THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DARLENE GREEN,
Grievant,

v. **Docket No. 2009-0764-KanED**

KANAWHA COUNTY BOARD
OF EDUCATION,
Respondent.

DECISION

Grievant Darlene Green filed her grievance on December 8, 2008. The statement of grievance reads:

> Respondent terminated grievant because of the result of a drug test. Grievant contends that the result was a false positive resulting from several over-the-counter and prescription medications that she is taking and irregularities in the procedure committed by the medical review officer. (See 49CFR40) Grievant asserts that the Respondent violated WEST VIRGINIA CODE §§18A-2-12a & 18A-2-8.

For relief Grievant seeks, "reinstatement with compensation for all lost wages and benefits with interest. Grievant also seeks expungement of her record of all references to her suspension and termination."

A level three hearing was held on August 25, 2009, at the Grievance Board's Charleston office. Grievant was represented by John Roush, Esq., West Virginia School Service Personnel Association, and Respondent was represented by James W. Withrow, Esq., General Counsel. This case became mature on September 24, 2009, upon the parties' submissions of Findings of Fact and Conclusions of Law.

Synopsis

Grievant is a bus operator. On September 30, 2008, she backed her bus into a parked car. Pursuant to Division of Transportation ("DOT") regulations, Grievant was

immediately taken for a drug screen. The results of that screen showed amphetamines in Grievant's system. Respondent asserts that, due to a positive result on the post-accident drug screen, Grievant has violated State Board Policy 4336 §16. Therefore, Respondent terminated Grievant on December 2, 2008, by letter.

Grievant asserts the result was a false positive, caused by the over-the-counter and prescription medicine she was taking.

Respondent has met its burden of proof in this matter. This grievance is DENIED.

Finding of Facts

1. Grievant was employed as a bus operator by Respondent for approximately eight years.

2. On September 30, 2008, Grievant backed her bus into a parked car. In accordance with DOT regulations, Grievant underwent a drug test.

3. Grievant's test was positive for amphetamines.

4. At the laboratory, Grievant's urine was split into two samples. One was tested by Quest Diagnostics Incorporated, a laboratory chosen by Respondent, while the other sample was maintained should Grievant want an independent test.

5. Quest Diagnostics conducted two tests on the sample. The first, an initial screening test, was positive for amphetamines. Upon the positive result, the laboratory then conducted a Gas Chromatography Mass Spectrophetometry ("GCMS") on the same sample.

6. The GCMS is used as a confirmatory test that is extremely specific for drugs to rule out any false positives.

7. At the time of the drug screen, Grievant was taking the following prescription medications: Lisinopril, Celexa, Veiscare, Ibuprofen and Flexeril.

8. At the time of the drug screen, Grievant was taking the following over-the-counter medications: Sudafed Sinus, Tylenol Cold Daytime, Afrin, and Dexatrim.

9. Grievant chose to have the split sample tested by an independent laboratory. The result from that test was positive for amphetamines.

10. Grievant was terminated by letter dated December 2, 2008.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *Hoover v. Lewis County Board of Education*, Docket No. 93-21-427; *Landy v. Raleigh County Board of Education*, Docket No. 89-41-232. A preponderance of the evidence is defined as "evidence which is 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." *Black's Law Dictionary* (6th ed. 1991); *Leichliter v. West Virginia Department of Health & Human Resources*, Docket No. 92-HHR-486. Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

WEST VIRGINIA CODE § 18A-2-7 provides that "[t]he superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter." WEST VIRGINIA CODE § 18A-2-8 goes on to state, 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.

However, "It is not the label a county board of education attaches to the conduct of an employee in the termination notice that is determinative. The critical inquiry is whether the board's evidence is sufficient to substantiate that the employee actually engaged in the conduct." *Allen v. Monroe County Bd. of Educ.*, Docket No. 90-31-021 (July 11, 1990); *Duruttya v. Mingo County Bd. of Educ.*, Docket No. 29-88-104 (Feb. 28, 1990). Further Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute her judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998).

Dismissal of an employee under WEST VIRGINIA CODE § 18A-2-8 "must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously." Syl. Pt. 3, in part, *Beverlin v. Board of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975); Syl. Pt. 4, in part, *Maxey v. McDowell County Board of Education*, 212 W. Va. 668, 575 S.E.2d 278 (2002); Syl. Pt. 7, in part, *Alderman v. Pocahontas County Bd. of Educ.*, __ W.Va. __, 675 S.E.2d 907(2009).

"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 are closely related to actions that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

West Virginia State Board Policy 4336, §16 provides that "The school bus operator shall have no mental, nervous, organic, or functional disease or psychiatric disorder and take no medication likely to interfere with his or her ability to operate the bus safely."

Grievant's employment as a school bus operator is also regulated in part by the Code of Federal Regulations, which in 49 C.F.R. §382.213 states:

> (a) No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions when the driver uses any controlled substance, except when the use is pursuant to the instructions of a licensed medical practitioner, as defined in §382.107, who has advised the driver that the substance will not adversely affect the driver's ability to safely operate a commercial motor vehicle.
>
> (b) No employer having actual knowledge that a driver has used a controlled substance shall permit the driver to perform or continue to perform a safety-sensitive function.
>
> (c) An employer may require a driver to inform the employer of any therapeutic drug use.

Respondent asserts Grievant violated both its policy and the Code of Federal Regulations, and in making that determination, it relies on the positive drug screen. Grievant asserts it must have been a false positive, and she relies on the prescription and over-the-counter medicines possibly causing the incorrect result.

Dr. Charles Moorefield, a licensed physician and certified medical review officer, testified at the lower level. As a certified medical review officer, Dr. Moorefield is charged with overseeing the drug testing procedure. He becomes involved when there is a positive

result. Upon being notified of a positive result, Dr. Moorefield interviews the subject in an attempt to determine if there's a medically acceptable reason for the positive. If there is, then the result is changed from a positive to a negative.

In this particular case, Dr. Moorefield spoke with Grievant upon receiving notification of a positive result. Dr. Moorefield testified that he typically discusses prescription and over-the-counter medicines with a client who has tested positive. However, he did not specifically remember his conversation with Grievant. Yet, he testified that none of the prescription medicines would give a false positive on the GCMS.[1]

On cross-examination, Grievant's counsel asked extensive questions about the over-the-counter medicines Grievant was taking at the time of the test. Dr. Moorefield continually reiterated that none of the medicine Grievant was taking would have caused a false positive.

Grievant counters this argument with supposition and two internet articles which indicate pseudoephedrine and phenylephrine, both contained in medicine Grievant was taking, would cause a false positive. First, these web sites are given little weight, as there is no indication of reliability. Also, there was no indication the web sites were referencing the GCMS, which according to Dr. Moorefield, is a highly sensitive test, much more so than the initial urine screen. Grievant's independent test verified the results of Quest Diagnostics Incorporated.

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[1]Dr. Moorefield indicated he had the notes from his conversation with Grievant close at hand, but he was never asked to review them to determine if he spoke with her about any over-the-counter medication.

Dr. Moorefield's testimony is persuasive. Respondent has met its burden. Clearly, as a bus operator, Grievant is charged with transporting children. Allowing her to continue in this position after a post-accident positive drug screen, would be irresponsible. Respondent's decision to terminate is not arbitrary or capricious. This grievance is DENIED.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *Hoover v. Lewis County Board of Education*, Docket No. 93-21-427; *Landy v. Raleigh County Board of Education*, Docket No. 89-41-232. A preponderance of the evidence is defined as "evidence which is 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." *Black's Law Dictionary* (6th ed. 1991); *Leichliter v. West Virginia Department of Health & Human Resources*, Docket No. 92-HHR-486. Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

2. WEST VIRGINIA CODE § 18A-2-7 provides that "[t]he superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter." WEST VIRGINIA CODE § 18A-2-8 goes on to state, in part, that:

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3. However, "It is not the label a county board of education attaches to the conduct of an employee in the termination notice that is determinative. The critical inquiry is whether the board's evidence is sufficient to substantiate that the employee actually engaged in the conduct." *Allen v. Monroe County Bd. of Educ.*, Docket No. 90-31-021 (July 11, 1990); *Duruttya v. Mingo County Bd. of Educ.*, Docket No. 29-88-104 (Feb. 28, 1990). Further Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute her judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998).

4. Dismissal of an employee under WEST VIRGINIA CODE § 18A-2-8 "must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously." Syl. Pt. 3, in part, *Beverlin v. Board of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975); Syl. Pt. 4, in part, *Maxey v. McDowell County Board of Education*, 212 W. Va. 668, 575 S.E.2d 278 (2002); Syl. Pt. 7, in part, *Alderman v. Pocahontas County Bd. of Educ.*, __ W.Va. __, 675 S.E.2d 907(2009).

5. "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 are closely related to actions that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

6. Respondent met its burden of proof.

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 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: December 9, 2009

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Wendy A. Elswick
Administrative Law Judge