WYATT McCLAIN,

Grievant,

v. **Docket No. 04-18-182**

JACKSON COUNTY BOARD OF EDUCATION,

Respondent,

D E C I S I O N

Grievant Wyatt McClain was employed as a probationary, substitute bus operator by the Jackson County Board of Education ("JCBOE" or "Board"). His Statement of Grievance alleges:

> **Grievant, a school substitute bus operator, contends that Respondent terminated Grievant's contract of employment in violation of West Virginia Code §§ 18A-2-6, 18A-2-8a, 18A-4-15 & 18A-2-12a.** (See footnote 1)
>
> **Relief sought: Grievant seeks reinstatement of his substitute contract of employment, instatement into any regular position for which he would be entitled and for which he is denied as a result of his termination, compensation for lost wages and other benefits, pecuniary and nonpecuniary and elimination of all references in his personnel record to his termination.**

The grievance was denied at Levels I and II, and waived at Level III. Grievant appealed to Level IV on May 17, 2004, and a Level IV hearing was held on December 7, 2004, after several continuances for good cause. This case became mature for decision on January 5, 2005, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

First, Grievant asserts Respondent should have the burden of proof as he believes the nonrenewal of his contract was a disciplinary action. Second, Grievant asserts he should be given another chance as the allegations against him were either not proven, were the fault of the students on his bus, or not "just cause" for termination.

Respondent asserts this action was a nonrenewal of a probationary, substitute contract, and as such JCBOE should not have the burden of proof. (See footnote 3) **Further, Respondent notes Grievant had been given numerous chances, as he was counseled, given frequent evaluations pointing out problem areas, placed on an Improvement Plan, and given additional training, and his unsatisfactory performance did not improve to a satisfactory level.**

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact. The parties agreed to place the transcript and exhibits from the hearing before the Board into the record.

Findings of Fact

1. Grievant was employed as a substitute, probationary bus operator for three years. 2. On November 29, 2001, and February 13, 2003, Grievant received satisfactory evaluations. Grievant started a long-term assignment in February of 2003, and apparently had some difficulties with student discipline toward the end of the 2002 - 2003 school year.

3. On September 25, 2003, Grievant's supervisor, Transportation Supervisor Jennings Stewart, evaluated Grievant and noted Grievant needed improvement in the areas of "Follows instructions" and "Compliance with rules." Grievant needed to stop letting students off the bus at non-designated stops. Mr. Stewart noted Grievant was improving in the "Relationship with staff" area. Resp. No. 2 at JCBOE Hearing.

4. A bus operator is allowed to let students off at a transfer point, if they have to go to the bathroom. Grievant was directed to let these students off one at a time, and to not let the next student go until the first one returned.

5. On October 3, 2003, Mr. Stewart again evaluated Grievant and found Grievant was unsatisfactory in the area of "Work judgments" and needed improvement in three areas: "Relationship with students," "Relationship with staff," and "Speaks and writes standard English clearly and correctly." Mr. Stewart noted Grievant had caused an accident by pulling out in front of a car. Grievant received a ticket for his failure to yield the right of way. Grievant was also directed to show more respect to students, and to improve his current poor working relationships with the staff at the schools his bus serviced. Mr. Stewart discussed with Grievant the fact that the staff members at the schools were the best source of help with

disciplinary problems. Resp. No. 3 at JCBOE hearing; Test. Stewart, Level IV Hearing.

6. On November 12, 2004, Mr. Stewart again evaluated Grievant and found he was now unsatisfactory in the areas of "Work judgments" and "Follows instructions." Mr. Stewart noted he had received calls from two of Grievant's schools stating they could not get Grievant to control the student from his bus. Grievant was continuing to let students off his bus after being told repeatedly not to do this. Resp. No. 4 at JCBOE Hearing. 7. Because of complaints he had received from Cindy Ray, Assistant Principal of Ravenswood Middle School, about students uncontrolled behavior on the bus, Mr. Stewart pulled the tape for Grievant's run on January 23, 2004. Resp. No. 2 at Level IV; Resp. No. 8 at JCBOE Hearing. This tape shows students standing in the aisles, climbing over the seats, not facing forward, students' feet in the aisles, and excessive noise, all while the bus was moving. Mr. Stewart then reviewed the other days on this same tape and found them to be the same. During these tapes, Grievant did little to correct the behavior other than occasionally to tell the students to shut up and occasionally coming back and talking to them. Grievant's interventions had no effect on the students' behavior. 8. After viewing the tape, on January 26, 2004, Mr. Stewart again evaluated Grievant and found he continued to need improvement in the areas of "Relationship with students" and "Relationship with staff." Mr. Stewart discussed what he had seen on the tape with Grievant.

9. Mr. Stewart received verbal complaints from Cottageville Elementary Principal Keri Starcher about Grievant's students on January 28 and 29, 2004, which she formalized in a letter dated February 1, 2004. Resp. No. 9 at JCBOE Hearing. She reported Grievant continued to let students off the bus, and it had taken her staff 10 - 15 minutes to "round these students up" and to remove them from the gym at her school. 10. On January 29, 2004, Mr. Stewart again evaluated Grievant and found he was unsatisfactory in the areas of "Follows instructions," "Acceptance of responsibility," and "Compliance with rules." Grievant needed improvement in the areas of "Work judgments," "Quality of work," "Relationship with students" and "Relationship with staff," and "Follows confidentiality procedures regarding students, parents/guardians, and fellow staff members." Resp. No. 7 at JCBOE Hearing. Mr. Stewart was disconcerted because he had just talked to Grievant two days prior to this evaluation about his unsatisfactory performance.

11. Mr. Stewart was concerned because Grievant continued to engage in behaviors after being repeatedly told not to, such as letting students off the bus at undesignated stops. He placed Grievant on an Improvement Plan for thirty days, from February 2, 2004, to March 3, 2004. This Improvement Plan directed Grievant to keep students on the bus while at transfer points, not to let students off at undesignated stops, and gain control of the students on the bus. Grievant was sent to an in-service on student discipline and given training tapes to review. Additionally, Mr. Stewart gave Grievant written suggestions on how to relate to students and discipline. This Improvement Plan was signed by Grievant on Monday, February 2, 2004.

12. On the following Wednesday, February 4, 2004, two days after being placed on the Improvement Plan, Mr. Stewart again pulled the tape for Grievant's. Resp. No. 1 at Level IV. This tape again showed students standing in the aisles, climbing over the seats, not facing forward, students' feet in the aisles, and excessive noise, all while the bus was moving. Mr. Stewart then reviewed the other days on this tape and found them to bethe same. During these tapes, Grievant again did little to control the students' dangerous behaviors.

13. On April 12, 2004, Mr. Stewart again evaluated Grievant and found him to be unsatisfactory in the following areas: "Follows instructions," "Acceptance of responsibility," "Compliance with rules," "Work judgments," "Quality of work," "Relationship with students" and "Relationship with staff," and "Follows confidentiality procedures regarding students, parents/guardians, and fellow staff members." Resp. No. 7 at JCBOE Hearing. Mr. Stewart noted Grievant still had inconsistent control of the students on his bus, and there were still problems with Grievant letting students off the bus at transfer and waiting points.

14. Grievant admitted he continued to let students off the bus for other than bathroom needs, even after he had been repeatedly told not to do so. This behavior continued after the Improvement Plan as well. Contrary to Grievant's assertions, Grievant also continued to let more than one student off the bus at a time after being told not to do so in September 2003.

15. After the conclusion of the Improvement Plan, Mr. Stewart asked the principals at Grievant's schools if they had noticed improvement.

16. By letter dated April 21, 2004, Grievant was notified he was not recommended to be rehired as a substitute bus operator for the 2004 - 2005 school year.

17. On April 22, 2004, Grievant asked for a hearing to learn the reasons for the nonrenewal of his contract. This hearing was scheduled for April 23, 2004, but was continued at Grievant's request until May 10, 2004. Resp. No. 1 at JCBOE Hearing.

18. In response to Mr. Stewart's request for feedback, Steve Buffington, Assistant Principal at Ravenswood High School, noted in a letter dated April 23, 2004, that whileGrievant waited at Ravenswood High School he continued to let students off his bus and allowed his students to yell out the windows of the bus. Additionally, one student was getting off Grievant's bus, going to an adjacent shopping center, and getting in the car with someone. (See footnote 4) **Principal Buffington noted Grievant seemed "oblivious" to the problem, and often Principal Buffington had to leave his office to handle difficulties caused by Grievant's students. Resp. No. 10 at JCBOE Hearing.**

19. On May 6, 2004, Principal Judy Reed of Ravenswood Middle School responded to Mr. Stewart's request for feedback in writing. Her main concern was student's getting off the bus and getting into cars with others off campus. She discussed Grievant's disrespectful behavior both to her and to the students. Additionally, she reported Grievant did not follow the seating chart they had devised "to change inappropriate behavior on the bus. . . ." Further, she believed Grievant's failure to follow through created an environment that told students the safety rules did not have to be followed. Resp. No. 11 at JCBOE Hearing.

20. After the hearing on May 10, 2004, the Board unanimously voted to accept Superintendent Ronald Ray's recommendation to not renew Grievant's contract.

21. Grievant never filed a grievance on any of his performance evaluations, did not file a grievance on his Improvement Plan, and never chose to write anything additional on his evaluations.

22. Grievant took good care of his bus, completed his runs on time, and was dependable in attending work.

Discussion

The nonrenewal of a contract is not a termination and is not a disciplinary matter; thus, an employee whose contract was not renewed has the burden of proof by a preponderance of the evidence. Loundman-Clay v. Higher Educ. Policy Comm'n, Docket No. 02-HEPC-013 (Aug. 29,

2002); Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6. "The preponderance 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. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

The West Virginia Supreme Court of Appeals held in Baker v. Hancock County Bd. of Educ., Docket No. 97-15-447 (May 5, 1998), aff'd 207 W. Va. 513, 543 S.E.2d 378 (2000), that the nonrenewal of a probationary contract at the end of the school year, even for cause, is governed by W. Va. Code § 18A-2-8a, and W. Va. Code § 18A-2-8 does not apply. (See footnote 5) **The rights and procedures applicable to probationary employees are discussed extensively in this Grievance Board's decision in Cordray v. Wood County Bd. of Educ., Docket No. 90-54-267 (Jan. 31, 1991). Cordray notes that when a board of education, as in this case, elects to merely not renew a probationary contract, it need only follow the provisions of Code § 18A-2-8a. Baker, supra. W. Va. Code § 18A-2-8a provides:**

> **The superintendent at a meeting of the board on or before the first Monday in May of each year shall provide in writing to the board a list of all probationary teachers that he recommends to be rehired for the next ensuing school year. The board shall act upon the superintendent's recommendations at that meeting in accordance with section one of this article. The board at this same meeting shall also act upon the retention of other probationary employees as provided in sections four and five of this article. Any such probationary teacher or other probationary employee who is not rehired by the board at that meeting shall be notified in writing, by certified mail, return receipt requested, to such persons' last-known addresses within ten days following said board meeting, of their not having been rehired or not having been recommended for rehiring.**
>
> **Any probationary teacher who receives notice that he has not been recommended for rehiring or other probationary employee who has not been reemployed may within ten days after receiving the written notice request a statement of the reasons for not having been rehired and may request a hearing before the board. Such hearing shall be held at the next regularly scheduled board of education meeting or a special meeting of the board called within thirty days of the request for hearing. At the hearing, the reasons for the nonrehiring must be shown.**

When a probationary contract is not renewed per the procedure set forth in Code § 18A-2-8a, the board is "not required to convene a pre-termination hearing because Grievant, in

effect, was not terminated; rather, his contract, which is probationary and thus affords him no property interest in his employment, was not renewed." Cordray, supra (citing Belota v. Boone County Bd. of Educ., Docket No. 90-03-252 (Nov. 30, 1990); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985)). Even if the reasons for non- renewal are disciplinary in nature, a probationary employee is not entitled to any protections beyond those provided for in W. Va. Code § 18A-2-8a. See Baker, supra; Meredith v. Mercer County Bd. of Educ., 00-27-247 (Jan. 31, 2000); Burrows v. Wood County Bd. of Educ., Docket No. 96-54-281 (Oct. 24, 1996). Grievant has not asserted he did not receive proper notice or that he did not receive what is mandated by W. Va. Code § 18A-2-8a. The only issue is whether Grievant's contract should have been renewed. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Syl. Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). See Rogers v. Logan County Bd. of Educ., Docket Nos. 99-23-196/246 (Nov. 16, 2002). W. Va. Code § 18A-2-8a gives broad discretion to the county board when determining whether or not to rehire a probationary employee, and to prove his case, Grievant must establish JCBOE's decision to not renew Grievant's contract was arbitrary and capricious. Beheler v. Logan County Bd. of Educ., Docket No. 98-23-276 (Dec. 11, 1998). See Miller v. Bd. of Educ., 190 W. Va. 153, 437 S.E.2d 591 (1993); Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991); Rogers, supra. (See footnote 6)

The evaluation of a personnel decision under the arbitrary and capricious standard entails close examination of the process used to make the decision. Considerable deference must be afforded the professional judgment of those who made the decision. Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995). Baird v. Kanawha County Bd. of Educ., Docket No. 95-20-445 (Sept. 16, 1996). "In applying the 'arbitrary and capricious' standard, a reviewing body applies a narrow scope of review,limited to determining whether relevant factors were considered in reaching that decision and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may

reasonably be discerned. Bowman, supra, at 286." Hill and Cyrus v. Kanawha County Bd. of Educ., Docket No. 96-20-362 (Jan. 30, 1997). "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. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Res., Docket No. 93-HHR-322 (June 27, 1997). 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).

Grievant's evidence on the issue of whether the nonrenewal decision was arbitrary and capricious consisted of assertions the principals who complained did not know whose bus the problem students rode, he was "just a substitute" bus operator and was learning, and testimony of two co-workers and friends that Mr. Stewart did not have any problems with Grievant's driving ability and dependability. At hearing, Mr. Stewart was clear he did not have a problem with Grievant's care of the bus and dependability, but was very concerned, and indeed, disappointed and frustrated by Grievant's continued inability tocontrol the behavior of the students who rode his bus. Mr. Stewart noted the number of telephone complaints he received was very unusual, and he had never received more than a couple of written complaints on all the bus operators during his time as Transportation Supervisor. He also considered Grievant had held the same run for over a year and was expected to know the students and anticipate which ones had a greater likelihood of creating problems if let off the bus. JCBOE also noted Grievant's repeated failure to follow the directions he was given and his failure to improve.

JCBOE did not terminate Grievant's contract, it merely decided not to renew the contract of a probationary employee who had consistently demonstrated unsatisfactory performance, and had failed to improve adequately with evaluations and an Improvement Plan. It is well-established that there were difficulties with Grievant's performance throughout the school year. He received an Improvement Plan which identified these problems, and identified the steps he was to take to resolve his difficulties. The evidence also demonstrated Grievant

disregarded the directions of his supervisor and the principals at the schools he served. Accordingly, JCBOE has provided a sufficient basis for its decision. See Cordray, supra. (See footnote 7) The reasons for the nonrenewal of Grievant's contract were not arbitrary and capricious, but were substantive in nature.

In accordance with the foregoing findings and discussion, the following Conclusions of Law are made.

Conclusions of Law

1. The non-renewal of a contract is not a termination and is not a disciplinary matter; thus, an employee whose contract was not renewed has the burden of proof by a preponderance of the evidence. Loundman-Clay v. Higher Educ. Policy Comm'n, Docket No. 02-HEPC-013 (Aug. 29, 2002). See Rogers v. Logan County Bd. of Educ., Docket Nos. 99-23-196/246 (Nov. 16, 2002).

2. When a board of education decides not to renew a probationary employee's contract at the end of a school year, the provisions of W. Va. Code § 18A-2-8 do not apply and the provisions of W. Va. Code § 18A-2-8a are to be followed. Cordray v. Wood County Bd. of Educ., Docket No. 90-54-267 (Jan. 31, 1991).

3. W. Va. Code § 18A-2-8a requires a county board of education to provide "after-the-fact" notice to a probationary employee that it has decided not to renew his contract within ten days of that decision. If the employee so requests, the board must provide the employee a list of reasons for the decision and a hearing on those reasons. Miller v. Bd. of Educ., 190 W. Va. 153, 437 S.E.2d 591 (1993).

4. A probationary employee whose contract is not renewed has no property interest in his employment, is not entitled to due process of law, and does not have a right to a pre-termination hearing or notice. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Bd. of Regents v. Roth, 408 U.S. 564 (1972); Cordray, supra; Belota v. Boone County Bd. of Educ., Docket No. 90-03-252 (Nov. 30, 1990).

5. When a board of education elects to not renew a probationary contract at the end of the year, even "for cause," it is not required to follow the conditions of W. Va. Code § 18A-2-8, it need only follow the provisions of W. Va. Code § 18A-2-8a. Baker v. HancockCounty Bd. of Educ., Docket No. 97-15-447 (May 5, 1998), aff'd 207 W. Va. 513, 543 S.E.2d 378 (2000).

6. W. Va. Code § 18A-2-8a gives broad discretion to county boards when determining whether or not to rehire a probationary employee. To prove his case, a grievant must establish the decision to not renew the contract was arbitrary and capricious. Beheler v. Logan County Bd. of Educ., Docket No. 98-23-276 (Dec. 11, 1998). See Miller v. Bd. of Educ., 190 W. Va. 153, 437 S.E.2d 591 (1993); Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991); Rogers, supra.

7. "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. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Res., Docket No. 93-HHR-322 (June 27, 1997). 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)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

8. A preponderance of the evidence in this case establishes that JCBOE's action of not renewing Grievant's contract was not arbitrary and capricious. Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Jackson 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: February 28, 2005

Footnote: 1

Grievant did not specify any particular violations of these Code Sections. Code §§ 18A-2-6 and 18A-4-15 do not appear relevant, and Code §§ 18A-2-8a and 18A-2-12a(6) were followed.

Footnote: 2

Grievant was represented by John Roush, Esq., from the West Virginia School Service Personnel Association, and Respondent was represented by Howard Seufer, Esq., of Bowles Rice McDavid Graff and Love.

Footnote: 3

It would appear Grievant's contract would no longer have been probationary, if it had been renewed, because the 2004 - 2005 school year would have been Grievant's fourth year of employment.

Footnote: 4

Both the mother of this student and the principal believed drinking alcohol was involved.

Footnote: 5

However, if a board of education wishes to dismiss a probationary employee for disciplinary reasons prior to the end of the school year, then it must proceed under W. Va. Code § 18A-2-8. Cordray, supra.

Footnote: 6

Grievant may also claim the action was taken in violation of some substantial public policy. Belheler, supra. See, e.g., Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978).

Footnote: 7

As discussed in Cordray, supra, there is no "for cause" standard for non-renewal of a probationary employee's contract, and a board of education need only show that there were substantive reasons for its decision.