THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DAVID ELLISON,

Grievant,

v. **Docket No. 2013-0298-FayED**

FAYETTE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, David Ellison, filed this expedited level three grievance against his employer, Fayette County Board of Education, dated September 6, 2012, stating as follows: "[g]rievant, a former regularly employed school bus operator, has been suspended & dismissed from his employment as a result of a guilty plea to a misdemeanor related to off-duty conduct. Grievant alleges a violation of W. Va. Code 18A-2-8 and contends that the Respondent has not established a rational nexus between the Grievant's plea and his employment." As relief sought, "[g]rievant seeks reinstatement to employment, wages & benefits less appropriate set-off retroactive to the date of suspension, reinstatement of regular employment seniority, and interest on all monetary sums. Grievant also seeks the redaction of this suspension and dismissal from personnel records maintained by the Respondent."

The level three grievance hearing was held on two days, March 12, 2013, at the Raleigh County Commission on Aging in Beckley, West Virginia, and July 25, 2013, at the Grievance Board's Charleston, West Virginia, office, before the undersigned administrative law judge. Grievant appeared in person and by counsel, John Everett Roush, Esquire, of the West Virginia School Service Personnel Association.

Respondent, Fayette County Board of Education, appeared by counsel, Rebecca M. Tinder, Esquire, of Bowles Rice, LLP. This matter became mature for consideration on August 27, 2013, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a bus operator. While he was off work due to a work-related injury, Grievant stole merchandise from a retail store. Grievant was arrested and was charged with petit larceny, a misdemeanor. Respondent did not take disciplinary action against Grievant upon learning of his misconduct. Respondent made attempts to bring Grievant back to work on light duty, but that was unsuccessful. Soon thereafter, Grievant pled guilty to petit larceny and made restitution to the retail store. Months later, while Grievant was still off work due to his injury, Respondent suspended Grievant without pay then terminated him for his misconduct at the retail store. Respondent alleged Grievant engaged in insubordination, immorality, intemperance and violated the Employee Code of Conduct. Grievant denies Respondent's allegations, and asserts that there is no rational nexus between his off-duty conduct at the retail store and the performance of his duties as a bus operator. Respondent failed to meet its burden of proving a rational nexus. Therefore, this grievance is GRANTED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. At all times relevant herein, Grievant, David Ellison, was employed by Respondent, Fayette County Board of Education, as a bus operator.

. In late October or early November of 2011, Grievant suffered a work-related injury and was placed off work. As a result of his injury, Grievant was prescribed, and was taking, pain medication.

2. During the late evening of November 7, 2011, Grievant went to the Walmart in Beckley, West Virginia, loaded a television and some other items into a shopping cart, and left the store without paying for the merchandise. He then drove to his home and unloaded the merchandise from his truck.

3. Grievant returned to Walmart soon thereafter, just after midnight on November 8, 2011, to get two more televisions. After a store employee helped Grievant load them into a shopping cart, the employee mentioned that someone had just stolen a television from the store. At that point, Grievant realized that the employee was talking about him. Grievant panicked and left the store without taking the two televisions in his shopping cart.

4. When Grievant got to his car, two police officers approached him. The officers had been at the store and employees told them that Grievant had stolen a television a short time before. The officers asked Grievant if he had stolen a television, and he denied the same. Grievant offered to allow them to look in his vehicle, and, of course, none of the merchandise was there.

5. Later that day, the police reviewed the store security recordings which showed the Grievant taking the first television and other merchandise. The police later arrested Grievant at his home.

6. Grievant attributes his actions during the Walmart incident to the medication he was taking to treat his injuries.

7. Before the Walmart incident, Grievant had never had criminal charges brought against him.

8. Superintendent Dwight Dials learned of the Walmart incident in December 2011.[1] During Christmas break, Grievant spoke with Dials and Transportation Director Gary Hough by telephone about the incident, and told them that he believed the pain medication caused his behavior.

9. In January 2012, Respondent's administration discussed with Grievant the possibility of him returning to work on light duty.

10. On February 14, 2012, Grievant pled guilty to petit larceny, a misdemeanor, and made restitution at Walmart. However, Grievant was unable to return to work on light duty due to his injury.

11. By letter dated June 21, 2012, Grievant was suspended without pay for violation of the Employee Code of Conduct resulting from the Walmart incident, and Grievant was advised that Superintendent Dials was recommending to the State Board of Education that he be terminated.

12. By Order entered by the State Superintendent of Schools on August 31, 2012, Grievant was terminated from his employment with Respondent.

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[1] Mr. Dials retired from his position as Superintendent at the end of June 2012. He was replaced by Robert Hull on July 1, 2012.

13. Grievant has not been released from his doctor to return to work.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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 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 proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.* Docket No. 96-20-380 (Mar. 18, 1997). "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). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

Respondent asserts that its suspension and termination of Grievant was appropriate because his conduct at Walmart in November 2011 violated the Employee Code of Conduct. Respondent further argued at level three that Grievant's conduct at Walmart constituted insubordination, immorality, and intemperance. Grievant denies Respondent's allegations and argues that his suspension and termination were improper as there was no rational nexus between his conduct at Walmart and his employment as a bus operator.

WEST VIRGINIA CODE § 18A-2-7 provides that "[t]he superintendent, subject only to approval of the board, shall have the authority to assign, transfer, promote, demote, or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter." W. VA. CODE § 18A-2-7. Further, WEST VIRGINIA CODE §18A-2-8 states, in part that,

> (a) 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 felony charge. . . .

W. VA. CODE § 18A-2-8(a). 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, Bell v. Kanawha County Bd. of Educ.,* Docket No. 91-20-005 (Apr. 16, 1991); *Beverlin v. Bd. of Educ*., 158 W. Va. 1067, 216 S.E.2d 554 (1975); *Maxey v. McDowell County Board of Education*, 212 W. Va. 668, 575 S.E.2d 278 (2002).

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv*., 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions are closely related to actions that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

While Respondent alleges that Grievant engaged in immorality, insubordination, and intemperance, in addition to violating of the Employee Code of Conduct, it is undisputed that Grievant's conduct at Walmart and his subsequent plea is what resulted in his suspension and dismissal from his employment. It is noted that Grievant pled guilty to a misdemeanor, not a felony, and no felony charges were brought against him. Grievant argues that his misdemeanor charge arose from acts that occurred away from work and had nothing to do with the performance of his work duties; therefore, no rational nexus exists between his conduct and his employment.

"In order to dismiss a school board employee for acts performed at a time and place separate from employment, the Board must demonstrate a 'rational nexus' between the conduct performed outside the job and the duties the employee is to perform." *Syl. Pt. 2, Golden v. Bd. of Educ.*, 169 W. Va. 63, 285 S.E.2d 665 (1981). A rational nexus exists in at least two circumstances: (1) if the conduct directly affects the performance of the occupational responsibilities of the employee; or (2) if, without contribution on the part of the school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the particular employee to discharge the responsibilities of his position. *See*, *Id. See also, Rogliano v. Fayette County Bd. of Educ.*, 176 W. Va. 700, 347 S.E.2d 220 (1986).

The Supreme Court reviewed the basis for the *Golden* "rational nexus" rule in the decision of *Powell v. Paine,* 221 W. Va. 458, 655 S.E.2d 204 (2007). In *Powell,* the Court decided that a coach should not have his license to teach suspended for four years because he was convicted of battering his son at home even though the son was a student in the teacher's school system. The court noted that:

> The teacher in *Golden* had been charged with felony shoplifting and pled no contest to the misdemeanor offense of petty theft. Thus, the discipline was for conduct occurring outside of the school setting. We observed in *Golden* it would be an unwarranted intrusion on a teacher's right to privacy to discipline a teacher solely on evidence that statutorily delineated misconduct occurred outside of the school environment. To overcome the privacy interest, a legitimate interest of the school board has to be at stake, that is, there must be additional evidence of a resulting unfavorable impact on the teacher's fitness to teach or upon the school community. *Id.* at 69, 285 S.E.2d at 669. We further observed that dismissal based solely on the off-the-job misconduct of a teacher and not its effect on the teacher's fitness to teach or upon the school community would result in a statute which would be void for vagueness under substantive due process constitutional standards. *Id.* at 68-69, 285 S.E.2d at 669.

Id. at 463, 209.

As Grievant was not working at the time of the incident, the issue becomes whether there is a rational nexus between his off-duty conduct and the performance of his duties as a bus operator. Respondent argues that there is a rational nexus. In this case, Grievant was off from work due to a work-related injury at the time of the Walmart incident. He drove his personal vehicle to Walmart that evening. Grievant was at the store for personal reasons that were in no way related to his job. There has been no evidence that Grievant had become the subject of any notoriety. In fact, Respondent was attempting to bring Grievant back to work on light duty after learning of the incident and did not suspend and terminate Grievant until six months after learning of it. The remaining issue is whether the conduct directly affected the performance of Grievant's responsibilities as a bus operator.

In his position as a bus operator, Grievant did not handle money or deal with purchasing. Further, Grievant did not work as a clerk or accountant, and was not an

inventory clerk or responsible for keeping track of inventory. Grievant was a bus operator, and his responsibilities related only to driving a bus. While Respondent argues that Grievant has been trusted to drive a very expensive school bus which is equipped with expensive equipment and tools, the undersigned is not persuaded that such is enough to establish a rational nexus between Grievant's conduct and the performance of his duties as a bus operator. While Respondent attempts to bolster its argument by citing two prior disciplinary actions taken against Grievant, those have no impact on the rational nexus analysis that must be conducted here. Neither of the two prior disciplinary instances concern allegations of stealing, and neither was the reason Grievant was terminated in June 2012.[2] Respondent also argues that Grievant was once suspected of stealing a torque wrench. Respondent does not assert that Grievant was disciplined for stealing the torque wrench. Again, such is irrelevant and does not establish a rational nexus between the Grievant's actions at Walmart and the performance of his duties as a bus operation.

For the foregoing reasons, the undersigned concludes that there is no rational nexus between Grievant's conduct in stealing the merchandise from Walmart and the performance of his duties as a bus operator. *See Golden v. Bd. of Educ.*, 169 W. Va. 63, 285 S.E.2d 665 (1981); *Haught v. Wetzel County Bd. of Educ.,* Docket No. 52-87-230-3 (Mar. 31, 1988); *Clark v. Kanawha County Bd. of Educ.*, Docket No. 2013-0123-KanED (Mar. 27, 2013). Accordingly, Respondent has failed to meet its burden. As there is no rational nexus between Grievant's conduct and the performance of his duties

[2] One disciplinary action resulted from Grievant driving his bus across a yard, and the other, from Grievant's failure to arrange for a substitute and turning in an incorrect time sheet.

as a bus operator, there is no need for the undersigned to address Respondent's allegations of insubordination, immorality, intemperance, or violation of the Employee Code of Conduct. Therefore, this grievance is GRANTED.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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).

2. An employee of a county board of education may be suspended or dismissed only for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a *nolo contendere* to a felony charge. *See*, W. VA. CODE § 18A-2-8.

3. 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, as amended, and must be exercised reasonably, not arbitrarily or capriciously. *See, Bell v. Kanawha County Bd. of Educ.,* Docket No. 91-20-005 (Apr. 16, 1991); *Beverlin v. Bd. of Educ*., 158 W. Va. 1067, 216 S.E.2d 554 (1975); *Maxey v. McDowell County Board of Education*, 212 W. Va. 668, 575 S.E.2d 278 (2002).

4. "In order to dismiss a school board employee for acts performed at a time and place separate from employment, the Board must demonstrate a 'rational nexus'

between the conduct performed outside the job and the duties the employee is to perform." *Syl. Pt. 2, Golden v. Bd. of Educ.*, 169 W. Va. 63, 285 S.E.2d 665 (1981).

5. A rational nexus exists in at least two circumstances: (1) if the conduct directly affects the performance of the occupational responsibilities of the employee; or (2) if, without contribution on the part of the school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the particular employee to discharge the responsibilities of his position. *See*, *Id. See also, Rogliano v. Fayette County Bd. of Educ.*, 176 W. Va. 700, 347 S.E.2d 220 (1986).

6. In *Powell v.* Paine, 221 W. Va. 458, 655 S.E.2d 204 (2007), the Court noted that:

> The teacher in *Golden* had been charged with felony shoplifting and pled no contest to the misdemeanor offense of petty theft. Thus, the discipline was for conduct occurring outside of the school setting. We observed in *Golden* it would be an unwarranted intrusion on a teacher's right to privacy to discipline a teacher solely on evidence that statutorily delineated misconduct occurred outside of the school environment. To overcome the privacy interest, a legitimate interest of the school board has to be at stake, that is, there must be additional evidence of a resulting unfavorable impact on the teacher's fitness to teach or upon the school community. *Id.* at 69, 285 S.E.2d at 669. We further observed that dismissal based solely on the off-the-job misconduct of a teacher and not its effect on the teacher's fitness to teach or upon the school community would result in a statute which would be void for vagueness under substantive due process constitutional standards. *Id.* at 68-69, 285 S.E.2d at 669.

Id. at 463, 209.

7. The Respondent failed to prove a rational nexus between Grievant's conduct and the performance of his duties as a bus operator.

Accordingly, the grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant to his position as a bus operator, and to pay him back pay from the date of his suspension to the date he is reinstated, plus statutory interest, less any appropriate off-set, and to restore all benefits, including seniority. Further, Respondent is **ORDERED** to remove all references to this suspension and dismissal from Grievant's personnel records maintained by Respondent.

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 (eff. July 7, 2008).

DATE: October 10, 2013.

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Carrie H. LeFevre
Administrative Law Judge