THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

JAMES LONG,

Grievant,

v. Docket No. 2008-1396-MasED

MASON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant James Long grieves his termination by Respondent ("BOE") as a substitute bus operator for his alleged failure to comply with Respondent's Policy 808, which requires substitute operators to work a minimum of "15 days or 75% of the days called per semester." Following the County Superintendent's recommendation that he be terminated, Grievant requested a hearing before the BOE. He appeared before the BOE regarding the Superintendent's recommendation on several occasions. At its meeting on March 27, 2008, the BOE voted 3 to 2 to approve the recommendation.

Pursuant to W. Va. Code §§ 18A-2-8(c) and 6C-2-4(a)(4) (LEXIS current through 2008 Regular and 1st Extraordinary Sessions), Grievant filed a grievance directly at Level Three of the grievance procedure. It was received by this Board by facsimile transmission on April 1, 2008. His statement of grievance was:

> **Grievant was employed by Respondent as a substitute bus operator. On**

> **March 27, 2008, Respondent terminated Grievant for violation of Mason CBOE Policy 808. Grievant contends that the policy has been applied/interpreted in a [sic] arbitrary and capricious manner and discriminatorily. As a result he has been a victim of disparate treatment, favoritism and discrimination. [West Virginia Code §6C-2-2(g)(1)] Grievant also contends that he is not guilty of any statutory grounds for dismissal. [West Virginia Code §18A-2-8]**

He sought the following relief:

> **[R]einstatement as a substitute bus operator or as a regular bus operator, compensation for all lost wages and benefits, both pecuniary and nonpecuniary, with interest.**

The undersigned conducted a Level Three hearing at the Board's Charleston office on May 22, 2008. Grievant was represented by his counsel, John Everett Roush of the West Virginia School Service Personnel Association. Respondent was represented by its counsel, Gregory W. Bailey of Bowles Rice McDavid Graff & Love LLP. The record was kept open until June 5, 2008, for the submission of minutes of BOE meetings. The case became mature for decision on June 19, 2008, the deadline for the parties to submit proposed findings of fact and conclusions of law.

Summary

Following Grievant's appearance before the Respondent BOE, it voted (3 to 2) to approve the County Schools Superintendent's recommendation that the Grievant's employment as a substitute bus operator be terminated for his failure to accept the number of bus runs required under the Respondent's policy for filling temporary operator vacancies. The evidence failed to establish that the Grievant's failure to accept calls was knowing or intentional, particularly in light of evidence of technical problems with Respondent's automated call system. As a result, the BOE failed to meet its burden to prove by a preponderance of the evidence that the Grievant willfully neglected the duties of his position. Grievance GRANTED.

After thorough review of the record, the undersigned finds the following facts:

Findings of Fact

1 1. Grievant began work as a substitute bus operator in January 2006. Throughout his tenure, Grievant has also worked for another employer. The other employer permitted the

Grievant to leave that job to drive the school bus when he was called to do so, except on the one day each week when both owners of the business had the day off. The Grievant's outside employment made him unavailable to accept driving runs only on that day of the week.

2 2. Respondent's Policy 808, approved August 16, 2007, provides in part:

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> **Unavailability for assignment shall include failure to answer the telephone contacts when two (2) attempts to call said employee in one (1) day have been documented and/or acceptance of employment with some other employer which precludes availability of assignments as a substitute or results in refusal of assignments.**

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> **Substitutes must work 15 days or 75% of the days called per semester.**
>
> **. . .**

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> **The terms of the policy are in effect for one school year and commence anew for the following school year.**

3 3. During the portion of the 2005-2006 school year which the Grievant worked (roughly the second semester), the secretary in Respondent's Transportation Department made the telephone calls to offer bus runs to the substitute operators. Grievant's record of accepting bus runs during this period of time was good.

4 4. In the 2006-2007 school year, Respondent began using an automated call system to offer bus runs to the substitute operators to fill temporary vacancies. When necessary under various circumstances, the system was taken over by an employee, who then personally telephoned the substitute operators. Respondent refers to the latterprocedure as "administrative assignment."

5 5. The automated call system functions only when a live person answers the call and punches in a code which identifies the substitute operator, permitting the substitute to interact with the system. When the system is connected with voice mail or an answering device, the system treats it as a "no answer," although _ at least in the Grievant's case _ the answering system captures the beginning of the system's recorded announcement, then cuts

off. The system places calls from 7:30 p.m. to 11:00 p.m. in the evening, and beginning at 5:00 a.m. in the morning, until jobs are filled. Offers made by the automated system must be accepted more or less immediately.

6 6. Substitute bus operators experienced a variety of problems with the automated system, including failure of the system to allow them to log on, dropped calls, and inability to input numbers. These problems may have been greater with cellular telephones, but they affected both cellular and land-line telephones. The problems may have been greater in the first year following introduction of the system, but they continued throughout the period relevant to this grievance.

7 7. Grievant experienced difficulty with the automated call system during the 2006-2007 school year, as did other substitute operators. The Grievant complained about his problems on several occasions. It was determined that Respondent's employees had entered an incorrect telephone number for the Grievant in the automated call-out system, but the Grievant continued to have trouble even after that problem was corrected.

8 8. Grievant's problems with the automated call-out system continued in the 2007-2008 school year.

9 9. The specific problems which the Grievant experienced with the automated callsystem included those detailed above in Finding of Fact 6, as well as the following problems:

> **9.1. The system reported unanswered calls although the Grievant's telephone did not receive an incoming call;**
>
> **9.2. The system refused to accept the Grievant's code, preventing him from interacting with the system, on twenty or more occasions;**
>
> **9.3 The Grievant heard the system's announcement on his home and cellular voice mail on some fifteen occasions, at times when the Grievant was briefly away from the phone. Under such circumstances, the system had usually offered the run to the next operator by the time the Grievant could call Respondent's offices.**

10 10. The number of occurrences of the problems described above, under circumstances beyond the Grievant's control, or which did not amount to willful neglect on his part, was sufficient to account for the Grievant's failure to meet the minimum number of call acceptances required by Respondent's Policy 808.

11 11. The Grievant complained about his difficulties with the automated system on

multiple occasions to Larry Wright, Assistant Transportation Director; Betty Matheny, Secretary in the Transportation and Maintenance Department; and Debra Sayre, Secretary and manager of the callout system. He complained to Mr. Wright and to Ms. Sayre on some ten occasions each.

12 12. The problems with the automated call system in the 2007-2008 school year were significant enough to cause Debbie Sayre to maintain a log of the Grievant's complaints, and those of other drivers.

13 13. When his complaints did not lead to the problems' being remedied, theGrievant eventually gave up attempting to achieve a resolution and resolved to try to survive until his seniority led to an offer of a permanent operator's job, a position in which the automated call system would not be a factor.

14 14. During the 2007-2008 school year, there were 157 attempts to reach Grievant. This represented some 65 job opportunities, since the automated call system made multiple efforts to reach the Grievant for some jobs. As of January 20, 2008, Grievant had accepted four runs from the automated system, and there had been 14 instances of multiple no-answers on a single day.

15 15. As of April 1, 2008, Grievant had accepted five bus runs from the automated system. He had also accepted nine runs by "administrative assignment", i.e., personal calls. He had 14 acceptances for the 2007-2008 school year at the time of his termination on March 27, 2008, and he had declined two offered runs. The record does not establish whether these refusals involved offers from the automated system or from administrative assignments.

16 16. The Grievant had an excellent rate of acceptance of calls made by a person rather than a machine.

17 17. The Grievant reported his difficulties with the automated call system, detailed above, to the School Board when he appeared before it.

18 18. The Grievant accepted calls approximately 75% of the time when he had an actual opportunity to do so, that is, when the automated system functioned properly, or when he was called by a person.

19 19. The Grievant's failure to accept offers of bus runs was not knowing or intentional. 20 20. At the time of his termination, Grievant was next in line to be offered

a full-time operator's position.

Discussion

The burden of proof on the Grievant's termination rests with the employer, who must meet that burden by proving the charges against the employee by a preponderance of the evidence. 156 C.S.R. § 156-1-3 (eff. July 5, 2008); *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). The employer has the burden of proving each element of a disciplinary action by a preponderance of the evidence. *Morrison v. W. Va. Bureau of Commerce*, Docket No. 97-DOL-490 (Jan. 15, 1998). Where the evidence supports both sides equally, the employer has not met its burden. *Leichliter, supra.* "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Id*.

The authority of a county board of education to terminate an employee must be based on one or more of the causes listed in W. Va. Code § 18A-2-8 (LEXIS current through 2008 Regular and 1st Extraordinary Sessions) and must be exercised reasonably, not arbitrarily or capriciously. Syl. Pt. 2, *Parham v. Raleigh County Bd. of Educ.*, 192 W. Va. 540, 453 S.E.2d 374 (1994); 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). Section 18A-2-8(a) provides:

> **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 of nolo contendere to a felony charge.**

Respondent characterizes the Grievant's low rate of call acceptance as willful neglect of duty, declaring that "[t]he failure of a substitute employee to abide by the terms of a policy requiring availability and acceptance of assignments amounts to willful neglect of duty," Respondent's Proposed Findings of Fact and Conclusions of Law, ¶ 23, citing *Carr v. Randolph County Board of Education*, Docket No. 99-42-086 (September 29, 1999); *Regester v. Harrison County Board of Education*, Docket No. 01-17-094 (May 9, 2001); and *McCoy v. Pocahontas County Board of Education*, Docket No. 03-38-261 (March 19, 2004). It is true that failure of a substitute to accept calls, in violation of the employer's policy, has been found to constitute willful neglect of duty. Such determinations are fact-based, however, and the decisions cited by Respondent are factually inapposite to the case at hand.

One of the decisions on which Respondent relies, *Regester, supra,* declares:

> **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 one. *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 requires "a knowing and intentional act, as distinguished from a negligent act." *Chaddock, supra*. Willful neglect of duty has also been defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. *Adkins v. Cabell County Bd. of Educ.*, Docket No. 89-06-656 (May 23, 1990).**

***Id*.**

When the existence or nonexistence of 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 the witnesses. *See 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. *Holmes v. Bd. of Directors/W.Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

The Grievant's complaints about the automated call system predated his receipt of notice of his termination. This undermines any suggestion that he manufactured the technical problems with the automated system. Throughout his tenure, the Grievant had an excellent rate of acceptance of calls made by a person, rather than a machine. The undersigned finds the Grievant's account of his difficulty dealing with the automated call system credible. During his testimony, the Grievant avoided exaggeration and took care to be accurate in describing, for example, the number of times he had registered his complaints. The undersigned finds him credible based on his demeanor at the hearing, his respect for the proceedings, and the plausibility of his account of the facts.

The Respondent's contention that the Grievant, who was next in line for a full-time bus operator's position, would jeopardize his chances by "doing the least amount of workas possible" (See footnote 1) is not only illogical but contrary to the credible evidence. The Grievant testified persuasively that he held down two jobs to make a living. He testified, for example, that the day of the Level Three hearing, a Thursday and his regular day to work at his second job, was the first day he had missed at that employment. The contention that he is a slacker is not supported by the credible evidence.

The Respondent's case for termination is predicated entirely on the claim that the Grievant willfully neglected the duties of his position as a substitute bus operator. The Respondent failed to meet its burden to prove this claim by a preponderance of the evidence. This grievance is therefore GRANTED.

Conclusions of Law

1 1. The burden of proof on the Grievant's termination rests with the employer, who must meet that burden by proving the charges against the employee by a preponderance of the evidence. 156 C.S.R. § 156-1-3 (eff. July 5, 2008); *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). The employer has the burden of proving each element of a disciplinary action by a preponderance of the evidence. *Morrison v. W. Va. Bureau of Commerce*, Docket No. 97-DOL-490 (Jan. 15, 1998). Where the evidence supports both sides equally, the employer has not met its burden. *Leichliter, supra.* "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Id*.

2 2. The authority of a county board of education to terminate an employee must be based on one or more of the causes listed in W. Va. Code § 18A-2-8 (LEXIS currentThrough 2008 Regular and 1st Extraordinary Sessions) and must be exercised reasonably, not arbitrarily or capriciously. Syl. Pt. 2, *Parham v. Raleigh County Bd. of Educ.*, 192 W. Va. 540, 453 S.E.2d 374 (1994); 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).

3.

> **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 one. *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 requires "a knowing and intentional act, as distinguished from a negligent act." *Chaddock, supra*. Willful neglect of duty has also been defined as an employee's intentional and inexcusable failure to perform a work-related responsibility.**

***Adkins v. Cabell County Bd. of Educ.*, Docket No. 89-06-656 (May 23, 1990).**

4 4. When the existence or nonexistence of 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 the witnesses. *See 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. *Holmes v. Bd. of Directors/W.Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

5 5. The Grievant's account of his difficulty dealing with the automated call system is credible. The Grievant was a credible witness, based on his demeanor at the hearing, his respect for the proceedings, and the plausibility of his account of the facts. The contention that he is a slacker is not supported by the credible evidence.

6 6. In this termination case, the Respondent failed to meet its burden to prove by a preponderance of the evidence that the Grievant willfully neglected the duties of his position as a substitute bus operator.

Accordingly, the grievance is GRANTED, and the Respondent BOE's action terminating Grievant's employment is REVERSED. The Respondent is DIRECTED to reinstate any

applicable seniority, salary, and benefits attributable to the Grievant's termination, together with legal interest on any sums, subject to the calculation of any other earnings by the Grievant, and to remove references to the termination from the records which Respondent maintains on the Grievant.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. W. Va. Code § 6C-2-5 (2007). 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) (2008) to serve a copy of the appeal petition on 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. § 156-1- 6.20 (eff. July 5, 2008) and Rule 2(e) of the West Virginia Rules of Procedure for Administrative Appeals.

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Thomas J. Gillooly

Administrative Law Judge

Date: August 4, 2008

Footnote: 1

Respondent's Proposed Findings and Conclusions, ¶ 21.