THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CONNIE MULLINS,

Grievant,

v. DOCKET NO. 07-20-404

KANAWHA COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant Connie Mullins filed this grievance on June 7, 2007, stating, “In September 2006, I stepped-up to a supervisory position. In May, 2007, I was removed from the supervisory position despite the fact that the regular employee had not returned to work.” Her stated relief sought is “Reinstatement to the supervisory position and all back pay and benefits to which I am rightfully entitled.”

A level two hearing was held at the Offices of the Kanawha County Board of Education on October 1, 2007. Grievant was represented by Gary Archer of the West Virginia Education Association and Respondent was represented by James W. Withrow, its General Counsel. Following denial at level two, level three was waived and Grievant appealed to level four, where the parties agreed to submit the matter for decision based on the record developed below. The matter became mature for decision on May 12, 2008, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant was “stepped up” to her supervisor's position as a substitute to cover a long-term absence. Her performance faltered, and at her own request she was given two weeks to improve.

She did not improve, partly because she was absent due to familyemergency for one of the weeks. Held that Respondent's action in replacing her in the supervisory position was not proper, as her lack of improvement during the allotted time was due to circumstances beyond her control. Grievance GRANTED.

Findings of Fact

Based on a preponderance of the evidence contained in the record already developed, I find the following material facts have been proven:

1. Grievant Connie Mullins is a 24-year employee of Kanawha County Schools. For the past nine years she has been employed in the Crede warehouse as a warehouse clerk.

2. Grievant's immediate supervisor is Libby O'Brian, Coordinator of Services/Inventory Supervisor.

3. In September 2006, Ms. O'Brian began an absence that continued to the date of the level two hearing. (See footnote 1) Knowing she would be off for an indeterminate time, Ms. O'Brian asked Grievant to “step up” into her position. This was not the first time Grievant had been temporarily promoted in such a manner.

4. The normal practice in Kanawha County for filling the warehouse supervisor's absence is to ask the most senior warehouse clerk first, then the next senior clerk, and so on. On the day Ms. O'Brian appointed Grievant to fill in, Rick Leachman, the most senior clerk, was absent. Grievant was next in line.

5. Ms. O'Brian's immediate supervisor is Tim Easterday (See footnote 2) . When Grievant was substituting for Ms. O'Brian, Mr. Easterday was her immediate supervisor. 6. From September 2006 to May 2007, Grievant's performance in the supervisory role was satisfactory to Mr. Easterday. In May 2007, Mr. Easterday was made aware of several problems with inventory logistics at the warehouse, and on May 15, met with Grievant to discuss the issues.

7. Grievant requested two weeks to resolve the problems, to which Mr. Easterday agreed.

8. Between May 15 and May 30, Grievant only worked four days. The week of the 15th included a holiday, and Grievant took five vacation days the following week due to a family emergency (her son had been in a vehicle accident).

9. Mr. Easterday saw no improvement by May 30, and on May 31, 2007, he returned Grievant

to her former position and appointed Mr. Leachman to fill in for the still- absent Ms. O'Brian.

Discussion

As the personnel action Grievant complains of was effectively a demotion for performance reasons, it was a disciplinary action for which Respondent bears the burden of proof. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6 (See footnote 3) ; *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).

Respondent presented very little evidence regarding Grievant's performance. At the level two hearing, the only witnesses were Grievant and Mr. Easterday, and the hearing examiner improperly placed the burden of proof on Grievant. Instead, Respondent's position is that Grievant had no right to be in the supervisor's position, so she had no right to any sort of due process before she was removed. In fact, Respondent's proposed findings state, “No formal improvement plan or specific improvement period is required because the employee has no right to be placed or continue in the position.”

County boards of education have substantial discretion in matters related to hiring, assignment, transfer, and promotion of school personnel. However, that discretion must be tempered in a manner that is reasonably exercised, in the best interest of the schools, and in a manner which is not arbitrary and capricious. (See footnote 4) Further, that discretion is limited when there is specific statutory or regulatory authority addressing the issue in question. Here, the issues are a service employee's right to substitute for another, and, once in the substitute position, the employer's power to remove the employee before the absent employee returns.

Respondent is correct that West Virginia Code § 18A-4-15(b)(3) does not apply, as that substitute assignment procedure only addresses employees in the same classification. In this case, there were no other employees at the Crede warehouse who held Ms. O'Brian's classification. There is no statutory “step-up” procedure for cases when there isno similarly-classified employee to fill the absence. The rotating, seniority-based substitute selection process contained in that section only speaks directly to employment of personnel hired by the Board as substitutes, not to employees already working as a regular employee. Mr. Easterday testified that there was no substitute roll

established for the position at issue, as only someone already intimately familiar with the operation would be able to fill the roll. Because there were no regular employees in the same classification at the same work location, and because there were no substitute service personnel hired to fill absences in the warehouse supervisor position, there is no statutory procedure to guide the employer in the situation that started this grievance.

However, "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." (See footnote 5) Respondent has effectively, through long practice, established a procedure for placing a substitute in the warehouse supervisor position as needed, and cannot now claim Grievant had no right to be in the position in the first place based on the Respondent's failure to follow the letter of the law. Grievant attained the temporary position properly when her supervisor followed the established practice for appointing her.

Regardless of how she was placed in the position, Grievant was effectively performing as a substitute for the absent Ms. O'Brian. (See footnote 6) Had there been another serviceemployee with the same classification in the same work location, there would have been a statutory procedure to follow. Likewise, there would have been a statutory procedure to follow had the board already hired substitutes to choose from for Ms. O'Brian's position. There is no statutory procedure for the situation that was in play here, so Respondent was free to develop its own procedure for doing so, making that in-house procedure the manner in which a substitute employee is properly assigned. Respondent's procedure was established by practice rather than being formalized in writing. Mr. Easterday ratified and acceded to Grievant's temporary promotion as he allowed her to remain in that position for some eight months, even after he learned that Ms. O'Brian's absence would extend much longer than he previously expected. "A substitute employee properly assigned to fill the position of an absent employee on a temporary basis shall hold that position throughout the period of the regular employee's absence. W. Va. Code § 18A-4-15." (See footnote 7) Grievant's argument at first appears suspect, that she seeks to have the benefit of an *improper* appointment to the position, and also the benefit of statutorily *proper* removal procedures. However, given Respondent's unwritten but consistent procedure for appointing a substitute for the Warehouse Supervisor position, Grievant was properly appointed and was entitled to remain in the supervisory position until properly removed.

> All school personnel are entitled to know how well they are fulfilling their responsibilities and should be offered the opportunity of open and honest evaluations of their performance on a regular basis and in accordance with the provisions of section twelve of this article. All school personnel are entitled to opportunities to

> improve their job performance prior to the termination or transfer of their services. Decisions concerning the promotion, demotion, transfer or termination of employment of school personnel, other than those for lack of need or governed by specific statutory provisions unrelated to performance, should be based upon the evaluations, and not upon factors extraneous thereto. All school personnel are entitled to due process in matters affecting their employment, transfer, demotion or promotion[.]

W. Va. Code § 18A-2-12a(b)(6).

Grievant places much weight on the facts that she was not given a formal notice of improvement or improvement period, and that she only had four working days in which to improve after Mr. Easterday first communicated his concerns to her. However, she does not deny that on or about May 15, he told her what was wrong and what needed to be improved. She did not argue that improvement was not needed. The two weeks he gave her to resolve the problems was her proposal, to which Mr. Easterday agreed. At the end of the two weeks, Grievant had only worked four days, and the problems were still there. Under this scenario, I must find that the two weeks was sufficient to give Grievant enough time to improve her performance. Given that two weeks was a sufficient period for Grievant to show improvement, the question becomes one of whether she was, for practical purposes, actually given two weeks or whether she was given only four days. The first week was a four-day work week due to a holiday, that we must presume Grievant knew about when she proposed the length of time she did. Grievant was not at work at all the second week due to a situation she could not have foreseen, her son's car accident. There was scant evidence of the nature of this emergency, other than Grievant's testimony that her son had been in a car accident. Grievant's payroll leave form specifies that she was using vacation time, and not family illness leave.

There is, evidence, that Grievant did not follow the proper procedure for requesting the time off. Instead of calling Mr. Easterday, who was her immediate supervisor, she left a message with Becky Clendenin, an accountant/supply manager, who arrived at work before Mr. Easterday. Mr. Easterday believed he was told Grievant called in sick, and he did not know she would be off the whole week. It is unclear whether Grievant reported off once for the whole week, or just for the first day. There is no evidence Mr. Easterday contacted her during the week.

Under this set of facts, it was proven that Grievant was entitled to remain in the warehouse supervisor position until Ms. O'Brian returned. Respondent met its burden of proving her performance in the position was not satisfactory, and she was given an adequate time period in which to improve

that performance before a decision would be made to remove her by demoting her back down to her regular position. Respondent met its burden of proving that Grievant did not adequately improve in that time period. This shifts the burden to Grievant to prove the affirmative defense that Mr. Easterday arbitrarily and capriciously expected the same amount of improvement in two weeks despite Grievant's emergency absence. An affirmative defense is one that, "assuming the complaint to be true, constitutes a defense to it." Black's Law Dictionary, Abridged 6th Ed. (1991). "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." 156 C.S.R. 1 § 4.21.

The record does not establish who filled in for Grievant in the warehouse supervisor slot while she was off the last week of May. Respondent did not rebut Grievant's claim that her absence was not strictly voluntary. Also, the two week period Mr. Easterday granted Grievant to clear up the inventory problems that had arisen was not put into writing, and it was never clarified whether this was two calendar weeks or two weeks worth of working days. Had either party presented more evidence, or had the terms of the informal improvement period been reduced to writing, this case would be much more clear. However, the burden of proof is low, and I find it is more likely than not Grievant had a valid excuse for not working for the week in question.

An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." (See footnote 8) "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simplysubstitute [his] judgment for that of a board of education." (See footnote 9) Under this standard, I am unable to find that Mr. Easterday's decision was reasonable. Mr. Easterday himself had an obligation to make sure the warehouse operations were meeting the requirements of the school system, and he took the action he felt was necessary to do so. However, he had granted Grievant two weeks in which to show improvement, and capriciously required her to make that improvement in four days instead. He stated that "after two weeks, 98% of the problems were still there," without acknowledging that result should have been expected. Grievant's absence during the improvement period was to a significant extent beyond her control, and Mr. Easterday had no reason to expect the same level of improvement under these circumstances.

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. A substitute employee properly assigned to fill the position of an absent employee on a temporary basis shall hold that position throughout the period of the regular employee's absence. W. Va. Code § 18A-4-15. 3. "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs. Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977)." *Morris v. Kanawha County Bd. of Educ.*, Docket No. 99-20-200 (July 27, 1999).

4. Grievant was properly appointed as a substitute for the warehouse supervisor using the county's established practice of "stepping up" a warehouse clerk to that position.

5. Grievant was adequately informed of her performance deficiencies and given an improvement period lasting for the length of time she herself chose, which under this set of facts, was reasonable.

6. An affirmative defense is one that, "assuming the complaint to be true, constitutes a defense to it." Black's Law Dictionary, Abridged 6th Ed. (1991). "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." 156 C.S.R. 1 § 3.

7. Grievant met her burden of proving Mr. Easterday's decision was arbitrary and capricious.

For the foregoing reasons, this grievance is hereby **GRANTED**. Grievant is awarded any back pay, with interest, and seniority she would have earned had she remained in the substitute position until the regular employee returned to work.

Any party may appeal this decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty days of receipt of this decision. W. Va. Code § 18- 29-7. (See footnote 3) Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve acopy 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.

September 16, 2008

Figure

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

There was no evidence that Ms. O'Brian requested a formal leave of absence.

Footnote: 2

Mr. Easterday's title is not in the record.

Footnote: 3

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007.

Footnote: 4

Syl. Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

Footnote: 5

Morris v. Kanawha County Bd. of Educ., Docket No. 99-20-200 (July 27, 1999).

Footnote: 6

Under W. Va. Code § 18A-4-15(b), Service personnel substitutes shall be assigned in the following manner:

> *(1) The substitute with the greatest length of service time in the vacant category of employment has priority in accepting the assignment throughout the period of the regular service person's absence or until the vacancy is filled on a regular basis pursuant to section eight-b of this article. Length of service*

time is calculated fromthe date a substitute service person begins assigned duties as a substitute in a particular category of employment.

(2) All service personnel substitutes are employed on a rotating basis according to their lengths of service time until each substitute has had an opportunity to perform similar assignments.

(3) Any regular service person employed in the same building or working station and the same classification category of employment as the absent employee shall be given the first opportunity to fill the position of the absent employee on a rotating and seniority basis. In such case the regular service person's position is filled by a substitute service person. A regular service person assigned to fill the position of an absent employee has the opportunity to hold that position throughout the absence. For the purpose of this section only, all regularly employed school bus operators are considered to be employed within the same building or working station.

Footnote: 7

Pierson v. Kanawha County Bd. of Educ., Docket No. 06-20-182 (Jan. 23, 2007).

Footnote: 8

State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996).

Footnote: 9

Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997); Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001).