BRUCE BOOTH and NEWTON WARE,

Grievants,

v. **Docket No. 04-42-418**

RANDOLPH COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Bruce Booth and Newton Ware ("Grievants") initiated this proceeding in September of 2004, challenging their suspensions by the Randolph County Board of Education ("BOE") for harassment of another employee. (See footnote 1) After denials at level one, a joint hearing was held before Glen Karlen, Superintendent, on October 13, 2004. The grievances were denied in a decision dated November 19, 2004. Level three consideration was bypassed, and Grievants appealed to level four on December 1, 2004. A hearing was held in Elkins, West Virginia, on February 2, 2005. Grievants were represented by counsel, Frank P. Bush, and Respondent was represented by counsel, Kimberly S. Croyle. This matter became mature for consideration upon receipt of the parties' fact/law proposals on March 16, 2005.

The following material facts have been proven by a preponderance of the evidence of record.

Findings of Fact

1. Grievants are employed as bus operators by the BOE.

2. Sarah Martin is employed by BOE in the finance department and handles employee benefits, such as sick leave, insurance and workers' compensation.

3. Grievant Ware was on workers' compensation during the 2003-2004 school year and had back surgery as a result of his injury. On March 31, 2004, he submitted to Ms. Martin a "return to work" slip from Dr. James Weinstein, which indicated he would be able to work as of June 13, 2004, which was the last day of the 2003-2004 school year.

4. Grievant Ware was in a motorcycle accident on May 8, 2004, prior to his return to work, but

after his last visit to Dr. Weinstein.

5. Prior to the beginning of the 2004-2005 school year, Grievant Ware provided Ms. Martin with a medical release from the doctor who treated him after his motorcycle accident (not Dr. Weinstein), stating that he was able to work.

6. Ms. Martin, Grievants' supervisor, and Superintendent Karlen all agreed that Grievant Ware should provide an updated release from Dr. Weinstein prior to his return to work, due to his intervening motorcycle accident.

7. On August 23, 2004, a few days prior to the first day of school, Grievant Ware was advised by his supervisor, Gail Tacy, that he needed to see Ms. Martin in the finance office concerning his medical release.

8. Grievant Ware went to Ms. Martin's office, taking Grievant Booth with him to serve as “a witness” to his conversation with Ms. Martin.

9. Upon being advised by Ms. Martin that he needed to provide an updated medical release from Dr. Weinstein, Grievant Ware became agitated, raised his voice, shook his finger, and told Ms. Martin that the prior releases were “all she was getting.” 10. Another finance office employee advised Finance Director Gary Ransbottom that there was a problem in Ms. Martin's office. As he approached the office, Mr. Ransbottom observed Grievant Ware yelling and shaking his finger at Ms. Martin, at which time Grievant Booth closed and apparently locked the door, standing in front of it.

11. When Grievant Ware became agitated and raised his voice, Grievant Booth closed the door to Ms. Martin's office and stood against it.

12. Mr. Ransbottom attempted to open Ms. Martin's door, discovered it was locked, and proceeded to knock on it loudly, yelling to Grievants to open the door. Mr. Booth did not move and did not open the door for Mr. Ransbottom. Shortly thereafter, Grievants left Ms. Martin's office.

13. Just after Grievants left Ms. Martin's office, Mr. Ransbottom confronted Grievant Booth in the hallway. He stepped in front of Grievant, blocked his path, and chastised him for treating Ms. Martin disrespectfully. Mr. Ransbottom was angry and raised his voice, and physically prevented Grievant from walking past him during this exchange.

14. Mr. Ransbottom was disciplined for his conduct toward Grievant Booth, but he was not suspended.

15. Superintendent Karlen met with both Grievants on September 15, 2004, and discussed the

incident in Ms. Martin's office. He advised them that their conduct was inappropriate and that he would be recommending that they be suspended.

16. By correspondence dated September 15, 2004, Superintendent Karlen advised Grievants that, at the BOE meeting on September 20, he would be recommending their suspensions--five days for Grievant Ware and three days for Grievant Booth. 17. Upon receipt of Mr. Karlen's September 15 correspondence, Grievants contacted their attorney, (See footnote 2) who advised them he was not available for the hearing, and he also told Grievants not to attend the hearing. Grievants did not request that the BOE hearing be rescheduled.

18. BOE met on September 20, 2004, and voted to suspend Grievant Ware for five days and Grievant Booth for three days.

19. Grievants were notified of the BOE's decision by Superintendent Karlen in letters dated September 21, 2004, which stated, in part:

> The reason for this suspension is because of your actions on the afternoon of August 23, 2004, in which you confronted and verbally assaulted an employee in her office at the county board of education central offices.

In addition, the letter stated that Grievants were to contact Superintendent Karlen prior to September 27, 2004, to decide the dates they would serve their suspensions.

20. As of the level four hearing in this grievance, Grievants had not yet served their suspensions.

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 grounds upon which a Board may suspend or 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.

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 her judgment for that of a board of education." Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001).

As a preliminary issue, Grievants contend that they were denied due process of law, because Respondent failed to follow its own policy requiring ten days' notice of a board hearing regarding a disciplinary suspension. However, it must be noted that this ten-day notice provision in Respondent's internal policy differs from the provisions of W. Va. Code § 18A-2-8, which states that the charges must be presented to the employee inwriting “within two days of presentation of said charges to the board.” Accordingly, Respondent's policy provides employees with additional notice which is not statutorily required. Also, in this case, BOE undisputedly failed to follow that policy. However, Grievants did receive notice which would comport with the statutory two-day requirement.

"Due process is a flexible concept, and . . . the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985) (citing Clark v. W. Va. Bd. of Regents, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). Prior to an unpaid suspension, an employee is entitled to a pre- suspension hearing, an explanation of the evidence, and an opportunity to respond. Id. at Syl Pt. 3; Board of Education of the County of Mercer v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994); See Starkey v. Jefferson County Bd. of Educ., Docket No. 02-19-010 (April 8, 2002).

As discussed in Starkey, supra, the key issue in any due process analysis is whether the employees received the notice to which they were entitled *prior to* the property deprivation at issue.

In this case, it is true that Grievants did not receive the ten-day notice contemplated by the BOE's policy. However, since Grievants have not yet actually received their suspensions, they still have suffered no deprivation. Undeniably, they have received far more notice than that to which they are entitled, in that they have received an oral explanation of the charges from the Superintendent, a written explanation from him as to why the BOE voted to suspend them, and they have participated in *two* full adversarial hearings regarding these charges. Accordingly, under these circumstances, it is quite impossible to conclude that any due process violation has occurred. Respondent contends that Grievants' conduct constitutes both insubordination and willful neglect of duty, although those specific charges were not previously communicated to Grievants. "It is not necessary for a board of education to identify an employee's offenses by the exact terms utilized in W. Va. Code § 18A-2-8, as long as the required written notice of charges specifically identifies the alleged acts of which the employee is accused." Jordan v. Mason County Bd. of Educ., Docket No. 99-26-080 (July 6, 1999). 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., 569 S.E.2d 456 (W. Va. 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). Respondent argues that Grievant's behavior violated the State Board of Education's Employee Code of Conduct, 126 C. S. R. 162. It has been held by this Grievance Board that an employee who violates that Code by failing to "exhibit professional behavior," "maintain a[n] environment, free from harassment [and] intimidation," "create a culture of caring through understanding and support," or "demonstrate responsible citizenship by maintaining a high standard of conduct, self-control[,]" has engaged in insubordinate conduct as contemplated by W. Va. Code § 18A-2-8. Domingues v. Fayette County Bd. of Educ., Docket No. 04-10-341 (Jan. 28, 2005).

Grievants' behavior easily violated these standards--Grievant Ware raised his voice to Ms. Martin and shook his finger at her, which conduct could easily be described as intimidating or harassing, and Grievant Booth closed the office door, blocked it, and did not open it when Mr. Ransbottom tried to gain access, which is conduct which would make anyreasonable person fear for his or her safety and feel concern that one is being physically held against one's will. Consequently, there can be no dispute that both Grievants engaged in extremely unprofessional, intimidating and harassing behavior

toward Ms. Martin, which constitutes insubordination.

To prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990). Although the West Virginia Supreme Court has not formulated a precise definition of "willful neglect of duty," it does encompass something more serious than incompetence and imports "a knowing and intentional act, as distinguished from a negligent act." Chaddock, supra. Once again, Grievants' behavior here cannot be described as negligent, and it was clearly intentional. Grievant Ware obviously went to Ms. Martin's office with a somewhat confrontational attitude, having testified that he took Mr. Booth “as a witness.” He made it abundantly clear that he did not believe he should have been required to submit any further medical releases, and he knew when he was called to Ms. Martin's office that was the subject of discussion. Therefore, it is impossible to escape the conclusion that Grievant Ware went to Ms. Martin's office for the purpose of having a confrontational discussion and intentionally engaged in the behavior that ensued. Similarly, Grievant Booth acted willfully when he closed the office door, stood against it, and refused to let Mr. Ransbottom in. He made conscious choices to engage in these acts, and there was clearly no negligence involved.

Grievants argue that, because Ransbottom engaged in “similar” conduct and was not suspended, this is evidence that Respondent's treatment of them was arbitrary andcapricious. Although not labeled as such, this contention amounts to an argument of discrimination. Discrimination is defined by W. Va. Code §18-29-2(m) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." As recently held by the West Virginia Supreme Court of Appeals, an employee attempting to prove discrimination under the education statute need only establish that he/she was treated differently from a similarly situated employee, and the action was neither job related nor agreed to by the grievant. Bd. of Educ. v. White, 605 S.E.2d 814 (W. Va. 2004). Accordingly, it must be determined whether or not Grievants were similarly situated to Mr. Ransbottom.

As explained by Superintendent Karlen, he distinguished Mr. Ransbottom's behavior from Grievants' in that Mr. Ransbottom was reacting in anger to the misbehavior of other employees, whom he perceived had unjustifiably attacked an innocent coworker. The undersigned agrees. Grievants' deliberate actions in going to Ms. Martin's office, confronting her in anger, and closing and

blocking the door as if to “hold her prisoner” cannot be compared to Mr. Ransbottom's angry outburst toward Grievant Booth. While the record does not specify what discipline Mr. Ransbottom received, it was established he was punished in some fashion for his behavior, but Superintendent Karlen did not believe it was conduct as severe as Grievants', which merited suspension. Under these circumstances, I do not believe that Mr. Ransbottom was similarly situated to Grievants, and the difference in treatment was justified.

For all of the foregoing reasons, Grievants' suspensions must be upheld.

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. 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 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. Prior to an unpaid suspension, an employee is entitled to a pre-suspension hearing, an explanation of the evidence, and an opportunity to respond. Syl Pt. 3, Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985); Board of Education of the County of Mercer v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994); See Starkey v. Jefferson County Bd. of Educ., Docket No. 02-19-010 (April 8, 2002).

5. Grievants have not yet served their suspensions, and they have received all due process to which they are entitled by law.

6. The State Board of Education's Employee Code of Conduct at 126 C. R. S. 162 directs all West Virginia school employees to "exhibit professional behavior," "maintain a safe and healthy environment, free from harassment [and] intimidation," "create a cultureof caring through

understanding and support," and "demonstrate responsible citizenship by maintaining a high standard of conduct, self-control."

7. 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., 569 S.E.2d 456 (W. Va. 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).

8. To prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990).

9. Respondent has proven by a preponderance of the evidence that Grievants' conduct toward Sarah Martin constituted insubordination and willful neglect of duty.

10. An employee attempting to prove discrimination under [W. Va. Code §18-29- 2(m)] need only establish that he/she was treated differently from a similarly situated employee, and the action was neither job related nor agreed to by the grievant. Bd. of Educ. v. White, 605 S.E.2d 814 (W. Va. 2004).

11. Grievants failed to prove that they were similarly situated to Gary Ransbottom, so they have not established discrimination.

Accordingly, this grievance is **DENIED**. Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Randolph 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: March 28, 2005

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant Ware had also filed an associated grievance alleging harassment regarding his sick leave over a two-year period, and Grievant Booth had filed another grievance requesting that the finance director be disciplined for allegedly threatening him. These related grievances were not addressed at the level four hearing or in Grievants' post-hearing submissions, so they are deemed to have been abandoned.

Footnote: 2

Grievants hired a new attorney at level four.