish insubordination, an employer must demonstrate a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dep't, Docket No. 90-H-128 (Aug. 8, 1990). An employee's belief that management's decisions are incorrect or the result of incompetence, absent a threat to the employee's health and safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. Vickers v. Bd. of Directors/W. Va. StateCollege, Docket No. 97-BOD-122B (Aug. 7, 1998). See Parker v. W. Va. Dep't of Health and Human Res., Docket No. 97-HHR-042B (Sept. 30, 1997). Additionally, an employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . .". McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992) (citing In re Burton Mfg. Co., 82 L.A. 1228 (Feb. 2, 1984)).

OCBE has established that Grievant willfully refused to appear for scheduled lunch duty, and to meet with administrators, thereby acting in an insubordinate manner. Grievant does not appear to contest this issue, as indicated in his post-hearing submission in which he

states, "the grievant's appeal to level four was not to determine his guilt or innocence of the charges [but] to determine whether . . . the Board acted in an arbitrary and capricious manner by suspending the grievant for thirty days instead of the five days recommended by the superintendent." Grievant argues that proposed disciplinary action should be definitive, because "without the full knowledge of the possible outcomes if a grievant appeals his/her recommended suspension before the Board can only create a chilling effect for those who are seeking due process." Grievant also alleges that he was denied a fair and unbiased hearing by the introduction of evidence that was not relevant to the present charges, i.e., Principal Carder's 2002 letter to Superintendent Miller recommending that Grievant be suspended.

The authority of a county board of education to discipline an employee 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 andcapricious 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 Res., 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 her judgment for that of a board of education." Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001).

Grievant was not denied a fair and impartial hearing because Principal Carder's letter recommending a suspension in 2002 was made part of the record. His position that the letter should not have been considered because the suspension was never implemented, and that recommendation was not part of the present charges, is incorrect. Grievant was notified by Superintendent Miller in the March 10, 2004 letter that he would recommend a suspension based upon events of the current year, and for similar behavior during the 2001-2002 school year. It is not unreasonable for the Board to consider the fact that Grievant has exhibited acts of insubordination over an extended period of time. Neither did the Board act in an

arbitrary and capricious manner by extending the suspension to thirty days. Grievant was given notice that Superintendent Miller would recommend a five day suspension, "or other such disciplinary action as the Board deems appropriate. . . ." Although no explanation was given by the Board members, it appearslikely that Grievant's demeanor during the hearing, which was belligerent and disrespectful to OCBE administrators and Board members, was the basis for the greater discipline. In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

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. A board of education may suspend any person in its employment for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance substantiated by an employee performance evaluation, 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. 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. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." Butts v. Higher Educ. Interim Governing Bd. 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). See Riddle v. Bd. of Directors, So. W. Va. CommunityCollege, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989).

5. An employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . .". McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992) (citing In re Burton Mfg. Co., 82 L.A. 1228 (Feb. 2, 1984)).

6. OCBE properly determined Grievant's conduct constituted insubordination under W. Va. Code § 18A-2-8. Butts, supra; McKinney, supra.

7. Grievant was not denied a fair and impartial hearing because evidence of similar behavior during the previous year was made part of the record.

8. OCBE did not act in an arbitrary and capricious manner when it voted to suspend Grievant for thirty days, rather than the five days recommended by the Superintendent.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Ohio County or 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court. DATE: JULY 29, 2004

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.The hearing was conducted over the objection of Ms. Finsley who did not want to subject Grievant to the stress while he was on medical leave. Grievant appeared calm, and indicated that he wanted to proceed. The hearing concluded without incident.