THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MARVIN R. WOODS,

Grievant,

v. **Docket No. 2013-0600-CONS**

NICHOLAS COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Marvin R. Woods, filed two expedited level three grievances against his employer, Respondent, Nicholas County Board of Education, regarding an incident that occurred on August 29, 2012. The first grievance is dated September 19, 2012, and states as follows: "[r]espondent suspended Grievant without pay from August 29, 2012 through the conclusion of an investigation of the charge that Grievant was under the influence of alcohol on the job in violation of county policy. Grievant denied the charge. Respondent ratified and extended the suspension without pay until the conclusion of the investigation after a hearing on September 17, 2012. Grievant alleges a violation of W. Va. Code 18A-2-8." As relief sought, Grievant seeks, "(a) compensation for lost wages and benefits of any kind that results from his suspension without pay; (b) interest on all sums to which he is entitled; (c) removal of all references to his suspension without pay and the underlying incident from any file maintained by Respondent."

Grievant's second grievance is dated October 4, 2012, and states as follows: "[r]espondent terminated Grievant on October 3, 2012 on the charge that he was under the influence of alcohol in violation of county policy while performing his duties. Grievant denies the allegation and asserts a violation of W. Va. Code 18A-2-8." As

relief sought, “Grievant seeks: (a) reinstatement to his position; (b) compensation for lost wages and benefits of any kind resulting from his suspension without pay and termination; (c) interest on all sums to which he is entitled; and (d) removal of all references to Grievant’s suspension and termination from all files maintained by Respondent or its agents.” These grievances were consolidated by Order entered October 12, 2012.

The level three grievance hearing on the consolidated grievance was held on February 12, 2013, at the Raleigh County Commission on Aging in Beckley, West Virginia, before the undersigned administrative law judge. Grievant appeared in person and by counsel, John Everett Roush, Esquire, WVSSPA. Respondent, Nicholas County Board of Education, appeared by counsel, Richard E. Boothby, Esquire, Bowles Rice, LLP. This matter became mature for consideration on March 18, 2013, upon receipt of the last of the parties’ proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant reported to work and began performing his duties as a Mechanic Foreman, which required him to drive a van owned by Respondent. At the second bus garage he visited that morning, Grievant had a conversation with another employee during which that employee detected the smell of beer on Grievant’s breath. Thereafter, Grievant left the bus garage to drive to the central office. The employee told another employee about smelling beer on Grievant, and that employee sent a text message to the Director of Transportation saying that Grievant had been drinking and was driving the county van. The Superintendent instructed the Director of Transportation to make a report to the police. Grievant was eventually stopped by the city police and

administered a breathalyzer. The results of the breathalyzer indicated that Grievant had a blood alcohol level of 0.079, which is more than is required for a public intoxication charge, but less than that required for a DUI charge. Grievant was not arrested or issued any citation, but the police officer would not let him drive the van after the traffic stop. Grievant denied consuming alcohol that morning, but admitted to drinking beer the night before. Respondent suspended Grievant, and later terminated his contract for violating the Drug-Free Workplace Policy, citing insubordination. Grievant denies all of Respondent's allegations. Respondent met its burden of proving by a preponderance of the evidence that Grievant violated the Drug-Free Workplace Policy. Therefore, this grievance is DENIED.

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, Marvin R. Woods, was employed by Respondent as a Foreman Mechanic. Grievant had held that position since 1985, but first began working for Respondent in 1978.

2. Respondent has a policy in place entitled "Nicholas County Board Policy GBEG Drug-Free Workplace," which prohibits employees from reporting to work under the influence of alcohol and controlled substances.[1] Grievant was aware of this policy.[2]

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[1] *See*, Policy GBEG "Drug-Free Workplace", Respondent's Exhibit 2 from October 3, 2012 Board hearing.

[2] *See*, Drug-Free Workplace Verification Statement, Respondent's Exhibit 3 from October 3, 2012 Board hearing.

3. On the evening of August 28, 2012, Grievant drank beer at his home. Grievant stopped drinking by 10:00 p.m. and went to bed. It is unclear from the evidence presented how much Grievant had to drink that evening.

4. On the morning of August 29, 2012, Grievant got up at his normal time, and got ready for work. Grievant did not feel impaired and was not suffering any ill effects from drinking the night before.

5. Grievant did not consume alcohol either before reporting to work, or while at work, on August 29, 2012.

6. Grievant reported to work at Respondent's Fenwick, West Virginia, garage at about 6:00 a.m. Other employees began to report to work at the Fenwick garage soon after Grievant arrived.

7. Grievant had conversations with several employees at the Fenwick garage that morning. During each conversation, Grievant was in close proximity with the other employees, and none of them detected the smell of alcohol coming from Grievant. Further, Grievant did not appear impaired to the other employees. *See*, testimony of John Hanna, Donis Snider, Curtis Loudin, and Ralph Zangari.

8. At approximately 9:00 a.m., Grievant left the Fenwick garage and drove to the Summerville garage. Grievant drove a van owned by Respondent on this trip.

9. While at the Summersville garage, Grievant spoke to several of the employees and prepared paperwork.

10. Grievant spoke briefly to Steve Herndon. At the time, Grievant was at least twenty feet from Mr. Herndon. Mr. Herndon smelled no alcohol on Grievant.

11. Also, while at the Summersville garage, Grievant had a conversation with Colby Holdren, a mechanic. During the conversation, the two men were about an arm's length apart. Mr. Holdren noticed the smell of beer on Grievant's breath. James Tucker, another mechanic, was not involved in this conversation. At the time of the conversation, Mr. Tucker was working in his bay at least ten feet away. However, after Grievant left the Summersville garage, Mr. Holdren told Mr. Tucker that he had smelled beer on Grievant's breath.

12. No one at the Summersville garage said anything to Grievant about smelling alcohol on him.

13. While at the Summersville garage, Grievant did not appear impaired.

14. Grievant left the Summersville garage just after 10:00 a.m. to take paperwork to Respondent's central office.

15. At 10:14 a.m., James Tucker sent a text message to Ernie Jarvis, Director of Transportation, stating as follows[3]: "Marvin has been drinkin (sic) and is driving county van can u take care of this issue." To which, Mr. Jarvis replied, "Where is he…?" Mr. Tucker responded by stating, "At bus garage he smells like it and i think he is coming to ur office to drop off some paperwork he got papers out of box so i assume he is going there. He just left here." Mr. Jarvis's response was, "OK."

16. After receiving the text message from Mr. Tucker, Director Jarvis contacted Superintendent Beverly Kingery about the situation. Superintendent Kingery instructed Director Jarvis to make a report to the Summersville Police Department.

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[3] *See*, Respondent's Exhibit 1, screen print of text message conversation.

17. Director Jarvis called the city police as instructed, and told someone there that it had been reported to him that Grievant was driving a county van after drinking.[4]

18. Summersville Police Department officer, Thomas E. Baker, III, was alerted to the situation with Grievant.[5] Officer Baker saw the van Grievant was driving and proceeded to make a traffic stop.[6] Grievant pulled the van over and stopped as directed. For unknown reasons, three more police cars converged at the traffic stop.

19. Officer Baker noticed the smell of alcohol coming from Grievant and asked him if he had been drinking. Grievant told Officer Baker that he had not consumed alcohol since 10:00 p.m. on the night before. Officer Baker asked Grievant to take a breathalyzer test, and Grievant agreed. Grievant was cooperative and compliant with the officers.

20. Grievant's breathalyzer test recorded a blood alcohol level reading of .079. Officer Baker informed Grievant of the reading.

21. Officer Baker did not arrest Grievant because the reading from the breathalyzer was less than 0.080, the level required for a DUI charge.

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[4] The record is silent as to with whom Director Jarvis spoke when he called the police department.

[5] Officer Baker could not recall whether he had received a call or whether the information about the white van came across his radio. *See*, testimony of Thomas Baker.

[6] Officer Baker testified that he only pulled the van over after seeing it cross the white line several times. However, it is noted that he had already been told that the driver of the van may be under the influence of alcohol. Also, Officer Baker did not issue Grievant a citation for crossing the white line, or for anything else.

22. Grievant's blood alcohol level reading registered higher than that required to be charged with public intoxication. However, Officer Baker did not issue Grievant a citation for public intoxication, as such was in his discretion.

23. Officer Baker would not allow Grievant to drive after the traffic stop and had Grievant call to arrange for someone to pick him up.

24. Grievant called Steve Herndon at the Summersville garage to come and pick him up. Mr. Herndon drove a vehicle owned by the Respondent to the location of the traffic stop to get Grievant. Mr. Herndon then drove Grievant to the central office. At that time, Herndon noticed the smell of alcohol coming from Grievant.

25. At the central office Grievant met with Director Jarvis and Superintendent Kingery. Grievant was asked to explain his behavior and he explained that he had not been drinking since 10:00 the night before. Grievant requested a blood test, and Superintendent Kingery informed Grievant that he could have a blood test if he wanted, but that she could not require him to take one. Neither Superintendent Kingery nor Director Jarvis assisted Grievant in obtaining a blood test even though both had the authority to do so. During their meeting, Director Jarvis noticed the smell of alcohol on Grievant.

26. At the meeting on August 29, 2012, Superintendent Kingery placed Grievant on unpaid suspension pending the investigation of the day's events. Respondent approved his suspension on September 17, 2012.

27. After the August 29, 2012, meeting, Mr. Herndon drove Grievant back to the Fenwick garage where Grievant's personal vehicle was parked.

28. Grievant left the Fenwick garage and drove to the Wellness Center to attempt to get a blood alcohol test. There, he was instructed to go to Summersville Hospital for the test. At Summersville Hospital, Grievant was advised that they would not perform the test without a doctor's order. Grievant then drove to Craigsville, West Virginia, to his family doctor's office to get an order.

29. Once he had the doctor's order for the blood test, Grievant drove back to Summersville Hospital and had the test performed. By this time, it had been several hours since the traffic stop.

30. The blood test indicated that there was no alcohol in Grievant's system.

31. By letter dated September 20, 2012, Superintendent Kingery notified Grievant that she would be recommending his termination to the Board. Respondent voted to terminate Grievant's contract on October 3, 2012.

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 Grievant violated the Nicholas County Board Drug-Free Workplace Policy by reporting to work under the influence of alcohol. Respondent argues that such constitutes insubordination. Grievant denies that he reported to work under the influence of alcohol.

WEST VIRGINIA CODE § 18A-2-7(a) 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(a). 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).

Dismissal or suspension of an employee under 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. 3, in part, *Beverlin v. Bd. of Educ*., 158 W. Va. 1067, 216 S.E.2d 554 (1975). Syl. Pt. 4, in part, *Maxey v. McDowell County Board of Education*, 212 W. Va. 668, 575 S.E.2d 278 (2002); Syl. Pt. 7, in part, *Alderman v. Pocahontas County Bd. of Educ.,* 223 W. Va. 431, 675 S.E.2d 907 (2009).

The Respondent's Drug-Free Workplace Policy prohibits employees from reporting to work under the influence of alcohol. The policy further states that employees in violation of this policy shall be subject to disciplinary action up to and including termination.[7] It is undisputed that Grievant consumed alcohol just before going to bed the night before the incident. The evidence presented establishes by a preponderance of the evidence that Grievant reported to work under the influence of alcohol. While Grievant argues that the breathalyzer was not presented as evidence, nor was any report from the test, and that the test is unreliable, citing criminal statutes, the legal standard for grievance actions is far different than that of criminal actions. The evidence presented establishes that more than one witness smelled the odor of beer on Grievant, and afterward, Grievant took a breathalyzer test which revealed that he had enough alcohol in his system to exceed the level required for a charge of public intoxication.

It is true that neither Superintendent Kingery nor Director Jarvis assisted Grievant in obtaining a blood test, even though they had the authority to do so. However, they were not required to order a blood test. Had they assisted Grievant in getting the blood test he requested, this grievance may not have been filed. Certainly, assisting Grievant in obtaining a blood test when he asked for it would have been a more respectful way of treating an excellent, long-term employee. The blood test results reflect Grievant's blood alcohol level several hours after the initial traffic stop; therefore, those results are irrelevant. The undersigned cannot explain why those at the Fenwick garage did not smell alcohol on Grievant, while those at Summersville did. From the evidence

[7] *See*, Policy GBEG "Drug-Free Workplace", Respondent's Exhibit 2 from October 3, 2012 Board hearing.

presented, it is more likely than not, that Grievant consumed more beer than he realized and that the alcohol was still in his body when he reported to work the next morning. Grievant was not visibly impaired and he was not feeling the effects of the alcohol, but the alcohol was still in his body. Therefore, Grievant violated Respondent's Drug-Free Workplace Policy on August 29, 2012.

Pursuant to WEST VIRGINIA CODE § 18A-2-8, Respondent has the authority to both suspend and terminate employees for insubordination. The question becomes whether Grievant's violation of the Drug-Free Workplace Policy amounts to insubordination. In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *See Conner v. Barbour County Bd. of Educ.,* Docket No. 94-01-394 (Jan. 31, 1995). However, "[i]t is not the label a county board of education attaches to the conduct of the employee . . . that is determinative. The critical inquiry is whether the board's evidence is sufficient to substantiate that the employee actually engaged in the conduct." *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).

Grievant knowingly consumed alcohol just before going to bed on the night of August 28, 2012. Grievant knew of the existence of the Drug-Free Workplace Policy which prohibited him from reporting to work under the influence of alcohol. Nonetheless, he reported to work just hours after consuming alcohol. This resulted in Grievant reporting to work with alcohol in his system. Grievant then drove a vehicle

owned by the Respondent in the performance of his duties. He could have been called to drive a school bus that morning, but, luckily, he was not so called. The Grievance Board has previously recognized this type of behavior as insubordination. *See Jones v. Barbour County Bd. of Educ.,* Docket No. 96-01-471 (Feb. 28, 1997); *Mellow v. Jefferson County Bd. of Educ.,* Docket No. 2010-1397-JefED (Oct. 8, 2010). Accordingly, the undersigned must conclude that Grievant's violation of the Drug-Free Workplace Policy was insubordination.

"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." *Trimboli v. Dept. of Health & Human Res.,* Docket No. 93-HHR-322 (June 27, 1997). "Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable." *State ex rel. Eads v. Duncil*, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker,* 547 F. Supp. 670 (E.D. Va. 1982)).

Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned administrative law judge cannot substitute her judgment for that of the employer. *Jordan v. Mason County Bd. of Educ*.,

Docket No. 99-26-080 (July 6, 1999); *Tickett v. Cabell County Bd. of Educ*., Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ*., Docket No. 97-06-150 (Oct. 31, 1997).

It was not unreasonable for Respondent to suspend, then terminate Grievant for violating the Drug-Free Workplace Policy. Grievant reported to work and drove a county vehicle in the performance of his duties while his blood alcohol level was greater than that required for a charge of public intoxication. Such behavior cannot be condoned.

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. WEST VIRGINIA CODE §18A-2-8 sets out the reasons for which a public school employee may be suspended or dismissed and states, in part as follows:

> (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.

3. Dismissal or suspension of an employee under 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. 3, in part, *Beverlin v. Bd. of*

Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975). Syl. Pt. 4, in part, *Maxey v. McDowell County Board of Education*, 212 W. Va. 668, 575 S.E.2d 278 (2002); Syl. Pt. 7, in part, *Alderman v. Pocahontas County Bd. of Educ.,* 223 W. Va. 431, 675 S.E.2d 907 (2009).

4. Respondent demonstrated that Grievant reported to work on August 29, 2012, under the influence of alcohol in violation of its Drug-Free Workplace Policy, and proceeded to drive a county van in the performance of his duties.

5. In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *See Conner v. Barbour County Bd. of Educ.,* Docket No. 94-01-394 (Jan. 31, 1995).

6. The Grievance Board has previously concluded that conduct such as Grievant's on August 29, 2012, constitutes insubordination. *See Jones v. Barbour County Bd. of Educ.,* Docket No. 96-01-471 (Feb. 28, 1997); *Mellow v. Jefferson County Bd. of Educ.,* Docket No. 2010-1397-JefED (Oct. 8, 2010).

7. "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." *Trimboli v. Dept. of Health & Human Res.,* Docket No. 93-HHR-322 (June 27, 1997). "Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable." *State ex rel. Eads v. Duncil*, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in

disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker,* 547 F. Supp. 670 (E.D. Va. 1982)).

8. Respondent's decision to first suspend, then later terminate Grievant's contract for his conduct on August 29, 2012, was not arbitrary and capricious.

Accordingly, the 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 (eff. July 7, 2008).

DATE: August 15, 2013.

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Carrie H. LeFevre
Administrative Law Judge