CAMERON JARRELL,

Grievant,

v. **Docket No. 04-18-204**

JACKSON COUNTY
BOARD OF EDUCATION,

Respondent.

DECISION

The grievant, Cameron Jarrell ("Grievant"), challenges the action of his former employer, respondent Jackson County Board of Education ("BOE") in failing to renew his contract for the 2004-2005 school year as a substitute bus operator. Upon request of Grievant, a hearing was held before the BOE on May 6, 2004, wherein the grounds for not rehiring Grievant were established. At the conclusion of its hearing, BOE voted not to renew Grievant's contract.

Grievant's statement of grievance, which was filed with the West Virginia Education and State Employees Grievance Board ("Grievance Board") on May 28, 2004, stated the basis of his grievance as "Terminated." (See footnote 1) The relief requested was to be "[r]ehired as a substitute bus operator."

A Level IV hearing was conducted on July 13, 2004, in the Charleston office of the Grievance Board. The grievant was present in person and by his representative, Anita Mitter of the West Virginia Education Association. BOE was represented by HowardSeufer, Jr., Esquire. This case matured for decision on August 30, 2004, by which time both parties had submitted proposed findings of fact and conclusions of law.

There is little factual dispute in this grievance. Rather, Grievant argues that nonrenewal of his contract was an excessive response to Grievant's problems during his probationary period as a substitute bus operator. He claims that he should have been given additional time to improve his performance.

After careful review of the entire record, including the transcript of the hearing before BOE, the

undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

FINDINGS OF FACT

1 1. Grievant completed training as a substitute bus operator in March 2003.

2 2. During the 2003-2004 school year, Grievant was employed by BOE as a probationary substitute bus operator.

3 3. Grievant's immediate supervisor was James Stewart, Supervisor of Transportation ("Supervisor Stewart").

4 4. Supervisor Stewart has worked for BOE for 27 years. He has been in the position of Supervisor of Transportation for 3 years. Prior to that he served as a substitute bus operator, mechanic and chief mechanic.

5 5. Several perceived deficiencies in Grievant's performance as a probationary substitute bus driver during the 2003-2004 school year resulted in Supervisor Stewart informing the Assistant Superintendent that he did not recommend Grievant for employment as a substitute bus driver for the 2004-2005 school year. Exhibit 6 at BOE Hearing.

6 6. BOE was required to determine which probationary employees it would re- hire by the first Monday in May. At a meeting on April 20, 2004, Grievant was not recommended for re-hiring. Exhibit 7 at BOE Hearing. By correspondence, dated April 21, 2004, Grievant was informed by Ronald E. Ray, Superintendent of Jackson County Schools, about the April 20 meeting and the fact that Grievant was not recommended for re-employment as a substitute bus operator for the 2004-2005 school year. Exhibit 7 at BOE Hearing.

7 7. At Grievant's request [Exhibit 8 at BOE Hearing] a non-renewal hearing was held by BOE on May 6, 2004. (See footnote 2)

8 8. The evidence adduced during the non-renewal hearing established that there were four areas of concern that led to the recommendation not to renew Grievant's contract. These included 1) on-going problems with conducting a proper pre-trip inspection of his bus, despite counseling on this issue from Supervisor Stewart; 2) allowing his bus to run seven to eight quarts low on oil; 3) failing to properly report that his bus had sustained damage in an accident; and 4) reporting late for work thereby causing the students to be late.

Pre-trip Inspection

9 9. Each bus operator is required to conduct a safety inspection of the bus before each trip. Tr. 5-6. Such pre-trip inspections are important to the safety of the students who ride the bus. Tr. 9.

10 10. Bus operators are expected to arrive in time to complete the pre-trip inspection before departing for a run. Tr. 13.

11 11. Grievant had been required, as part of his training, to demonstrate that he was capable of properly conducting a pre-trip inspection.

12 12. On January 19, 2004, Supervisor Stewart gave Grievant a written observation/evaluation form, dated January 16, 2004, concerning Grievant's failure to properly perform a pre-trip inspection on the bus he drove on the morning of January 16. Specifically, Grievant failed to check the lights and safety devices. It was noted that the lights were out when Grievant pulled off of the lot. Exhibit 3 at BOE Hearing.

13 13. Grievant signed the observation/evaluation form for the January 16, 2004, incident. Exhibit 3 at BOE Hearing. Grievant testified that he placed his copy of the observation/evaluation form in a notebook without reading it.

14 14. Grievant failed to conduct a pre-trip inspection on January 20, 2004. Tr. 9.

15 15. Grievant inspected under the hood of the bus but failed to check the lights or the safety equipment, which he should have done as part of the pre-trip inspection, on February 6, 2004. Tr. 9.

16 16. Again on February 20, 2004, Grievant looked under the hood but neglected to check the lights or the safety equipment. (See footnote 3) Tr. 9.

17 17. Grievant was counseled by Supervisor Stewart about not properly, thoroughly conducting the required pre-trip safety inspection of the bus. Tr. 11-12.

18 18. When conducting pre-trip inspections, Grievant would usually “check what's under the hood and check down both sides to check and make sure that nothing is broke[n].” Tr. 24. In conducting the inspection in this cursory manner, (See footnote 4) Grievant ignored a number of mandatory components of the pre-trip inspection. Tr. 30; Exhibit 2 at BOE Hearing.

The Oil Incident

19 19. Checking the oil level is one of the tasks that should be performed as part of the pre-

trip inspection.

20 20. During one run, Grievant had to stop the bus and call for a mechanic because the oil level in his bus had dropped too low. The mechanic added eight quarts of oil. Tr. 8.

21 21. Prior to leaving on that run, Grievant checked the oil while the bus was parked on a slope. Tr. 19. He concluded that the bus was one quart low on oil but did not add a quart at that time.

22 22. Allowing the oil level to become too low can result in damage to the engine. Supervisor Stewart deems anything more than two quarts low to be excessive.

23 23. Grievant's assertion that the bus was only a quart low when he started the run [Tr. 19] led to concern on the part of Supervisor Stewart that there were mechanical problems with Grievant's bus.

24 24. To address this concern, Supervisor Stewart interviewed a bus operator who had driven that same bus for thirteen days before the bus was assigned to Grievant. This bus operator reported that the bus was using between two and four quarts of oil a week. Tr. 8-9.

25 25. Supervisor Stewart also conducted a test drive. He drove the same bus the same number of miles that Grievant had driven it before the oil light came on. Supervisor Stewart ascertained that the bus had used half of a quart of oil. Tr. 8, 16-17.

26 26. The bus was placed up on a rack and allowed to remain there for a day to see how much oil leaked out. This test only produced a spot about 3 to 4 inches in diameter, which is not excessive given the age and mileage of that bus.

27 27. Based on Supervisor Stewart's investigation, the bus in question could not have run eight quarts low on oil in the distance driven by Grievant even if, as Grievant asserted, the bus was a quart low when he started the run.

28 28. The fact that the engine was eight quarts low after Grievant drove it approximately 54 miles indicates that Grievant failed to properly check the engine's oil level during the pre-trip inspection. (See footnote 5)

The Accident

29 29. In January 2004, Grievant backed his bus into a tree limb, breaking a light and tearing off its housing.

30 30. The light that was broken was a clearance light. There are twelve such lights that run around the top of the bus for visibility. The broken light was a safety hazard and, had it been

observed by a State inspector, the bus would have been pulled off the road.

31 31. Grievant did not report the accident or the damage to the bus to Supervisor Stewart, who could have made arrangements to have a mechanic fix the broken light before the bus returned to service the next day. As it was, Grievant drove the bus again before the light was repaired.

32 32. After the accident, Grievant left the bus parked at the Ripley garage with a note on the driver's seat about the broken light. (See footnote 6) Tr. 33. This was at a time when Grievant knew that the mechanic at that garage was off on sick leave. Tr. 35. Grievant did not telephone the mechanic or check to see if anyone had seen the note.

33 33. Grievant was “taught to notify the person that needed to be notified in order to get the bus fixed.” Tr. 31. In other words, “if you have a problem with a bus, take it to a garage mechanic and have it fixed.” Tr. 34. With respect to the broken light, Grievant failed to comply with this training.

34 34. If Grievant had properly conducted the pre-trip inspection, he would have realized that the light was not working.

Failure to Report on Time

35 35. On January 12, 2004, Grievant, who was substituting for Barbara Redman, failed to report on time.

36 36. At that time, Grievant was relying on an outdated schedule, despite the fact that he knew a new schedule had been issued in November 2003.

37 37. The outdated bus schedule in Grievant's possession indicated that Barbara Redman's bus left the main garage at 6:30 a.m. to go to Ripley Elementary School.

38 38. Grievant was aware that, contrary to the outdated schedule he had in his possession, Barbara Redman had been parking her bus at the Ripley lot. Grievant concluded that it would only take him fifteen minutes to reach his first stop at Ripley Elementary School.

39 39. In the ordinary course of events, the regular bus operator leaves a voice message for the substitute bus operator on the automated system if there is any information that needs to be conveyed to the substitute. There was no such message for the substitute from Barbara Redman.

40 40. Grievant attempted, without success, to contact Barbara Redman and her son. (See footnote 7)

41 41. Upon failing to obtain the correct information regarding Barbara Redman's route, Grievant reported for work approximately 30 to 45 minutes late on January 12, 2004.

42 42. Grievant was also late for an extra-duty vo-tech run on March 30, 2004. He was to load students at 8:05 a.m. in front of the high school.

43 43. Approximately five minutes before the bus was scheduled to depart, Grievant called Supervisor Stewart and informed him that he would be approximately five minutes late. This delay was due to difficulties with child care arrangements.

44 44. Five minutes notice did not afford Supervisor Stewart sufficient time to obtain a different bus operator for the vo-tech run. The regular bus operator had the bus ready to go but could not take the run himself due to a doctor's appointment.

45 45. Supervisor Stewart attempted, without success, to contact other bus operators.

46 46. Grievant finally arrived at approximately twenty minutes after eight. The students riding the bus driven by Grievant were approximately 25 minutes late in arriving at vo-tech.

47 47. The first priority of the school bus transportation system is to safely deliver students on time.

48 48. When a school bus is delayed, students are exposed to increased risks to their health and safety, especially in winter weather. Further, they may miss such things as meals, required instructional time, tests, and so forth.

DISCUSSION

Contrary to his assertion, Grievant was not terminated from his employment as a substitute bus operator. He was still a probationary employee and, as such, was employed on a one-year contract. Once the contract expired, he did not have any further entitlement to continued employment. *Pendleton v. Raleigh County Bd. of Educ.*, Docket No. 01-41- 401 (Sept. 5, 2001). Under the terms of West Virginia Code section 18A-2-8a, BOE is afforded “broad discretion . . . when determining whether or not to rehire a probationary employee[.]” *Rogers v. Logan County Bd. of Educ.*, Docket No. 99-23-196 (Nov. 6, 2002). Nonetheless, such discretion is not without limitations. The Supreme Court of Appeals of West Virginia has noted that a board of education “must exercise its discretion reasonably to the end that it should not act arbitrarily or capriciously[.]” *Pockl v. Ohio County Bd. of Educ*., 185 W. Va. 256, 259, 406 S.E.2d 687, 690 (1991)(citing Syl. pt. 3, *Dillon v. Wyoming County Bd. of Educ*., 177 W. Va. 145, 351 S.E.2d 58 (1986)).

Pursuant to West Virginia Code section 18A-2-8a, Grievant was entitled to notice that he had not been recommended for a new contract for the 2004-2005 school year. He was also entitled to

receive, upon his request, both a statement of the reasons he was not being offered a new contract and a hearing before BOE. W. Va. Code § 18A-2-8a. A board of education may not “refuse to rehire a probationary employee for just any, or no, reason.” *Cordray v. Wood County Bd. of Educ*., Docket No. 90-54-267 (Jan. 31, 1991). The reasons identified by BOE for not rehiring Grievant must support that decision. However, those reasons need not rise to the level of a “for cause” requirement. *Stewart v. Berkeley County Bd. of Educ*., Docket No. 99-02-224 (Mar. 31, 2000).

In accordance with his statutory rights, Grievant requested and received a hearing before BOE. The hearing was held on May 6, 2004.

The evidence presented to BOE, and supplemented at the Level IV hearing on July 13, 2004, makes it clear that the decision not to re-employ Grievant was based on his performance as a substitute bus operator during the 2003-2004 school year. There werea number of problems with Grievant's performance, such as instances of tardiness, failing to properly report the accident in which Grievant backed the bus into a tree, and failing to report the consequent damage to the bus from the accident.

Perhaps most troubling was Grievant's continued failure to properly conduct the pre- trip inspection that a bus operator is required to perform before each run. Due to his refusal to perform the inspections in the manner he had been taught, Grievant transported students on a bus with a broken, inoperable light. The light in question was supposed to be on for safety purposes to make the bus visible to other drivers. The cursory manner in which Grievant inspected his bus caused Grievant to transport students on a bus that was dangerously low on oil. A mechanic had to meet Grievant on the road to add eight quarts of oil to the bus. A proper pre-trip inspection would have prevented this incident.

Grievant argues that “[n]ew employees sometimes may get confused about the procedures that must be followed, but should be given time for improvement and time to become familiar with the processes.” [Grievant's] Proposed Findings of Fact and Conclusions of Law at 5. This argument might assist Grievant with issues such as how to report damage to his bus but it does not carry any weight with respect to his on-going refusal to properly perform a pre-trip inspection of his bus. Grievant clearly knows how to do the inspection. He had recently completed training during which he learned all of the proper components of a pre-trip inspection. In fact, during his testimony at the hearing before BOE, Grievant described the steps that should be taken during such inspection.

Grievant initially testified at the BOE hearing that he conducted a thorough inspection before each run. This testimony is not credible because it was contradicted by the testimony of Supervisor Stewart, by the problems Grievant had with his bus in termsof running the oil low, and by Grievant's own subsequent testimony before BOE. Grievant's testimony was internally inconsistent. He testified that he performed the steps he outlined for a properly conducted pre-trip inspection "[m]ost of the time[.]" Tr. 18. When asked by his representative if he did "that every time" Grievant answered, "Yes." Tr. 19.

In flat contradiction to this testimony, Grievant subsequently testified that "usually" all he did was "check what's under the hood and check down both sides to check and make sure that nothing is broke[n]." Tr. 24. Grievant expressly acknowledged that he did not "do a full pre-trip" every time he drove a bus. Tr. 27. He also acknowledged that he "knew what was supposed to be done" in terms of the inspection but he "just didn't do it." Tr. 30. Grievant took it upon himself to ignore his training and abbreviate the mandatory inspection.

The chief thrust of Grievant's arguments that his contract should be renewed is that he was not given sufficient opportunity to improve his deficiencies. This might have more merit if Grievant had been confused. However, his testimony clearly establishes that Grievant willfully ignored his training.

Further, Grievant did not demonstrate much, if any, responsiveness to Supervisor Stewart's efforts to help Grievant improve his performance. In fact, Grievant testified that he did not bother to read the observation/evaluation forms when they were given to him. This testimony is hardly credible given the brevity of those forms, the fact that Grievant had to sign for them, and the importance of Supervisor Stewart's approval of his performance to Grievant's efforts to obtain the status of a regular, rather than probationary, employee. If ever an employee has the motivation to offer up his very best performance, it is duringhis probationary period. Despite having been verbally counseled by Supervisor Stewart, Grievant did not correct his faulty performance with respect to pre-trip inspections.

Supervisor Stewart provided Grievant with a written observation/evaluation regarding Grievant's deficiencies in performing a pre-trip inspection on January 12, 2004. Exhibit 1 at BOE Hearing. Grievant claims that he did not receive that form until April 5, 2004. The form, which was signed by Grievant, reflects that the conference with Supervisor Stewart took place on January 14, 2004.

If the date on the form was not correct, Grievant should not have signed it. Therefore, the January

14 date would appear to be correct. Nonetheless, this is not a significant issue. There is no doubt that Grievant was aware that he was not performing the inspections as required. He was counseled by Supervisor Stewart without any obvious improvement.

Grievant's actions in both failing to perform his job properly and in failing to respond to his supervisor's stated concerns regarding his performance suggest that additional time would not result in significant improvement. As BOE points out, Grievant's actions have serious safety implications for students. It seems that Grievant did not take these safety implications seriously. Otherwise he would not have circumvented the inspection procedures in the first place. At a minimum, he would have demonstrated marked improvement when his deficiencies were identified. He did not. Grievant's argument that he should have been given more time to improve is not persuasive.

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

CONCLUSIONS OF LAW

1 1. “[A] probationary employee's contract is for one year and the contract automatically expires if it is not renewed without any affirmative action by the board of education.” *Pendleton v. Raleigh County Bd. of Educ.*, Docket No. 01-41-401 (Sept. 5, 2001).

2 2. “The non-renewal of a probationary substitute contract of employment is not disciplinary in nature, and the burden of proof is upon the grievant to prove the elements of his grievance by a preponderance of the evidence.” *Rogers v. Logan County Bd. of Educ.*, Docket No. 99-23-196 (Nov. 6, 2002) (citing *Baker v. Hancock County Bd. of Educ*., Docket No. 97-15-447 (May 5, 1998), *aff'd* 207 W. Va. 513, 534 S.E.2d 378 (2000); *Beheler v. Logan County Bd. of Educ*., Docket No. 98-23-276 (Dec. 11, 1998)).

3 3. “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. Dep't of Health and Human Resources*, Docket No. 92-HHR-486 (May 17, 1993). Phrased differently, a preponderance “is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. *Petry v. Kanawha County Bd. of Educ*., Docket No. 96-20-380 (Mar. 18, 1997).” *Harvey v. Summers County Bd. of Educ*., Docket No. 01-45-360 (Sept. 20, 2001).

4 4. To prevail, Grievant must establish, by a preponderance, that the decision not to renew

his contract was arbitrary and capricious. *Rogers v. Logan County Bd. of Educ.*, Docket No. 99-23-196 (Nov. 6, 2002).

5 5. Under the terms of West Virginia Code section 18A-2-8a, BOE is afforded "broad discretion . . . when determining whether or not to rehire a probationary employee[.]" *Rogers v. Logan County Bd. of Educ.*, Docket No. 99-23-196 (Nov. 6, 2002).

6 6. Nonetheless, such discretion is not without limitations. The *Rogers* decision refers the reader to *Pockl v. Ohio County Bd. of Educ*., 185 W. Va. 256, 406 S.E.2d 687 (1991), wherein the Supreme Court of Appeals of West Virginia noted that a board of education "must exercise its discretion reasonably to the end that it should not act arbitrarily or capriciously[.]" *Pockl*, 185 W. Va. at 259, 406 S.E.2d at 690 (citing Syl. pt. 3, *Dillon v. Wyoming County Bd. of Educ*., 177 W. Va. 145, 351 S.E.2d 58 (1986)).

7 7. BOE may not "refuse to rehire a probationary employee for just any, or no, reason." *Cordray v. Wood County Bd. of Educ*., Docket No. 90-54-267 (Jan. 31, 1991). The *Cordray* decision teaches that, when requested by the former probationary employee, the reasons for the non-renewal decision must be provided, albeit after the decision has been made, and those reasons must support the decision. However, the reasons do not need to rise to the level of a "for cause" requirement. *Stewart v. Berkeley County Bd. of Educ*., Docket No. 99-02-224 (Mar. 31, 2000).

8 8. The decision not to re-employ Grievant was supported by valid reasons. This decision could not be deemed arbitrary and capricious.

9 9. Grievant failed to carry his burden of proof.

Accordingly, this grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of McDowell County. Any such appeal must be filed within thirty (30) days ofreceipt 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. However, the appealing party is required by West Virginia Code section 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: October 27, 2004

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

As discussed more fully herein, BOE decided not to rehire Grievant, who was a probationary employee. Thus, it is not legally correct to say that Grievant was terminated. See Conclusion of Law 1, below.

Footnote: 2

References to pages in the transcript of the BOE hearing shall appear as "Tr. ___."

Footnote: 3

On two other occasions Supervisor Stewart noted that Grievant did not appear to properly conduct the pre-trip inspections. However, the circumstances surrounding thoseincidents were not clear. Tr. 9. Therefore, they have not been considered deciding this grievance.

Footnote: 4

Grievant gave inconsistent testimony regarding the steps he took during a pre-trip inspection. A lengthy description of the steps required during a proper pre-trip inspection was elicited during direct examination of Grievant. Tr. 18. His description of a proper pre- trip inspection did not comport with Grievant's actions, as observed by Supervisor Stewart. Nor does it comport with allowing a bus to run 8 quarts low on oil. As such, Grievant's testimony on this point is deemed to be self-serving. It constitutes an inaccurate description of Grievant's normal practice. Grievant's later testimony, in which he admitted, that he does not "do a full pre-trip" is clearly more accurate. Tr. 27.

Footnote: 5

This is consistent with Grievant's assertion that he checked the oil level while the bus was sitting on a slope.

Footnote: 6

There was no testimony that anyone ever found such note.

Footnote: 7

There is no evidence that Grievant attempted to contact Supervisor Stewart to clarify the time the run started under the amended schedule.