PATRICIA BASHAM,

Grievant,

v.

DOCKET NO. 05-27-099

MERCER COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

The grievant, Patricia Basham ("Basham") grieves her dismissal by her employer, the Mercer County Board of Education ("BOE"). Basham was dismissed on the grounds of willful neglect of duty after she failed to report for work, as directed by Deborah S. Akers, Superintendent of Mercer County Schools, ("Superintendent Akers").

Basham alleges that her dismissal was unlawful and constituted discrimination for having filed a workers' compensation claim. According to her "Amended Statement of Grievance, Basham "seeks rescinding of Termination for Failure to Report to Work, assurance of fair and equitable treatment and any other relief the Grievance Board deems appropriate." At the Level IV hearing, Basham asked to amend her request for relief to include being placed on the transfer list. As BOE did not object to such amendment, it was allowed.

Because she was dismissed, Basham was entitled to bring this grievance directly to Level IV. A Level IV hearing was conducted in the Beckley hearing room of the West Virginia Education and State Employees Grievance Board ("the Grievance Board") on June3, 2005. At the Level IV hearing,

Basham represented herself, (See footnote 1) while BOE was represented by Kathryn Reed Bayless, Esquire. This grievance matured for decision on June 27, 2005, after the parties submitted their proposed findings of fact and conclusions of law.

There are few, if any, factual disputes in this grievance. The parties diverge in their view of the legal significance of the facts.

After careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1 1. Basham had been employed by BOE as a classroom teacher from 1983 until her dismissal in 2005.

2 2. On March 10, 2000, while working as a kindergarten teacher assigned to Princeton Primary School, Basham suffered a compensable, work-related injury, after which she missed work for an extended period.

3 3. During the pendency of her workers' compensation claim, Basham made a very brief return to work in 2001, at which time she was re-injured during contact with an elementary student. She has not returned to the classroom since then. She did, however, attend an in-service training at the beginning of the 2004-05 school year although she did not have any intention of returning to her classroom position.

4 4. Through a letter from her attorney, dated August 29, 2002, Basham tendered her resignation. Resp.Exh.9. For reasons not clear in the record, this letter was addressed to Kay Bayless, (See footnote 2) an attorney who represents BOE in certain, but not all, legal matters. Counsel for Basham explained that she was “not now medically ready to return” to work. He opined that her medical situation would be resolved “within a few weeks - - or a few months at most.” Resp.Exh.9.

5 5. In correspondence, dated September 3, 2002, Superintendent Akers advised Basham that if she were to request additional leave time until she was “medically ready to return to work” that could be arranged. Resp.Exh.10. Superintendent Akers further noted that “reasonable accommodation has been and will be available” to enable Basham to return to work when she was medically ready to do so. Resp.Exh.10. This letter concluded with an offer from Superintendent Akers

to allow Basham “the opportunity now to withdraw your attorney's request and await your return to work.” Resp.Exh. 10.

6 6. Basham accepted Superintendent Akers' offer and withdrew her resignation.

7 7. BOE held Basham's position at Princeton Primary School open and available for her by employing substitutes for Basham from the date of her original injury through the termination of her employment contract, with the exception of the limited period when Basham returned to work for less than one month in 2001. (See footnote 3)

8 8. By facsimile, Basham's attorney forwarded a letter, dated August 19, 2004, informing BOE's personnel director that Basham said she was still not “medically cleared to return to the classroom” but would be attending in-service training. The thrust of the letter was that Basham's “chronic impairment” precluded her from returning to the classroom but she would be happy to accept the promotion to special education specialist, instead. Gr.Exh.1.

9 9. While reviewing BOE's workers' compensation cases, Superintendent Akers became aware that, by August 2004, Basham had reached her maximum degree of medical improvement and was no longer under a total, temporary disability. As a result, Superintendent Akers sent a letter to Basham, dated January 14, 2005, directing her to report to work on January 31, 2005. Resp.Exh.1. This correspondence was forwarded to Basham by certified mail, return receipt requested. Resp.Exh.1. Superintendent Akers further instructed Basham to contact Roger Daniels, BOE's Director of Human Resources (“Director Daniels”), if any of the information upon which Superintendent Akers was relying was in error. Resp.Exh.1.

10 10. Basham directed her response to Director Daniels. In her letter, dated January 24, 2005, Basham stated that she was “still medically restricted from returning to a classroom teaching position.” Resp.Exh.2.

11 11. Basham also took the opportunity afforded by her January 24 correspondence to Director Daniels to lobby for a position she had been seeking. She asserted that her doctor was “in agreement that a primarily office position such as SpecialEducation Specialist, which I applied for several times, would accommodate my physical limitations, unlike teaching.” (See footnote 4) Resp.Exh.2.

12 12. Superintendent Akers responded on March 1, 2005. She gave a detailed explanation of why it would not be appropriate to grant Basham's request for a promotion to the position of special

education specialist, even if there had been an opening in such position at that time. She further advised Basham that immediate action had to be taken with respect to Basham's contract because plans for staffing had to be completed and the needs of the students had to be met. Resp.Exh.3.

13 13. In her March 1, 2005, correspondence, Superintendent Akers also informed Basham that

> [b]ecause you cannot return to your employment as a teacher either with or without reasonable accommodation, and because the accommodation you have requested, that you be placed in the position of special education specialist, is not a “reasonable” accommodation, I shall recommend the termination of your employment contract with the Mercer County Board of Education at its meeting to be held on March 15, 2005[.]

Resp.Exh.3. As specific grounds for her recommendation, Superintendent Akers identified Basham's “failure to return to work, as directed, and as required by your contract of employment.” Resp.Exh.3.

14 14. The time and place of the March 15 meeting was provided to Basham, and she was invited to attend the meeting to challenge Superintendent Akers' recommendation for termination of her contract. Resp.Exh.3. Basham was asked to notify SuperintendentAkers' office by March 11, 2005, if she desired to attend the March 15 meeting. Resp.Exh.3.

15 15. On March 10, 2005, Basham wrote that she could not be prepared by March 15 to appear in front of BOE . Resp.Exh.4. Superintendent Akers did not receive this letter until March 14, 2005, and did not respond to this request.

16 16. Basham telephoned the central office on or about March 10 and notified Director Daniels that she was requesting a later hearing date.

17 17. In a written memorandum to BOE, dated March 15, 2005, Superintendent Akers advised that she was recommending termination of Basham's employment contract “for failure to return to work as directed.” Resp.Exh.5. The attached memorandum, which was also dated March 15, 2005, set forth the charge against Basham as “[w]illful neglect of duty due to violation of the terms of the employment contract.” Resp.Exh.5.

18 18. This recommendation was approved. Resp.Exh.6. By letter of March 16, 2005, Superintendent Akers notified Basham of BOE's action in terminating her contract and advised her of her right to file a grievance. A copy of the grievance form was enclosed for her use. Resp.Exh.7.

19 19. Basham persists in her refusal to return to a classroom teaching position. She also persists in asserting that she should be given the position of special education specialist, which, she

maintains, she is capable of filling despite the medical problems that prevent her from returning to the rigors of teaching a class of elementary students.

20 20. The special education specialist position is a central office position with a higher pay scale, a higher county supplement, and a longer contract term than a classroomteacher would receive. Granting Basham's request to place her in this position would be a promotion.

21 21. As set forth in the correspondence from Superintendent Akers, dated March 1, 2005, even if Basham were given the position of special education specialist she would still have to work directly with special education students, including those with behavioral disorders. Resp.Exh.3. Granting Basham the requested promotion would not reduce or eliminate the risk that a student could cause Basham to re-injure herself or aggravate her existing condition.

22 22. BOE does not dispute that Basham suffers a twenty percent partial permanent disability.

23 23. Prior to the termination of her contract of employment, Basham never asked to be reinstated to her teaching position, with or without any accommodation.

24 24. Basham's doctor, Richard A. Shorter, D.O., complied with a request, presumably from Basham, to “provide an update on the employment restrictions applicable” to her. Gr.Exh.2. (See footnote 5) In his correspondence, dated September 3, 2004, Dr. Shorter stated his belief that Basham should not return to the position she held at the time of her injury (Gr.Exh.2 at ¶4) but opined that she could “return to the workplace in some capacity” as long as it was not as a classroom teacher (Gr.Exh.2 at ¶5).

25 25. Basham followed Dr. Shorter's advice that she seek other employment if the school system could not place her in a position that would accommodate her physicallimitations. Gr.Exh.2 at ¶6. By the time of the Level IV hearing, Basham was employed as a lawyer in Tennessee.

Discussion

BOE bears the burden of establishing, by a preponderance of the evidence, the charges upon which Basham's dismissal was based. W. Va. Code § 18-29-6; *Gross v. Kanawha County Bd. of Educ*., Docket No. 02-20-090 (Aug. 30, 2002). “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 and Human Res.*, 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).

West Virginia Code section 18A-2-8 provides, in pertinent part, that a board of education may dismiss an employee at any time for "[i]mmorality, 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 board of education's authority to dismiss an employee pursuant to West Virginia Code section 18A-2-8, "must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously.'" Syl. pt. 4, *Maxey v. McDowell County Bd. of Educ*., 212 W. Va. 668, 575 S.E.2d 278 (2002)(quoting Syl. pt. 3, *Beverlin v. Bd. of Educ.*, 158 W.Va. 1067, 216 S.E.2d 554 (1975)). Procedurally, in order to terminate a teacher's contract for one of the grounds set forth in West Virginia Code section 18A-2-8, a board of education is required to serve the affected teacher with a written copy of the charges "within two days of presentation of said charges to the board." The teacher must then "be given an opportunity, within five days of receiving such written notice, to request, in writing, a level four hearing," as provided for in the grievance procedures applicable to education employees. (See footnote 6) W. Va. Code § 18A-2-8.

Superintendent Akers' March 1, 2005, correspondence provided Basham with written notice of the charges in advance of their presentation to BOE. Basham was also offered the opportunity to challenge her termination by appearing for a hearing at the March 15, 2005, BOE meeting. While the statute is silent on this point, it is well- established that due process requires that an employee be provided with notice and an opportunity to respond prior to being dismissed on one of the grounds set forth in West Virginia Code section 18A-2-8. *Bd. of Educ. v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994). The *Wirt* Court expressly stated that the pre-termination hearing need not be a full-blown adversarial, evidentiary hearing.

Basham claims that she "was denied the opportunity to respond to the charges." Basham's Proposed "Findings of Facts and Conclusions of Law" ("Basham's Proposed Decision") at 3, ¶15. This is not true. She was offered the opportunity to attend the March 15 meeting at which time BOE would have held a hearing.

Basham was supposed to notify Superintendent Akers by March 11 if she planned to participate in

the March 15 hearing. Instead, on March 10, Basham telephoned DirectorDaniels' office to request a later hearing date. She also wrote to Superintendent Akers, asserting that she could not be prepared by March 15. Resp.Exh.4. Although it was dated March 10, 2005, Superintendent Akers did not receive Basham's letter until March 14, 2005. This was one day before the scheduled BOE meeting and three days after the deadline Basham had been given for notifying Superintendent Akers if she intended to appear on March 15. Superintendent Akers did not respond to Basham's request for a later hearing date, meaning that the hearing remained set for March 15.

Based upon the foregoing, Basham now complains that she “requested, in writing and by phone, a hearing before the Board of Education to present any medical or other information the Board felt was unclear or lacking to support Grievant's physical inability to report to work.” Basham's Proposed Decision at 3, ¶15. Ignoring for the moment that Basham was offered a hearing, neither Superintendent Akers nor BOE disputed Basham's assertions about her inability to return to the classroom. In the notice to Basham of the reasons for her recommendation that Basham's contract be terminated, Superintendent Akers expressly stated it was “[b]ecause you cannot return to your employment as a teacher with or without reasonable accommodation[.]” Resp.Exh.3. Nowhere in the March 1 notice of the charges does Superintendent Akers question Basham's assertion that medical restrictions prevent her from resuming her duties as a classroom teacher. Rather, the entire March 1 letter is predicated upon acceptance of this premise. Resp.Exh.3.

This case is distinguishable from *Wines v. Jefferson County Bd. of Educ*., 213 W. Va. 379, 582 S.E.2d 826 (2003), in which a lawyer representing the employee who was facing termination informed the Jefferson County Board of Education that he could not attend the November 8, 2000, meeting at which the employment status of his client, Wines,would be determined. Counsel for Wines proposed alternative dates within roughly the same time frame. The Jefferson County Board of Education refused to accommodate this request for a different date for Wines' pre-termination hearing. Unlike Wines, Basham did not assert that she was not available to attend the pre-termination hearing on its scheduled date. Although she expressed a preference for a different date so that she could be better prepared, this preference was not effectively communicated to Superintendent Akers until the day before the BOE meeting was set to be held.

When there was no response from BOE indicating that the hearing date would be changed, (See footnote 7) Basham simply opted not to appear at the scheduled time and place to participate in such

hearing. Having chosen to forego the hearing, Basham cannot now claim that she was denied due process because a pre-termination hearing was not held. It is the opportunity for such hearing that BOE is required to provide, and, in fact, did provide.

If a request for a continuance is not affirmatively granted, it is incumbent upon the parties to appear on the scheduled hearing date. A party who fails to appear does so at their own peril. Having failed to obtain a new hearing date, Basham bears the responsibility for not appearing. *See*, *Kimberly Industries v. Lilly Explosives Co.*, 199 W. Va. 584, 486 S.E.2d 324 (1997).

As BOE has correctly noted in its post-hearing submission, none of the evidence introduced by Basham at the Level IV grievance hearing was dated after March 15, 2005, which was the date of the BOE hearing. This suggests Basham already had all of thedocumentary evidence needed to appear before BOE to challenge the termination of her contract. In any event, she could have appeared and made a proffer as to what further evidence she hoped to develop. This would have provided an appropriate predicate for asking BOE to hold any decision on her employment in abeyance until Basham had a further opportunity to develop such evidence. Basham took none of these steps to protect her interests.

When Superintendent Akers informed Basham of the results of BOE's vote on whether to terminate her employment contract, she also informed Basham of her right to pursue an appeal to Level IV of the grievance process. Such notice comports with the requirements of West Virginia Code section 18A-2-8.

As to the substantive grounds for the termination of her contract, Basham argues she did not willfully neglect her duty by refusing to return to her teaching position. Rather, Basham's perception of the matter is that she was compelled to leave the classroom as a result of medical advice and her inability to perform the duties required of a classroom teacher. Basham is taking a very passive view of her role in this matter. She did not inform BOE when she reached her maximum medical improvement. She did not ask to be reinstated. She did not advise BOE as to what reasonable accommodations were needed in order for her to resume her teaching responsibilities. Instead, she laid low, finished law school, and took a bar exam, all while BOE was holding her position open for her. Apparently, Basham was intending for this situation to go on *ad infinitum*.

Basham is trying to make too fine a distinction by arguing that her refusal to return to the classroom was not willful neglect of duty. To the extent that she means that there was nothing

volitional about her medical condition, her point is well-taken. There is,however, something more to the meaning of willful neglect of duty. The Supreme Court of Appeals of West Virginia has acknowledged that, although our jurisprudence lacks a precise definition for this term, it “encompasses something more serious than 'incompetence,' which is another ground for teacher discipline under W. Va. Code, 18A-2- 8. The term 'willful' ordinarily imports a knowing and intentional act, as distinguished from a negligent act.” *Bd. of Educ. v. Chaddock*, 183 W. Va. 638, 640, 398 S.E.2d 120, 122 (1990)*(per curiam*)(citing *Fox v. Bd. of Educ*., 160 W. Va. 668, 672, 236 S.E.2d 243, 246 (1977)).

While the condition from which she suffers is not knowing and intentional, Basham made a conscious decision not to return to work despite Superintendent Akers' instruction to do so. While Basham has reasons for not returning to the position, her refusal to fulfill her teaching contract was knowing and intentional, as was her decision not to inform BOE when she reached her maximum degree of medical improvement. As such, it was correctly described by Superintendent Akers as a willful neglect of duty. Further, to the extent that Basham failed to step forward and make a request for reasonable accommodations, her actions in avoiding performance of her contractual duties were, in fact, a willful neglect of duty. Therefore, BOE has established that the termination of Basham's employment contract was based upon one of the statutory grounds found in West Virginia Code section 18A-2-8.

It is unclear what Basham hopes to achieve by taking issue with whether her actions constituted willful neglect of duty. She has no intention of fulfilling her contractual obligations as a classroom teacher. Therefore, her request for reinstatement is disingenuous. The obvious question is, to what end would Basham want BOE to continueto hold a classroom teaching position open for her when Basham is adamant that her permanent, partial disability prohibits a return to the classroom. This question remains unresolved.

Basham also argues that BOE has violated the non-discrimination provision of the state Workers' Compensation Act. In pertinent part, that statute provides that “[i]t shall be a discriminatory practice . . . to terminate an injured employee while the injured employee is off work due to a compensable injury . . . and is receiving or is eligible to receive temporary total disability benefits[.]” W. Va. Code § 23-5A-3(a). Basham was not receiving or eligible to receive temporary total disability benefits at the time that Superintendent Akers wrote to Basham on January 14, 2005. Nor were temporary total disability

benefits available to Basham at the time BOE voted to terminate her employment contract. Therefore, this portion of the statute is inapplicable to Basham.

"It shall be a discriminatory practice . . . for an employer to fail to reinstate an employee who has sustained a compensable injury to the employee's former position of employment **upon demand for such reinstatement** provided that the position is available and the employee is not disabled from performing the duties of such position." W. Va. Code § 23-5A-3(b)(emphasis added). This provision is likewise inapplicable to Basham because she never made a demand for reinstatement. Further, Basham insisted that she was disabled from performing the duties of a classroom teacher. There is no evidence to indicate that BOE has violated the provisions of the State Workers' Compensation statutes prohibiting discrimination against an employee who has suffered a compensable injury.

Rather than discriminating against her, BOE has treated Basham fairly throughout her recovery period. For instance, BOE discouraged Basham from resigning her positionat a time when she had not yet reached the maximum level of medical improvement and, in addition, held her position for her for five years. Basham made a conscious decision to refuse Superintendent Akers' directive to return to work or face termination now that she has reached her maximum degree of medical improvement. In so doing, Basham placed her employer in an untenable situation that needed to be resolved. It is unreasonable to expect a board of education to continue placing substitute teachers in a position that is being held for a classroom teacher who, having reached maximum medical improvement, clearly has no intention of ever returning to the position that was held open for her.

BOE has met its burden of proof and has established, by a preponderance of the evidence, that the termination of Basham's contract of employment was based on one of the permissible grounds set forth in West Virginia Code section 18A-2-8 and, procedurally, comported with the requirements that same statute. For nearly five years, BOE preserved for Basham a position she does not want. Basham now claims that her permanent injuries bar her from filling that position. Prior to her termination, Basham did not seek reinstatement and did not identify any reasonable accommodation that would allow her to fulfill her contractual obligations. Therefore, BOE's decision and action in terminating Bashams's contract of employment cannot be considered arbitrary and capricious. This grievance must be denied.

Conclusions of Law

1 1. BOE bears the burden of establishing, by a preponderance of the evidence, the charges upon which Basham's dismissal was based. W. Va. Code 18-29-6, *Gross v. Kanawha County Bd. of Educ*., Docket No. 02-20-090 (Aug. 30, 2002).

2 2. “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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

3 3. BOE proved, by a preponderance of the evidence, that Basham's refusal to return to her contractual teaching duties constituted a willful neglect of duty,

4 4. The substantive and procedural requirements of West Virginia Code section 18A-2-8 were met with respect to BOE's decision and action in terminating Basham's employment contract.

5 5. There has been no violation of the non-discrimination provisions of West Virginia Code section 23-5A-3(a) because Basham was not receiving or eligible to receive temporary total disability benefits when her contract was terminated.

6 6. There has been no violation of the non-discrimination provisions of West Virginia Code section 23-5A-3(b) because 1) Basham never demanded reinstatement, and 2) BOE never refused to reinstate Basham to her former position.

7 7. BOE's decision to terminate Basham's employment contract was reasonable. It cannot be described as arbitrary and capricious.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mercer County. Any 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. However, the appealing party is required byWest 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:

August 5, 2005

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

After her injury in 2000, and before the Level IV hearing, Basham obtained a law degree. She was admitted to the Tennessee bar in November 2004 and currently practices law in Chattanooga.

Footnote: 2

This is Kathryn Reed Bayless.

Footnote: 3

To the extent that Basham attempted to argue that BOE made inadequate accommodations for Basham during this brief return to work, such argument would be untimely. These assertions will not be addressed further in this grievance.

Footnote: 4

There was no evidence to suggest that Basham ever grieved her non-selection for the special education specialist position.

Footnote: 5

This item was not directed to any particular individual, but rather "to whom it may concern." The reference line contains a claim number, so it appears that it was drafted in connection with Basham's workers' compensation claim. Basham's social security number also appeared in the reference line, but has been redacted in the file copy of this exhibit.

Footnote: 6

W. Va. Code § 18-29-1 et seq.

Footnote: 7

In fact, her request was not received by Superintendent Akers until the day before the scheduled BOE meeting.