JOSEPH JACOBS,

Grievant,

v. **Docket No. 05-30-295**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Joseph Jacobs ("Grievant") filed this grievance directly at level four on August 22, 2005, challenging the termination of his employment as a cook for the Monongalia County Board of Education ("MCBOE"). A hearing was held in Westover, West Virginia, on October 17, 2005, at which Grievant was represented by counsel, John E. Roush, and Respondent was represented by counsel, Jennifer Caradine and Harry M. Rubenstein. This matter became mature for consideration upon receipt of the parties' fact/law proposals on November 15, 2005.

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

Findings of Fact

1. Grievant was employed by Respondent as a cook for approximately nine years.

2. At the beginning of the 2004-2005 school year, Grievant failed to report for work. Rick Williams, Assistant Manager of Human Resources, contacted Grievant, who informed him he was having "personal problems." Mr. Williams told Grievant to take some time off, if needed. (See footnote 1) 3. Grievant had a history of alcohol problems, and he had been through a treatment program at Chestnut Ridge Hospital in Morgantown, West Virginia.

4. In November of 2004, some employees at Mountainview Elementary, where Grievant was assigned, reported that Grievant had come to work smelling of alcohol. Mr. Williams met with Grievant and encouraged him to enroll in another treatment program through the Veterans' Administration, which Grievant apparently did.

5. On January 24, 2005, Grievant failed to report for work, because he was arrested for driving while intoxicated, on a suspended license. Grievant's mother contacted MCBOE to inform them that Grievant was incarcerated and would not be able to work.

6. Grievant had exhausted all of his accrued leave prior to his arrest.

7. Grievant remained incarcerated for approximately 4½ months. Upon his release, on May 17, 2005, he was advised by Dr. Janice Christopher, Interim Superintendent, that he was being placed on suspension for willful neglect of duty, and that his termination would be recommended. In this letter, the cited reason for the recommendation was “in response to your conviction for second offense DUI” and because “you failed to report to work since January 24, 2005.” Dr. Christopher further stated, “As you know, . . . many people within this organization have tried to help you but to no avail. It is with deep regret that I make these recommendations[.]”

8. Following a hearing before the MCBOE on August 17, 2005, Grievant's employment was terminated.

Discussion

Grievant is challenging his termination, a disciplinary action in which 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 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. Syl.Pt. 3, Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975); 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 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).

There is no factual dispute in this case; the parties only disagree as to whether or not Grievant's allegedly “involuntary” absence from work, due to incarceration, constituteswillful neglect of duty. 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.

Per Grievant's reasoning, his absence from work was not “willful,” because he was incarcerated against his will. However, this reasoning is far too simplistic, and ignores the facts leading up to Grievant's incarceration. Clearly, Mr. Williams and MCBOE had made every effort to assist Grievant with his alcohol problems and get him the help he needed. As Mr. Williams testified, Grievant was a well-liked employee who suffered from an illness, and no one wanted to terminate him, which is why he was given ample opportunities to get treatment and resolve his problems. However, when he was arrested and incarcerated in late January of 2005, MCBOE officials formed the opinion that there was little hope for his rehabilitation.

Having been through extensive treatment for his alcoholism, and having already had his driver's license suspended, Grievant *did* act willfully and intentionally when he took the course of action which resulted in his arrest, incarceration, and consequent inability to work.

In the past, this Grievance Board has held that, when substitute employees are repeatedly unavailable for work, termination for willful neglect of duty is appropriate. Regester v. Harrison County Bd. of Educ., Docket No. 01-17-094 (May 9, 2001); Carr v.Randolph County Bd. of Educ., Docket No. 99-42-086 (Sept. 29, 1999). Moreover, it has also been observed that “[e]mployers have the right to expect employees to attend work as required,” and employees whose attendance cannot be relied

upon may be properly terminated. Hatfield v. Dep't of Corrections, Docket 98-CORR-020 (Apr. 30, 1998); See Scarberry v. Bureau of Employment Programs, Docket No. 94-BEP-625 (Jan. 31, 1995); Smith v. Dep't of Corrections, Docket No. 93-CORR-538 (May 17, 1994).

Obviously, Grievant did not want to be incarcerated. Nevertheless, his conduct prior to his incarceration was the direct cause of his extended absence from work. Respondent admirably attempted to give Grievant every opportunity to work out his problems, and clearly only pursued termination as a last resort. Under these circumstances, Grievant's termination for willful neglect of duty was not an unreasonable decision.

The following conclusions of law are consistent with the foregoing.

Conclusions of Law

1. In a disciplinary termination 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. The grounds upon which a Board may 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.

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 beexercised reasonably, not arbitrarily and capriciously. Syl. Pt. 3, Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975); Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991).

4. 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).

5. Grievant's termination for willful neglect of duty 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 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 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: November 18, 2005_____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Apparently, Grievant did take off some time in the early part of the school year.