THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JAMES M. SWIMM,
Grievant,

v. **DOCKET NO. 2009-1690-WayED**

WAYNE COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed by Grievant, James M. Swimm, at level three of the grievance procedure, on June 24, 2009, contesting his suspension without pay and subsequent dismissal from his employment with the Wayne County Board of Education ("WBOE"), after his arrest for driving under the influence of alcohol, and his plea to that offense, and the loss of his school bus operator certification. The statement of grievance reads:

> Grievant was suspended without pay upon his arrest for DUI and was subsequently dismissed from employment after his plea to first offense DUI. Grievant alleges a violation of West Virginia Code 18A-2-8 and disparate treatment.[1]

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[1] No evidence was presented in support of the allegation of disparate treatment. Although Grievant asserted in his proposed findings of fact that in the 1990's, more than 10 years ago, Respondent had allowed several bus operators whose bus operator certifications were in jeopardy due to pending criminal charges to bid out of bus operator positions, the undersigned was unable to find this information in the record developed at level three. Accordingly, this argument will not be addressed. However, the undersigned would note that even were this allegation true, any such Board action would be too remote in time to be of any consequence in this matter.

The relief sought by Grievant is "reinstatement to regular employment and an opportunity to apply for regular positions in other classifications."

A level three hearing was held before Administrative Law Judge Mark A. Barney on November 9, 2009, at the Grievance Board's Charleston, West Virginia office. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by David Lycan, Esquire. This matter became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on December 15, 2009.

Synopsis

Grievant, a bus operator, was suspended and then dismissed from his employment after his DUI arrest, plea of no contest, and loss of his school bus operator certificate. Grievant was no longer competent to perform the duties he was hired to perform, as he did not hold the prerequisite school bus operator certificate. Respondent was allowed by statute to dismiss Grievant from his employment. Grievant's argument that he should have been allowed to remain an employee until he was able to bid into another classification was without foundation in the law.

The following Findings of Fact are made based upon the record developed at level three.

Findings of Fact

1. Grievant was employed by the Wayne County Board of Education ("WBOE") as a bus operator for 16 years. Prior to that he had worked as a substitute employee for WBOE for about 4 years.

2. On October 19, 2008, Grievant was arrested for driving under the influence of alcohol (DUI).

3. The arresting officer found a cut off straw, typically used to snort drugs in powder form, in Grievant's car and in his pocket, and observed some type of residue in Grievant's nostril. He asked Grievant if he had being snorting Xanax, and Grievant, in an intoxicated state, responded that he had. Grievant was not charged with snorting illegal drugs, nor was the residue in his nostril tested. Grievant has a prescription for Xanax and had taken a pill the preceding afternoon.

4. On October 20, 2008, WBOE suspended Grievant without pay for 30 days due to his arrest. Grievant's suspension was renewed at the end of 30 days, and continued until his employment was terminated.

5. On December 3, 2008, Steven L. Paine, the State Superintendent of Schools, notified Grievant that his school bus operator certificate would be suspended for two years, effective December 23, 2008, and that he had the right to request a hearing on the suspension of his certification. Grievant requested a hearing, but asked that the hearing be postponed until the DUI proceedings had been resolved. Grievant's school bus operator certificate has been suspended by the State Department of Education.

6. Grievant is unable to perform his duties as a bus operator without a school bus operator certificate.

7. On March 31, 2009, Grievant entered a plea of no contest to the charge of first offense DUI.

8. On May 20, 2009, WBOE Superintendent Gary L. Adkins notified Grievant that he was recommending Grievant be dismissed from his employment with WBOE for

his DUI arrest and what he referred to as Grievant's criminal conviction. Superintendent Adkins stated "I am especially concerned about your admission to the arresting officer that you had been snorting Xanax up your nose before your arrest." Superintendent Adkins concluded that Grievant's actions constituted incompetency, immorality and willful neglect of duty.

9. On June 18, 2009, WBOE held a hearing on the Superintendent's recommendation to dismiss Grievant from his employment. At the conclusion of the hearing, WBOE voted to terminate Grievant's employment.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). A preponderance of the evidence is evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proven is more probable than not. *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in WEST VIRGINIA CODE § 18A-2-8, 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). WEST VIRGINIA CODE § 18A-2-8 provides that "[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 contendre to a felony charge." In the instant case, Respondent suspended Grievant for his arrest and plea of no contest to first offense DUI, and subsequent loss of his school bus operator certificate, which it initially alleged constituted willful neglect of duty, incompetency and immorality. Respondent did not pursue the argument that Grievant's actions constituted willful neglect of duty.

The term immorality as used in the statute "connotes conduct 'not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior.'" *Golden v. Bd. of Educ. of County of Harrison*, 169 W. Va. 63, 285 S.E.2d 665, 668 (1981); *Hayes v. Kanawha County Bd. of Educ.*, Docket No. 94-20-1143 (June 28, 1995). "'Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires at least an inference of conscious intent.' *See Hayes, [supra], citing Youngman v. Doerhoff*, 890 S.W.2d 330 (MOCC. 1994)." *Bell v. Mingo County Bd. of Educ.*, Docket No. 97-29-172 (Mar. 10, 1998); *Petry, supra.*

"'Incompetency'" is defined to include 'lack of ability, **legal qualification**, or fitness to discharge the required duty.'" *Black's Law Dictionary* 526 (Abridged Sixth Ed. 1991) (Emphasis added). *See Durst v. Mason County Bd. of Educ.*, Docket No. 06-26-028R (May 30, 2008). . . . 'temporary ineligibility for certification' *does* fit within one of the

statutorily defined grounds for termination." *Posey v. Lewis County Bd. of Educ.*, Docket No. 2008-0328-LewED (July 25, 2008).

The Grievance Board has previously addressed the issues presented. As Grievant did not possess the necessary certification to drive a school bus, he was not competent to perform the duties for which he was hired. *Id.; Jones v. Fayette County Bd. of Educ.*, Docket No. 2009-1075-FayED (Aug. 5, 2009). Grievant could be dismissed from his employment. *Id.*

Grievant argued that he should have been allowed to retain his employment with WBOE, until he could bid into another classification which did not require certification. Grievant went so far as to compare his situation to that of someone with a physical disability, and suggested that he should be transferred into another classification. There is no statutory provision which requires this treatment. As noted in *Jones, supra,* nothing prevents Grievant from applying for other positions in other classifications, and Grievant has in fact done so. Grievant was not selected for any of the positions for which he applied, and he filed another grievance contesting his non-selection. Because of that pending grievance, Respondent requested that a ruling be made on whether Grievant snorted Xanax, and whether this constituted immoral conduct.

"Possession of marijuana is illegal, and 'not in conformity with accepted principles of right and wrong behavior.' *Golden, supra.*" *Miller v. Wood County Bd. of Educ.*, Docket No. 03-54-376 (Mar. 16, 2004). Respondent asserted that Grievant was a drug abuser, based upon the allegation that he was snorting Xanax. Respondent did not prove that Grievant was snorting Xanax. As Grievant pointed out, Grievant had a prescription for Xanax, he was not charged with snorting Xanax, and no tests were performed to determine

what the residue was that the arresting officer observed in his nose. While Grievant told the arresting officer, at a time when Grievant was intoxicated, that he had snorted Xanax, he testified under oath that he had not been doing so, but was just being a smart aleck, and that he had been using two nasal sprays for his allergies. Regardless of whether the undersigned were to give more credence to Grievant's testimony under oath than the statement he made while intoxicated, Respondent did not demonstrate that there was anything implicitly wrong with Grievant ingesting a medication for which he had a prescription through his nasal passages, one time, while off duty, nor did Respondent demonstrate that Grievant is a drug abuser. The arresting officer's opinion that snorting Xanax is a *sign* of abuse is insufficient to attach the destructive label of drug abuser to Grievant, and there is no foundation for WBOE to jump to such a conclusion.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

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 WEST VIRGINIA CODE § 18A-2-8, 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).

3. WEST VIRGINIA CODE § 18A-2-8 provides that "[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 contendre to a felony charge."

4. "Lack of the prerequisite legal certification or licensure required to perform one's job duties may constitute incompetency within the meaning of W. VA. CODE § 18A-2-8. *See Rogers v. Kanawha County Board of Education*, Docket No. 93-20-447 (Mar. 23, 1994)." *Posey v. Lewis County Bd. of Educ.*, Docket No. 2008-0328-LewED (July 25, 2008).

Accordingly, this grievance is **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. 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 a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: February 22, 2010