PATRICIA DYER,

Grievant,

v. **DOCKET NO. 97-22-246**

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

This grievance was submitted directly to Level IV by Grievant Patricia Dyer when Respondent Lincoln County Board of Education ("LBOE") terminated her substitute bus operator contract on April 21, 1997, for violation of "Policy 8-15.01 - unavailability for work." Grievant alleged Respondent had violated W. Va. Code § 18A-2-8 by not notifying her within two days of LBOE's decision, and that it was discrimination for LBOE to terminate her contract when other substitutes who had not been available for work because they were working elsewhere (as she was) were not dismissed. She sought as relief to be returned to the substitute list.

This case is confusing as the parties chose to present little evidence relevant to the dispositive issues, and very little argument. LBOE presented the testimony of only one witness, relying primarily upon Grievant's testimony to prove its case. The following Findings of Fact are made based upon the evidence presented at the Level IV hearings held on June 18 and July 9, 1997. (See footnote 1)

Findings of Fact

1. Prior to the termination of her substitute contract by LBOE, Grievant had been employed by LBOE as a substitute bus operator since 1992. She has also been employed by the Wayne County Board of Education as a substitute bus operator since 1993.

2. LBOE has guidelines in place for all substitute service personnel, County Substitute Service Personnel Policy 8-15.01, which provides, among other things, that "[t]he approved substitute must report to work when called unless prevented from doing so by personal illness or other just cause." It further states, "when a substitute service employee has accumulated three (3) consecutive refusals

to work not covered by one of the following, the individual's name shall be removed from the substitute list unless a waiver is granted by the Superintendent: Acceptable reasons for refusals are: 1. A written doctor's statement for personal illness. 2. Death in the immediate family." It further provides that a substitute who is "unavailable for work for an extended period of time, other than medical, . . . shall not be considered for re-employment. If a substitute is unavailable or the phone is unanswered for five (5) consecutive times, this will be considered excessive and the substitute's name will be removed from the substitute list and not contacted for the remainder of the year." Respondent's Exhibit 1. 3. Mira Johnston, LBOE's Executive Secretary, is responsible for calling substitutes to work, and recording whether they accept employment, refuse the work, or do not answer the telephone.

4. Notwithstanding the LBOE Policy, Grievant had been allowed, prior to October of 1996, to call Ms. Johnston and tell her she would not be available for a period of time. Grievant would then be removed from the rotation for the substitute list until she called Ms. Johnston and told her she was available again. (See footnote 2)

5. Grievant exceeded the number of consecutive refusals allowed by the Policy, refusing work on September 10, 13, and 16, 1996.

6. On October 8, 1996, Superintendent Dallas Kelley sent Grievant a letter advising her she was in violation of Policy 8-15.01, by exceeding the amount of refusals and/or not being available for work when called. Grievant thereafter appeared before LBOE at the October 1996 meeting. Her contract was not terminated at that time.

7. Because it appeared that some substitutes were not aware of the Policy regarding three consecutive refusals, in October or November 1996, Superintendent Kelley sent a letter to all substitutes with a copy of the Policy. (See footnote 3) At that time, all substitutes were given a clean slate; that is, Ms. Johnston started each person's record with no refusals.

8. Grievant substituted continuously in Wayne County for the same driver from February 1997, through the end of the 1996-97 school year, and was not available to substitute inLincoln County. (See footnote 4) Ms. Johnston called Grievant on February 13 and 18, 1997, and marked Grievant as "not available, no answer." On February 24, 25, and 26, 1997, Ms. Johnston marked refusals of work by Grievant on the call-out sheet, as Grievant responded when called that she was working elsewhere and could not work those days for LBOE.

9. On February 28, 1997, Donna Martin, Superintendent, sent Grievant a letter notifying her she was in violation of County Substitute Service Personnel Policy 8-15.01, in that she had "exceeded the amount of refusals and/or have not been available for work when called." The notice also informed her she must have a doctor's excuse to remain on the substitute list. The letter concluded: "If you do not contact us as to your intentions, your name will be removed from the substitute list." This letter did not inform Grievant that she might be dismissed, or that she had a right to a hearing before LBOE. Grievant's Exhibit 4. She received no further notices from LBOE until she was notified that her contract had been terminated.

10. Grievant's contract was terminated by LBOE on April 21, 1997. Grievant was not notified that LBOE was meeting on April 21, 1997, to consider the termination of her contract.

11. Grievant was notified of the termination of her contract by letter from Rick P. Powell, Superintendent (the third superintendent for the 1996-97 school year referenced in this grievance), dated April 25, 1997, sent certified mail, return receipt requested, and received by her on May 5, 1997. The letter states in full:

> Please be advised that at the April 21, 1997 meeting of the Lincoln County Board of Education, the Board voted to terminate your substitute contract due to violation of Lincoln County Policy 8-15.01 - unavailability for work.
>
> If you have any questions regarding this decision, please contact my office.

Grievant's Exhibits 5 and 6.

Discussion

W. Va. Code § 18A-4-15 provides that "[s]ubstitute service employees who have worked thirty days for a school system shall have all rights pertaining to suspension, dismissal and contract renewal as is granted to regular service personnel in sections six, seven, eight and eight-a, article two of this chapter." (See footnote 5) Employees subject to these protections acquire continuing contract rights, and their contracts may be terminated only pursuant to W. Va. Code § 18A-2-6 or 18A-2-8. W. Va. Code § 18A-2-8 provides that an employee may be suspended or dismissed 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. A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article. The charges shall be stated in writing served upon the

employee within two days of presentation of said charges to the board.

Otherwise, W. Va. Code § 18A-2-6 allows a county board of education to terminate any employee's contract "with written notice, stating cause or causes, to the employee, by a majority vote of the full membership of the board before the first day of April of the then current year." (See footnote 6) The parties presented this grievance as a disciplinary dismissal grievance, governed by W. Va. Code § 18A-2-8. As such, the burden of proof is on the employer to substantiate the charges against the employee by a preponderance of the evidence. W. Va. Code § 18A-2-8; Perkins v. Greenbrier County Bd. of Educ., Docket No. 94-13-019 (Aug. 12, 1994). The charges must be one or more of those listed in Code § 18A-2-8. Stover v. Mason County Bd. of Educ., Docket No. 95- 26-078 (Sept. 25, 1995). Finally, a county board of education must act reasonably, not arbitrarily or capriciously. Rovello v. Lewis County Bd. of Educ., 381 S.E.2d 237 (W. Va. 1989). Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991).

LBOE's only stated reason for terminating Grievant's contract was "violation of Lincoln County Policy 8-15.01 - unavailability for work." It did not identify which of the listed causes for termination at any time was applicable. (See footnote 7) LBOE presented as evidence only the testimony of Ms. Johnston regarding her efforts to contact Grievant to substitute, and what she did when Grievant was not available. Grievant admitted she was not available for work in Lincoln County after February 23, 1997, and LBOE proved it had in fact called her to work and received refusals to work from Grievant three consecutive times. Thus, LBOE has proven the charge that Grievant violated Policy 8-15.01 by being unavailable for work. Grievant's action appears to best fit within the category of willful neglect of duty. See Carrell v. Kanawha County Bd. of Educ., Docket No. 20-87-036-1 (Apr. 8, 1987). An employer asserting willful neglect of duty "must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act." Jones v. Mingo County Bd. of Educ., Docket No. 95-29- 151 (Aug. 24, 1995).

In this case, LBOE had a Policy in place which required Grievant to be available for work, and if Grievant refused work three times, her name would be removed from the substitute list. The Policy further provided that if an employee were unavailable for work for an extended period of time, she would not be "considered for re-employment." Grievant argued that she understood that her employment in Wayne County would not cause her to be removed from the Lincoln County substitute list. Indeed the parties admitted this was true prior to October 1996. However, LBOE has proven

Grievant was given notice by the October letter notifying her she had violated the Policy, and the letter thereafter from Superintendent Kelley regarding the Policy, that LBOE had decided that in the future it would enforce its Policy. LBOE had been reminded by a ruling of this Grievance Board that it must follow this Policy. ("A county board of education must abide by the regulations it promulgates." Dyer, et al., v. Lincoln County Bd. of Educ., Docket No. 95-22-494 (June 28, 1996).) (See footnote 8) Grievant was thus aware of the Policy, she did not dispute that she was made aware that it would be enforced, and she presented no evidence that she subsequently made an effort to be granted a waiver by the Superintendent. Grievant thereafter knowingly and intentionally acceptedemployment in Wayne County, which resulted in her being unavailable to work her substitute job in Lincoln County for an extended period of time. LBOE has proven Grievant willfully neglected her duty.

Although LBOE did not notify Grievant that she was entitled to a hearing before LBOE prior to its decision to terminate her contract, Grievant did not argue a due process violation. (See footnote 9) Rather, her sole arguments were that LBOE violated W. Va. Code § 18A-2-8 by not serving notice upon her within two days of its decision to terminate her contract, and that it discriminated against her. (See footnote 10) LBOE did not dispute that it had failed to meet the statutory requirements, nor did it argue it should be excused from these requirements, and presented no justification for its action. It did not argue that Grievant suffered no harm from its tardiness, nor did it argue that it had previously provided Grievant with notice. Under the circumstances of this case, the undersigned concludes that LBOE'sfailure to comply with the statutory deadline for notifying Grievant of the decision to dismiss her requires LBOE's decision to be vacated.

In an early Grievance Board decision, Warren v. Logan County Bd. of Educ., Docket No. 23- 86-375-1 (July 14, 1987), the county superintendent had informed the grievant, a substitute bus aide, that he would not recommend that her contract be renewed, and notified her of the date the school board would offer her a hearing. The grievant chose not to attend the hearing, and the school board never notified her that it had, in fact, not renewed her contract. W. Va. Code § 18A-2-8a required such notice, in writing, by certified mail. The school board argued it had substantially complied with the statute, and that the grievant's due process rights were not violated because of the notice given before the hearing. The Administrative Law Judge ruled, however, in Conclusion of Law 3, that "[f]ailure of the school board to comply strictly with the notice provisions of W.Va. Code, 18A-2-8a vitiates its action in nonrenewal of grievant's employment contract."

However, this analysis was seemingly rejected in Jones v. Nicholas County Bd. of Educ., Docket No. 92-34-305 (July 28, 1993), aff'd Nos. 93-AA-213, 94-AA-76 (Kanawha County Cir. Ct. Apr. 5, 1995), when the Administrative Law Judge found that the school board had met the Code § 18A-2-8 requirement of giving the grievant notice of the charges within two days of presentation of the charges to the board, by the superintendent's previous letter which had notified the grievant the superintendent was suspending him "for crimes that deal with school funds." The Administrative Law Judge continued, "[a]lthough this wording is somewhat vague and general, it does set out the claims presented to the board in that crimes dealing with school funds constitutes immoral behavior."

Finally, in Parker-Howes v. Webster, Docket No. 94-51-531 (Jan. 31, 1995), the board of education failed to notify the grievant within ten days of the decision to place her on the transfer list,as required by W. Va. Code § 18A-2-7. The Administrative Law Judge stated, "when a board of education fails to strictly comply with the timelines, the [Supreme] Court [of Appeals of West Virginia] has held that the grievant is entitled to reinstatement to his or her position." She concluded that this rule applied to the facts of that case; however, the grievant could not be reinstated because the position no longer existed.

Perhaps the Legislature chose two days because an employee has only five days to file a grievance at Level IV. This seems an unlikely reason, because the statute says the five days begins to run when the employee receives written notice of the charges presented to the school board, not five days from the presentation of the charges. This would make it appear that the two day requirement is part of the mechanism in place to ensure that grievances are filed promptly after the grievable event occurs.

Regardless of the purpose, the requirement is there and cannot simply be ignored. To the contrary, "[s]chool personnel regulations and laws are to be strictly construed in favor of the employee." Syl. pt. 1, Morgan v. Pizzino, 256 S.E.2d 592 (W. Va. 1979). There are many examples of the failure to comply with statutory deadlines, when the noncompliance is unexcused, resulting in a grievance being dismissed because it was not timely filed or not timely appealed to Level IV, or an employer's action being vacated. Lambert and White v. Div. of Envtl. Protection, Docket No. 97-DEP-275 (Aug. 20, 1997); Suan v. Lewis County Bd. of Educ., Docket No. 96-21-273 (Dec. 31, 1996); Kessel v. Grant County Bd. of Educ., Docket No. 95-12-341 (Mar. 30, 1996); Daniels v. Dept. of Health and Human Resources, Docket No. 94-HHR-1135/95-HHR-053 (May 31, 1995); Ball v.

Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995). In Morgan v. Pizzino, the Supreme Court of Appeals of West Virginia stated in Syl. pt. 2, "W. Va. Code, 18A-2-7 provides for notice and hearing before an employee's placement on a transfer or reassignment list is approved by a board of education. It must be complied with strictly." Where a county board of education failed to give notice that a contract would be terminated under W. Va. Code § 18A-2-6 by April 1, the board was required to pay the grievant as though he had continued in the position. Doss v. Mason County Bd. of Educ., Docket No. 96-26-108 (Sept. 30, 1996).

The Jones ruling discussed above compels some inquiry into the previous notice provided to Grievant. Grievant's only notice prior to her termination, in February 1997, stated that her name would be removed from the substitute list for three consecutive refusals. LBOE's Policy provides that when an employee "has accumulated three (3) consecutive [unexcused] refusals to work . . . the individual's name shall be removed from the substitute list." (Emphasis added.) The Policy later states that when a substitute "is unavailable or the phone is unanswered for five (5) consecutive times, this will be considered excessive and the substitute's name will be removed from the substitute list and not contacted for the remainder of the year," and that a substitute who is "unavailable for work for an extended period of time, other than medical, . . . shall not be considered for re-employment." (Emphasis added.) It would seem then that there are three different possible consequences, depending upon the situation: removal from the substitute list, removal from the substitute list and no contact for the remainder of the year, and no consideration for re-employment. (See footnote 11) Ms. Johnston testified only that a substitute may be terminated for three consecutive refusals, and Grievant was terminated for exceeding her refusals. She did not explain the differences in the three listed consequences, or whether, in fact, they are different. It is not clear from reading the Policy or the February letter sent to Grievant that this is what is meant by the Policy, or the letter, and the Policy is not self-explanatory. (See footnote 12) One could just as easily draw the conclusion from the Policy and the letter received by Grievant, that the consequence of three consecutive refusals is removal from the substitute list only for the remainder of the school year, with no permanent consequences, including no loss of seniority and no contract termination.

Further, the undersigned is of the opinion, after listening to the brief questioning of Grievant by LBOE's counsel and reading the Policy and the letter, that Grievant was not terminated for three consecutive refusals, as is stated in the February letter, but because she was unavailable for work for

an extended period of time. Under the facts of this case, with the limited argument, limited evidence, and lack of clarity regarding the Policy consequences and exactly what occurred, the undersigned concludes that the February 1997 notice given Grievant did not clearly apprise her that she was being recommended for dismissal, and did not excuse the subsequent procedural error.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. In disciplinary matters, the burden of proof is on the employer to substantiate the charges against an employee by a preponderance of the evidence. W. Va. Code § 18A-2-8; Perkins v. Greenbrier County Bd. of Educ., Docket No. 94-13-019 (Aug. 12, 1994). LBOE proved thecharges against Grievant and that they fell within one of the causes listed for dismissal in Code § 18A-2-8, willful neglect of duty.

2. A county board of education must give notice of the charges against the employee under Code § 18A-2-8 within two working days after the presentation of the charges to the board.

3. LBOE did not meet the statutory deadline for notifying Grievant of its decision to dismiss her under Code § 18A-2-8.

4. No facts were shown which would excuse LBOE's late notification, and LBOE did not provide Grievant prior clear notice that it was going to consider whether to dismiss her.

5. Under the facts of this case, LBOE's failure to notify Grievant of its action within the mandated time period does not constitute substantial compliance with the statute.

Accordingly, this grievance is **GRANTED**. The action of the Lincoln County Board of Education dismissing Grievant is vacated. The Lincoln County Board of Education is ORDERED to return Grievant's name to the substitute rotation list as though she had not been dismissed.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lincoln County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

BRENDA L. GOULD

Administrative Law Judge

Dated: September 11, 1997

Footnote: 1

The second hearing was for the purpose of taking the testimony of a rebuttal witness. This matter became mature for decision upon receipt of Grievant's proposed findings of fact and conclusions of law on July 30, 1997. Respondent declined to submit written argument.

Footnote: 2

The parties stipulated to this statement of fact.

Footnote: 3

This letter was not placed into evidence. It is, therefore, unknown exactly how the policy was explained in the letter by Superintendent Kelley.

Footnote: 4

The record does not reflect whether LBOE was aware in February 1997 that Grievant would not be available to substitute for the rest of the school year.

Footnote: 5

LBOE did not dispute that Grievant had worked at least 30 days. This Grievance Board has ruled that once a substitute works 30 days in one school year, the substitute has met this requirement for the remaining school years. Uchanski v. Ohio County Bd. of Educ., Docket No. 95-35-008 (Aug. 16, 1995).

Footnote: 6

It is the undersigned's belief that this is the provision LBOE intended to use to terminate Grievant's contract, but when it realized it had missed the April 1 deadline, it allowed this grievance to proceed under 18A-2-8. Whether Grievant was misled or simply went along with this so she could proceed directly to Level IV is unknown. However, since Grievant did not argue a violation of this Code Section, and LBOE was not on notice that this was an issue, it would be unfair for the undersigned to raise this as grounds to dismiss the grievance. Further, LBOE could use Code § 18A-2-8 to dismiss Grievant, and no evidence was presented that LBOE has issued Grievant a new contract for this school year.

Footnote: 7

This Grievance Board has found that a board of education need not identify which of the statutory causes for dismissal is applicable, so long as it states what the employee has done which has caused the action. Walker v. Kanawha County Bd. of Educ., Docket No. 89-20-384 (Oct. 26, 1989). See Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380

(Mar. 18, 1997).

Footnote: 8

Grievant believed the Policy was being enforced simply to get rid of her because another employee wanted her employment terminated due to a dispute between the two over a bus run. It appears to the undersigned, however, that it is the cited Grievance Board case which resulted in the Policy being enforced. The grievant in that case was Grievant's brother-in-law, and his grievance involved the very same Policy.

Footnote: 9

While Grievant appeared to raise a due process argument at the hearing, citing Wirt v. Bd. of Educ. of County of Mercer, 192 W. Va. 568 (1994), and again in her post-hearing written submission, when the undersigned specifically asked Grievant's representative at the hearing if she was making a due process argument, she said no, and then stated the reason she had answered that way was she could not find any case law which extended these protections to substitutes.

Footnote: 10

Because of the conclusions reached on the two day argument it is not necessary to address Grievant's discrimination argument. However, were the undersigned to address this issue, Grievant failed to prove discrimination. Although she produced evidence that other employees had refused work on three occasions, they did not refuse work on three consecutive occasions; nor was there evidence of any employee being unavailable for work for an extended period of time. It does appear to the undersigned, however, that LBOE may not be enforcing that part of the Policy relating to failure to answer the telephone, as Ms. Johnston repeatedly stated that if a substitute did not answer the telephone when she called, this "was not counted against them." The Policy states,"[i]f a substitute is unavailable or the phone is unanswered for five (5) consecutive times, this will be considered excessive and the substitute's name will be removed from the substitute list and not contacted for the remainder of the year." (Emphasis added.) Although it is not entirely clear what the consequence is, it is clear there is some consequence to failure to answer the telephone.

Footnote: 11

In fact, assuming that removal from the substitute list is something different from dismissal, the undersigned does not believe LBOE's Policy would have allowed Grievant to be dismissed under the facts of this case. The Policy provides that after three consecutive refusals, Grievant's name is to be removed from the substitute list. Once that occurs, she cannot then be terminated under the Policy for not being available for work for an extended period of time, because her name has been removed from the rotation for the rest of the year.

Footnote: 12

If some other policy explains what removal from the substitute list means, the parties did not place that information into the record.