THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

JOHN WEBB,

Grievant,

v. **Docket No. 06-10-458**

Janis I. Reynolds

Chief Administrative Law Judge

FAYETTE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, John Webb, a bus operator, filed this grievance against the Fayette County Board of Education ("FCBOE" or "Board") on November 27, 2006. The Statement of Grievance says, "Grievant was unlawfully discharged." The relief sought was, "Re- instatement."

This grievance was directly to Level IV, because it was a termination. After several continuances by the Grievant, a Level IV hearing was held in the Grievance Board's Beckley office on April 17, 2007. Grievant was represented by Michael Clifford, Esq., and FCBOE was represented by Erwin Conrad, Esq. This case became mature for decision on May 1, 2006, after receipt of the parties' proposed findings of fact and conclusions of law. This case was reassigned for administrative reasons to the undersigned Administrative Law Judge on June 5, 2007.

Synopsis

Respondent asserts Grievant failed too met the mandatory state requirements to continue as a bus operator. Thus, FCBOE could not continue to employ him as a busoperator. Additionally, FCBOE indicated Grievant willfully neglected his duty and was insubordinate when he did not follow Board Policy and the requests of his supervisor.

Grievant asserts he had been under a doctor's care since April 2006, and was unable to meet the requirements to be a bus operator. In response to this argument, FCBOE notes Grievant did not inform it of these issues, it did not timely receive any doctor's excuses and did not receive clear notice of Grievant's illness until the hearing for his termination. Additionally, Grievant was working part-time at a family owned pizza parlor during the entire time he did not work for FCBOE.

At the Level IV hearing for the first time, Grievant asserted that he had been threatened with loss of his retirement. The evidence on this matter was hearsay only, the person who allegedly made this statement was not called as a witness, and the statement made to Grievant appears to have been misinterpreted. Accordingly, this issue will not be addressed further.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. At the time of his termination, Grievant had been employed by FCBOE for 18 years. For 11 of those 18 years, Grievant used all his allotted leave, and then had to have days removed from his retirement total. For the past three years, Grievant held a ten- month contract. He worked 5.55 months during the 2003 - 2004 school year; 8.15 months during the 2004 - 2005 school year; and 4.95 months during the 2005 - 2006 school year. Grievant never reported to work for the 2006 - 2007 school year, and he had not worked at all from February 20, 2006, to the time of his termination. 2. During the 2005 - 2006 school year, Grievant was off with a Workers' Compensation ankle injury from October 2005 to February 2006. The injury was resolved and Grievant returned to work, worked approximately one week, and then did not return to work again.

3. During this time period, Grievant did not properly submit the required doctor's

excuses.

4. On April 6, 2006, the Director of Transportation, David Seay, wrote Grievant and informed Grievant that FCBOE Policy required an employee to submit a doctor's excuse for all absences of greater than three days, and he had been off work since February 20, 2006 and had not submitted any excuses for any of this time period. Grievant was directed to submit doctors' excuses for all his absences to the principal at Valley High School. Mr. Seay also noted Grievant had not been calling the Transportation Office when he was going to be off, and he was directed to do so. Mr. Seay noted Grievant's prior problems of not coming to work and that he had taken "an excessive amount of time off without good cause." He informed Grievant if this problem did not improve "we will take steps to terminate your employment." Respondent. No. 1 at Level IV.

5. Grievant did not submit any doctor's excuses after he received this letter, but Grievant believed he did call Mr. Seay once.

6. By letter dated May 22, 2006, Mr. Seay informed Grievant he had failed the required, written, bus operator certification test. He directed Grievant to study his manual and although he did not have to, he gave him a second opportunity to take the test on June 2, 2006. Respondent. No. 2 at Level IV. Grievant passed on the second attempt with the lowest possible score. (Grievant had failed the test the year before and had to retake it.) 7. To maintain his certification as a bus operator, Grievant is required to pass this written test, take 18 hours of inservice training, and be certified in first aid and CPR. 8. Although notified of inservice training, Grievant did not attend and has not met this requirement. Grievant is also not certified in first aid and CPR.

9. Since at least March 2006, Grievant has worked 2½ days a week at his family's pizza parlor, cooking and keeping the books. His shifts lasts from 10:00 a.m. to 5:00 p.m.

10. By letter dated October 17, 2006, Grievant was notified he was suspended without pay pending a hearing on the Superintendent's recommendation that her be terminated from his employment for his "[f]ailure to provided renewed First Aid/CPR certification and as a result of neglect of your duties due to your repeated and extensive absences during the previous several years. To date for this school year you have not yet reported to work." Jt. No. 1 at Level IV.

11. On October 23, 2006, Grievant submitted some medical excuses that were dated in August and September of 2006. Because these excuses were on a doctor's prescription pad that was out of date, FCBOE questioned the validity of these excuses.

12. During the pre-disciplinary hearing, Board Member David Arritt, noted he ate the pizza parlor frequently, and every time he went in there he saw Grievant there working. **(See footnote 1)**

13. Grievant's pre-disciplinary hearing was held on November 6, 2006. At this hearing, he presented a letter from Dr. Timothy Thistlewaite dated November 3, 2006,stating he had been in treatment since April 2006 for Major Depressive Disorder, Recurrent and is receiving medication for this problem. Dr. Thistlewaite noted:

> **Mr. Webb is off work due to severe depression and poor concentration, decreased energy and fatigue. Mr. Webb also has mood liability and anger issues. He is currently in treatment with mild to moderate response. Mr. Webb needs to stay off work for the near future to achieve mood stability. While no one can predict future behavior, it is my goal to return Mr. Webb to his job and expect this can be accomplished with continued treatment. Mr. Webb will be monitored and I will re-visit the issue of his return to work when appropriate.**

14. After the pre-disciplinary hearing was over and FCBOE had voted to terminate Grievant's employment, Grievant presented a letter from Mr. Michael Clifford stating he represented Grievant, and Grievant was under a medical leave of absence from his physician. He noted, "Any decision to termination Mr. Webb would result in a civil issue." Jt. No. 2 at Level IV.

15. Grievant never asked for a medical leave of absence until the day of termination hearing, on November 6, 2006.

16. A board of education cannot employ an individual as bus operator if he does not meet the state-mandated requirement for the position. Even if Grievant were released by his doctor, FCBOE could not utilize him as a bus operator because he is not certified.

17. As of the date of the Level IV hearing, Grievant had not been released to return to work.

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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he 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 and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.; See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

I. Credibility

An issue that must be addressed is credibility, as Grievant testified he is unable to meet the requirements to be certified as a bus operator (attending in service training and obtaining CPR and first aid certifications) due to his depression, medication, and other issues. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Res., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of thewitnesses, even if she/he did not observe the testimony, but reviewed the testimony by means of a tape or transcript. See Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996); Lanehart v. Logan County Bd. of Educ., Docket No. 95-23- 235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Res./Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty;

4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. **(See footnote 2)** **See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra. "[A] [f]actor to be considered in making and explaining credibility determinations is [the] possibility that [the] witness is biased and may consciously or unconsciously shade his or her testimony for or against one of the other witnesses or parties." Chin v. Dep't of Treasury, 44 M.S.P.R. 201 (1990).**

In assessing Grievant's testimony, it first should be noted Grievant did not really testify. The direct testimony of Grievant consisted of his attorney asking him yes or no questions with the answers contained within the questions. While Respondent did notobject to these leading questions, this method of eliciting testimony decreases the weight that can be given to Grievant's testimony.

The undersigned Administrative Law Judge finds Grievant was less than truthful in his testimony about the amount of time he worked in his family's pizza parlor, and his inability to perform the tasks necessary to become certified. While it is certainly true depression is a serious illness that can be very debilitating, it is unclear to the undersigned Administrative Law Judge how Grievant can work regularly for a seven hour shift at his family's pizza parlor cooking and keeping the books, but is too ill to attend the 18 hours of training necessary to maintain his bus operator certification and to complete CPR and first aid courses. The undersigned Administrative Law Judge notes it takes energy and concentration to cook professionally and to engage in bookkeeping activities.

II. Merits

W. Va. Code §18A-2-8 identifies the types of conduct that can result in disciplinary action and 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 contendere to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article.**

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). FCBOE provided Grievant written notice of the charges.A. Willful Neglect of Duty

Respondent asserts Grievant's actions can best be described as willful neglect of duty. FCBOE must prove a charge of willful neglect of duty by a preponderance of the evidence. Arbaugh v. Putnam County Bd. of Educ., Docket No. 90-40-437 (May 22, 1991). Although the West Virginia Supreme Court of Appeals 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." Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990). Hence, 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 Chaddock, supra.

Respondent has met its burden of proof by a preponderance of the evidence. Grievant was aware and was reminded by his supervisor that he needed to submit doctor's excuses, and he still did not respond in a timely manner to requests for medical reports to substantiate his time off. He did not follow board policy in notifying his employer of his needs and status at either the end of the 2005 - 2006 school year or the beginning of the 2006 - 2007 school year. Grievant demonstrated by his ability to work 2½ days a week that he was capable of completing the requirements for certification. Rice v. Mason County Bd. of Educ., Docket No. 94-26-608; Carrell v. Kanawha County Bd. of Educ., Docket No. 20- 87-036-1 (Apr. 8, 1987).

Additionally, no evidence was presented that Grievant ever formally requested a medical leave of absence until the termination hearing. While employees certainly can become ill and need time off, an employee is still required to advise his employer of hisstatus and when he plans to be able to return to work. Indeed, Grievant's behavior could be viewed as job abandonment. Pugh v. Hancock County Bd. of Educ., Docket No. 00-15- 356 (Jan. 2, 2001).

B. Insubordination

Grievant's behavior can also be labeled as insubordination. 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., 212 W. Va. 209, 569 S.E.2d 456 (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). 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, supra. See Riddle, supra; Webb, supra. "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." Butts, supra. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dep't, Docket No. 90-H-128 (Aug. 8, 1990).

The same reasoning applied in the willful neglect of duty discussion would apply here. The elements identified in the Butts test are met: (a) Grievant did not follow FCBOE's policies and the directions of his supervisor to supply FCBOE with his employment status; (b) Grievant was aware of these policies, as he was a long-termemployee, and these policies had been in place for many years; and (c) the State of West Virginia and FCBOE's policies requiring recertification and notice of medical status with accompanying medical documentation to support sick leave are reasonable and valid. FCBOE has demonstrated Grievant was insubordinate.

C. Medical leave of absence

Grievant asserts he should be granted a medical leave of absence, and FCBOE basically, arbitrarily denied his request. A county board of education is not required to grant a leave of absence except "for the purpose of pregnancy, childbirth or adoptive or infant bonding . . . ." W. Va. Code §18A-2-2a(b). "Decisions on whether to grant a leave of absence requested by an employee for reasons other than those addressed by statute is ordinarily a matter within the sound discretion of the board of education. Abston v. Putnam County Bd. of Educ., Docket No. 97-40-057 (July 28, 1997); See Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406

S.E.2d 687 (1991)." West v. Putnam County Bd. of Educ. Docket No. 97-40-524 (Mar. 20, 1998).

Grievant's request was not for one of the enumerated reasons, so Grievant was not entitled to the leave, and Respondent was free to exercise its discretion in deciding whether to grant the request. Of course, Respondent must exercise that discretion in a manner that is not arbitrary or capricious.

"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 theDeaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, 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.

Given Grievant's failure to maintain his certification, failure to respond to numerous requests for information and documentation, and very poor attendance record for many years and especially for the last three years, FCBOE's decision not to grant Grievant a medical leave of absence is not arbitrary and capricious. Francis v. Wyoming County Bd. of Educ., Docket No. 02-55-051 (June 26, 2006).

The above-discussion will be supplemented by the following Conclusions of Law.

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. "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence,which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he 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 and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.; See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

3. A county board of education possesses the authority to terminate an employee, but this authority cannot be exercised in an arbitrary and capricious manner. W. Va. Code §18A-2-8. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23- 235 (Dec. 29, 1995).

4. Willful neglect of duty is among the causes listed in W. Va. Code §18A-2-8 for which an education employee may be disciplined. See Rovello v. Lewis County Bd. of Educ., 181 W. Va. 122, 381 S.E.2d 237 (1989); Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975); Woo v. Putnam County Bd. of Educ., Docket No. 93-40-420 (June 2, 1994), aff'd 202 W. Va. 409, 504 S.E.2d 644 (1998); Jones v. Mingo County Bd. of Educ., Docket No. 95-29-151 (Aug. 24, 1995).

5. 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).

6. "Willful neglect of duty," encompasses something more serious than incompetence and denotes "a knowing and intentional act, as distinguished from a negligent act." Chaddock, supra.

7. FCBOE has met its burden of proof by a preponderance of the evidence and

demonstrated Grievant is guilty of willful neglect of duty under W. Va. Code § 18A-2-8.

8. 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., 212 W. Va. 209, 569 S.E.2d 456 (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).

9. 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, supra. See Riddle, supra; Webb, supra.

10. "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." Butts, supra.

11. FCBOE has proven Grievant was guilty of insubordination.

12. Because Grievant is not certified, FCBOE cannot legally hire him as a bus operator. 13. A county board of education is not required to grant a leave of absence except "for the purpose of pregnancy, childbirth or adoptive or infant bonding . . . ." W. Va. Code §18A-2-2a(b). "Decisions on whether to grant a leave of absence requested by an employee for reasons other than those addressed by statute is ordinarily a matter within the sound discretion of the board of education. Abston v. Putnam County Bd. of Educ., Docket No. 97-40-057 (July 28, 1997); See Pockl v. Ohio County Bd. of Educ.. 185 W. Va. 256, 406 S.E.2d 687 (1991)." West v. Putnam County Bd. of Educ. Docket No. 97-40-524 (Mar. 20, 1998).

14. "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

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15. Given Grievant's failure to maintain his certification, failure to respond to numerous requests for information and documentation, and very poor attendance recordfor many years and especially for the last three years, FCBOE's decision not to grant Grievant a medical leave of absence is not arbitrary and capricious. Francis v. Wyoming County Bd. of Educ., Docket No. 02-55-051 (June 26, 2006).

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha or Fayette 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.

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Janis I. Reynolds

Chief Administrative Law Judge

Date: June 25, 2007

Footnote: 1

There was some allegation that Grievant worked at the pizza parlor while he was off on Workers' Compensation. This allegation was not proven.

Footnote: 2

The undersigned Administrative Law Judge originally obtained this list of factors to use when assessing credibility from The United States Merit System Protection Board Handbook. Harold J. Asher and William C.

Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).