WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

VICKI LYNN JONES,
Grievant,

v. **Docket No. 2009-1075-FayED**

FAYETTE COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Vicki Lynn Jones ("Grievant") filed this grievance against her employer, Respondent Fayette County Board of Education ("BOE"), on February 24, 2009. Her "Statement of Grievance" provides that "Grievant, a former school bus operator, has been dismissed from her employment due to lack of certification as a school bus operator. Grievant alleges violation of West Virginia Code § 18A-2-8." As relief, "Grievant seeks reinstatement to employment as a school bus operator upon her recertification as a school bus operator and/or the opportunity to apply for vacancies in other service personnel classifications which do not require certification."

As this matter is disciplinary in nature, Grievant filed directly to Level Three. *See* W.VA. CODE § 6C-2-4(a)(4). A Level Three evidentiary hearing was held before the undersigned Administrative Law Judge ("ALJ") in Beckley, West Virginia, on June 3, 2009. Grievant appeared in person and through her counsel, John Everett Roush, Esquire, West Virginia School Service Personnel Association, and the BOE appeared by and through its counsel, Erwin L. Conrad, Esquire. After presentation of the evidence, the parties were afforded the opportunity to submit proposed findings of fact and conclusions of law on or before June 22, 2009, and this matter became mature for decision on this date. Both parties submitted proposed findings of fact and conclusions of law.

Synopsis

Grievant, while off duty, was arrested for driving under the influence. Her school bus operator certification was suspended for two years by the State Board of Education. Grievant agreed to accept the two-year suspension. Thereafter, she was dismissed from her position as a school bus operator by the BOE because she did not hold the required certification.

Grievant alleges a violation of WEST VIRGINIA CODE § 18A-2-8 because a temporary suspension of certification is not specifically listed as a ground in which an employee may be dismissed. The BOE maintains that Grievant lacks the legal prerequisite to perform her assigned duties. Further, the BOE avers that the relief sought by the Grievant is speculative and premature.

The BOE has established, by a preponderance of the evidence, that the Grievant's dismissal complied with the provisions of WEST VIRGINIA CODE § 18A-2-8 and was not arbitrary and capricious. This grievance is **DENIED**.

The following findings of fact are based upon a thorough review of the record produced in this matter:

Findings of Fact

1. Prior to the disciplinary action that is the subject of this grievance, Grievant was employed by the BOE as a school bus operator.

2. Grievant received good evaluations of her performance and had no disciplinary problems prior to the situation addressed in this grievance. Level Three, Grievant's Exhibit 1.

3. In the early morning of January 1, 2008, Grievant was arrested and charged with driving under the influence.[1] At the time of her arrest, Grievant's blood alcohol level was .123.

4. At the time of her arrest, Grievant was not on duty, was not on BOE property and was not in a BOE vehicle.

5. On January 3, 2008, Fayette County Superintendent of Schools, Christopher A. Perkins, suspended Grievant without pay from her bus operator position because she was charged with driving under the influence. Level Three, Respondent's Exhibit 6.

6. On January 4, 2008, David Seay, with the BOE, notified Ben Shew, West Virginia Department of Education Executive Director of School Transportation, of the Grievant's pending charge and her suspension from employment with the BOE.

7. Upon review of the criminal complaint, the arrest report and the action taken by the BOE, Director Shew recommended to the State Superintendent that Grievant's bus operator certification be suspended[2] for two years.

8. On January 9, 2008, the State Superintendent notified Grievant that her bus operator certification would be suspended for two years. Level Three, Respondent's Exhibit 5.

9. On January 23, 2008, Grievant, through her counsel, appealed the State Superintendent's decision to suspend her bus operator certification. A hearing was held

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[1] Grievant was also charged with speeding.

[2] "Suspension" means "a temporary revocation imposed for a fixed and definite period of time. After a period of suspension has expired, the affected individual must reapply for licensure." 126 C.S.R. 4 § 1.5 (commonly referred to as "Policy 1340").

on December 8, 2008.

10. At the Department of Education hearing, Grievant agreed to accept a two-year suspension of her certification to operate a school bus in West Virginia, commencing on January 3, 2008. Level Three, Respondent's Exhibit 4.

11. By letter dated January 9, 2008, the Fayette County Superintendent and Fayette County Transportation Director was advised that Grievant's bus operator certification had been suspended for two years. Level Three, Respondent's Exhibit 5.

12. Acting on the lack of certification to serve as a bus operator, the Superintendent of Fayette County Schools provided a notice of recommendation for dismissal to Grievant and scheduled and rescheduled a termination hearing. Level Three, Respondent's Exhibits 1 and 6. A termination hearing was held on February 17, 2009.

13. At the close of the termination hearing wherein Grievant appeared in person and by counsel, the Fayette County Board of Education, by a vote of four to one (4-1), accepted the recommendation of the Superintendent and terminated the employment of Vicki Lynn Jones as a bus operator for Fayette County Schools.

Discussion

As this grievance involves a disciplinary matter, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. 156 C.S.R. 1 § 3 (2008); *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). 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 & 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).

The issue to be addressed in this grievance is whether the BOE has met its burden and proven a violation of WEST VIRGINIA CODE § 18A-2-8(a), so as to warrant the Grievant's dismissal. "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).

"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 & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997)(citation omitted). "Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable." *State ex rel. Eads v. Duncil*, 198 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 BOE has proven, by a preponderance of the evidence, that the Grievant was unable to perform her duties as a bus operator because she did not have the required certification and was therefore incompetent. The BOE's dismissal of the Grievant was reasonable given the facts and circumstances. WEST VIRGINIA CODE § 18A-2-8(a) provides, in part, that:

> (a) 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.

(Emphasis added). The BOE did not specifically articulate the precise statutory reason for dismissal. However,"[i]t 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). Grievant was dismissed because she did not have the required certification. She was provided specific notice of the charge against her. Level Three, Respondent's Exhibits 1, 5 and 6.

"The State Superintendent may suspend, revoke or refuse to renew the certification or impose any condition upon the certification of any school bus operator upon evidence that the school bus operator is not otherwise qualified to perform the

duties of school bus operator . . . ." 126 C.S.R. 92 § 19.1. Pursuant to the WEST VIRGINIA CODE OF STATE RULES, where a bus operator is found to have operated a vehicle under the influence of alcohol, his or her certification may be suspended.[3] Additionally, where a bus operator's irresponsible conduct outside of the workplace has a rational nexus to his or her position, the employee's certification may be suspended.[4]

In this matter, the Grievant operated a vehicle while intoxicated, and the State Department of Education suspended Grievant's certification without protest. A bus operator certification is required to operate a bus. Lack of the prerequisite legal

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[3] A bus operator's certification may be suspended for "[c]onviction of and/or DMV suspension or revocation of license, on a charge of operating a motor vehicle while under the influence of alcohol or controlled substances, *or preponderance of evidence presented, such as positive breath or blood test, of operating a motor vehicle under the influence of same*. The applicant/employee *shall not be certified to operate a school bus for at least two years* subsequent to a first offense for such conviction or suspension/revocation." (Emphasis added). 126 C.S.R. 92 § 19.1.6.

[4] A bus operator's certification may be suspended for violation of the employee code of conduct for actions which have a rational nexus to his or her duties. 126 C.S.R. 92 § 19.1.11. 126 C.S.R. 162 § 4.2.6 requires school employees to "demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior," while 126 C.S.R. 162 § 4.2.7 requires school employees to "comply with all Federal and West Virginia laws, policies, regulations and procedures."

A rational nexus exists between Grievant's conduct and her position as a bus operator. "A rational nexus exists if the conduct performed outside of the job directly affects the performance of the *occupational responsibilities* of the employee, or, if without contribution on the part of school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the employee to discharge the responsibilities of the position." *Rogliano v. Fayette County Bd. of Educ.*, 176 W. Va. 700, 347 S.E.2d 220 (1986)(emphasis added). It is the "occupational responsibilities" that must be examined, not, as the Grievant suggests in her proposed findings of fact and conclusions of law, some hypothetical classification. As previously recognized by this Board, a rational nexus exists between a bus operators duties and a charge of driving under the influence. *Stewart v. Marion County Bd. of Educ.*, Docket No. 96-24-151 (July 23, 1996); *Messer v. Mingo County Bd. of Educ.*, Docket No. 00-29-332 (May 16, 2001) *aff'd* by Cir. Ct. of Kanawha Co. (Civil Action #01-AA-80, Kaufman).

certification or licensure required to perform one's job duties constitutes incompetency within the meaning of WEST VIRGINIA CODE § 18A-2-8 in this particular scenario. *Rogers v. Kanawha Co. Bd. of Educ.*, Docket No. 93-20-447 (Mar. 23, 1994); *Posey v. Lewis Co. Bd. of Educ.*, Docket No. 2008-0328-LewEd (July 25, 2008). "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); *Posey*, *supra*.[5] The Grievant's lack of certification for her position constitutes "incompetency." She was unable to do her duties because she lacked the legal certification/qualification.[6]

Insofar as the Grievant argues that this matter should be analyzed under a different listed reason in WEST VIRGINIA CODE § 18A-2-8(a), namely "insubordination" and "willful

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[5] This general definition is consistent with West Virginia jurisprudence. In *Green v. Board of Education of Marion County*, 133 W. Va. 356, 56 S.E.2d 100 (1949), the Court considered the meaning of the term "incompetency" as used in an old education statute that was very similar to WEST VIRGINIA CODE § 18A-2-8(a). In Syllabus Point Two the *Green* Court held that "the word 'inefficiency' used in a resolution of a Board of Education, assuming to terminate a teacher's continuing contract of employment on the grounds of 'inefficiency and failure to perform the duties of a teacher', will be treated as synonymous with the word 'incompetency,' as used in Code, 18-7-6."

[6] Assuming *arguendo* the Grievant prevailed in this matter, it would still not be appropriate to award the requested relief. First, she requests certification at the end of her two year suspension. Such an award would be speculative as it presumes the Grievant will meet the qualifications for certification at the end of the time period. 126 C.S.R. 4 § 1.5 specifically requires that the Grievant reapply for certification after her suspension. The application process contains a battery of tests that are safety related. *See* 126 C.S.R. 92 § 15.3.1. Such relief is premature and speculative and "[t]he Grievance Board has continuously refused to deal with the issues when the relief sought is speculative or premature or otherwise legally insufficient." *Dooley v. Dep't of Transp./Div. of Highways*, Docket No. 94-DOH-255 (Nov. 30, 1994). Secondly, insofar as the Grievant seeks to apply for positions that do not require certification, there is no indication that she has been prevented from doing so. In fact, the evidence suggests she had the opportunity to apply for other positions with the BOE and simply did not apply.

neglect of duty," her arguments are unpersuasive. The preponderant evidence establishes that the Grievant was dismissed because she lacked the required legal prerequisite to perform her duties. The BOE has proven, by a preponderance of the evidence, that the Grievant was incompetent, and its decision was reasonable.

The following conclusions of law are appropriate:

Conclusions of Law

1. In a disciplinary matter the burden is upon the BOE to prove the charges against the employee by a preponderance of the evidence. *Perkins v. Greenbrier County Bd. of Educ.*, Docket No. 94-13-019 (Aug. 12, 1994). "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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

2. "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).

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

1994).

4. Respondent BOE has proven, by a preponderance of the evidence, that Grievant's dismissal complied with the provisions of WEST VIRGINIA CODE § 18A-2-8 and was not arbitrary and capricious under the facts and circumstances presented.

Accordingly, this grievance is **DENIED**.

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 Decision. *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 WEST VIRGINIA 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: August 5, 2009

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Mark Barney
Administrative Law Judge