THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DOUGLAS M. MELLOW,
Grievant,

v. **DOCKET NO. 2010-1397-JefED**

JEFFERSON COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed by Grievant, Douglas M. Mellow, at level three of the grievance procedure, on April 26, 2010, contesting his suspension without pay through the end of the school year, and the failure by his employer, the Jefferson County Board of Education ("JBOE"), to renew his probationary contract. The relief sought by Grievant is, "full back pay, regular run back # 78."

A level three hearing was held before the undersigned Administrative Law Judge on July 28, 2010, in the Grievance Board's Westover office. Grievant appeared *pro se*, and Respondent was represented by Amy S. Brown, Esquire, General Counsel, Jefferson County Schools. This matter became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on August 30, 2010.

Synopsis

Grievant appeared for his afternoon bus run smelling of alcohol. When questioned by the Coordinator of Transportation, Grievant admitted that he had a beer at 10:00 a.m. Grievant was tested and his blood alcohol level was .077. Grievant was suspended for the remainder of the school year, and his probationary contract was not renewed. Grievant

claimed at the level three hearing that he had not admitted to drinking a beer, and had been taking medication which contained alcohol. Grievant also claimed that other employees who had been involved in drug activity had not been disciplined. Grievant was not a credible witness, and he did not produce evidence sufficient to support his claim of discrimination.

The following Findings of Fact are made based upon the record developed at level three.

Findings of Fact

1. Grievant began working for the Jefferson County Board of Education ("JBOE") as a regular school bus operator on February 17, 2010, and was a probationary employee. Prior to his employment as a regular employee he had been employed as a substitute bus operator since 2007.

2. JBOE has in place a Drug-Free Workplace Policy and a Transportation Employee Alcohol and Controlled Substance Abuse Policy, both of which provide that employees are not to report to work if their blood alcohol level exceeds .004. In addition, the latter Policy provides that employees are not to report to work if they have used alcohol within the previous four hours, and it specifically defines alcohol to include medications containing alcohol. Grievant had been provided with a copy of each Policy at the beginning of the 2009-2010 school year, and both Policies were reviewed with employees during the beginning of the year in-service training.

3. On February 25, 2010, Grievant appeared at the bus garage for his afternoon run, and took the keys to his bus off the board in the garage. Grievant also removed a tag that had been placed on the board which was used to notify the bus operators that the

secretary in the garage needed to see them. Grievant did not go to see what the secretary, Brenda Swinney, needed to see him about, instead, proceeding to go out to the parking lot.

4. When a JBOE bus operator removes his keys from the board in the garage, he is considered to be on the job.

5. Ms. Swinney told Robert Boylan, Coordinator of Transportation, that she needed to see Grievant. Mr. Boylan went to the parking lot and, from a distance, told Grievant to go see Ms. Swinney.

6. Grievant went to Ms. Swinney's office and stood in the doorway between her office and Mr. Boylan's office. Mr. Boylan was in his office. He observed that Grievant's eyes were glassy and he smelled strongly of alcohol. He closed the door out to the employee area and asked Grievant if he had been drinking. Grievant responded that he had a beer at 10:00 a.m. Ms. Swinney witnessed this conversation, and she also smelled alcohol on Grievant.

7. Mr. Boylan completed the paperwork necessary to obtain a voluntary reasonable suspicion test, and took Grievant to Business Health Services for alcohol testing. This trip took approximately 25 minutes, and Grievant finished eating a sandwich during the drive.

8. Grievant was given a breathalyzer test, which showed his blood alcohol level was .077. A second test was administered 15 minutes later, which showed his blood alcohol level was .074.

9. Grievant did not at any time tell Mr. Boylan on February 25, 2010, that he had taken any medication containing alcohol, or that he was ill.

10. Mr. Boylan took Grievant back to the bus garage, and Grievant was told to go home. Grievant was placed on leave pending an investigation.

11. On March 1, 2010, Grievant met with Mr. Boylan and Bill Askew, Human Resources Facilitator for JBOE, to discuss the incident on February 25, 2010. Grievant did not state at any time during this meeting that he had been taking medication on February 25, 2010, or that he had been ill on that date.

12. Grievant was suspended from his employment on March 1, 2010. JBOE voted on April 12, 2010, to ratify the suspension and to extend it through the remainder of the school year.

13. JBOE voted on March 8, 2010, not to renew Grievant's probationary contract after the 2009-2010 school year.

14. Sometime in January 2010, Grievant was in the JBOE bus garage parking lot when an officer from the Jefferson County Sheriff's Department approached him and served him with divorce papers. The officer administered a field sobriety test, and told Grievant he should not drive. Grievant told the officer and Mr. Boylan on this occasion that he had been taking cold medication which contained alcohol. Mr. Boylan explained to Grievant that if he was taking medication containing alcohol, he was to advise Mr. Boylan and let him decide whether he should be driving. Mr. Boylan told Grievant to take the afternoon off.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. *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 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 proven is more probable than not. *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in WEST VIRGINIA CODE § 18A-2-8, 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). WEST VIRGINIA CODE § 18A-2-8 provides that "[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 contendre to a felony charge."

Grievant denied that he had been drinking alcohol on February 25, 2010, testifying that he was taking daytime Nyquil and Tylenol. He denied that he had told Mr. Boylan that he had been drinking. His version of events was that he had said, "what do you want me to say, that I was drinking a beer?"

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

The undersigned does not find Grievant to be a credible witness. First, at the time the events occurred on February 25, 2010, he never mentioned that he was taking any medication to anyone, as he had done in January 2010. Grievant testified that he did not bother to tell Mr. Boylan because he did not trust him. Not only does this not make sense, but it does not explain why he also failed to mention this to Mr. Askew when he met with him on March 1. Second, the undersigned observed a nervous hesitation as Grievant was testifying at the hearing, as though he were making up the story as he went. Part of Grievant's story was that he never intended to drive the bus that afternoon, and that after he took his keys off the board he went to his car to get the medication he was taking to show it to Mr. Boylan. Again, it does not make sense that Grievant would remove his keys from the board if he did not intend to drive, and he did not explain why he did not carry through with getting the medication from his car. Both Mr. Boylan and Ms. Swinney testified that Grievant admitted he had a beer that morning.

Respondent demonstrated that Grievant appeared for work after consuming alcohol, intending to drive a bus transporting children. Very simply, someone who has no more concern for the welfare of children than this cannot be allowed to drive a school bus. The Grievance Board has previously concluded that this type of intentional behavior constitutes insubordination, intemperance, and willful neglect of duty. *Jones v. Barbour County Bd. of Educ.*, Docket No. 96-01-471 (Feb. 28, 1997).

Grievant argued he had been discriminated against, testifying that other employees had been arrested and convicted of illegal drug activities, and another employee had been charged with driving under the influence, and these employees had not been disciplined. Grievant did not identify these employees, when this occurred, or what type of work these employees performed. Mr. Askew testified that all employees who violated the Drug-Free Workplace Policy had been disciplined.

Discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination 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,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008). Grievant did not meet his burden of proof with his assertions. Grievant was not a credible witness, and he did not bolster his credibility by providing any details. Further, Grievant did not demonstrate that these alleged other employees were bus operators, or that their illicit activity occurred on school property.

The nonrenewal of a probationary contract is not a termination and is not a disciplinary matter; thus, an employee whose contract was not renewed has the burden of proof. *McClain v. Jackson County Bd. of Educ.*, Docket No. 04-18-182 (Feb. 28, 2005); *Loundman-Clay v. Higher Educ. Policy Comm'n*, Docket No. 02-HEPC-013 (Aug. 29, 2002); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). The West Virginia Supreme Court of Appeals held in *Baker v. Hancock County Bd. of Educ.*, 207 W. Va. 513, 543 S.E.2d 378 (2000), that the nonrenewal of a probationary contract at the end of the school year, even for cause, is governed by West Virginia Code § 18A-2-8a, and West Virginia Code § 18A-2-8 does not apply.[1] Even if the reasons for non-renewal are disciplinary in nature, a probationary employee is not entitled to any protections beyond those provided for in West Virginia Code § 18A-2-8a. *See Baker, supra*; *Meredith v. Mercer County Bd. of Educ.*, 00-27-247 (Jan. 31, 2000); *Burrows v. Wood County Bd. of Educ.*, Docket No. 96-54-281 (Oct. 24, 1996).

West Virginia Code § 18A-2-8a provides:

> The superintendent at a meeting of the board on or before the first Monday in May of each year shall provide in writing to the board a list of all probationary teachers that he recommends to be rehired for the next ensuing school year. The board shall act upon the superintendent's recommendations at that meeting in accordance with section one of this article. The board at this same meeting shall also act upon the retention of other probationary employees as provided in sections four and five of this article. Any such probationary teacher or other probationary employee who is not rehired by the board at that meeting shall be notified in writing, by

[1]However, if a board of education wishes to dismiss a probationary employee for disciplinary reasons prior to the end of the school year, then it must proceed under West Virginia Code § 18A-2-8. *Cordray v. Wood County Bd. of Educ.*, Docket No. 90-54-267 (Jan. 31, 1991).

> certified mail, return receipt requested, to such persons' last-known addresses within ten days following said board meeting, of their not having been rehired or not having been recommended for rehiring.
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> Any probationary teacher who receives notice that he has not been recommended for rehiring or other probationary employee who has not been reemployed may within ten days after receiving the written notice request a statement of the reasons for not having been rehired and may request a hearing before the board. Such hearing shall be held at the next regularly scheduled board of education meeting or a special meeting of the board called within thirty days of the request for hearing. At the hearing, the reasons for the nonrehiring must be shown.

County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Syl. Pt. 3, *Dillon v. Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986). *See Rogers v. Logan County Bd. of Educ.*, Docket Nos. 99-23-196/246 (Nov. 16, 2002). West Virginia Code § 18A-2-8a gives broad discretion to the county board when determining whether or not to rehire a probationary employee, and to prove his case, Grievant must establish the board's decision to not renew his contract was arbitrary and capricious. *Beheler v. Logan County Bd. of Educ.*, Docket No. 98-23-276 (Dec. 11, 1998). *See Miller v. Bd. of Educ.*, 190 W. Va. 153, 437 S.E.2d 591 (1993); *Pockl v. Ohio County Bd. of Educ.*, 185 W. Va. 256, 406 S.E.2d 687 (1991); *Rogers, supra.*

The evaluation of a personnel decision under the arbitrary and capricious standard entails close examination of the process used to make the decision. Considerable deference must be afforded the professional judgment of those who made the decision. *Cowen v. Harrison County Bd. of Educ.*, 195 W. Va. 377, 465 S.E.2d 648 (1995). *Baird v. Kanawha County Bd. of Educ.*, Docket No. 95-20-445 (Sept. 16, 1996). "In applying the

‘arbitrary and capricious' standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision and whether there has been a clear error of judgment. *Bowman Transp. v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974); *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. *Bowman, supra*, at 286." *Hill and Cyrus v. Kanawha County Bd. of Educ.*, Docket No. 96-20-362 (Jan. 30, 1997). "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 have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

Respondent’s decision not to renew Grievant’s contract was not unreasonable. Grievant was a bus operator entrusted with safely transporting students to and from school. A bus operator who reports to work under the influence of alcohol, intending to drive a school bus, cannot be trusted to transport students.[2]

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[2] Respondent has since been notified that the State Department of Education does not intend to renew Grievant’s bus operator certification. Without this certification, Grievant cannot operate a school bus, which is grounds for termination. *Swimm v. Wayne County Bd. of Educ.*, Docket No. 2009-1690-WayED (Feb. 22, 2010). “Lack of the prerequisite

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

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 WEST VIRGINIA CODE § 18A-2-8, 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).

3. WEST VIRGINIA CODE § 18A-2-8 provides that "[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 contendre to a felony charge."

4. Respondent demonstrated that Grievant appeared for work under the influence of alcohol in violation of its Drug-Free Workplace Policy, and that he intended to transport children while in this condition.

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legal certification or licensure required to perform one's job duties may constitute incompetency within the meaning of W. VA. CODE § 18A-2-8. *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 (July 25, 2008).

5. The Grievance Board has previously concluded that this type of intentional behavior constitutes insubordination, intemperance, and willful neglect of duty. *Jones v. Barbour County Bd. of Educ.*, Docket No. 96-01-471 (Feb. 28, 1997).

6. The nonrenewal of a probationary contract at the end of the school year, even for cause and if disciplinary in nature, is governed by West Virginia Code § 18A-2-8a, and West Virginia Code § 18A-2-8 does not apply. *Baker v. Hancock County Bd. of Educ.*, 207 W. Va. 513, 543 S.E.2d 378 (2000).

7. West Virginia Code § 18A-2-8a gives broad discretion to the county board when determining whether or not to rehire a probationary employee, and to prove his case, Grievant must establish the board's decision to not renew his contract was arbitrary and capricious. *Beheler v. Logan County Bd. of Educ.*, Docket No. 98-23-276 (Dec. 11, 1998). *See Miller v. Bd. of Educ.*, 190 W. Va. 153, 437 S.E.2d 591 (1993); *Pockl v. Ohio County Bd. of Educ.*, 185 W. Va. 256, 406 S.E.2d 687 (1991); *Rogers v. Logan County Bd. of Educ.*, Docket Nos. 99-23-196/246 (Nov. 16, 2002).

8. Respondent's decision not to renew Grievant's probationary contract was not arbitrary and capricious.

9. In order to establish a discrimination 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,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

10. Grievant did not prove his claim of discrimination.

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).

BRENDA L. GOULD
Administrative Law Judge

Date: October 8, 2010