JUSTIN RATCLIFF,

Grievant,

v. Docket No. 04-28-211

MINERAL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Justin Ratcliff ("Grievant"), employed by the Mineral County Board of Education ("MCBE") as a bus operator, filed a grievance directly to level four, as is permitted by W. Va. Code § 18A-2-8 on June 7, 2004, seeking reinstatement and back pay following the termination of his employment. The grievance was subsequently placed in abeyance pending Grievant's release from incarceration. A level four hearing was conducted in the Grievance Board's Westover office on February 7, 2005. Grievant was represented by John E. Roush, Esq., of the West Virginia School Service Personnel Association, and MCBE was represented by Kimberly S. Croyle, Esq., of Bowles Rice McDavid Graff & Love. The grievance became mature for decision upon receipt of post-hearing proposed findings of fact and conclusions of law on March 8, 2005.

The following facts are undisputed and may be set forth as findings of fact.

Findings of Fact

1. Grievant has been employed by MCBE as a bus operator for seventeen years, and the previous six years as a substitute employee. His performance evaluations have been satisfactory, and no disciplinary action had taken against him prior to his dismissal. 2. In January 2004, MCBE Superintendent Tilden Hackworth learned from a newspaper article that Grievant had been found guilty by the Magistrate Court of battery, involving the inappropriate touching of a student.

3. The battery was alleged to have occurred during a drill of the Patterson Creek Volunteer Fire Department, conducted at Frankfort Middle School on May 19, 2003. Specifically, Grievant was alleged to have touched the female student's buttocks, and

attempted to touch her breasts. The student in question, A.P., was assigned to Grievant's bus route, although it is not clear that she had in fact been using that mode of transportation. A. P. is also the step-sister of Grievant's domestic partner. (See footnote 1)

4. Superintendent Hackworth suspended Grievant, with pay, effective January 22, 2004, pending further investigation.

5. On April 7, 2004, the Circuit Court of Mineral County upheld the Grievant's Magistrate Court conviction.

6. By letter dated April 13, 2004, Superintendent Hackworth notified Grievant that he was suspended, without pay, effective April 14, 2004, and that he would recommend dismissal at the next regular meeting of the board of education.

7. Following a hearing on May 27, 2004, MCBE voted to ratify the suspension, and approved the recommendation that Grievant's employment be terminated, effective immediately.

8. Grievant's appeal of the criminal conviction to the West Virginia Supreme Court of Appeals was refused on February 9, 2005. 9. Grievant was incarcerated from August 2, 2004, through December 3, 2004, as a result of his conviction for battery.

Discussion

In a disciplinary grievance, the board of education bears the burden of proving the charges by a preponderance of the evidence. W. Va. Code § 18-29-6; Nicholson v. Logan County Bd. of Educ., Docket No. 95-23-129 (Oct. 18, 1995); 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 preponderance of the evidence standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dept. of Health and Human Res. Docket No. 92-HHR-486 (May 17, 1993). 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, as amended, and must be exercised reasonably, not arbitrarily or capriciously. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975). W. Va. Code § 18A-2-8 provides, in pertinent part:

Notwithstanding any other provisions of law, 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 guilty plea or a plea of nolo contendre to a felony charge. A charge of unsatisfactory performance shall not be made except as theresult of an employee evaluation pursuant to section twelve of this article.

Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir.1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). "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 [the employer]." Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001). Basing this dismissal solely on the criminal misdemeanor conviction was an arbitrary and capricious action. First, Grievant was not dismissed for one of the statutory reasons, but for his conviction of battery in Magistrate and Circuit Courts. A conviction for battery is not, in and of itself, a basis for dismissal. Immorality and insubordination were not cited as the basis for the action by MCBE's until submission of proposed findings of fact and conclusions of law. Second, the conviction was for battery, not sexual abuse or attempted rape. To properly dismiss an employee, a board of education must prove by apreponderance of the evidence that he acted in a manner consistent with one or more of the statutory categories for suspension and dismissal. In this instance, MCBE relied solely upon Superintendent Hackworth's testimony regarding the criminal proceedings. Neither the transcripts of the court proceedings, nor any other direct evidence, were made part of the record, and MCBE did not meet its burden of proof.

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 grievance, the board of education bears the burden of proving the charges by a preponderance of the evidence. W. Va. Code § 18-29-6; Nicholson v. Logan County Bd. of Educ., Docket No. 95-23-129 (Oct. 18, 1995); 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, as amended, and must be exercised reasonably, not arbitrarily or capriciously. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975). 3. W. Va. Code § 18A-2-8 provides that public school employees may be suspended or dismissed for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendre to a felony charge.

4. Generally, an agency's action is arbitrary and capricious if it did not rely onfactors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir.1985).

5. MCBE acted in an arbitrary and capricious manner when it terminated Grievant's employment without proving by as preponderance of the evidence that he engaged in any of the statutory causes for dismissal.

Accordingly, the grievance is GRANTED, and MCBE is Ordered to reinstate Grievant to the position of bus operator, with back pay, and all benefits.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Mineral 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: APRIL 4, 2005

_____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Consistent with Grievance Board practice, students will be identified by their initials.