

# THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**ROBIN GABBERT,**  
**Grievant,**

**v.**

**Docket No. 2017-2029-BooED**

**BOONE COUNTY BOARD OF EDUCATION,**  
**Respondent.**

## **DECISION**

Grievant, Robin Gabbert, is employed by Respondent, Boone County Board of Education ("Board"), as a Secretary III/Accountant II, in the Transportation Department.

Ms. Gabbert filed an expedited<sup>1</sup> grievance dated March 31, 2017, alleging:

Grievant was suspended without pay pending criminal investigation of her conduct on the job. Grievant has been credibly informed that no charges will be filed against her, yet Respondent has continued her suspension without pay. Grievant alleges violation of W. Va. Code 18A-2-12a (due process) and 18A-2-8.

As relief, Grievant seeks reinstatement with back pay and interest as well as removal of any reference to the suspension from all files maintained by Respondent.

This matter was originally scheduled for hearing on June 12, 2017, but was continued for good cause shown by Grievant. A level three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board on August 25, 2017. Grievant was present and represented by Joe Spradling, Esquire, West Virginia School Service Personnel Association. Respondent was represented by Rebecca Tinder, Esquire, Bowles Rice LLP. This matter became mature for decision on October 2, 2017.

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<sup>1</sup> See W. VA. CODE § 6C-2-4(a)(4).

## **Synopsis**

Grievant has been suspended without pay pending a criminal investigation and the Board's investigation into allegations of embezzlement in the Transportation Department which occurred over multiple years. Grievant admitted to altering an invoice for one of the participants in the alleged embezzlement activities. Respondent suspended Grievant while reviewing several years of invoices to determine the extent of Grievant's involvement. Respondent proved that the suspension pending investigation was justified and not arbitrary or capricious.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

## **Findings of Fact**

1. Grievant, Robin Gabbert, is employed by the Boone County Board of Education, as a Secretary III/Accountant II in the Transportation Department. She has been employed by the Board for approximately seven years.

2. In February 2017, it was reported to the Superintendent, by law enforcement, that the Grievant was under investigation for criminal activity that arose in connection with her employment.

3. Grievant's actions were discovered as a consequence of much broader investigation of alleged embezzlement of funds and resources in the Transportation Department by other employees. This activity may have been going on for multiple years.

4. Boone County Superintendent of Schools, Jeff Huffman, met with Grievant about the law enforcement report. Grievant admitted that she had assisted one of the Board employees involved in the embezzlement, by creating a false invoice.

5. At the other employee's request, Grievant placed a blank piece of paper over the portion of an existing invoice which contained the description, and the price of the originally purchased item, and then copied the invoice. On the copied invoice, Grievant typed in the description and price for brakes on a school bus instead of the actual items that had been purchased. This created an invoice for items which had not actually been purchased by the Board.

6. By letter dated February 20, 2017, Superintendent Huffman, suspended Grievant pending the criminal investigation and the administration's parallel investigation into the incident described by Grievant, and any other allegations involving her that may be discovered within the embezzlement investigation. The suspension was without pay. (Respondent Exhibit 1).

7. The investigation required going through multiple years of invoices and other paper work produced by purchases for parts, equipment and supplies for the Transportation Department. It had not been completed by the date of the level three hearing.<sup>2</sup>

8. Superintendent Huffman notified Grievant by letter dated March 15, 2017, that he was going to "ask the Board to ratify [Grievant's] suspension" imposed on February 20, 2017, and extend the suspension until the investigations were complete. Grievant was notified of her right to be heard by the Board before any action was taken. (Respondent Exhibit 2.)

9. At a special meeting of the Board on March 28, 2017, Superintendent Huffman made his recommendation to the Board and a hearing was held. Grievant was

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<sup>2</sup> Testimony of Superintendent Huffman.

represented at the hearing by John E. Roush, West Virginia School Service Personnel Association.<sup>3</sup> The Board voted to accept Superintendent Huffman's recommendation and extend the suspension until the investigations being conducted by law enforcement and the administration were complete.

10. Superintendent Huffman notified Grievant of the Board's decision by letter dated March 30, 2017. (Respondent Exhibit 3).

11. A short time before the Board's special meeting and hearing, the Prosecuting Attorney for Boone County, advised Superintendent Huffman that he was not going to pursue criminal charges against Grievant, but would not give written confirmation of that decision.

12. A mechanic and purchasing agent for the Transportation Department, Mr. Harvey, asked Grievant to alter an invoice stating that he lost the original and was embarrassed to ask the company for another one. Mr. Harvey told Grievant he was afraid he would get in trouble with their supervisor, Mr. Jerrell, if he found out.<sup>4</sup>

13. Grievant testified that she only altered one invoice because Mr. Harvey and Mr. Jerrell had been kind to her during an extended illness. She was going through chemo therapy which made it difficult for her to concentrate. Grievant was anxious about her job performance because of the amount of work she had missed due to her illness and did not want to "rock the boat."

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<sup>3</sup> Mr. Roush has since changed employers, and Mr. Spradling has taken over legal representation of Grievant.

<sup>4</sup> It was revealed at the level three hearing that Mr. Harvey and Mr. Jerrell were the main subjects of the criminal investigation related to the Transportation Department. Subsequent to the hearing, they entered pleas and have been sentenced to prison. Others have been indicted for alleged involvement in the Transportation Department scheme.

14. Grievant knew that Mr. Harvey and Mr. Jarrell were closely related and were operating a private trucking company in addition to their work for the Board.

15. As part of her duties at the Transportation Department, Grievant would sign for deliveries when neither Mr. Harvey nor Mr. Jarrell were available. Grievant was the only secretary and accountant for the Transportation Department.

16. Superintendent Huffman was concerned that Grievant may have had further involvement in the embezzlement scheme and decided not to place her back in the accountant position for the Transportation Department until the investigation was completed to confirm Grievant's overall level of involvement.

### **Discussion**

#### **Burden of Proof:**

The initial issue which must be addressed is which party has the burden of proof when an employee of a county board of education is suspended pending an investigation into employment related actions which are subject to a criminal investigation.

Respondent cites recent decisions in which the Administrative Law Judges ("ALJ") have held that the burden of proof is placed with the employee. By stating:

The suspension of an employee pending investigation of an allegation of misconduct is not disciplinary in nature and a grievant bears the burden of proving that such suspension was improper. *Ferrell and Marcum v. Reg'l Jail and Corr. Facility Auth./W. Reg'l Jail*, Docket No. 2013-1005-CONS (June 4, 2013); *Miller v. Kanawha County Board of Education*, Docket No. 2015-0214-KanED (May 29, 2015).

The ruling in *Miller supra*, relied upon the *Ferrell and Marcum, supra*, decision to reach that conclusion.

However, this is a departure from the Grievance Board's consistent prior decisions which held that the burden in such cases rests with the respondent, board of education in holding:

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code 18-29-6; *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). 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).

*Hays v. Hampshire County Bd. of Educ.*, Docket No. 03-14-327 (Jan. 30, 2004). See also, *Adkins v. Cabell County Board of Educ.* Docket No. 2012-0085-CabED (Apr. 26, 2012); *Blaney v. Wood County Bd. of Educ.*, Docket No. 03-54-169 (Jan. 16, 2004); *Balis v. Braxton County Bd. of Educ.* Docket No. 98-04-094 (Jan. 22, 1999).

Suspensions of State employees pending investigations are authorized by the Division of Personnel's ("DOP") Administrative Rule which states:

12.3. Suspension. -- An appointing authority may suspend any employee without pay for cause or to conduct an investigation regarding an employee's conduct which has a reasonable connection to the employee's performance of his or her job. The suspension shall be for a specific period of time, except where an employee is the subject of an indictment or other criminal proceeding.

W. VA. CODE ST. R. § 143-1-12.3.

This section specifically provides for a suspension while an investigation is on-going. Superintendents and boards of education get their authority to suspend from the West Virginia Code which provides in pertinent part:

The superintendent, subject only to approval of the board, may assign, transfer, promote, demote or suspend school personnel and recommend their dismissal pursuant to provisions of this chapter. . . The superintendent's authority to suspend school personnel shall be temporary only pending a hearing upon charges filed by the superintendent with the county board and the period of suspension may not exceed thirty days unless extended by order of the board.

W. VA. CODE §18A-2-7.

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.

W. VA. CODE § 18A-2-8(a).

Unlike the State rule, the authority for county boards of education derives from statutes related to misconduct which renders those suspensions disciplinary. This explains the ALJ's holding in *Hays, supra*, stating, "[a]lthough the substance of the charges against Grievant is not at issue at this time, he has, contrary to Respondent's assertions, been disciplined by his employer." *Id.*

Based upon the Grievance Board's prior rulings, the burden of proof in cases where a public school employee is suspended by the superintendent or the board of education pursuant to W. VA. CODE §§ 18A-2-7 or 18A-2-8, rests with the employer. To the extent that any West Virginia Public Employees Grievance Board decisions hold otherwise, they are specifically overruled on that issue alone.

In this matter, "the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code 18-29-6; *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).”

Additionally, [t]he 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).” *Hays v. Hampshire County Bd. of Educ.*, Docket No. 03-14-327 (Jan. 30, 2004).

**Merits:**

Grievant was suspended by the Board while a criminal investigation and internal investigation were conducted concerning allegations of fraud and embezzlement in the Transportation Department. Respondent was notified by law enforcement that Grievant might be implicated in the larger embezzlement scheme. Superintendent Huffman interviewed Grievant who admitted that she had falsified an invoice for one of the main suspects in the embezzlement investigation, but that was the full extent of her involvement. Given the gravity of the overall embezzlement investigation, and Grievant’s position as the only accountant at the Transportation Department, Superintendent Huffman suspended Grievant until the criminal and disciplinary investigations were concluded. After a hearing before the Board, the suspension was ratified and extended by the Board until both investigations were concluded.

Grievant’s counsel argued that the suspension was arbitrary and capricious as well as disproportionate to any action of misconduct committed by Grievant.



In situations where a school employee has been suspended incident to a criminal investigation, “[t]he question presented by this grievance is whether Respondent violated law, rule, or policy or otherwise acted arbitrarily and capriciously in suspending Grievant without pay, . . . while the matter was investigated and a decision made regarding discipline.” *Miller v. Kanawha County Board of Education*, Docket No. 2015-0214-KanED (May 29, 2015).

Grievant did not argue that the Board lacked authority to suspend Grievant pending an investigation into suspected criminal activity. Grievant admitted to one incident of falsifying an invoice which could be considered willful neglect of duty, one of the statutory causes for suspension in § 18A-2-8, “Willful neglect of duty may be defined as an employee’s intentional and inexcusable failure to perform a work-related responsibility. *Adkins v. Cabell County Bd. of Educ.*, Docket No. 89-06-656 (May 23, 1990). As an Accountant for the Transportation Department, Grievant is required “to maintain accounting records and to be responsible for the accounting process associated with billing, budgets, purchasing and related operations.” W. VA. CODE § 18A-4-8(i)(5). Grievant willfully neglected that duty by intentionally falsifying a purchasing invoice.

Respondent did not have to prove that actual disciplinary action would be justified but that suspension pending an investigation was proper. See *Lemery v. Monongalia County Bd. of Educ.*, Docket No. 91-30-477/494 (Apr. 30, 1992); *Kitzmiller v. Harrison County Bd. of Educ.*, Docket No. 13-88-189 (Mar. 31, 1989) (citing *Brown v. Dept. of Justice*, 715 F.2d 662 (D.C. Cir. 1983)). See also *Miller, supra*. Respondent proved by a preponderance of the evidence that the suspension of Grievant pending the completion of the investigation related to criminal charges was justified. Grievant had admitted to

improper conduct with one of the main subjects of the embezzlement investigation. There was no way to confirm that she had not participated in other activity without completing the investigation of the Transportation Department invoices. Superintendent Huffman credibly testified that a diligent effort was being undertaken to expeditiously complete that investigation but it was ongoing at the time of the hearing. Grievant did not present any evidence that the investigation was complete, or was not being conducted diligently.

Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). 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). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra*, (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

Even though Grievant had openly admitted to a single improper act, it was not unreasonable for Superintendent Huffman to delay placing Grievant back into the position of the sole accountant for the Transportation Department until an investigation of the invoices of the time period identified for the embezzlement scheme had been completed. Grievant did not offer any evidence that Respondent's investigation of the alleged embezzlement activity was completed. Respondent's decision to suspend Grievant

pending the completion of the investigation related to embezzlement in the Transportation Department was not arbitrary or capricious.

Finally, Grievant argues that the suspension of Grievant pending the completion of the investigation was a disproportionate penalty for any misconduct she may have committed. Grievant recognized that the Board was “faced with the aftermath of massive fraud in which the facts are unclear” but “dismissal” of Grievant was far too severe and she should be reinstated.<sup>5</sup>

"Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case-by-case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995); *Crites v. Dep't of Health & Human Ser.*, Docket No. 2011-0216-DHHR (Nov. 16, 2011).

The problem in this case is the Board has not decided what punishment, if any, to ultimately impose upon Grievant for any misconduct found during the investigation. While Grievant has gone through considerable hardship by being suspended without pay for months, her employment has not been terminated, notwithstanding what Grievant's counsel states.<sup>6</sup> The Board may choose a penalty short of termination. The issue of mitigation is premature. Respondent must take some action at the completion of the investigation which could range from full reinstatement of Grievant to terminating her employment, with a variety of lesser penalties between those extremes. When that

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<sup>5</sup> Grievant's Proposed Findings of Fact and Conclusions of Law.

<sup>6</sup> *Id.*

happens, Grievant may raise the issues of whether the Board's actions were legal and proper, as well as whether any penalty imposed is disproportionate to Grievant's misconduct. Those issues are premature at this juncture.

Accordingly, the Grievance is DENIED.

### **Conclusions of Law**

1. When an employee of a county board of education is suspended pursuant to W. VA. CODE §§ 18A-2-7 and/or 18A-2-8, the employer bears the burden of establishing the reasons for the suspension by a preponderance of the evidence. W. Va. Code 18-29-6; *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 suspend 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).” *Hays v. Hampshire County Bd. of Educ.*, Docket No. 03-14-327 (Jan. 30, 2004).

3. “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.” W. VA. CODE § 18A-2-8(a).

4. Respondent did not have to prove that actual disciplinary action would be justified but that suspension pending an investigation was proper. See *Lemery v.*

*Monongalia County Bd. of Educ.*, Docket No. 91-30-477/494 (Apr. 30, 1992); *Kitzmiller v. Harrison County Bd. of Educ.*, Docket No. 13-88-189 (Mar. 31, 1989) (citing *Brown v. Dept. of Justice*, 715 F.2d 662 (D.C. Cir. 1983)). See also *Miller, supra*.

5. Respondent proved by a preponderance of the evidence that the suspension of Grievant pending the completion of the investigation related to criminal charges was justified.

6. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). 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). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "

7. Respondent's decision to suspend Grievant pending the completion of the investigation related to embezzlement in the Transportation Department was not arbitrary or capricious.

8. "Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case-by-case basis."

*McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995); *Crites v. Dep't of Health & Human Ser.*, Docket No. 2011-0216-DHHR (Nov. 16, 2011).

9. Respondent has not taken any final disciplinary action related to Grievant's alleged misconduct. The argument that the discipline should be mitigated is premature.

Accordingly, the 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: October 25, 2017.**

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**WILLIAM B. MCGINLEY**  
**ADMINISTRATIVE LAW JUDGE**