THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

TRACY BELCHER,

Grievant,

v. **DOCKET NO. 06-23-156**

M. Paul Marteney, ALJ

LOGAN COUNTY BOARD

OF EDUCATION,

Employer.

DECISION

Procedural History

Grievant Tracy Belcher, formerly employed by the Logan County Board of Education (LCBOE), filed this grievance on May 16, 2006, challenging her termination. She seeks reinstatement and back pay. This matter was filed directly at level four, and a hearing was held in the Grievance Board's Charleston office on November 17, 2006. The matter became mature for decision on January 5, 2007, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Appearing for Grievant: John Everett Roush, Esq.
West Virginia School Service Personnel Association

Appearing for Respondent: Leslie K. Tyree, Esq.

Synopsis

Grievant was terminated from her position as a bus operator after she passed out at the wheel while stopped in front of a school, then subsequently tested positive for opiates. Grievant claims she was denied due process in the termination, and that a second, negative drug test exonerated her

alleged misconduct. Respondent did fail to protect Grievant's due process right, but at level four proved adequate cause to support the termination. Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant was employed by LCBOE as a regular Bus Operator. She started driving in 1994, and became a full-time operator in 2001.

2. Grievant suffered a foot injury, and was prescribed Vicodin ES to control the pain associated with the injury.

3. Vicodin ES is the brand name for a medication comprising 750mg acetaminophen and 7.5mg hydrocodone bitartrate. Hydrocodone is an opiate narcotic, and in therapeutic doses can impair the ability to drive, cause drowsiness and mental clouding.

4. In the late afternoon, around 5:30 p.m., on October 11, 2005, Grievant took a dose of Vicodin ES for her foot pain.

5. Grievant parks her bus at her home. On the morning of October 12, around 5:30 a.m., while making her pre-trip inspection of her bus, Grievant struck her head on a rearview mirror. Although it caused substantial pain, Grievant did not believe this injury would affect her ability to operate her bus, and she proceeded to drive her route.

6. As Grievant continued her route, her head continued to ache and got progressively worse. When she arrived at West Chapmanville Grade School, she opened the door to the bus, but told the students to wait (she normally assists the pre-school students off the bus and walks them in to the school). As her head was in pain, she rested her head on the steering wheel, and passed out. She does not recall anything after that until she woke up in the emergency room at Logan General Hospital. 7. One of the students got off the bus and found the school principal, Mark Adkins, who came to the bus and found Grievant unconscious. He called 911, and Grievant was transported to the hospital by ambulance.

8. At the hospital, Grievant was diagnosed as having had a syncopal episode. As part of her evaluation at the hospital, a urine sample was screened for drugs, and the result was “presumptive positive” for opiates. Due to the positive result, the split sample was sent to LabCorp for a second test. Grievant was discharged from the hospital after refusing a referral to a neurologist, and was

released to return to work on October 15. At the emergency room, she denied having taken any medication until she was told of the positive test result, then she admitted having taken Vicodin the day before.

9. The results of the LabCorp test on the split sample were negative for any controlled substances.

10. Although Grievant was not officially suspended, she was told not to return to work. LCBOE directed Grievant to undergo a forensic psychological evaluation by Dr. David A. Clayman, Ph.D., which was performed on October 28, 2005. Dr. Clayman had not reviewed Grievant's medical records, including the drug tests, and found no psychological reason for Grievant's syncope. He did note in his report that Grievant denied “psychological, alcohol, drug or legal problems,” and that she “denied ever using drugs or alcohol whether at work or not.”

11. On December 20, 2005, Dr. Clayman submitted a “Follow-up Comment” to LCBOE Superintendent David Godbey, in which he noted that he had received Grievant's hospital records, which revealed the positive drug test. He then stated:

> Her failure to reveal the use of drugs on the day of the event raises serious concerns with regard to her capacity ro function safely and effectively as a school bus driver. There is no indication medications had been prescribed for any condition. Because of her lack of forthrightness, the degree to which she has been abusing this prescription medication cannot be addressed. Even if she were taking them under the direction of a physician, she should have considered the potential for possible negative impact and taken appropriate preventive actions to assure safety in her job.
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> Based upon the additional information received, it is clear that her actions placed her students and herself unnecessarily at risk. Because of the type of violation, it would be necessary to test her for drugs in her system in order to best assure the Logan County School System that her ability to perform is not being compromised by the inappropriate use of a controlled substance. Short of this, there is no way to assure that she will behave in a responsible, drug free manner that might not present further problems that could ultimately cause harm.

12. Dr. Clayman never received a copy of the LabCorp negative drug report.

13. Dr. Pat J. White was LCBOE Director of Transportation at the time of the incident. Although County Policy requires it, neither he nor Grievant's supervisor were made aware of her prescription for Vicodin.

14. LCBOE provides bus operators with yearly training on controlled substance use, and has in place a policy prohibiting the use of any drug or controlled substance, with penalties including

dismissal. Under the policy, a driver cannot work with any proscribed drugs in her system.

15. By letter dated April 28, 2006, Superintendent Godbey informed Grievant that he would recommend her termination to the Board of Education at a regular meeting to be held May 11, 2006.

16. Grievant, by counsel, requested to be heard on the issue, and appeared at the meeting, but the Board declined to hear from her. Grievant's Counsel, Kimberly Levy, faxed the request to be heard to LCBOE's counsel on May 5, 2006. 17. By letter dated May 15, 2006, Superintendent Godbey informed Grievant that “The Board chose to waive your hearing directly to level IV in that it is disciplinary in nature.” He also denied the Board had notice prior to the meeting that she wished to be heard, and claimed she had appeared “unannounced.”

18. The Board was never informed by Superintendent Godbey of the second, negative drug test.

Discussion

The employer bears the burden of establishing the charges alleged to be the basis of Grievant's termination by a preponderance of the evidence. (See footnote 1) Despite alluding to other complaints against Grievant or other problems with her work performance in its termination letter, LCBOE terminated Grievant solely on the charge that she tested positive for opiates after she passed out with a busload of students.

Respondent based its decision to terminate, in part, on Dr. Clayman's opinion that Grievant could not be trusted to report her use of controlled substances or to accurately judge their effects in her ability to perform her job. I do not find Dr. Clayman's conclusions to be entirely reliable, as his language and method seem to indicate a definite bias against Grievant that clouds his professional judgment. Further, his follow-up comments are based on an incomplete medical record, as he had no knowledge of the negative drug test, or that Grievant had a prescription for her medication, until the level four hearing. He states “the degree to which she has been abusing. . .cannot be addressed,” an odd word choice that preassumes use equals abuse. He later talks about “the type of violation”without any reference to what Grievant might be violating. Throughout his follow-up comment, he makes it clear that he believes the drug use and the syncope are related, without ever addressing that conclusion outright. In summary, he mostly appears indignant that he was lied to when he asked Grievant if she used drugs. There is no evidence, aside from Dr. Joseph's

speculation, that the drug use and Grievant's blackout were related. Further, it is not inconceivable that grievant answered in the negative because she believed he was asking about illegal drug use, as she suggested was the question she perceived he was asking. The only evidence Dr. Clayman had that Grievant abused her medication was the inference he drew from her denial of its use.

Although not conclusively causitive of Grievant's syncope, Grievant's use of a narcotic is nevertheless very much an issue. The blackout episode was merely an agent in making it known to KCBOE that Grievant was using the drug. Although there is evidence that the LabCorp test is more accurate and reliable than the drug screen used at the hospital, I simply cannot find the negative result to be valid, due to Grievant's admission that she had taken Vicodin the evening before the incident. Such an admission is so damaging to Grievant's defense, that there would be no reason for her to make it if it were not true. Grievant's own expert witness testified that after a single dose of Vicodin, only twenty-six percent is excreted in the urine in seventy-two hours. Although he also stated the second test indicates the first test was wrong, this conclusion is an opinion at odds with the established scientific data upon which he relies. The conclusion that Grievant did have opiates in her system while operating a school bus establishes a pivot-point for the entire matter, as that charge was the basis for the termination of Grievant's employment.

Grievant's employment as a school bus operator is regulated in part by the Code of Federal Regulations, which in 49 C.F.R. § 382.213 states:

> (a) No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions when the driver uses any controlled substance, except when the use is pursuant to the instructions of a licensed medical practitioner, as defined in §382.107, who has advised the driver that the substance will not adversely affect the driver's ability to safely operate a commercial motor vehicle.
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> (b) No employer having actual knowledge that a driver has used a controlled substance shall permit the driver to perform or continue to perform a safety-sensitive function.
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> (c) An employer may require a driver to inform the employer of any therapeutic drug use.

In addition, LCBOE has established a policy requiring bus operators to notify their supervisor that they have been prescribed a controlled substance, and Grievant made no such disclosure. LCBOE's

Drug Free Workplace policy prohibits bus operators from operating a bus with any amount of a controlled substance in their systems. Grievant had not been informed that Vicodin will not adversely affect her ability to drive, and without that information, the federal regulation prohibited her from operating her bus. Respondent has met its burden of proving Grievant violated federal regulations and county policy by having Vicodin in her body system while she was operating a school bus loaded with students.

"The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code §18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously." (See footnote 2) West Virginia Code section 18A-2-8 identifies the types of action that can result in disciplinary action and provides, in pertinent part:

> 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 felonycharge. 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.

However, "It is not the label a county board of education attaches to the conduct of the employee in the termination notice that is determinative. The critical inquiry is whether the board's evidence is sufficient to substantiate that the employee actually engaged in the conduct." (See footnote 3) Further, Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute his judgement for that of the employer. (See footnote 4) Grievant's failure to report her drug use, her allowing the drug to be in her system while operating her bus, and her apparent deception as to whether she used any drugs, constitute insubordination, and willful neglect of duty, and possibly intemperance.

"[F]or there to be "insubordination," the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." (See footnote 5) Grievant was well-versed in the rules regarding controlled substance use while employed as a bus operator. She does not contend the regulations or policies are invalid. She did deny using any drug, until presented with evidence that she had, indicating a knowing and wilful intent to deceive her employer. This conduct does rise to the level of insubordination. Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. (See footnote 6) For the same reasons her

conduct is insubordinate, it is a willful neglect of her duty. Part of her duty is to ensure the safety of her students by refraining from using a controlled, intoxicating or impairing substance. This she did not do, knowing full well that such behavior was improper. She did not comply with her duty to report her drug use, and intentionally omitted it as part of her medical history when asked, until she was informed of the positive drug screen report.

Merriam-Webster's dictionary defines “intemperance” as “lack of moderation; especially : habitual or excessive drinking of intoxicants.” (See footnote 7) Although the term is usually associated with alcohol, it is the intoxication that matters, not the substance. Use of controlled substances that can impair one's ability to drive, such as the opiates found in Grievant's body, can be as intoxicating as alcohol, and their use can form the basis of an intemperance charge. “Intemperance,” as used in W. Va. Code § 18A-2-8 refers to the effect of habitual or excessive intoxication upon one's ability to function in a given capacity. “Excessive” in this use is relative, and in the case of a bus operator, any presence of an intoxicating substance such as Vicodin in the body while operating a bus is excessive.

Based on the foregoing analysis, I find Respondent met its burden of proving good and reasonable cause for terminating Grievant's employment. Her request for reinstatement to her position must therefore be DENIED. Due Process

Grievant's ancillary argument is that she was not afforded due process before she was suspended and then terminated. She was never formally suspended, although she was told not to return to work, and she had no pre-termination hearing before the Board made its decision. The West Virginia Supreme Court of Appeals has determined what due process is required. Prior to the termination of a continuing contract of employment, a tenured employee is entitled to a pre-termination hearing, not a full adversarial hearing, a written notice of the charges, an explanation of the evidence, and an opportunity to respond to the charges. (See footnote 8)

Grievant was given by Superintendent Godbey notice of the charge against her and of his intent to recommend termination. She met with Superintendent Godbey to explain her side of the story. However, it must be noted that the Superintendent does not make the decision to terminate employment: he only makes the recommendation to the Board. When Grievant and her counsel appeared at the Board Meeting where the fate of her continued employment was to be decided, she was refused the opportunity to be heard. Oddly, the Board seemed to be under the impression that she was requesting a level three grievance hearing, this despite the fact that no action had been

taken at that point and no grievance had been filed. Since it typically waives level three, it told Grievant it would waive her hearing. The Board had no power to waive Grievant's right to a pretermination hearing. Had it not done so, it may have been informed of the second, negative drug test, and decided differently. Grievant was not afforded her right of due process prior to her effective suspension and her eventual termination. Since her due process started with the level fourproceedings, that should establish the time frame from when her suspension and termination effort gained legitimacy.

The following conclusions of law support this discussion:

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; *Hoover v. Lewis County Bd. of Educ.*, Docket No. 93-21-427 (Feb. 24, 1994); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989).

2. "The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code §18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991). *See Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975)." *Graham v. Putnam County Bd. of Educ.*, Docket No. 99-40-206 (Sep. 30, 1999).

3. A school 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.

4. "[F]or there to be "insubordination," the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid. *Butts v. Higher Education Governing Board/Shepherd College* 569 S.E.2d 456 (W. Va. 2002). 5. Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. *Adkins v. Cabell County Bd. of Educ.*, Docket No. 89-06-656 (May 23, 1990).

6. "Intemperance," as used in W. Va. Code § 18A-2-8 refers to the effect of habitual or

excessive intoxication upon one's ability to function in a given capacity.

7. Respondent met its burden of proving Grievant was insubordinate, willfully neglected her duty, and was intemperate, all to the extent that the termination of her contract of employment was justified.

8. Prior to the termination of a continuing contract of employment, a tenured employee is entitled to a pre-termination hearing, not a full adversarial hearing, a written notice of the charges, an explanation of the evidence, and an opportunity to respond to the charges. *Bd. of Educ. of the County of Mercer v. Wirt*, 453 S.E.2d 402 (W. Va. 1994) at Syl. Pt. 3; W. Va. Code § 18A-2-8.

9. Grievant was not afforded the due process required before her contract was terminated.

For the foregoing reasons, this grievance is hereby **DENIED** in part and **GRANTED** in part. Grievant's misconduct is held to be supportive of LCBOE's decision to terminate her employment, so her request for reinstatement to her position is DENIED. However, the lack of due process prior to the termination decision prejudiced Grievant substantially, thereby rendering nugatory the action prior to the level four hearing. Grievant is therefore awarded back pay in the amount she would have earned, including benefits, between October 15, 2005 and November 17, 2006, had she been fully employed, plus legal interest. Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Logan County. Any such appeal must be filed within thirty 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 by W. Va. Code § 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.

January 25, 2007

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M. Paul Marteney

Chief Administrative Law Judge

Footnote: 1

W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994).

Footnote: 2

Graham v. Putnam County Bd. of Educ., Docket No. 99-40-206 (Sep. 30, 1999).

Footnote: 3

Allen v. Monroe County Bd. of Educ., Docket No. 90-31-021 (July 11, 1990); Duruttya v. Mingo County Bd. of Educ., Docket No. 29-88-104 (Feb. 28, 1990).

Footnote: 4

Tickett v. Cabell County Bd. of Educ., Docket No. 97- 06-233 (Mar. 12, 1998).

Footnote: 5

Butts v. Higher Education Governing Board/Shepherd College 569 S.E.2d 456 (W. Va. 2002).

Footnote: 6

Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990).

Footnote: 7

Merriam-Webster's Online Dictonary, available at: http://www.m-w.com/cgi-bin/dictionary ?&va=+intemperance

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Footnote: 8

Bd. of Educ. of the County of Mercer v. Wirt, 453 S.E.2d 402 (W. Va. 1994) at Syl. Pt. 3; W. Va. Code § 18A-2-8.