THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DELORES K. CLARK,
Grievant,

v. **DOCKET NO. 2009-1461-WayED**

WAYNE COUNTY BOARD
OF EDUCATION,
Respondent.

DECISION

Grievant Delores Clark filed this grievance on April 15, 2009, stating, "Refusal to return Grievant to bus operator duties, while subjecting her to unnecessary medical tests, and/or providing alternative work is arbitrary and capricious." Grievant also claims a due process violation and that she has been subjected to discrimination, as she was not given alternative or "light duty" work until she was medically able to resume her bus operator duties. Her stated relief sought is "Instatement and back pay and benefits, including sick days which should have accrued after October 9, 200[8], including pro rata credit for sick days for the next year and full pension credit for days after 10/9. Interest on backpay and backpay for lost extra runs."

A level three hearing was held in the Grievance Board's office on November 4, 2009. Grievant was represented by Andy Katz, Esq. and Respondent was represented by David Lycan, Esq. The matter became mature for decision on December 4, 2009, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant was suspended from employment by Respondent after her Bus Operator credential was suspended by the West Virginia Department of Education for medical

reasons. Grievant was not offered an alternate, non-driving work assignment. Respondent had no choice but to suspend Grievant as her legal disability - lack of a required credential - rendered her incompetent to perform her job. Respondent did not discriminate against Grievant by failing to offer her alternate duties, as it had other employees in the distant past. Respondent met its burden of proof, and therefore the grievance is denied.

Findings of Fact

Based on a preponderance of the evidence, I find the following material facts have been proven:

1. Grievant is regularly employed as a bus operator by Respondent.

2. On October 8, 2008, Grievant reported to her supervisor, Tab Mathis, Respondent's Transportation/Service Personnel director, with a return-to-work release from her physician. Grievant intended to resume her duties the following day.

3. Mr. Mathis had a concern about the reasons for Grievant's hospitalization, as told to him by Grievant, and called Benjamin Shew, Executive Director for School Transportation for the West Virginia Department of Education.

4. Mr. Shew instructed Mr. Mathis to obtain additional medical documentation and then he suspended Grievant's Bus Operator credential, effective October 14, 2008. Grievant was given no notice of her right to appeal or otherwise challenge the suspension of her credential.

5. On October 9, 2008, Grievant was instructed to report to Mr. Mathis' office rather than her bus garage, and he verbally informed her of the suspension of her credential.

5. A Bus Operator must have both a license and a credential. A county cannot employ as a Bus Operator an employee who lacks a credential from the State Department of Education.

6. As a result of her lack of a valid Bus Operator certification, Grievant was suspended from employment.

7. As soon as the State Department of Education reinstated Grievant's credential, Respondent reinstated her to her bus operator position.

8. Respondent did not offer Grievant any "light duty" or alternate duties during the period of her credential suspension.

9. In February 2003, another Bus Operator, Karen Maynard, was involved in an accident and was taken off her bus route. She was allowed to do secretarial work at the bus garage for one month while she was off her route.

10. Another Bus Operator, Diane Raines, who was involved in an accident was allowed to perform secretarial duties for a period in 2006.

11. Neither of the employees who were given alternate assignments had lost their Bus Operator credential.

12. On advice of its counsel, Respondent discontinued the practice of granting employees temporary alternate assignments in 2006, and has not done so since.

Discussion

The threshold issue in this case is the status of Grievant's certification as a bus operator. Whether or not the State Department of Education should or should not have suspended her certification is not a matter within the jurisdiction of this tribunal. Here, Grievant's employer is the Respondent, not the West Virginia Department of Education.

The State Superintendent of Schools has separate authority to hear appeals of decisions made by the Department of Education, and such appeals must be made through a different forum than the Grievance Board.[1] The undersigned Administrative Law Judge has no jurisdiction over the decision to suspend Grievant's bus operator certification, and so the decision to suspend it will, for the purposes of this case, be presumed valid. Although Grievant argues that the credential suspension was improper since she was denied through due process an opportunity to appeal Mr. Shew's decision, the undersigned cannot assume, as Grievant suggests, that it was a nullity and that Respondent was therefore free to employ Grievant.

Grievant, therefore, was employed by Respondent as a Bus Operator, but when she returned to work after her absence, she was not legally able to operate a school bus.[2] She was suspended from employment until her certification was reinstated. In contrast to the discrimination issue, the suspension was a disciplinary action for which the Respondent bears the burden of proof. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.[3]

WEST VIRGINIA CODE §18A-2-8 identifies the types of conduct that can result in disciplinary action and provides, in pertinent part:

> 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,

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[1]See 126 C.S.R. 4.

[2]See 126 C.S.R. 92 § 15.

[3]*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).

> unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article.

Of the possible reasons justifying suspension of an employee, the only one that applies in this case is incompetency. Grievant admits Respondent could not permit her to drive a bus while her credential was suspended. The concept of "competency" is not limited to simply knowing how to perform one's job. "[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."[4] A legal disability is no different. Grievant was unable to drive a bus – an essential function of her job as a Bus Operator[5] – and therefore she was not competent to perform the duties of her position. It may seem odd that someone with an unblemished performance history can be considered incompetent, but the label is one prescribed by semantics rather than emotion. 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.[6]

Grievant contended in her original statement of grievance that Respondent's actions were arbitrary and capricious. An action is recognized as arbitrary and capricious when

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[4] *Heavener v. Jefferson County Bd. of Educ.,* Docket No. 04-19-065 (June 28, 2004); *Phillips v. Summers County Bd. of Educ.*, Docket No. 96-45-146 (Mar. 27, 1997).

[5]"Bus Operator" means a person employed to operate school buses and other school transportation vehicles as provided by the State Board[.]" W. VA. CODE § 18A-4-8(i)(16).

[6]*See Rogers v. Kanawha County Board of Education*, Docket No. 93-20-447 (Mar. 23, 1994); *Posey v. Lewis County Bd. of Educ.*, Docket No. 2008-0328-LewED (Jul. 25, 2008).

"it is unreasonable, without consideration, and in disregard of facts and circumstances of the case."[7] Given Grievant's admission that Respondent could not have employed her as a Bus Operator while she had no Bus Operator Credential, she appears to recognize that her suspension on that ground was reasonable and based on a consideration of the operative facts.

Based on these facts, Respondent has met its burden of proving proper the suspension of Grievant's employment for the time in which she lacked a proper Bus Operator credential.

This discrimination claim asserted by Grievant is not a disciplinary matter, so Grievant bears the burden of proof of that issue. Grievant's allegations must be proven by a preponderance of the evidence. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not."[8] Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

Grievant is correct, and Respondent does not dispute, that other Bus Operators who were unable to drive for a period of time were given alternate assignments so they could still earn a salary. However, Respondent discontinued this practice in 2006 on advice of counsel, and there is likewise no dispute that no employee has since been afforded that treatment. Grievant was not permitted to perform alternate, non-driving duties. Grievant nevertheless contends this difference in treatment is discriminatory. In order to establish

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[7] *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

[8] *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:[9]

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

Grievant was not similarly situated to the two employees she identified who had been afforded alternate work duties while they were unable to drive their buses. Respondent, on advice of its counsel who believed such assignments were not legal, discontinued the practice in 2006, at least two years before the events involved in this grievance. This change in policy changed the status of the relationship between these employers and their employer vis-a-vis the status of the relationship between Grievant and her employer. To hold otherwise would obligate to an employer, after it makes a policy change, to continue treating its employees as if the change had never been made. There was no evidence of any employee being offered this special treatment after 2006. The passage of time and the change in policy are a change in circumstances that renders Grievant's situation entirely different than those other employees. Grievant, therefore, has not established a *prima facie* discrimination claim.

The following conclusions of law support this discussion:

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[9] *The Board of Education of the County of Tyler v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

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 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. "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). W. VA. CODE §18A-2-8 identifies the types of action that can result in disciplinary action and provides, in pertinent part:

> 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. A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article.

3. 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. *Posey v. Lewis County Bd. of Educ.*, Docket No. 2008-0328-LewED (Jul. 25, 2008). *See Rogers v. Kanawha County Board of Education*, Docket No. 93-20-447 (Mar. 23, 1994); *See also Durst v. Mason County Bd. of Educ.*, Docket No. 06-26- 028R (May 30, 2008).

4. Respondent met its burden of proving that it properly suspended Grievant for the time in which her state Bus Operator credential was suspended.

5. For non-disciplinary complaints, a grievant's allegations must be proven by a preponderance of the evidence. *See*, W. VA. CODE § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "The 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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

6. In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

> (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,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

The Board of Education of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

7. Grievant was not similarly situated to those employees who were offered alternate duty assignments prior to 2006, when the Respondent instituted a policy change that prohibited such assignments.

8. Grievant did not meet her burden of proving she was discriminated against.

For the foregoing reasons, this grievance is hereby **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).

February 1, 2010

M. Paul Marteney
Administrative Law Judge