WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

ESTATE OF MICHAEL DURST,

Grievant,

v. Docket No. 06-26-028R

MASON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

This grievance was filed at level four on January 20, 2006, following the termination of Grievant's employment by the Mason County Board of Education ("BOE") on January 19, 2006. After this matter was continued for a period of time, a level four hearing was conducted by Chief Administrative Law Judge Paul Marteney on September 21, 2006, in the Grievance Board's Charleston office. As Grievant had passed away prior to the level four hearing, his interests at the hearing were represented by John E. Roush of the School Service Personnel Association and his widow, Paula Durst. Respondent was represented by counsel, Gregory Bailey. The grievance was dismissed by Order of the undersigned dated March 29, 2007, wherein it was concluded that Grievant's passing had rendered his grievance moot.

The above-mentioned Dismissal Order was reversed by Final Order of the Circuit Court of Kanawha County, West Virginia, on December 13, 2007. That Order remanded the case to the undersigned for a determination on the merits of the case.

Synopsis

Grievant's employment was terminated after he exhausted all accrued leave and exercised his rights to unpaid leave under the Family Medical Leave Act. Because Grievantwas still unable to return to work, he was terminated due to physical incompetence to work. After this grievance was dismissed as being rendered moot because of Grievant's untimely death, the Circuit Court of Kanawha County, West Virginia, remanded the grievance for a determination upon the merits of Grievant's termination.

Per the provisions of W. Va. Code § 18A-2-8 and prior cases, an employee may be terminated due to physical inability to work. In this case, Grievant had no projected date upon which he might be able to return to work and had exhausted all required leave granted by his employer. Accordingly, his termination was within the discretion of the BOE, and no discrimination or favoritism was established, because all similarly situated employees were treated the same. The grievance is DENIED.

After a detailed review of the entire record, including the evidence introduced at Grievant's termination hearing before the BOE and the hearing conducted at level four, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was employed by the BOE as a half-time bus operator. He developed medical problems which caused him to be unable to work, beginning sometime in April of 2005. Grievant briefly returned to work for a one-day in-service training session in June of 2005.

2. Grievant had been diagnosed with cellulitis in his leg, which caused pain and swelling, leading his physician to advise that he not drive a school bus until the condition improved. 3. After exhaustion of his accrued paid leave, Grievant requested and was granted twelve weeks of leave under the Family Medical Leave Act ("FMLA") at the beginning of the 2005-2006 school year.

4. Grievant's leave under the FMLA expired in November of 2005, and he requested an unpaid medical leave of absence, due to his continued medical problems and inability to operate a school bus.

5. Grievant's request for a leave of absence was denied, and the superintendent recommended that Grievant's employment be terminated, due to his physical inability to

work.

6. At the BOE hearing conducted on January 17, 2006, Grievant testified that he was still unable to work, was undergoing continued treatment for his leg problems, and that his doctor was considering surgery. Neither Grievant nor his physician had, at that time, a projected date upon which he could possibly return to work. Grievant's doctor was also recommending weight loss in order to improve his condition, but Grievant was not actively involved in or enrolled in any specific program at the time of the BOE hearing.

7. The superintendent's recommendation to terminate Grievant's employment was approved by the BOE on January 19, 2006.

8. Grievant passed away unexpectedly as a result of pneumonia on August 7, 2006, which was unrelated to the medical condition which had rendered him unable to work. At the time of his passing, Grievant had not been released to return to work for the cellulitis condition.

9. Respondent's Policy 815 regarding leave for "illness and other causes" provides that the BOE, with the recommendation of the Superintendent, "may" approve aleave of absence without pay "not to exceed 365 days" for several causes, including ill health, "with recommendation of a physician."

Discussion

The conclusion of the Circuit Court in its December 13, 2007, Order was that Grievant' death did not render the issue of the propriety of his termination moot, thus directing the undersigned to render a decision on the merits of the grievance. The prior Dismissal Order only addressed the issue of whether or not the case was moot, and the underlying termination was not discussed, but the merits of the underlying grievance were addressed at both hearings.

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; (See footnote 1) ***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 basedupon 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).

Respondent contends that the termination in this case was the result of physical incompetence to perform the duties of the job, noting that incompetency is a statutory basis for dismissal of a school employee. "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). Although Grievant's counsel contends that "physical" incompetence is not contemplated by the provisions of W. Va. Code § 18A-2-8, past Grievance Board decisions contradict that premise.

In *Phillips v. Summers County Board of Education*, Docket No. 96- 45-146 (Mar. 27, 1997), the Grievance Board upheld the termination of an employee who was unable to work due to an injury, noting that "a permanent physical inability to perform the duties for which one was hired is incompetence within the meaning of W. Va. Code § 18A-2-8." Moreover, in a situation very similar to the instant case, termination of an employee who had been on leave for an extensive period of time for a heart condition was upheld. In *Heavner v. Jefferson County Board of Education*, Docket No. 04-19-065 (June 28, 2004), the undersigned held that, because the grievant was still unable to work at the expiration of his medical leave of absence, the board of education acted within its authority in terminating his employment. As noted in that case, the length of and conditions underwhich leaves of absence may occur are decisions within the discretion of the school board, and it was "within Respondent's discretion to determine that Grievant is no longer competent to continue his employment." Just as in the instant case, the grievant contended that his condition might not be permanent, but could not provide any definite date by which he would be released by his physician to return to work.

Grievant's counsel has also argued discrimination and favoritism, based upon Respondent's alleged "past practice" of not terminating employees who had exhausted all

leave, but could not return to work. W. Va. Code § 18-29-2(m) defines discrimination as "differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing." W. Va. Code § 18-29-2(o) defines favoritism as "unfair treatment of an employee as demonstrated by preference, exceptional or advantageous treatment of another or other employee." In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> **(a) that he or she has been treated differently from one or more similarly-situated employee(s);**
>
> **(b) that the different treatment is not related to the actual job responsibilities of the employees; and,**
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> **(c) that the difference in treatment was not agreed to in writing by the employee.**

***Frymier v. Higher Education Policy Comm*., 655 S.E.2d 52 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005). Grievant's counsel has not established discrimination or favoritism in this case. While contending that two previous Grievance Board cases involved similar situations, those cases involved requests for time from Respondent's leave bank, and the issue of the employees' competence to continue to perform their duties or be terminated was not involved or addressed. *See Stevens v. Mason County Bd. of Educ.*, Docket No. 96-26-397 (Mar. 8, 1998); *Gleason v. Mason County Bd. of Educ.*, Docket No. 02-26-127 (Oct. 31, 2002). Several employees were notified at the same time as Grievant that, because they had exhausted their leave and had not returned to work, they must return, resign, or be terminated. The only reason that Grievant "was the only employee who was terminated," as his counsel argues, was because all of the similarly situated employees returned to work or resigned.**

Accordingly, the evidence of record establishes that Grievant's termination for incompetency comported with applicable statutory provisions and case law. 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. 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. An employee of a county board of education may be suspended or dismissed only for immorality, incompetency, cruelty, insubordination, intemperance, willful neglectof 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. The physical inability to perform one's job duties may constitute incompetency, as contemplated by the provisions of W. Va. Code § 18A-2-8. *Heavner v. Jefferson County Board of Education*, Docket No. 04-19-065 (June 28, 2004); *Phillips v. Summers County Board of Education*, Docket No. 96- 45-146 (Mar. 27, 1997).

5. In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> **(a) that he or she has been treated differently from one or more similarly-situated employee(s);**
>
> **(b) that the different treatment is not related to the actual job responsibilities of the employees; and,**
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> **(c) that the difference in treatment was not agreed to in writing by the employee.**

***Frymier v. Higher Education Policy Comm*., 655 S.E.2d 52 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005). 6. Grievant has failed to prove discrimination or favoritism, or that his termination**

for incompetency was improper.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mason County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7 (repealed, *See Footnote 1, supra)*. 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: May 30, 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. References in this decision are to the former statutes, which continue to control the proceedings in this case.