THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

CHARLES POSEY,

Grievant,

v. **Docket No. 2008-0328-LewED**

LEWIS COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Charles Posey ("Grievant") initiated this grievance on December 11, 2006, challenging the termination of his employment as a bus operator for the Lewis County Board of Education ("BOE"). During a pre-hearing conference conducted on January 18, 2007, by Senior Administrative Law Judge Sue Keller, Grievant requested that this matter be placed in abeyance, pending the outcome of his appeal of a decision of the State Superintendent of Schools, which suspended his bus operator certification until after the conclusion of the 2006-2007 school year. During this period of abeyance, the grievance procedure and Grievance Board were modified by action of the West Virginia Legislature, prompting Grievant to request that this matter be transferred to and processed under the "new" grievance procedure. (See footnote 1) Following Grievant's unsuccessful appeals of the State Superintendent's order to Circuit Court and the West Virginia Supreme Court, a level three hearing was conducted by the undersigned (See footnote 2) in the Grievance Board's office in Westover, West Virginia, on May 27 and 28, 2008. Grievant was represented by counsel, John E. Roush of the School Service Personnel Association, and the BOE was represented by counsel, Jennifer S. Caradine. This grievance became mature for consideration upon receipt of the parties'

fact/law proposals on July 1, 2008.

Synopsis

Grievant was accused of inappropriate contact with a female student who rode his bus. After he was suspended by the BOE, the State Superintendent of Schools revoked Grievant's bus operator certification for the entire school year of 2006-2007, allowing him to reapply after that time and upon completion of sexual harassment training. Because he was not certified to drive a bus, Respondent terminated Grievant's employment.

Grievant argued that temporary incapacity to perform one's duties is not a legal justification for termination of a school employee. However, pursuant to W. Va. Code § 18A-2-8, employees may be terminated for incompetency, which includes the legal inability to perform one's job. Therefore, the termination was not arbitrary and capricious, and the grievance must be denied.

Findings of Fact

1. Prior to his termination, Grievant had been employed by the BOE as a bus operator for approximately thirteen years.

2. During the 2005-2006 school year, S.K. and C.K., (See footnote 3) her brother, were students on Grievant's regular bus run. Grievant had these students on his bus for several years previous and was acquainted with their parents.

3. Following an incident on April 7, 2006, S.K. complained to school officials that Grievant had touched her on the leg. This prompted an investigation by Superintendent Joseph Mace, during which other incidents between Grievant and S.K. were discussed. Although prior to the April incident, S.K. had assisted Grievant with other students on the bus, given out candy to the students for him, discussed helping him clean his bus, and had received a gift from him, her parents had not construed his actions as sexually motivated and had not complained to BOE officials.

4. Superintendent Mace concluded that Grievant had behaved inappropriately, but he did not believe that Grievant's actions toward S.K. were sexual in nature. Therefore, pursuant to his recommendation, Grievant was suspended from May 2, 2006, through June 2, 2006, and was ordered to bid upon a new bus assignment. Grievant did not challenge this suspension.

5. On June 26, 2006, Dr. Steven Paine, State Superintendent, notified Grievant that his bus operator certification would not be renewed for the 2006-2007 school year, dueto Grievant's conduct with regard to S.K., in violation of the Employee Code of Conduct and Policy 2421, prohibiting sexual harassment.

6. Grievant requested an evidentiary hearing before the State Superintendent regarding his certification, which was conducted on August 16, 2006. By decision dated November 2, 2006, Superintendent Paine denied Grievant's appeal and ordered that he would not be eligible to reapply for certification for the entire 2006-2007 school year. He also ordered that, before Grievant's certification could be renewed, he must attend sexual harassment training and, if re-employed by the BOE, bid on a different bus route.

7. Following receipt of the State Superintendent's decision, BOE Superintendent Mace notified Grievant, by letter dated November 14, 2006, that he would recommend to the BOE that Grievant's employment be terminated, due to his lack of the required license to operate a school bus.

8. A hearing was held by the BOE on December 4, 2006, upon the Superintendent's recommendation of termination. At the conclusion of the hearing, the BOE voted to terminate Grievant's employment; Grievant was notified by letter dated December 6, 2006.

9. Grievant appealed the State Superintendent's decision to Kanawha County Circuit Court and the West Virginia Supreme Court, and those appeals were denied.

10. Although Grievant became eligible to reapply for certification as a bus operator during the summer of 2007, he is no longer employed by a county board of education. Bus operators normally become certified upon recommendation of a county school system which has offered them employment. Grievant also has not attended the sexual harassment training ordered by the State Superintendent.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. 156 C.S.R. §156-1-3 (2008); *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). An employee of a county board of education may be suspended or dismissed only 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. 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, 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).” *Graham v. Putnam County Bd. of Educ*., Docket No. 99-40- 206 (Sep. 30, 1999).

The evidence submitted both at the BOE hearing and at the level three hearing before the undersigned focused upon Grievant's lack of bus operator certification, which Respondent contends required his termination. Although Respondent has not argued which of the causes listed in W. Va. Code § 18A-2-8 served as the basis of the termination, “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).” *Scott v. Wetzel County Bd.of Educ.*, Docket No. 06-52-289 (Jan. 3, 2007). There is no dispute in this case that Grievant was notified of the underlying reasons for his termination.

West Virginia Board of Education Policy 4336 discusses the requirements and procedures applicable to bus operator certification. Pursuant to the provisions of that policy, the State Superintendent has the authority to “recall, refuse or suspend the certification of any school bus operator” for specified reasons, including violations of Policy 5902 (Employee Code of Conduct). 126 CSR §126-92-18.1.14 (2007). Policy 4436 also provides bus operators whose certification is suspended or refused with an opportunity for a hearing in accordance with Policy 1340. The State Superintendent may, in accordance with Policy 1340, suspend an employee's certification or license for a fixed period of time, after which “the affected individual must reapply for licensure.”

As set forth above, the State Superintendent's decision regarding the suspension of Grievant's certification has been appealed to the highest level, unsuccessfully. Therefore, that decision, and the substantive basis for it, cannot and has not been challenged within the context of this grievance. However, the State Superintendent's suspension served as the basis for the termination of Grievant's employment, and Grievant contends that a temporary loss of certification is not one of the causes listed in W. Va. Code § 18A-2-8.

In *Rogers v. Kanawha County Board of Education*, Docket No. 93-20-447 (Mar. 23, 1994), the administrative law judge upheld the termination of a teacher who lacked the required certification to perform his duties as a termination for incompetency under W. Va. Code § 18A-2-8. "Incompetency" is defined to include "lack of ability, **legal qualification**,or fitness to discharge the required duty." *Black's Law Dictionary* 526 (Abridged Sixth Ed. 1991) (Emphasis added). *See Durst v. Mason County Bd. of Educ.*, Docket No. 06-26- 028R (May 30, 2008). Contrary to Grievant's assertions, “temporary ineligibility for certification” *does* fit within one of the statutorily defined grounds for termination. While Grievant argues that “temporary incapacity” is not grounds for termination, he has ignored the fact that incompetency is. The undersigned concludes that the lack of required certification, which is a prerequisite to performing the duties of one's position, constitutes incompetency within the meaning of the statute.

Much of Grievant's argument and evidence at the Grievance Board level of this grievance focused upon his current inability to become recertified, due to the fact that he is not employed by a county board of education, nor is he being considered for such employment. However, that issue is not relevant to the grievance at hand, which presents only the question of whether or not Grievant's termination was legally proper at the time it occurred. Pursuant to the BOE's authority to terminate employees under W. Va. Code § 18A-2-8, Grievant's termination was reasonable under the circumstances.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. 156 C.S.R. §156-1-3 (2008); *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. An employee of a county board of education may be suspended or dismissed only 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. 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, 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)." *Graham v. Putnam County Bd. of Educ*., Docket No. 99-40- 206 (Sep. 30, 1999).

4. Lack of the prerequisite legal certification or licensure required to perform one's job duties may constitute incompetency within the meaning of W. Va. Code § 18A-2-8. *See Rogers v. Kanawha County Board of Education*, Docket No. 93-20-447 (Mar. 23, 1994).

5. Respondent has proven by a preponderance of the evidence that Grievant's termination complied with the provisions of W. Va. Code § 18A-2-8 and was not arbitrary and capricious under the circumstances presented.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: July 25, 2008

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DENISE M. SPATAFORE

Acting Chief Administrative Law Judge

Footnote: 1

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007.

Footnote: 2

Administrative Law Judge Keller retired in October of 2007, so this matter was reassigned to the undersigned.

Footnote: 3

In accordance with Grievance Board practice and procedure, minor students will be identified only by their initials, in order to protect their privacy.