THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JESSICA CHAPMAN,
Grievant,

v. **Docket No. 2018-1321-JefED**

JEFFERSON COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Jessica Chapman, filed this action against her employer, Jefferson County Board of Education, directly to Level Three on June 12, 2018. Grievant was terminated from her position as a Cook II for willful neglect of duty stemming from violation of Jefferson County Schools' attendance policy. Grievant's initial statement of grievance stated as follows:

> Ms. Chapman was fired from her job for missing 1.5 days over her allowed days of 15 per school year, BOE/Superintendent felt she did not improve on her improvement plan.

As relief, Grievant sought:

> Ms. Chapman had improved over the 3 years while being on a improvement plan, going from 39 days to 16.5 days. Improving over high extreme circumstances.

At the outset of the Level Three hearing, Grievant amended her statement of grievance and relief sought, without objection by Respondent, as follows:

> Grievant was improperly terminated from her position of employment for willful neglect of duty, due to her absence from the workplace for 16 days during the instructional term. Grievant seeks to be reinstated to her position of employment, back pay and interest.

By agreement of the parties, a Level Three hearing was conducted before the undersigned on October 26, 2018, at the offices of the Jefferson County Board of Education, Charles Town, West Virginia. Grievant appeared in person and by her counsel, George B. ("Trey") Morrone III, West Virginia School Service Personnel Association. Respondent appeared by its Human Resource Facilitator, Bryan K. Cooley, and by its counsel, Tracey B. Eberling, Steptoe & Johnson, PLLC. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on November 30, 2018.

Synopsis

Grievant was employed by the Jefferson County Board of Education as a Cook II. It is undisputed that Grievant's work performance has always met or exceeded expectations in all respects, with the exception of attendance. Grievant has never received any form of prior discipline for absenteeism or for any reason. Grievant was terminated from her position as a Cook II for willful neglect of duty stemming from violation of Jefferson County Schools' attendance policy. During the twelve months prior to her termination, Grievant had successfully completed two plans of improvement regarding attendance, demonstrating that her conduct was correctable.

During the 2017-2018 school year, Grievant was absent a total of 16 days, but only 3,5 days after the start of her second plan of improvement on December 14, 2017. Grievant contends that her historical attendance issues were extraordinary and caused by extreme, extenuating circumstances. Grievant contends that her termination was too harsh and not warranted; that her conduct was correctable; that her conduct had been

corrected; that Respondent's decision to terminate her was arbitrary and capricious; that her punishment should be mitigated. A three-day suspension was sufficient discipline given the facts of this case. Accordingly, this grievance will be granted, in part, and denied, in part.

The following Findings of Fact are based upon the record of this case.

Findings of Fact

1. Grievant's work performance has always met or exceeded expectations in all respects, with the exception of attendance.

2. Grievant was absent from work 18 days during the 2013-2014 school year, but no disciplinary action was taken and no plan of improvement was implemented.

3. Grievant was absent from work 24.5 during the 2014-2015 school year, but no disciplinary action was taken and no plan of improvement was implemented.

4. Grievant was absent from work 32.5 days during the 2015-2016 school year, but no disciplinary action was taken and no plan of improvement was implemented.

5. Grievant was absent from work 39 days during the 2016-2017 school year. No disciplinary action was taken, but Grievant was placed on her first plan of improvement.

6. On February 1, 2017, Grievant received her first unsatisfactory evaluation concerning attendance and she was placed on a plan of improvement which extended to May 31, 2017.

7. On May 31, 2017, Grievant received a satisfactory evaluation in all respects, and Respondent concluded that Grievant had successfully completed her plan of improvement.

8. On December 14, 2017, Grievant received her second unsatisfactory evaluation concerning her attendance, for missing 12.5 days, and she was placed on a second plan of improvement.

9. On February 1, 2018, Grievant received a satisfactory evaluation in all respects, and Respondent concluded that Grievant had successfully completed her plan of improvement.

10. From the start of her second improvement plan on December 14, 2017, to her last day of employment, June 11, 2018, Grievant missed 3.5 days of the remaining 114 days of her 200-day contract.

11. Grievant missed her 16th day of work on April 30, 2018, due to the illness of her child, and the absence was classified as "absent without pay" and Grievant was not compensated.

12. By letter dated May 21, 2018, Superintendent Bondy Shay Gibson informed Grievant that she would be recommended for termination on June 11, 2018, for violation of attendance policy and an established pattern of willful neglect of duty.

13. Grievant worked the remainder of the school year, from April 30, 2018, to June 2018, without any absences.

14. Grievant's attendance rate from the beginning of her second improvement plan on December 14, 2018, to the last day of employment, June 11, 2018, was 97%.

15. Grievant's attendance rate at the time she was terminated was the best it had been during the 5-years of attendance information presented by Respondent, during which no discipline was issued to Grievant for absenteeism.

16. Grievant's 16th absence on April 30, 2018, did exceed by one day the 15 days allotted to school employees under the code.

17. Grievant's attendance issues were extraordinary and were caused by extreme, extenuating circumstances, including the following: Grievant's divorce; drug addiction and incarceration of her ex-husband; death of Grievant's grandmother; disability of her stepmother, followed by her stepmother being seriously burned in a house fire and eventual death after hospitalization for several months due to the burn injuries; the necessity to also care for her two siblings, one of which was a teenager and the other being of age but mentally impaired at a third-grade level; and all the while, caring for her own two minor children.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant 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 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 proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean

the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying determines the weight of the testimony." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

Respondent contends that Grievant's conduct amounted to willful neglect of duty. Grievant asserts that the allegations supporting the termination more closely resemble a charge of unsatisfactory performance. Grievant contends that the disciplinary action of termination was excessive under the circumstances of her case.

W. VA. CODE § 18A-2-7 provides that "[t]he superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter." W. VA. CODE § 18A-2-8 goes on to state, in part, that:

> (a) 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.

Dismissal of an employee under W. VA. CODE § 18A-2-8 "must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously." Syl. Pt. 3, in part, *Beverlin v. Board of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975); Syl. Pt. 4, in part, *Maxey v. McDowell County Board of Education*, 212 W.

Va. 668, 575 S.E.2d 278 (2002); Syl. Pt. 7, in part, *Alderman v. Pocahontas County Bd. of Educ.*, 223 W.Va. 431, 675 S.E.2d 907(2009).

The West Virginia Supreme Court of Appeals has found reversible error in the event an Administrative Law Judge does not assess whether Grievant's behavior was correctable pursuant to the State Board of Education Policy 5300.[1] *Maxey*, *supra*. In addition, "[f]ailure by any board of education to follow the evaluation procedure in West Virginia Board of Education Policy 5300 . . . prohibits such board from discharging, demoting or transferring an employee for reasons having to do with prior misconduct or incompetency that has not been called to the attention of the employee through evaluation, and which is correctable." *Id. "*A board must follow the West Virginia Board of Education Policy 5300 . . . procedures if the circumstances forming the basis for suspension or discharge are correctable. The factor triggering the application of the evaluation procedure and correction period is correctable conduct. What is correctable conduct does not lend itself to an exact definition but must be understood to mean an offense or conduct which affects professional competency." *Id*. Policy 5300 "envisions that where a teacher exhibits problematic behavior, the improvement plan is the appropriate tool if the conduct can be corrected. Only when these legitimate efforts fail is termination justified." *Id*.[2]

---

[1] That policy is now referred to as Policy 5310, 126 C.S.R. 142. It is worth noting that the legislature codified the specific improvement plan language from Policy 5300 in W. VA. CODE § 18A-2-12a(b)(6).

[2] W. VA. CODE § 18A-2-12a(b)(6) provides, in pertinent part, the following:

In the instant case, one of Respondent's stated reasons for terminating Grievant was willful neglect of duty. "Willful neglect of duty" is conduct constituting a knowing and intentional act, rather than a negligent act. *Williams v. Cabell County Bd. of Educ*., Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ*., Docket No. 95-29-151 (Aug. 24, 1995); *Hoover v. Lewis County Bd. of Educ*., Docket No.93-21-427 (Feb. 24, 1994). Willful neglect of duty encompasses something more serious than incompetence. *Bd. of Educ. v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120, 122 (1990); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996).

Respondent acknowledged that the 16th absence on April 30, 2018, triggered the termination decision. Grievant indicated that her absence on the 16th day was due to her son's illness. As counsel for Grievant aptly points out, this absence can hardly be considered inexcusable and an employee's absence from work for one day to take care of her sick minor son does not rise to the level of willful neglect of duty. In addition, there was little, if any, evidence presented in this case that Grievant's absences were intentional and inexcusable. The only absence that Respondent challenged as being

---

> All school personnel are entitled to know how well they are fulfilling their responsibilities and should be offered the opportunity of open and honest evaluations of their performance on a regular basis and in accordance with the provisions of section twelve [18A-2-12] of this article. All school personnel are entitled to opportunities to improve their job performance prior to the termination or transfer of their services. Decisions concerning the promotion, demotion, transfer or termination of employment of school personnel, other than those for lack of need or governed by specific statutory provisions unrelated to performance, should be based upon the evaluations, and not upon factors extraneous thereto.

inexcusable was a ½ day Grievant took to help her minor daughter get ready for picture day at her school. In any event, given the undisputed facts of this Respondent has met its burden of proof in demonstrating that the decision to discipline Grievant was justified after her previous excessive absences.

The facts of this case present an unusual situation and unique circumstances. Grievant is a single mother raising two minor children. The difficult and trying experiences Grievant has endured over the past few years have been tremendous and difficult to bear. During the most trying times, Grievant's absenteeism was at its highest. Yet, no disciplinary action was taken by Respondent. The initial and only disciplinary action taken by Respondent during Grievant's entire tenure of employment was termination for being absent one day without leave. Respondent could have used a lesser form of punishment since Grievant's attendance was at an all-time high over the seven months prior to her termination.

Grievant contends that the disciplinary action of termination was excessive under the circumstances of her case. The undersigned agrees. The argument that discipline is excessive given the facts of the situation is an affirmative defense and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." *Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

The Grievance Board has held that "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 Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

Nevertheless, a lesser disciplinary action may be imposed when mitigating circumstances exist. *See Conner v. Barbour County Bd. of Educ*., Docket No. 95-01-031 (Sept. 29, 1995). Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. *See Pingley v. Div. of Corr*., Docket No. 95-CORR-252 (July 23, 1996). When assessing the penalty imposed, "[w]hether 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)(citations omitted).

The record of this case established the following: Grievant had not been suspended in the past for absenteeism or for any reason; Grievant's work performance as a cook had always met or exceeded expectations; Grievant had successfully completed two improvement plans relating to attendance; Grievant's attendance record was dramatically improved at the time she was terminated, as compared to the prior three

years when no discipline was issued by Respondent; during the six months prior to her termination, Grievant's attendance record was the best it had been in five years; despite her 16th absence on April 30, 2018, Respondent permitted Grievant to continue to work every day to the end of the school year, without suspension or any form of discipline; and that Grievant worked from April 30, 2018, to June 11, 2018, without absence.

The facts of this grievance demonstrate that the disciplinary measure taken by Respondent on June 11, 2018, was disproportionate to the conduct of Grievant at the time such disciplinary action was taken. The facts of this grievance further demonstrate that the disciplinary action taken on June 11, 2018, was arbitrary and capricious, given the lack of discipline used by Respondent when Grievant's absenteeism was far worse than it was at the time of her termination.

Grievant does not deny that she was aware of Respondent's attendance policy. Grievant explained that she did not want to miss work, but that she felt that she had no choice with a sick child at home. The record is undisputed that Grievant's absenteeism was due to extraordinary and extreme circumstances. Given the facts presented, Grievant's punishment was excessive. It begs the question, if Grievant's conduct was of such a serious nature to warrant termination, it is difficult to understand why Respondent did not suspend her immediately without pay following her 16th absence. Grievant worked every day over the next six weeks and until the end of the school year. The fact that Grievant did not miss any more work for the remainder of the school year demonstrates that her absenteeism was not only correctable but that it had been corrected.

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. "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). *See Austin v. Kanawha County Bd. of Educ*., Docket No. 97-20-089 (May 20, 1997).

3. Grievant has demonstrated that mitigation is appropriate in this case given the penalty imposed is disproportionate to the offense proven. The action of Respondent to terminate Grievant when her attendance rate was at the highest it had been in five years, when no prior discipline had been given during prior years when her attendance rate was much lower, is arbitrary and capricious and indicates an abuse of discretion.

Accordingly, this grievance is **GRANTED, IN PART**, **AND DENIED, IN PART**. Respondent is **ORDERED** to reduce Grievant's penalty to a three-day suspension, to reinstate Grievant to her position as a cook for the Jefferson County Board of Education,

and to pay her back pay from the date of her dismissal to the date she is reinstated, less three days, plus interest at the statutory rate; and to restore all benefits, including seniority, as though she had been suspended for three days without pay; and to take all steps necessary to ensure that Grievant's employment record reflects a three day suspension without pay, rather than a dismissal.

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 (2018).

Date: January 3, 2019

_____

Ronald L. Reece
Administrative Law Judge