

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KEITH SMITH,
Grievant,

v.

Docket No. 2018-1278-CONS

ROANE COUNTY BOARD
OF EDUCATION,
Respondent.

DECISION

Keith Smith, Grievant filed grievances against his employer the Roane County Board of Education, Respondent. As a bus operator, Grievant protests his suspension, with pay, as well as his termination from employment. As a result of being placed on paid administrative leave, Grievant filed a grievance, dated January 24, 2018, stating:

Being singled out and discriminated against by the Superintendent Richard Duncan[.] [W]ants me to do another criminal background check one was done at hire almost 5 years ago[.] I'm the only one that he is doing this to I was placed on leave over it and he wants me to pay for all of it criminal check is kept at the state and county has to request.

As relief, Grievant sought: "Reinstate me immediately without any pay loss." (Docket No. 2018-0901-RoaED). Grievant filed directly to level three of the grievance process.¹ On or about March 14, 2018, Respondent filed a *Motion to Dismiss* the initial grievance, asserting that no agreement had been reached by the parties to proceed directly to level three and that Grievant was still on paid administrative leave. By *Transfer Order* entered on March 29, 2018, by this Grievance Board, Respondent's *Motion to Dismiss* was denied and the initial grievance matter was transferred to level one.

¹ W. VA. CODE § 6C-2-4(a)(4), provides that an employee may proceed directly to level three of the grievance process upon agreement of the parties, or when the grievant has been discharged, suspended without pay, demoted or reclassified resulting in a loss of compensation or benefits.

On March 22, 2018, Respondent Board voted to place Grievant on unpaid administrative leave until its next regular meeting.² Grievant was terminated from his position of employment by Respondent Board on April 12, 2018, pursuant to Superintendent Duncan's recommendation first presented during its regular meeting on March 22, 2018. Thereafter, Grievant filed an additional grievance, an expedited level three grievance against Respondent, dated April 26, 2018, (Docket No. 2018-1126-RoaED), in which the Grievant indicated that:

This directly relates to grievance filed 1-24-18[.] I was terminated from Roane County Schools on 4-12-18[.] Human Rights office is looking into discrimination[.] I did nothing wrong to be terminated[. I] will add more when I get [an] attorney[.]

As relief, Grievant requests to be "placed back on bus 58 with no pay loss[.] no seniority loss[.] no gap in employment [and] be reinstated where I was at[,] at time of termination".

On May 8, 2018, Respondent filed a new *Motion to Dismiss*, alleging that the second grievance was untimely. An *Order Consolidating Grievances and Denying Motion to Dismiss* was entered by this Grievance Board's Chief Administrative Law Judge on June 12, 2018. The two grievances were consolidated as the instant grievance Docket No. 2018-1278-CONS.

Grievant had originally and previously been represented by counsel, Joe Spradling, Esquire, West Virginia School Service Personnel Association (WVSSPA), but

² On January 4, 2018, Grievant was notified by Respondent that he was being suspended for one day, without pay, for a social media post made in late December 2017. This issue is a separate and distinct matter from the instant grievance. Nevertheless, on January 25, 2018, Roane Board of Education voted to table a recommendation regarding the one-day suspension, without pay, stemming from the social media post. Following that meeting, Respondent informed Grievant that he would remain on paid administrative leave, due to "information that requires further investigation."

George B. ("Trey") Morrone III, Esquire (WVSSPA) substituted as counsel for Grievant on or about August 20, 2018. Also, on August 20, 2018, Grievant requested a continuance of the scheduled Level Three hearing. An *Order of Continuance and Amended Notice of Hearing* was issued rescheduling the Level Three Hearing. A Level Three Hearing was held before the undersigned Administrative Law Judge on November 7, 2018, at the Grievance Board's Charleston office. Grievant appeared in person and was represented by George B. ("Trey") Morrone III, Esquire (WVSSPA). Respondent appeared by its Superintendent, Richard Duncan and by counsel Rebecca M. Tinder, Esquire, Bowles Rice LLP. At the conclusion of the Level Three hearing, the parties were invited to submit written proposed fact/law proposals. Both parties submitted Proposed Findings of Fact and Conclusions of Law, and this matter became mature for decision on or about January 7, 2019, on receipt of the last of these fact/law proposals.

Synopsis

Grievant was employed as a bus operator with Roane County Board of Education. After four and one-half years of service, Grievant was terminated from said position. Respondent terminated Grievant's employment upon becoming aware of his criminal background. It is undisputed that Grievant was not charged with any new or additional crimes during his tenure of employment with Respondent.

Grievant contends that he was wrongfully suspended and then terminated. Grievant argues that his employment with Respondent should be reinstated. Respondent argues Grievant's failure to completely and accurately disclose his criminal history on his three applications for employment with Roane County Schools coupled with

the contents of the criminal history, it is permissible and readily prudent to discharge Grievant from employment. Grievant has never been convicted of, plead guilty to or plead *nolo contendere* to a felony charge. Grievant underwent an extensive criminal background investigation under the direction of the West Virginia Department of Education prior to being hired by Respondent. He passed the investigation and was issued a bus operator certification. Respondent has not established a discovery rule exception in the confines of this case.

Respondent has failed to prove by a preponderance of the evidence that Grievant has committed any of the offenses set out in West Virginia Code § 18A-2-8(a) to justify termination.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was, at all times relevant, employed by the Roane County Board of Education, Respondent, as a regular bus operator, having been hired first as a substitute, in or about August 2013, then as a regular employee.

2. Grievant was employed by the Kanawha County Board of Education when he applied for his original bus operator certification from the West Virginia Department of Education (WVDE). Grievant was required to and did undergo a criminal background investigation conducted at the direction of the WVDE. Any criminal background check results obtained would have been shared with his employer, Kanawha County Schools.

3. Grievant was issued a bus operator certification by the WVDE in 2013, and then year-to-year thereafter to and through the term of his termination from employment by Respondent. West Virginia School Bus Transportation Policy and Procedures Manual (Policy 4336), § 126-92-15, in relevant part, sets forth the criteria for the Certification of School Bus Operators.

4. Grievant had previously been hired as a bus operator in Kanawha County, West Virginia, in July 2013 but resigned on August 28, 2013.

5. When hiring Grievant in or about August 2013, Respondent did not request an additional criminal background investigation.

6. At the time of Grievant's 2013 employment by Respondent, the Superintendent for Roane County Board of Education was Mickey Blackwell. Respondent has hired at least two new Superintendents, since Grievant's hire in 2013.

7. The current Superintendent for the Roane County School system is Richard Duncan, who was hired on or about July 2017.

8. During an investigation of misconduct involving Grievant, in January 2018, which is not the subject of this grievance, Superintendent Duncan reviewed the personnel file of Grievant. See R Ex 3, *Jan 5, 2018 letter* Superintendent Duncan engaged in a review of Grievant's personnel file, following a complaint regarding a social media post by Grievant.

9. Respondent's review of Grievant's personnel file revealed:

- a. a substitute bus operator application, dated October 12, 2012, admitting to conviction of misdemeanor regarding a minor traffic-related offense;

b. a regular bus operator application, dated July 8, 2014, denying conviction for any misdemeanor;

c. a substitute mechanic application, dated February 28, 2017, failing to respond to the question regarding misdemeanor convictions; and

d. no criminal background report or records

10. Superintendent Duncan was unable to obtain a copy of the 2013 criminal background investigation conducted by the WVDE.

11. A meeting with Grievant was scheduled and transpired on January 4, 2018.

12. On or about January 5, 2018, Respondent placed Grievant on paid administrative leave.

13. Grievant was placed on paid leave, by the Superintendent, pending investigation of Grievant's criminal background and Grievant was directed to submit a criminal background check as soon as possible, but no later than January 25, 2018. R Ex 3, *Jan. 5, 2018 letter*

14. There was some discussion as to who would pay for this second criminal background check. Ultimately Superintendent Duncan agreed that Respondent would pay the cost.

15. On the application for the criminal background check, Grievant admitted having been charged or arrested for a misdemeanor and denied having been charged or arrested for a felony. Joint Ex 1D

16. By way of explanation for the affirmative responses in the application for the background check, Grievant reported a dismissed extradition proceeding, "several traffic offenses about 24 - 28 years ago," a domestic violence in which he was found not guilty,

a theft in which he was either found not guilty or it was dismissed, and “motor vehicle offenses long ago.” Grievant’s explanation concluded with “There may be other issues I can't recall.” *March 6, 2018 letter*

17. Grievant requested the criminal background check through Regional Education Service Agency Five (RESA 5) and the results of the criminal background check were forwarded to the West Virginia Department of Education (WVDE).

18. WVDE investigator, James Agee, a former law enforcement officer, shared the results of the criminal background check with Superintendent Duncan along with the public records available concerning the crimes in the various jurisdictions.

19. Grievant’s criminal background check revealed the following:

- a. A name change of the Grievant from Keith McClung to Keith Smith.
- b. Arrests from January 1991 through June 2011.
- c. Arrests/charges originating in Butler, Pennsylvania; Canfield, Ohio; Mahoning County, Ohio; City of Girard, Ohio; Streetsboro, Ohio; Akron, Ohio; Trumbull County, Ohio; Youngstown, Ohio; Brookfield Township, Ohio; City of Hubbard, Ohio; Warren, Ohio; Boardman, Ohio; Liberty Township, Ohio; Medina, Ohio; and Fauquir, Virginia in the names of McClung and Smith.
- d. Incarcerations, including:
 1. 30 days in prison for simple assault,
 2. 180 days confinement for violating a protective order (having a firearm),
- e. Plea bargain
- f. 30 guilty dispositions following charges for:
 1. Driving an unregistered vehicle

2. Stop and yield signs violation
3. Retail theft
4. Disorderly conduct, harassment
5. Certification of inspection violation
6. Operating a vehicle without financial responsibility and driving an unregistered vehicle
7. False report to law enforcement
8. Reckless endangerment, driving while license suspended or revoked, fleeing
9. Simple assault, fleeing or attempting to elude officer
10. Altered registration plates, display plate card improper vehicle, fraudulent use/removal of registration plate, required financial responsibility, driving unregistered vehicle, transfer ownership/duty of transferee
11. Driving while operating privilege suspended or revoked
12. Suspended driving privilege violation, speeding
13. Expired license, bad muffler
14. Wrongful entrustment of a motor vehicle, reckless operation, driving under license suspension or restriction
15. Speeding, improper child restraint/seat belt – driver
16. Speeding
17. Domestic violence
18. No operator license in possession, defective speedometer
19. Disorderly conduct
20. Obedience to traffic control devices
21. Violating protection order (having a firearm)
22. Littering
23. 3 counts of possession of marijuana

24. Driving under suspension
25. Driving under suspension, fictitious plates/sticker
26. Fictitious registration, improper display
27. Driving under suspension
28. Tow truck identification
29. Probation violation
30. Obstructing official business

20. Grievant's criminal history did not change between 2013 and 2018. Grievant has never been convicted of, plead guilty to or plead *nolo contendere* to a felony charge.

21. Respondent placed Grievant on unpaid administrative leave on March 22, 2018.³

22. Following receipt of the information on the criminal background check and his conversation with Grievant regarding the inconsistencies on the applications, when compared to the criminal background results, Superintendent Duncan recommended, and Respondent approved the termination of Grievant's employment for:

- a. Grievant's failure to completely and accurately disclose his criminal history on his 3 applications for employment with Roane County Schools;
- b. the falsification of documents submitted to Roane County Schools;
- c. the contents of the criminal history, including 30 guilty dispositions, including multiple driving violations; and
- d. in the best interests of students.

See R Ex 3e, March 6, 2018 letter

³ On January 25, 2018, the Respondent Board voted to table the recommendation regarding the one-day suspension, without pay, stemming from the social media post. Respondent further informed Grievant that he would remain on paid administrative leave to March 8, 2018, due to "information that requires further investigation. On March 22, 2018, Respondent Board voted to place Grievant on unpaid administrative leave until its next regular meeting.

23. After reviewing the 2018 criminal background investigation conducted by the WVDE, Superintendent Duncan concluded that he did not believe Grievant should have been employed by Respondent in 2013.

24. Grievant was terminated from his position of employment by Respondent Board on April 12, 2018, pursuant to the School Board's Superintendent's recommendation first presented during a prior regular meeting.⁴ See R Ex 3f, April 13, 2018 letter which provides in relevant part:

[. . .] purpose of this letter is to inform you that, during its regular meeting on April 12, 2018, and pursuant to [Superintendent Duncan's] first presented during its regular meeting on March 22, 2018, which you attended in person and did request and was granted a hearing prior to any board action, the Roane County Board of Education voted to terminate your continuing contract as a bus operator, as well as your probationary contract as a substitute mechanic, effective immediately. Prior to this action, the board did attempt to provide an additional hearing to you, as evidenced in its agenda and as mentioned in my letter to you dated March 27, 2018, but you did not appear, nor did anyone on your behalf.

See R Ex 3f.

Discussion

As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018).

. . . See [*Watkins v. McDowell County Bd. of Educ.*, 229 W.Va.500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education*, 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary

⁴ Grievant was employed as a substitute mechanic in or about March 2017. He was suspended and terminated from both positions.

matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). See also *Hovermale v. Berkeley Springs Moose Lodge*, 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) (“Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence.”). . .

W. Va. Dep’t of Trans., Div. of Highways v. Litten, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision). 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, a party has not met its burden of proof. *Id.*

The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in WEST VIRGINIA CODE § 18A-2-8, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991). See *Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975). WEST VIRGINIA CODE § 18A-2-8 provides that “[A] board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of *nolo contendere* to a felony charge.”

The evolution of this consolidated grievance proceeding is somewhat convoluted. On January 4, 2018, Grievant was notified by Respondent that he was being suspended for one day, without pay, for a social media post made in late December, 2017. Further,

on January 4, 2018, Grievant was notified by Respondent that he was being placed on paid administrative leave until such time as a criminal background check is received and reviewed by the Superintendent's Office. On January 25, 2018, the Respondent Board voted to table the recommendation regarding the one-day suspension, without pay, stemming from the social media post. Respondent informed Grievant that he would remain on paid administrative leave to March 8, 2018, due to "information that requires further investigation." By letter dated March 6, 2018, Respondent informed Grievant that a recommendation to terminate his continuing contracts as a bus operator and substitute bus mechanic would be presented to the Respondent Board. On March 22, 2018, Respondent Board voted to place Grievant on unpaid administrative leave until its next regular meeting on April 12, 2018. Grievant was terminated from his position of employment by Respondent Board on April 12, 2018, pursuant to the School Board's Superintendent's recommendation first presented during its regular meeting on March 22, 2018.

Respondent purports that Grievant failed to comply with the Employee Code of Conduct and that his failure to comply was intentional. Grievant contends that he was wrongfully suspended and then terminated. Grievant by counsel highlights that Respondent's opportunity to consider and determine whether to employ Grievant occurred in 2013, not 2018.⁵ Grievant contends; (1) Respondent has no legal authority

⁵ In or about May or June 2013, Grievant received his certification as a bus operator and he was employed by the KCBOE as a substitute bus operator. While employed as a substitute bus with the Kanawha County Board of Education (KCBOE), Grievant made application for a position of employment with Respondent and disclosed thereupon that he had prior misdemeanor convictions. It is not established that Respondent made any further inquiry into Grievant's criminal background history prior to hiring Grievant. For the next four and one-half years, Respondent made no additional inquiry into Grievant's

for a do-over, especially where Respondent failed to demonstrate that the 2018 criminal background investigation resulted in any new or different information than that available to Respondent in 2013. (2) Further, Respondent has failed to prove by a preponderance of the evidence that Grievant has committed any of the offenses set out in West Virginia Code §18A-2-8 to justify suspension or termination. Grievant seeks to have his employment with Respondent reinstated.

In the circumstances of this matter, there are several different avenues of concern. The proper balancing of the instant parties' various diverse concerns is particularly confounding. Less baffling is Respondent's authority to suspend school personnel temporarily in pursuit of relevant facts and applicable protocols. The School Board 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 W. VA. CODE. "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(c).

In this case, Grievant was first suspended with pay, then without, pending receipt and review of unresolved information. During an investigation of misconduct involving Grievant, which is not the subject of this grievance, Superintendent Duncan reviewed the personnel file of Grievant. See R Ex 3, *Jan 5, 2018 letter*. Respondent's review of

criminal background history. Grievant has not been charged with any new or additional crimes during his tenure of employment with Respondent. It is also undisputed that Grievant has never been charged with, convicted of or entered a plea of any nature to a felony offense.

Grievant's personnel file revealed Grievant had answered the question regarding misdemeanor convictions differently over the years and there was no criminal background report in Grievant's file. Understandably this generated further interest by responsible administrative personnel. Respondent did not act in an arbitrary and capricious manner in choosing to investigate the abnormalities discovered in Grievant's personnel file.⁶ The suspension of an employee pending investigation of an allegation of misconduct is not disciplinary in nature and the grievant bears the burden of proving that such suspension was improper. *Miller v. Kanawha County Board of Education*, Docket No. 2015-0214-KanED (May 29, 2015) The reasonable suspension of an employee, pending investigation, is not arbitrary or capricious, a violation of statute, or an abuse of discretion. See *Blaney v. Wood County Bd. of Educ.*, Docket No. 03-54-169 (Jan. 16, 2004).

West Virginia Code § 18A-2-7(c) allows that an employee may be temporarily suspended pending hearing upon the charges, not to exceed thirty days unless extended by order of the board. In this case, the board did order the extension of the suspension within thirty days, the board approved Grievant's suspension and the continuance of the

⁶ 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 is 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). 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))." While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute his judgment for that of the authoritarian agency. See generally *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

suspension. Thus, Grievant failed to prove that Respondent violated law, rule or policy in suspending Grievant pending investigation of his criminal background check.

Much more ambiguous is the proper disposition of Grievant's employment. West Virginia Code § 18A-2-8 states, 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.
- (b) A charge of unsatisfactory performance shall not be made except as a result of an employee performance evaluation pursuant to section 12 of this article. The charges shall be stated in writing served upon the employee within two days of presentation of the charges to the board.

Respondent argues that Grievant's failure to fully disclosed all the details of his prior misdemeanor convictions justifies his termination. See R Ex 1. Grievant completed three different applications for service for employment with Respondent and replied differently for the same question (2013, 2014 and 2017). *Have you ever been convicted of a misdemeanor?* Grievant responded, yes in 2013, no in 2014, and unanswered in 2017. Respondent is found to have acted reasonably in investigating Grievant's inconsistent responses.⁷ Nevertheless, what if anything is Respondent empowered to do in 2018.

Grievant contends that he was wrongfully terminated and that his employment with Respondent Board should be reinstated. Grievant contends Respondent has no legal

⁷ By way of explanation for the affirmative responses in the application for the background check, Grievant reported a dismissed extradition proceeding, "several traffic offenses about 24 - 28 years ago," a domestic violence in which he was found not guilty, a theft in which he was either found not guilty or it was dismissed, and "motor vehicle offenses long ago."

authority for a do-over, especially where Respondent failed to demonstrate that the 2018 criminal background investigation resulted in any new or different information than that obtained and available to Respondent in 2013.

It is interesting that Respondent is quick to highlight misdeeds of Grievant but neglects to truly embrace prospective short coming(s) of its own accord. According to W. VA. CODE § 18-5-15c(d), "County boards of education shall request from the state Criminal Identification Bureau the record of any and all criminal convictions..." Grievant did undergo a criminal background investigation conducted at the direction of the WVDE, this is uncontested. Subsequent to that one of two prospectives are most probable; Respondent's prior Superintendent was aware of Grievant's history and chose to provide Grievant with a coveted opportunity to turn his life around or Respondent failed to request and review the contents of Grievant's records. Neither of these options are due to any malfeasance attributable to Grievant. The fact that the instant Respondent *may have* failed to avail itself of Grievant's Criminal history prior to employing him is relevant. But not necessarily dispositive to the issue in question. If Grievant had been found guilty of a felony, analysis would be far less thorny. Respondent would be within its purview to dismiss Grievant. See W. VA. CODE § 18A-2-8. Nevertheless, there is no evidence of record that Grievant has been adjudicated guilty of a felony. The conviction of a misdemeanor or a guilty plea or a plea of *nolo contendere* to a misdemeanor charge is simply not a dischargeable offense expressly set out within W. VA. CODE § 18A-2-8(a). 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).

Is it “proper” to allow Respondent to now invoke information that was available in 2013 as the basis for the instant dismissal? ⁸ More distinctly stated, the instant Superintendent and Respondent now wish to substitute their judgment in 2018 for the judgment exercised by the Superintendent and Respondent in office in 2013 and who recommended and approved Grievant’s original hire. Grievant had a criminal background check done in 2013. Further, West Virginia School Bus Transportation Policy and Procedures Manual (Policy 4336), § 126-92-15, in relevant part, sets forth the Criteria for the Certification of School Bus Operators. The results of the criminal background was previously placed on file with the West Virginia Department of Education. The fact that Respondent may, or may not, have ever availed itself of the information seems to be a double-edged sword. Respondent admitted that there was no new criminal background information arising between Grievant’s 2013 hire and his 2018 termination. ⁹ Further Respondent offered no evidence as to whether the 2013 Superintendent had any concerns over Grievant’s criminal background investigation conducted prior to his hire in 2013.

⁸ At the Level Three Hearing, Respondent’s Superintendent explained that Grievant was terminated because he would not have recommended Grievant for employment in 2013, had he reviewed Grievant’s criminal background investigation.

⁹ Grievant is of the fervent position that Respondent doesn’t get to call for a do-over, four years after he has turned his life around.

Respondent avers for consideration that the 30 guilty criminal dispositions, including his spending 30 days in prison for simple assault, and 180 days in confinement for violating a protective order (having a firearm), are evidence of a violation of the Employee Code of Conduct, potentially rising to the level of insubordination. This is debatable, given that all these offenses were prior to Grievant's employment. Respondent offered no evidence that the results of Grievant's criminal background investigation conducted in 2013 was any different from the criminal background investigation conducted in 2018.

It is understandable that Respondent is "now" reluctant to employ Grievant as a Bus Operator. It is not hard to envision the amount of fall out that would be heaped upon the Agency, if anything were to transpire and the primary cause was due to the malfeasance of Grievant. Grievant's list of driving offenses, include multiple driving on suspended license, fleeing to elude the police, multiple speeding, reckless operation, obedience to traffic control devices, and driving without a license. Respondent was faced with a dilemma. The undersigned is intrigued with Respondent's contentions that Grievant's actions of lying and violating criminal laws, as outlined above, are not in conformity with the accepted principles of right and wrong behavior and are contrary to the moral code of the community. The guilty criminal dispositions, including his spending 30 days in prison for simple assault, and 180 days in confinement for violating a protective order (having a firearm), could be viewed as evidence of immorality. Even so it is perceived that Respondent is attempting to fortify the facility but has previously neglected to keep the front gate close. What is lost in Respondent's argument is the fact that

Grievant underwent an extensive criminal background investigation under the direction of the WVDE and fully accessible to the Respondent prior to being hired and that he passed the investigation and was issued a bus operator certification. See criteria for the Certification of School Bus Operators, (Policy 4336), § 126-92-15. Respondent's opportunity to consider and determine whether to employ Respondent occurred in 2013, not 2018.

Respondent tends to infer procedural error but stops short of stating such. Respondent did not establish that its decision to hire Grievant was administrative error. A county board of education is not bound by an employee's mistake. *Samples v. Raleigh County Bd. of Educ.*, Docket No. 98-41-391 (Jan. 13, 1999); *Carr v. Monroe County Bd. of Educ.*, Docket No. 98-31-342 (Dec. 15, 1998); *Berry v. Boone County Bd. of Educ.*, Docket No. 97-03-305 (Apr. 13, 1998); *Chilton v. Kanawha County Bd. of Educ.*, Docket No. 89-20-114 (Aug. 7, 1989), *aff'd*, Kanawha County Cir. Ct., No. 89- AA-172 (Oct. 4, 1991). If indeed Respondent has grounds for disciplinary action, the bases should be new malfeasance by Grievant, not its ineffective administration of hiring procedure. Respondent relies heavily on the premises of "in the best interest of the student." Yet, fails to establish or identify the harm Grievant presents to the well-being of the students he transports to and from school. The undersigned, as the trier of fact, finds it is not established that Grievant represents a danger to students.¹⁰

¹⁰ Respondent did not establish a persuasive rational nexus. "In order to dismiss a school board employee for acts performed at a time and place separate from employment, the Board must demonstrate a 'rational nexus' between the conduct performed outside the job and the duties the employee is to perform." *Syl. Pt. 2, Golden v. Bd. of Educ.*, 169 W. Va. 63, 285 S.E.2d 665 (1981). A rational nexus exists in at least two circumstances: (1) if the conduct directly affects the performance of the occupational responsibilities of the employee; or (2) if, without contribution on the part of the school officials, the conduct

Respondent has an obligation to educate and to protect the children entrusted into its care. This sacred trust is paramount and is not forgotten by the undersigned. That responsibility however does not come with omnipotent authority. Respondent is compelled to operate within established rule, regulations and applicable statutes. This is no easy feat. Respondent's expressed "reason(s)" for terminating Grievant are understandable yet tends to fall short of establishing proper grounds. Judgement calls are made every day by administrative personnel, some are more controversial than others. This decision is such a call. The undersigned finds that Respondent acted reasonably in investigating Grievant's inconsistent responses on multiple applications, however the penalty for Grievant's misfeasance is not established to be termination of his employment, four years post his hiring. It is not established that Grievant misrepresented himself in 2013. Grievant made application for a position with Respondent and disclosed thereupon that he had prior misdemeanor convictions. Grievant had recently been issued his certification as a school bus operator. Grievant was not charged with any new or additional crimes during his four- and half-year tenure of employment with Respondent. It is also undisputed that Grievant has never been convicted of or entered a plea of any nature to a felony offense.

Respondent is an entity created by statute and has such power as have been conferred upon them by law expressly or by implication." Syl. Pt. 4, *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003) (citing Syl. Pt. 3, *Mountaineer*

has become the subject of such notoriety as to significantly and reasonably impair the capability of the particular employee to discharge the responsibilities of his position. See, *Id.* See also, *Rogliano v. Fayette County Bd. of Educ.*, 176 W. Va. 700, 347 S.E.2d 220 (1986).

Disposal Service, Inc. v. Dyer, 156 W. Va. 766, 197 S.E.2d 111 (1973)). Grievant underwent an extensive criminal background investigation under the direction of the WVDE prior to being hired by Respondent (information which was fully accessible to Respondent). Grievant was issued a bus operator certification. Grievant is a qualified bus operator. Respondent has not established a discovery rule exception in the confines of this case.

Respondent has simply failed to prove by a preponderance of the evidence that Grievant has committed any of the offenses set out in West Virginia Code § 18A-2-8(a) to justify termination. For the reasons discussed above this grievance is GRANTED.

The following conclusions of law are appropriate in this matter:

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 Public Employees Grievance Board, 156 C.S.R. 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. 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.*

2. "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.” W. VA. CODE § 18A-2-7(a). “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(c).

3. The suspension of an employee pending investigation of an allegation of misconduct is not disciplinary in nature and the 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).

4. Grievant failed to prove that Respondent violated law, rule or policy or otherwise acted arbitrary and capriciously in extending Grievant's temporary suspension.

5. The authority of a county board of education to terminate 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. See Syl. Pt. 2, *Parham v. Raleigh County Bd. of Educ.*, 192 W. Va. 540, 453 S.E.2d 374 (1994); Syl. Pt. 3, *Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975); *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991). The causes are:

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).

6. W. VA. CODE § 18A-2-8 authorizes a board of education to suspend or dismiss any person in its employment at any time for a number of reasons including cruelty, immorality, willful neglect of duty and insubordination, but this authority cannot be exercised in an arbitrary and capricious manner. W. VA. CODE § 18A-2-8. See *Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23- 235 (Dec. 29, 1995). 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).

7. School personnel regulations and laws are to be strictly construed in favor of the employee. *Morgan v. Pizzano*, 163 W.Va. 454, 256 S.E.2d 592 (1979); *Brum v. Bd. of Educ.*, 215 W.Va. 372, 599 S.E.2d 795 (2004).

8. Respondent failed to prove by preponderance of the evidence that Grievant engaged in conduct justifying dismissal.

Accordingly, this grievance should be **GRANTED**. Respondent Board is ordered to reinstate Grievant to his position as a bus operator and substitute mechanic, with back pay from the date, two working days post his unpaid suspension to the date he is reinstated, plus statutory interest, and to restore all benefits lost as a result of his dismissal, including seniority.

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: March 18, 2019

Landon R. Brown
Deputy Chief Administrative Law Judge