THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

MICHAEL HOLDEN,
Grievant,

v. **DOCKET NO. 2013-0730-LewED**

LEWIS COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed by Grievant, Michael Holden, at level three of the grievance procedure, on October 26, 2012, contesting his dismissal from his employment with the Lewis County Board of Education, when he was unable to pass a bus operator physical performance test administered to him after a two year medical leave of absence. The statement of grievance reads:

> The Board of Education refused my attempt to return to work from an approved medical leave of absence. In doing so, the Board relied upon factors that are not part of the requirements of WVDE policy "4336," found at Title 126, Series 92 of the West Virginia Code of State Regulations. Moreover, if the Employer thought I could not have worked, it should have granted me an additional medical leave of absence.

The relief sought by Grievant is "[r]einstatement with back pay and interest; alternatively, the benefits of remaining covered by PEIA."

A level three hearing was held before the undersigned Administrative Law Judge on March 13, 2013, at the Grievance Board's Westover, West Virginia office. Grievant was represented by Andrew J. Katz, Esquire, The Katz Working Families' Law Firm, L.C., and Respondent was represented by Denise M. Spatafore, Esquire, Dinsmore & Shohl, LLP.

This matter became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on April 26, 2013.

Synopsis

Grievant, a bus operator, attempted to return to work after a two year medical leave of absence. Grievant had gained weight while recuperating from his medical condition, and Respondent was concerned about whether Grievant could safely perform the duties of his position. Respondent requested assistance from the State Department of Education, which advised that the bus operator physical performance or physical agility test could be administered to determine whether Grievant was physically capable of safely operating a bus. This test was developed to assure that new bus operators can safely perform the duties of the position. The test was administered to Grievant by a bus inspector employed by the State Department of Education, and Grievant was unable to pass the very first requirement on the test, which was going up and down the bus steps 3 times in 30 seconds. The reason this is part of the test is that a bus operator must be able to help the children get off the bus quickly in an emergency. Respondent dismissed Grievant from his employment because he could not safely perform the duties of his position, which include assisting children in getting off the bus in an emergency. Grievant's claim that he should have been granted medical leave of absence was not timely filed.

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

Findings of Fact

1. Grievant was employed by the Lewis County Board of Education ("LBOE") as a substitute bus operator on April 16, 1996, and was hired as a regular bus operator on March 2, 1999.

2. Grievant was in an accident at his home and sustained an injury which prevented him from working during the 2010-2011 school year, and LBOE approved a medical leave of absence for Grievant for that school year.

3. Grievant attempted to return to work at the beginning of the 2011-2012 school year. After driving the bus one day Grievant felt that he was not physically able to perform his duties, and requested another medical leave of absence. LBOE approved a medical leave of absence for Grievant for the 2011-2012 school year.

4. In March 2011 Grievant weighed 640 pounds. Prior to that time his weight had been estimated at 495 pounds when he had a physical examination, because the scales used by the doctor's office were equipped only to weigh up to 450 pounds. Grievant gained weight after his injury as he was unable to walk any distance for some period of time, but it is unknown how much weight he gained.

5. Grievant returned to work at the beginning of the 2012-2013 school year. At that time Grievant weighed around 580 pounds.[1] Grievant passed a physical examination administered by his physician.

6. LBOE Superintendent Joseph Mace received telephone calls from parents who were concerned about whether Grievant could safely drive the school bus, and he was

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[1] Grievant testified at the October 8, 2012 hearing before the Board of Education that he weighed 580 pounds at his last weigh-in, which was around September 22, 2012.

also concerned about Grievant's ability to perform his duties due to his weight, specifically, Grievant's ability to get up from his seat and walk to the back of the bus in the required amount of time to turn the buzzer off at the rear of the bus and shut the door if there were an accident. Superintendent Mace was concerned for the safety of the children on the bus in an emergency situation. Superintendent Mace spoke with Director of Transportation L.D. Skarzinski about his concerns.

7. Mr. Skarzinski spoke with LBOE Transportation Supervisor Terry Cogar about Superintendent Mace's concerns. Mr. Cogar had observed Grievant drive a bus around the parking lot at the bus garage, but he was concerned with Grievant's ability to physically handle the students on the bus if there were an accident. He did not believe Grievant was in good shape physically. Mr. Cogar spoke with David Baber, an inspector employed by the State Department of Education ("DOE"), about whether there was anything that Grievant needed to do in order to return to work, and Mr. Baber mentioned that there is a physical agility test. Mr. Baber told Mr. Cogar that he would need to talk to Ben Shew, Executive Director for the Office of School Transportation, DOE. Mr. Shew was unavailable at that time, but later contacted Mr. Cogar and explained that the physical agility test could be administered to determine whether Grievant could safely perform the minimum requirements for a bus operator.

8. Grievant drove the bus for one and a half days at the beginning of the 2012-2013 school year. After Grievant drove his morning run on the second day of school, on August 24, 2012, Mr. Baber administered the physical agility test, labeled the School Bus Driver Physical Performance Test ("the PP Test"), to Grievant. The first item on the test required Grievant to make 3 trips up and down the bus steps in 30 seconds. It took

Grievant 48 seconds to complete this task. Because Grievant was unable to meet this requirement, Mr. Baber did not test Grievant on the remaining seven requirements. Grievant failed the test.[2]

9. A school bus operator must be able to assist in the evacuation of students in the event of an emergency. The bus operator must be able to help students get out of their seats and help students get up and down the steps, and that is the basis for the requirement on the PP Test that the driver be able to go up and down the steps 3 times in 30 seconds.[3]

10. Mr. Baber told Mr. Cogar and Mr. Skarzinski that Grievant should not be allowed to drive a school bus. Mr. Cogar believed Mr. Baber said that Grievant could not drive a school bus because he failed the PP Test. Grievant was not allowed to drive his afternoon run, or anytime thereafter.

11. The PP Test was developed by the DOE in 2006, and all new West Virginia school bus operators must pass this test in order to be certified as bus operators. It represents the minimum standards required of bus operators.

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[2] DOE's bus operator regulations provide that if a candidate fails "any portion of the skills of performance tests, the remainder of the test(s) shall not be administered." 126 C.S.R. 92 § 15.2.14.a.

[3] Grievant pointed out that DOE's regulations do not list going up and down the steps in 30 seconds as a duty of a bus operator. DOE's regulations state at § 16.2, "[t]he duties to be performed by a school bus operator **include** the following: . . ." 126 C.S.R. 92. (Emphasis added.) While this particular task is not included in the list of duties, it is quite clear that the list is not meant to be all inclusive. Grievant did not dispute that he is responsible for safely transporting students.

12. The BOE also encourages counties to administer the PP Test to bus operators each year as a training tool, and it is also used by some counties when a bus operator returns to duty after a medical leave of absence.

13. Grievant requested a medical leave of absence for the 2012-2013 school year, and that request was denied by LBOE on September 10, 2012. Grievant was notified of this action by letter dated September 11, 2012.

14. Grievant again raised the issue of a medical leave of absence at the hearing before LBOE on October 8, 2012, on the Superintendent's recommendation that his employment be terminated.

15. By letter dated October 10, 2012, Grievant was notified that LBOE had accepted the Superintendent's recommendation that Grievant's employment be terminated, retroactive to August 25, 2012, due to Grievant's "continued inability to physically perform all the required duties of a school bus operator in the state of West Virginia." The termination letter does not address Grievant's renewed request for a medical leave of absence.

16. At the time his employment was terminated, Grievant still held a bus operator certification issued by the DOE.

17. Respondent has not required any other bus operator returning from a leave of absence to pass any part of the PP Test when returning to work after a medical leave of absence.

18. No other bus operator has returned to work for LBOE after a two year medical leave of absence. No other bus operator who has returned to work for LBOE

exhibited physical conditions which caused LBOE administrators to be concerned about their physical ability to perform their duties.

19. One bus operator returned to work for LBOE after a knee injury, and was required to wear a knee brace. He had several operations on his knee over the years, and underwent rehabilitation on the knee. The record does not reflect whether this bus operator exhibited any problems walking after he returned to work.

Discussion

Respondent asserted that with regard to the challenge to LBOE's decision not to grant another medical leave of absence, this grievance was untimely filed. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997).

W. VA. CODE § 6C-2-3(a)(1) states that, "[a]n employee shall file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-4(a)(1) provides, in pertinent part:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. The employee shall also file a copy of the grievance with the board.

> State government employees shall further file a copy of the grievance with the Director of the Division of Personnel.

The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998).

LBOE denied Grievant's request for a medical leave of absence on September 10, 2012, and Grievant was notified by letter the following day. Grievant did not deny that he had promptly received notification of this decision. Adding two days for delivery, Grievant would have received notification by September 13, 2012. He had until October 4, 2012, to grieve this decision. This grievance was not filed until October 26, 2012. Grievant argued that he could grieve this issue because he had raised it again at the LBOE hearing on his termination on October 8, 2012. He offered no other excuse for failure to grieve this issue in a timely manner.

While Grievant raised the issue of his request for a medical leave of absence at the October 8, 2012 LBOE hearing, the record does not reflect that LBOE gave this renewed request any consideration. Respondent had already made its determination on this issue, and had told Grievant its determination in writing. Grievant had until October 4, 2012, to grieve the denial of his medical leave of absence and he failed to do so. In fact, the time period for filing the grievance had already passed by the time Grievant raised this issue at the LBOE hearing. There is no evidence that any LBOE personnel gave Grievant some reason to believe that the issue had not been decided when LBOE acted on the request on September 10, 2012, or that LBOE would entertain his request anew at the October 8,

2012 Board hearing. The Supreme Court of Appeals of West Virginia, in *Naylor v. West Virginia Human Rights Commission*, 180 W. Va. 634, 378 S.E.2d 843 (1989), defined the types of representations made by employers which would bar a subsequent claim of untimely filing. The Court held that estoppel was available to the employee only when the untimely filing "was the result either of a deliberate design by the employer or actions that an employer should unmistakably have understood would cause the employee to delay filing his charge." There is no evidence that any LBOE personnel made any representations of any kind to Grievant that this issue was not dead. This issue has not been timely grieved.

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 on 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 argued that his employment could not be terminated for failure to pass the PP Test, and that the PP Test is flawed because it creates physical requirements beyond what are set forth in the BOE's regulations related to bus operator qualifications. Finally, Grievant argued he was discriminated against, in that no other bus operator has been required by Respondent to pass the test at issue after return from a leave of absence. Respondent argued that the PP Test certainly could be used to determine whether Grievant was physically capable of safely transporting the students when Respondent's personnel's observations led them to believe that Grievant might not be up to the task.

Grievant's employment was terminated because Respondent felt that his physical condition rendered him incapable of **safely** discharging the duties of his position. Whether the PP Test creates physical requirements beyond what is set forth in the BOE's regulations, or whether the PP Test was designed to be administered only to new bus operators is of no moment. There is no doubt that a school bus operator is required to help children quickly get off the bus in the case of an emergency. The fact is that, due to his physical condition, Grievant was unable to go up and down the bus steps quickly, which Respondent believed compromised the safety of the children in an emergency situation. Grievant did not offer any evidence to dispute this conclusion. Rather than assuming that Grievant could not carry out his duties in a safe manner, Respondent asked the DOE for guidance on this issue, and was advised that the PP Test could be administered to determine whether there was any real basis for concern. Respondent had every right to

take all steps necessary to determine whether Grievant could safely carry out all the requirements of operating a school bus, and the PP Test offered one method by which this could be determined.[4] The PP Test verified the misgivings of Respondent's personnel. Rather than place children at risk under Grievant's watch, Grievant's employment was terminated for incompetency.

"'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). *See Durst v. Mason County Bd. of Educ.*, Docket No. 06-26-028R (May 30, 2008). *Posey v. Lewis County Bd. of Educ.*, Docket No. 2008-0328-LewED (July 25, 2008).

> 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 under which 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

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[4] Grievant also argued that the Superintendent was somehow precluded from using the PP Test to gauge Grievant's ability to safely operate the bus, because DOE's regulations provide that if there is any question "regarding the ability of a school bus operator and the safety of students or the sufficiency of an annual physical examination," the Superintendent "has the right to require a physical and/or psychological examination from a designated health care provider." 126 C.S.R 92 § 18.2. This regulation does not say that this is the only action that can be taken by a County Superintendent to determine whether a bus operator can safely operate a bus, nor did Grievant cite any statute that would give the State Board of Education the authority to place any limitation on a County Superintendent or a County Board of Education that has not been taken over by the State Board of Education. This argument is specious.

> 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.

Durst, supra.

In support of its position, Respondent offered the testimony of Mr. Shew and Superintendent Mace, both of whom testified that they did not believe Grievant could safely transport students when he could not perform the very first function on the PP Test. Superintendent Mace further questioned whether Grievant could walk to the rear of the bus to safely discharge his duties. Mr. Shew testified that a school bus operator must be able to assist in the evacuation of students in the event of an emergency. The bus operator must be able to help students get out of their seats and help students get up and down the steps, and that is the basis for the requirement on the PP Test that the driver be able to go up and down the steps 3 times in 30 seconds. Mr. Shew did not believe that Grievant should be driving a school bus because his inability to perform this function compromises the safety of the students. Grievant offered his opinion that he could safely perform the duties of a school bus operator, but he did not explain how this would be possible when he could not manage to quickly get up and down the bus steps to get the children off the bus in the event of an emergency. One must wonder whether Grievant could even get himself out of his seat and off the bus quickly enough in an emergency such as a bus fire. Respondent demonstrated that Grievant was not competent to safely perform his duties.

Finally, Grievant argued he was discriminated against. For purposes of the grievance procedure, 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 demonstrate that any other employee was similarly-situated to him. While other employees have returned to work from a medical leave of absence and not been required to take the PP Test, none had been off work for two years, and Grievant did not demonstrate that on their return to work, any other employee exhibited physical conditions which did or should have caused a concern as to whether that employee could safely transport children. Respondent had a legitimate concern, and took the action necessary to determine whether Grievant could meet the minimum standards for a bus operator, which he could not.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If the

respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997).

2. An employee must file a grievance within 15 days "following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance." W. VA. CODE § 6C-2-4(a)(1); W. VA. CODE § 6C-2-3(a)(1).

3. The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998).

4. Grievant did not timely grieve the denial of his request for a medical leave of absence, and he did not present a valid excuse to the untimely filing.

5. 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).

6. 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).

7. 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."

8. "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)." *Durst v. Mason County Bd. of Educ.*, Docket No. 06-26-028R (May 30, 2008).

9. Respondent demonstrated that Grievant was not physically able to safely perform his duties as a bus operator.

10. 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).

11. Grievant did not demonstrate that any other employee was similarly-situated to him.

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: June 6, 2013