

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RON BROWN,

Grievant,

v.

Docket No. 2023-0083-HamED

HAMPSHIRE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Ron Brown, is employed by Respondent, Hampshire County Board of Education, as a bus driver. Grievant also trains Respondent's drivers through Eastern Panhandle Instructional Cooperative (EPIC). On August 1, 2022, Grievant initiated this action after Respondent issued him a written reprimand and suspended for a year its use of his driver training services through EPIC. Respondent had determined that Grievant violated law and policy by driving his bus left of the center line and that this caused an oncoming truck to strike a student. Grievant asserts discrimination because Respondent failed to discipline another bus driver who crossed left of center to block the fleeing vehicle. Grievant claims tortious interference with his EPIC contract and that Respondent is not statutorily authorized to stop using his third-party services. He requests mitigation.

On August 5, 2022, the parties waived the grievance directly to level three.¹ A level three hearing occurred before the undersigned at the Westover office of the Public Employees Grievance Board on October 27, 2022. Grievant appeared in person and was represented by Rebecca Roush, Esq., WVSSPA. Respondent appeared by

¹West Virginia Code § 6C-2-4(a)(4) provides that a grievance may proceed directly to level three of the upon agreement of the parties.

Superintendent Jeffrey Pancione and was represented by Kim Croyle, Esq., Bowles Rice LLP. This action matured for decision on November 21, 2022. Each party submitted Proposed Findings of Fact and Conclusions of Law (PFFCL).

Synopsis

Grievant is employed as a bus driver by Respondent, Hampshire County Board of Education, and trains Respondent's drivers through a third-party employer. One morning, Grievant maneuvered his bus over the center line in response to an oncoming pickup truck that had crossed into his lane. The pickup truck in turn veered to its right where it struck and injured a student attempting to crossover to board the bus. Respondent issued Grievant a written reprimand which deemed Grievant's maneuver improper and the cause of injury. Respondent suspended for a year its use of Grievant's training services. Grievant claims that he acted to protect students by maneuvering for impact. Grievant asserts that Respondent is not statutorily authorized to stop using his third-party services and claims tortious interference. The Grievance Board lacks jurisdiction over claims related to Grievant's third-party employment. Respondent proved that Grievant improperly crossed the center line and that this infraction was associated with an injury. Grievant failed to prove discrimination or mitigation. Accordingly, this grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant, Ron Brown, is employed by Respondent, Hampshire County Board of Education, as a bus driver.

2. Grievant is also employed as a bus operator trainer by the Eastern Panhandle Instructional Cooperative (EPIC), an educational services cooperative governed by West Virginia Code. (Grievant's testimony).

3. The morning of April 25, 2022, Grievant drove his usual route with students aboard his bus when a camera on the bus behind him documented the following incident. (Grievant's Exhibit A).

4. At the crest of a hill, Grievant stopped his bus as a student moved to the shoulder of the road. At the same time, an oncoming pickup truck crossed into Grievant's lane. Whereupon, Grievant deployed his stop sign and maneuvered left of center. Grievant's maneuver did not slow the oncoming truck which swerved to its right. At that moment, the student took a step into oncoming traffic and was struck by the pickup truck. The force of the truck lifted the student into the air and threw him back against a road sign. The pickup truck continued unabated and only slowed to a stop many car lengths ahead when the bus following Grievant crossed the center line to block the truck from fleeing. (Grievant's Exhibit A).

5. Grievant maneuvered left of center to position the bus for impact, as well as to better see through the sun in his mirrors and get the truck driver's attention. (Grievant's testimony).

6. The student was hospitalized but has since fully recovered.

7. Days after the incident, upon an invitation from Superintendent Jeffrey Pancione, a Hampshire County Deputy Sheriff viewed video taken from the bus that had been following Grievant. The Sheriff issued a report which determined that, while the sun had distracted both drivers, Grievant was ultimately at fault because he crossed the

center line and ran the pickup truck into the student. However, neither driver was issued a citation.

8. The West Virginia Department of Education (WVDE) conducted its own investigation and recommended that Respondent terminate Grievant's employment due to multiple violations of State Code and WVDE Policy 4336, including crossing the center line, not moving as far right as possible, not coming to a full stop before activating the red flashing lights, and not training the injured student to move towards the bus when signaled or properly signaling the student. (Testimony of State Department of Education Transportation Director David Barber and State Department of Education bus operator trainer Darrin Younker).

9. On July 8, 2022, Respondent issued Grievant a letter of reprimand, citing him only for crossing the center line. It stated in relevant part:

...As you slowed to pick up the student, you crossed the center line of the road, causing the on-coming driver to swerve to avoid hitting your bus, and in doing so, that driver struck the student who was walking toward the road to board the bus. Although you were not cited, the police report found you to be at fault in causing the accident that resulted in a student being injured. ...

Your actions ... failed to comply with the State Code, as it relates to staying in your lane and not crossing the center line. A review of your history reveals that you have satisfactory evaluations and no driving infractions. As a result of the foregoing, I am choosing not to suspend you or terminate your employment. Instead, I am placing this letter in your file and requiring you to undergo re-training, which you have already completed.

As I explained when we met, in addition to being investigated by law enforcement, the accident was investigated by the West Virginia Department of Education, Office of Transportation. They recommended, and I agreed, to recommend to EPIC that you not be permitted to train

other bus operators for the remainder of the 2022-2023 school year. Let this letter serve as notice, by my directive, that you will not be permitted to train any drivers in Hampshire County until after June 30, 2023.

(Grievant's Exhibit F).

10. WVDE Policy 4336 states that "[w]hen approaching the stop, the operator shall ... move as far as possible to the right on the traveled portion of the roadway." w.

VA. CODE ST. R. § 126-92-12.1.b.4. (2020).

11. West Virginia Code § 17C-7-9(a) states:

Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply: (1) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

12. West Virginia Code § 17C-7-1(a) states:

Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows: (1) When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement; (2) When the right half of a roadway is closed to traffic while under construction or repair; (3) Upon a roadway divided into three marked lanes for traffic under the rules applicable thereon; or (4) Upon a roadway designated and signposted for one-way traffic.

13. West Virginia Code § 17C-7-6(a) states:

No vehicle shall at any time be driven to the left side of the roadway under the following conditions: (1) When approaching the crest of a grade or upon a curve in the highway where the driver's view is obstructed within such distance as to create a hazard in the event another vehicle might approach from the opposite direction; ...

14. EPIC serves several county boards. Each board contacts either EPIC or

an EPIC trainer when it determines that a driver needs training.

15. Each county board chooses from the EPIC trainers who are available to serve its area.

16. Two EPIC trainers serve Respondent.

17. An EPIC trainer may serve multiple counties.

18. Grievant voluntarily limits his training services with EPIC to Respondent's drivers.

19. Each county board pays EPIC and EPIC in turn pays its trainers.

20. While Respondent never followed through on recommending that EPIC not use Grievant to train, Respondent has not used Grievant's services through EPIC to train its own drivers since issuing the letter of reprimand.

21. West Virginia Code provides that the governing council of an educational services cooperative consists of numerous individuals including the superintendent of each county participating in the cooperative agreement. W. VA. CODE §18-5-13C(c)(1).

22. Thus, Superintendent Pancione is a voting member on EPIC's council.

23. West Virginia Code further states, in relevant part:

The governing council is the sole employer of the educational services cooperative's personnel it employs and shall be responsible for any benefit and liability programs necessitated by such employment. ... A recipient of personnel services from the educational services cooperative is not deemed an employer because of the exercise of supervision or control over any personnel services provided.

W. VA. CODE §18-5-13C(d)(3).

24. There is no evidence that Grievant's employment with EPIC was suspended or terminated or that EPIC took any action against Grievant.

25. Over his 17 years with Respondent, Grievant has a stellar driving record.

26. No one was injured when the bus following Grievant crossed the center line to prevent the offending pickup truck from fleeing.

Discussion

The grievant bears the burden of proof in a grievance that does not involve a disciplinary matter and must prove her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). In disciplinary matters, the burden of proof rests with the employer to prove that the action taken was justified, and the employer must prove the charges against an employee by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). “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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Respondent issued Grievant a written reprimand, charging only that Grievant crossed the center line in violation of law and policy, and that this caused an oncoming truck to veer right and strike a student. Respondent also suspended its use of training services provided by Grievant through third-party employer EPIC. Grievant claims discrimination because the bus driver behind him also crossed the center line to block the fleeing truck without any repercussion. Grievant primarily challenges the suspension of his training services as tortious interference with his third-party employment contract. He claims that Respondent is not statutorily authorized to stop using his services through EPIC and requests mitigation.

The Grievance Board is limited by statute to the type of grievances it can adjudicate. Under its enabling statute, "[g]rievance' means a claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee ..." W. VA. CODE § 6C-2-2(i)(1). As EPIC is not a party to this action, any claims against EPIC are improperly pled. Further, Grievant does not cite a violation of statute, rule, policy, or agreement in relation to his claims of tortious interference or Respondent's non-use of training services through EPIC. Thus, Grievant failed to prove by a preponderance of the evidence that the Grievance Board has jurisdiction over these claims.

As for Grievant's written reprimand, the only charge made therein is that Grievant crossed the center line and this caused an oncoming truck to strike a student. This will therefore be the only charge addressed herein. A grievance concerning a letter of reprimand involves a disciplinary matter in which the employer bears the burden of establishing the charges against an employee by a preponderance of the evidence. *Simms v. Division of Natural Resources*, Docket No. 2015-1156-DOCS (Nov. 12, 2015). Respondent has discretion to take disciplinary actions, but those actions must be reasonable and not arbitrary and capricious. *McDaniel v. Div. of Highways*, Docket No. 2017-1404-CONS (June 30, 2017).

An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "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), *aff'd*, Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

Respondent asserts that law and policy mandates that bus drivers stay in their lane. Respondent concedes that bus drivers do on occasion cross the center line but implies it cannot rectify all infractions. As such, it did not discipline the bus driver behind Grievant that had crossed the center line to block the truck from fleeing. Respondent implies that it only disciplined Grievant because his actions resulted in injury. Despite WVDE recommending dismissal, Respondent only issued Grievant a written reprimand. This was due to Grievant's stellar record and the lack of prior infractions over 17 years of employment. Respondent proved by a preponderance of the evidence that Grievant violated law and policy in crossing the center line and that this was associated with an injury. A written reprimand is a minor form of discipline and is proportionate to Grievant's infraction. Respondent proved the written reprimand was not arbitrary and capricious.

Grievant alleges discrimination in that the second bus crossed the center line into oncoming traffic without repercussion. "Discrimination' means 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). Grievant did not show that he was similarly situated to the second bus driver because, unlike the second bus driver, his actions were associated with an injury. Thus, Grievant failed to prove discrimination by a preponderance of the evidence.

Lastly, Grievant implies mitigation. “[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was ‘clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the offense and the personnel action.’ *Martin v. W. Va. Fire Comm’n*, Docket No. 89-SFC-145 (Aug. 8, 1989).” *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995), *aff’d*, Kanawha Cnty. Cir. Ct. Docket No 95-AA-66 (May 1, 1996), appeal refused, W.Va. Sup. Ct. App. (Nov. 19, 1996).

“Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation.” *Overbee v. Dep’t of Health and Human Resources/Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996); *Olsen v. Kanawha County Bd. of Educ.*, Docket No. 02-20-380 (May 30, 2003), *aff’d*, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), appeal refused, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004). “When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate

to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved.” *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994); *Cooper v. Raleigh County Bd. of Educ.*, Docket No. 2014-0028-RaLED (Apr. 30, 2014), *aff’d*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

Respondent considered Grievant’s stellar record in issuing Grievant a letter of reprimand instead of dismissing him. A letter of reprimand is a relatively minor punishment and not disproportionate to crossing the center line and the associated injury. Grievant understood the prohibitions against crossing the center line. Grievant did not prove that his punishment was arbitrary and capricious or that mitigation is warranted. Accordingly, this grievance is DENIED.

Conclusions of Law

1. The grievant bears the burden of proof in a grievance that does not involve a disciplinary matter and must prove her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). In disciplinary matters, the burden of proof rests with the employer to prove that the action taken was justified, and the employer must prove the charges against an employee by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3. “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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. "'Grievance' means a claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee ..." W. VA. CODE § 6C-2-2(i)(1).

3. Grievant failed to prove by a preponderance of the evidence that the Grievance board has jurisdiction over claims of tortious interference or Respondent's non-use of third-party services.

4. Respondent has discretion to take disciplinary actions, but those actions must be reasonable and not arbitrary and capricious. *McDaniel v. Div. of Highways*, Docket No. 2017-1404-CONS (June 30, 2017).

5. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

6. Respondent proved by a preponderance of the evidence that Grievant violated law and policy in crossing the center line and that his infraction was associated with an injury. Thus, the letter of reprimand was proportionate to the infraction and not unreasonable.

7. "'Discrimination' means 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).

8. Grievant did not prove discrimination by a preponderance of the evidence, as his infraction was associated with an injury.

9. “[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was ‘clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the offense and the personnel action.’ *Martin v. W. Va. Fire Comm’n*, Docket No. 89-SFC-145 (Aug. 8, 1989).” *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995), *aff’d*, Kanawha Cnty. Cir. Ct. Docket No 95-AA-66 (May 1, 1996), appeal refused, W.Va. Sup. Ct. App. (Nov. 19, 1996).

10. Respondent did not prove by a preponderance of the evidence that mitigation is warranted.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Intermediate Court of Appeals.² Any such appeal must be filed within thirty (30) days of receipt of this decision. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

²On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over “[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]” W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.

DATE: January 4, 2023.

Joshua S. Fraenkel
Administrative Law Judge