DONALD SIDES,

Grievant,

v. Docket No. 05-24-362

MARION COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Donald Sides ("Grievant"), employed by the Marion 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, following the termination of his employment. For relief, Grievant requests reinstatement, back pay with interest, and benefits, along with expungement of his record of all references to the termination. An evidentiary hearing was conducted in the Grievance Board's Westover office on December 1, 2005. Grievant was represented by John E. Roush, Esq., of the West Virginia School Service Personnel Association, and MCBE was represented by Stephen R. Brooks, Esq., of Flaherty, Sensabaugh & Bonasso, P.L.L.C. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before February 2, 2006.

The following facts have been derived from a preponderance of the credible evidence made part of the record at level four.

Findings of Fact

1. Grievant was regularly employed by MCBE as a bus operator for approximately seven years. There is no evidence that Grievant had ever been disciplinedfor any reason, and his evaluations establish his performance as satisfactory during his employment.

2. On April 27, 2005, Grievant, requested an educational leave of absence, without pay, from May 16, 2005 through the end of the school year. The reason for the request was to allow Grievant to attend the Basic Training Course of the West Virginia State Police Training

Academy in Institute, West Virginia.

3. Grievant supported his request for the leave of absence by stating that the course would increase his knowledge of traffic laws. In fact, Grievant had the opportunity to work for the city of Mannington as a police officer, but first had to attend the police academy from May 16 through August 26, 2005.

4. Administrative Assistant Gary Price determined that attending the police academy did not qualify for an educational leave of absence under MCBE policy because it did not provide advanced study or training to increase the employee's working skill.

5. Mr. Price also investigated Grievant's claim that another employee had been granted a leave of absence to attend the police academy. He found that the employee had inquired about a leave, but did not formally request a leave of absence, or attend the academy.

6. Based on his interpretation of MCBE's policy "Leave of Absence for Non- teaching Personnel," and his findings regarding a prior situation, Mr. Price advised Grievant that attending the police academy would not qualify for education leave.

7. Grievant submitted his request to MCBE at its May 2, 2005, meeting; however, the board took no action on the matter.

8. On May 16, 2005, Grievant's spouse called MCBE to report that he was ill, and could not appear for work. 9. Grievant did not appear, or report off work, for the remainder of the school year. Grievant was not paid for the absence because he had previously exhausted his sick leave and personal leave time.

10. Administrative Assistant Gary Price notified Grievant on June 27, 2005, that he intended to recommend to recommend the termination of his employment for his failure to report to work, and to obtain appropriate leave.

11. Superintendent James B. Phares advised Grievant on July 11, 2005, that he would recommend his dismissal for the willful neglect of his duties.

12. Grievant requested a hearing before MCBE regarding the recommendation to dismiss. He did not dispute the facts concerning his absence from work, and the dismissal was approved.

13. Sometime earlier, another MCBE employee was suspended for five days, or less, when he was observed working on the roof of his home after reporting off work for being sick.

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 todiscipline 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). MCBE alleges willful neglect of duty as a justification for Grievant's termination. 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. MCBE has proven that

Grievantknowingly and intentionally did not report to work for approximately two weeks so that he could attend the police academy, willfully neglecting his duty as a bus operator.

Grievant alleges that MBOE engaged in discrimination because another employee who had improperly reported sick leave was only suspended. Former Assistant Superintendent Dennis Edge confirmed that the individual was suspended. Discrimination is defined 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." W. Va. Code § 18-29-2(m). In discussing discrimination claims under the grievance statutes, the Supreme Court of Appeals has noted that "[t]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]" Bd. of Educ. v. White, 605 S.E.2d 814, 818 (W. Va. 2004)(emphasis added). In the present case, Grievant established that another individual employed as a bus operator also reported off work with a misrepresentation of illness, but was subject only to a suspension. However, there is no indication that the co-worker had previously requested and denied leave, or abandoned his position more than two weeks. The evidence does not support a finding that Grievant was similarly situated to the other employee. The only remaining issue to be addressed is whether dismissal was the appropriate measure of discipline. "The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was 'clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action.' Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989)." Meadows v. Logan County Bd. of Educ.,Docket No. 00-23- 202 (Jan. 31, 2001). "Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995) (citations omitted). "[M]itigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness

of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

Grievant knew that he had not been granted a leave of absence, but willfully and intentionally did not report to work for thirteen consecutive days. By his own testimony, he was backed into a corner, and had to decide whether he would complete the duties of bus operator for MCBE or fulfill a long-time dream of working in law enforcement. Grievant must accept the consequences of that action. MCBE "has substantial discretion to determine a penalty in these types of situations, and the undersigned shall not substitute her judgement for that of the employer, absent a finding that the decision was arbitrary and capricious. Tickett v. Cabell County Bd. of Educ., Docket No. 97-06-233 (Mar. 12, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997)." Meadows v. Logan County Bd. of Educ., Docket No. 00-23-202 (Jan. 31, 2001). MCBE's action wasneither so clearly disproportionate to the employee's offense that it indicates an abuse of discretion, nor was it arbitrary and capricious.

The following formal conclusions of law support the decision reached.

Conclusions of Law

1. In disciplinary matters, the burden of proof is on the employer to substantiate the charges against an employee by a preponderance of the evidence. W. Va. Code § 18A-2-8; Perkins v. Greenbrier County Bd. of Educ., Docket No. 94-13-019 (Aug. 12, 1994).

2. W. Va. Code § 18A-2-8 provides that an employee may be suspended or dismissed 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 contendere* to a felony charge.

3. MCBE proved by a preponderance of the evidence that Grievant willfully neglected his duties as a bus operator to attend the police academy.

4. "The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was 'clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action.' Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989)." Meadows v. Logan County Bd. of Educ., Docket No.

00-23-202 (Jan. 31, 2001).

5. "Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and anymitigating circumstances, all of which must be determined on a case by case basis." McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995) (citations omitted).

6. "[M]itigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996). 7. Grievant has failed to prove that dismissal was so clearly disproportionate to his admitted willful neglect of duty that it indicates an abuse of discretion.

8. Grievant has failed to prove discrimination, because he is not similarly situated to the employee to whom he compares himself. See W. Va. Code § 18-29-2(m); Bd. of Educ. v. White, 605 S.E.2d 814, 818 (W. Va. 2004).

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Marion 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 partyto 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: FEBRUARY 16, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE