KAREN JENKINS,

Grievant,

v. Docket No. 05-30-203

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Karen Jenkins ("Grievant"), employed by the Monongalia County Board of Education ("MCBE") as an Aide, filed a grievance directly to level four on June 15, 2005, challenging a two-day suspension. For relief, Grievant requests the suspension be rescinded. A level four hearing was conducted at the Grievance Board's Westover office on July 26, 2005. Grievant was present and represented by Rhonda M. McIntyre, Esq. MCBE was represented by Harry M. Rubenstein, Esq. of Kay Casto and Chaney. Both parties waived the opportunity to file post hearing proposed findings of fact and conclusions of law, and the grievance became mature for decision at the conclusion of the hearing.

The following facts have been derived from a preponderance of the evidence admitted during the level four hearing.

Findings of Fact

1. Grievant was employed by MCBE as an Aide assigned to Mountainview Elementary School ("MES") at all times pertinent to this grievance.

2. Grievant, who is also a Licensed Practical Nurse, was assigned to work with teacher Lisa McCutcheon in the Special Education department. 3. One of Ms. McCutcheon's students, a male of approximately seven years of age, had been exhibiting a reluctance to exit the bus upon arrival at school. (See footnote 1)

4. On the morning of April 12, 2005, the student had remained on the bus for approximately fifteen minutes. Ms. McCutcheon and Grievant were discussing the situation with the bus operator and the bus aide, who had to proceed on with their schedule.

5. To remove the student from the bus, Grievant engaged in a maneuver consisting of

reaching under his arm to grab the back waistband of his trousers, quickly lift him up and get him in motion. This technique is taught as a non-violent method of physical direction and redirection by the Crisis Intervention Prevention program, and was appropriate for this student, who would fall to the ground if simply lifted to a standing position.

6. On the day in question the student was wearing nylon athletic-type pants which tend to create noise whenever touched or moved.

7. Stephen B. King, Principal of MES, conducted an investigation of a report that Grievant had "mishandl[ed] a student," when she allegedly swatted or otherwise struck the student in the buttocks as she assisted him from the bus to escort him in the building." After viewing the video tape from the bus, Mr. King concluded that Grievant had "used the open palm of her had to swat [the student] on the buttocks one time to hasten his compliance of exiting the bus. There was also an audible sound consistent with a swat as alleged. The contact did not appear to be the result of intent to injure or harm the student." 8. Upon review of Principal King's investigative report, Dr. Janice Christopher, Interim Superintendent, notified Grievant by letter dated April 20, 2005, that she would be suspended for two days, without pay, "in response to an investigation into physical contact with a student which happened on April 12, 2005."

9. In addition to MCBE's investigation, the Department of Health and Human Resources conducted an independent investigation into the matter. That report, issued June 2, 2005, concluded there had been no abuse of the child.

Discussion

In disciplinary matters, 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 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 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 andcapricious, 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). W. Va. Code § 18A-2-8 provides, in pertinent part:

[A] board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a plea of nolo contendere to a felony charge.

In the correspondence which notified Grievant she was being suspended, MCBE did not identify a statutory cause it was relying upon; however, most likely the alleged conduct would have constituted cruelty. In such cases, the proper focus is whether the charge of misconduct has been proven, not the label attached to such conduct. Lake v. Barbour County Bd. of Educ., Docket No. 99-01-294 (Jan. 31, 2000). Cruelty includes deliberately seeking to inflict pain and suffering. Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990). Behavior directed toward a student, to include slapping the student, without the need for self-defense, meets this definition. Wilkerson v. Lincoln County Bd. of Educ., Docket No. 99-22-420 (Mar. 27, 2000); Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996). See Eggleston v. Greenbrier County Bd. of Educ., Docket No. 94-13-395 (Dec. 29, 1994).

In the present matter, the record does not reveal who reported the “incident.” Mr. King's report was based on the video taken on the bus, and “individuals who may have witnessed or provided pertinent information relative to the investigation.” These individuals, and the information they provided, were also not identified. Mr. King did state in the report that the video was the primary evidence available. The video was twice reviewed by the undersigned during the level four hearing. Grievant was observed to enter the school bus,

reach around the student, raise him to a standing position and walk him off the bus within a matter of seconds. It does not appear that the child was slapped or "swatted." Ms. McCutcheon was standing on the bus steps, testified that she did not hear or see a slap. Human Resources Administrator Richard Williams testified that he is somewhat familiar with the technique used by Grievant to get a person moving, and does not believe that she engaged in abuse or neglect. Although the full report was not made part of the record, DHHR found that Grievant had not acted in a manner constituting abuse.

The facts of this case are similar to those in Lawson v. Lewis County Board of Education, Docket No. 93-21-141 (Nov. 30, 1993), in which individuals reported that a teacher had slapped a child, but did not accurately see what had occurred (she had held the child's hand but slapped her own to communicate that the action had been unacceptable. On another occasion she had touched the child's face.) Just as in the present matter, DHHR found no abuse in Lawson, and the Grievance Board ordered her suspension rescinded. The same outcome is appropriate in this case because MCBE has failed to prove by a preponderance of the evidence that Grievant engaged in cruelty, and therefore acted in an arbitrary and capricious manner by suspending her for two days.

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 disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code § 18-29-6; Hoover v. LewisCounty 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 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). 3. "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).

4. MCBE failed to prove by a preponderance of the evidence that Grievant acted in a cruel or abusive manner to a student.

Accordingly, the grievance is GRANTED. MCBE is Ordered to remove all reference of the suspension from Grievant's record, and to compensate her for the two days of lost wages.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Monongalia 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 theGrievanceBoard. 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: AUGUST 4, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Consistent with Grievance Board practice, the student will not be identified by name.