

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**SHAWN MILLER,
Grievant,**

v.

Docket No. 2020-0494-KanED

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

DECISION

Grievant, Shawn Miller, was employed by Respondent, Kanawha County Board of Education. On October 14, 2019, Grievant filed this grievance against Respondent protesting the superintendent's recommendation that his employment be terminated for immorality for the theft of aluminum. For relief, Grievant seeks reinstatement, restoration of all lost pay and benefits, and removal of all references to the discipline from Grievant's personnel records. On October 22, 2019, Grievant, by counsel moved to amend his grievance stating that Respondent had accepted the superintendent's recommendation to terminate his employment. The motion to amend was granted by order entered December 6, 2019.

The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held on February 11, 2020, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared in person and by counsel, John Everett Roush, AFT-WV/AFL-CIO. Respondent appeared by Principal Jennifer Stowers and was represented by counsel, Lindsey D.C. McIntosh, General Counsel. This matter became mature for decision on April 8, 2020, after an agreed request to extend the time to file was granted, and upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a teacher at Ben Franklin Career Center teaching classes to adults for the operation of heavy equipment. Grievant's employment was terminated for immorality for the theft of a large slab of aluminum. Grievant denied the charges. Although there was some question of the ownership of the aluminum, Respondent proved it was more likely than not Grievant stole the aluminum and that it was reasonable to terminate Grievant's employment for the same. Accordingly, the 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 was employed by Respondent as a teacher at Ben Franklin Career Center, teaching classes to adults for the operation of heavy equipment and had been so employed since 2011.

2. In the early 1970's Ben Franklin received a large quantity of heavy grade aluminum ("Ben Franklin aluminum") purchased from federal surplus. This aluminum has been used since that time to build fixtures for Ben Franklin and in projects for the education of students. There is no longer a record of the original purchase of the metal.

3. The Ben Franklin aluminum came in large slabs of different thicknesses from which pieces would be cut as needed. The slabs have two stamped marks. The first is the grade number, 50 52 2, which designates the type of aluminum. The second is the "ABL" number that indicates a year date and another three-digit number. The aluminum is somewhat unusual due to its size and grade.

4. Throughout his employment with Ben Franklin, Grievant stored scrap metal and other personal property on Ben Franklin property.

5. In 2011, as a practical experience exercise for his students, Grievant and his students assisted a private construction company in demolishing the old Bennigan's restaurant in the Town Center mall. The owner of the construction company gave permission for Grievant to take scrap metal from deconstructed walk-in coolers, which included large slabs of aluminum ("Bennigan's aluminum"). The students tore out the coolers and loaded the metal onto Grievant's trailer. Grievant hauled it to Ben Franklin and stored it there.

6. On June 4, 2019, Grievant used Ben Franklin equipment to remove a 1,660 pound slab of aluminum from Ben Franklin property and sell it to RJ Recycling for \$664.

7. In late July 2019, a former employee, Carl Teel, approached Matt Cole, Ben Franklin's Machine Tools and Metals instructor, to say that he had seen a slab of aluminum at RJ Recycling that looked like Ben Franklin's aluminum.

8. The Ben Franklin aluminum, along with other Ben Franklin property, is stored in a locked outdoor cage. The aluminum is stacked in a pile in the cage. Grievant was the only employee that had a key to the cage, although the cage is not completely secure as it does not have a roof.

9. Mr. Cole discussed what he'd been told by Mr. Teel with Principal Stowers and went to the cage to check if any aluminum was missing. Mr. Cole had last seen the aluminum in the spring of 2019. It appeared to him upon viewing the cage that at least one piece of the aluminum was missing.

10. Mr. Cole's method of inventorying the aluminum was lacking. Each slab of aluminum weighs a ton or more and Ben Franklin does not have a scale capable of weighing anything that heavy. Nevertheless, rather than inventory the aluminum by measuring and counting the slabs, noting the ABL number, Mr. Cole inventoried the aluminum by estimating the weight of all aluminum present.

11. As Grievant was the only employee with a key to the cage, Mr. Cole texted Grievant to ask about the aluminum in the cage. Grievant stated that he had seen the metal and did not think any had been moved.

12. Principal Stowers reported the theft to Lieutenant George Radar, Prevention Resource Officer. Lieutenant Radar interviewed the manager of RJ Recycling, who provided him with a receipt, video footage, and a driver's license copy showing that RJ Recycling purchased the piece of aluminum from Grievant.

13. Upon receiving the information from Lieutenant Radar, Principal Stowers contacted the Board of Education and was instructed to suspend Grievant.

14. Principal Stowers met with Grievant to inform him of the suspension. Grievant admitted he took the aluminum from Ben Franklin property but asserted he thought the aluminum belonged to him. Grievant offered to pay Respondent the money he received for the metal.

15. On August 12, 2019, Superintendent Ronald E. Duering, Ed.D, notified Grievant by letter confirming Grievant had been suspended with pay for theft of the metal pending a disciplinary hearing.

16. A disciplinary hearing was held on September 18, 2019, before a hearings examiner engaged by Respondent.

17. By decision rendered September 25, 2019, the hearings examiner determined Grievant committed immorality and that Respondent could take disciplinary action "up to and including termination."

18. On an unspecified date, Respondent terminated Grievant's employment.

19. RJ Recycling will not return the aluminum to Ben Franklin without definitive proof of ownership such as an invoice.

20. Criminal charges have not been filed because proof of ownership of the aluminum cannot be established beyond a reasonable doubt.

21. Grievant met or exceeded standards on all his annual evaluations.

Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. 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. 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.*

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. 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). “Immorality is an imprecise word which means different things to different people, but in essence it also connotes conduct ‘not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked. . . .’ Webster's New Twentieth Century Dictionary Unabridged 910 (2d ed. 1979).” *Golden v. Bd. of Educ.*, 169 W. Va. 63, 67, 285 S.E.2d 665, 668 (1981).

Respondent asserts it properly terminated Grievant’s employment for immorality for Grievant’s theft of the aluminum slab. Grievant denies he stole the aluminum, asserting that the aluminum he sold was his or, at worst, he mistakenly took aluminum owned by Respondent rather than his own.

In situations where “the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required.” *Jones v. W. Va. Dep’t of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of

prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Grievant does not deny that the Ben Franklin aluminum is a heavy-grade aluminum that had been at the school since before he became employed, although he disputes any characterization of the same as military grade or that it is rare. Grievant admits that the picture of the aluminum at RJ Recycling is the aluminum he sold to RJ Recycling. Therefore, the disputed facts are whether that piece of aluminum is a piece of Ben Franklin aluminum and, if it is, whether Grievant intentionally or mistakenly took it. Respondent does not appear to deny that Grievant was allowed to take slabs of aluminum from the demolition of a restaurant, Respondent simply asserts that the aluminum Grievant sold was Ben Franklin's aluminum and not any other. Therefore, it is not necessary to make a credibility assessment of Mr. Maynard, the owner of the construction business who gave Grievant scrap aluminum.

The only two witnesses who testified who had first-hand knowledge of the properties of the Ben Franklin aluminum are Grievant and Mr. Cole. Mr. Cole was responsible for inventorying the aluminum, is an instructor in metals, had used the aluminum in his instruction, and was familiar with the aluminum from using it when he was previously a student at Ben Franklin. Grievant had also used the aluminum in the course of his employment. Both demonstrated appropriate demeanors during their level three testimony. Both have an interest in the outcome: Grievant to recover his employment and Mr. Cole because he was responsible for the aluminum that was stolen.

The credibility determination must therefore be made based on the plausibility of the testimony and the consistency of prior statements.

Mr. Cole credibility testified that the Ben Franklin aluminum is unusual and that the aluminum at RJ Recycling looked like Ben Franklin aluminum due to its thickness, size, weathering and stamped numbers. As Mr. Cole is an instructor in metals and had regularly used the metal both as a student and then as an instructor, his opinion on the characteristics of the metal and that it is unusual is plausible. Photographs of the RJ Recycling piece and the Ben Franklin pieces show the same grade number, which also appears to be stamped in the same font on the pieces. Inexplicably, although Mr. Cole testified that the ABL number on the RJ Recycling piece also matched the Ben Franklin aluminum ABL numbers, only a picture of the grade number on the RJ Recycling piece and not the ABL number was introduced into evidence. Mr. Cole's testimony between the disciplinary hearing and the level three hearing was consistent. Mr. Cole was credible.

Grievant's testimony was inconsistent. Within the disciplinary hearing, Grievant's testimony continually shifted as he was cross examined regarding the specifics of the Bennigan's aluminum, adding more detail that appeared to contradict prior testimony the longer he testified. Eventually, Grievant specifically stated that the thick pieces of aluminum were "all in the cage in two piles" and that the heavy pieces of aluminum from Bennigan's were in the cage. He also stated that if the piece of aluminum he sold was Ben Franklin's then someone would have had to have put it on the wrong pile because he did not put any of his aluminum on top of Ben Franklin's property. Then, at the level three hearing, Grievant changed his testimony to say that the piece of aluminum was in a pile 100 feet outside of the cage. Reviewing the testimony from both proceedings

together Grievant's explanations do not appear to be from his memory of actual events but rather an attempt to explain away any misconduct on his part.

Further, neither Grievant's assertion that the aluminum he took was the Bennigan's aluminum¹ or that he took a Ben Franklin piece by mistake is very plausible. Grievant testified that he regularly scrapped metal, including aluminum, so he would have been aware of the value of the aluminum. It seems very unlikely that Grievant would have allowed a piece of aluminum he owned with a scrap value of almost \$700 to be left for the school's use for eight years before then deciding to sell it. Therefore, it appears unlikely that the Bennigan's aluminum was still at Ben Franklin when Grievant removed the piece of aluminum to sell or, if it was that Grievant actually believe he owned it. Even if the Bennigan's aluminum was still there, and considering Grievant's level three testimony that his scrap metal was stored outside of the cage, for Grievant to have taken the Ben Franklin aluminum by mistake would have required someone to have moved the 1600 pound piece of aluminum, and just that one piece, onto Grievant's pile of scrap 100 feet outside of the cage. If the Bennigan's aluminum had been in the cage as he testified in the disciplinary hearing, it would be strange that Grievant would not have mentioned

¹ Whether the Bennigan's aluminum was actually Grievant's personal property is not clear. Although Grievant asserts the Bennigan's aluminum was his because Mr. Maynard gave it to him personally and not as a donation to the school, the aluminum was received as a result of a project Grievant was doing in the course of his employment with Respondent, the coolers were demolished by students, the scrap was loaded by students, and then the scrap was stored on Ben Franklin's property. These facts would tend to establish that the Bennigan's aluminum was also the property of Ben Franklin. However, as it is ultimately determined that it was not the Bennigan's aluminum Grievant sold and as Grievant's belief that the aluminum was his is an available defense for lack of intent regardless of the truth of ownership, it is not necessary to determine whether Grievant actually owned the Bennigan's aluminum.

taking it when Mr. Cole texted him about aluminum missing from the cage. Grievant was not credible.

The burden of proof in this action is simply more likely than not. While it is not possible to conclusively prove ownership of the aluminum, as evidenced by the lack of criminal charges, the credible testimony of Mr. Cole, the lack of credibility in Grievant's testimony, and the consistency of characteristics between the Ben Franklin aluminum and the aluminum Grievant sold is enough to establish it is more likely than not Grievant stole the aluminum from Ben Franklin. Theft is immoral and Respondent's decision to terminate Grievant's employment for the theft of valuable property was reasonable.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. 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. 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.*

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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:

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W. VA. CODE § 18A-2-8(a).

3. “Immorality is an imprecise word which means different things to different people, but in essence it also connotes conduct ‘not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked. . . .’ Webster’s New Twentieth Century Dictionary Unabridged 910 (2d ed. 1979).” *Golden v. Bd. of Educ.*, 169 W. Va. 63, 67, 285 S.E.2d 665, 668 (1981).

4. Respondent proved it was more likely than not Grievant stole a valuable piece of aluminum, which is immoral.

5. Respondent’s decision to terminate Grievant’s employment for that theft was reasonable.

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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: May 14, 2020

Billie Thacker Catlett
Chief Administrative Law Judge