ROGER McVICKER, .

Grievant, .

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v. . Docket Number: 95-20-059

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KANAWHA COUNTY BOARD OF EDUCATION, .

Respondent. .

D E C I S I O N

Roger McVicker (hereinafter Grievant) was a Bus Operator for the Kanawha County Board of Education (hereinafter Board) until his dismissal from employment was approved by Board vote on January 31, 1995. Grievant filed the instant grievance with this Grievance Board on February 6, 1995, pursuant to the provisions of West Virginia Code §§18-29-1, et seq., alleging a violation of W. Va. Code §18A-2-8, and requesting reinstatement to his former position along with all related benefits. An evidentiary hearing was held at the Grievance Board's office in Charleston, West Virginia, on April 10, 1995, and the case became mature for decision on or about May 16, 1995, following receipt of the parties' respective post-hearing briefs.

Discussion

Grievant was employed as a Bus Operator by the Board for the 1989-1990 school year. Since that time, he has been assigned to drive a bus out of the Board's St. Albans bus garage. Grievant's short work history with the Board has not been uneventful. Grievant was given a written warning on December 3, 1990, for having used inconsistent and ineffective discipline procedures on his bus and

also for having used inappropriate language in communication with his student passengers. On October 1, 1991, he was suspended for five days for similar misconduct relating to inappropriate language, for having used tobacco products while driving his bus and for having failed to stop at a stop sign along his route. Neither of these disciplinary measures were challenged by Grievant at the time of their imposition.

Many of Grievant's student passengers have been young, teenagers in junior high school. On October 20, 1994, while Grievant was taking his students home, one of the students on his bus began passing a tampon around to the other students, thereby causing much commotion. Grievant, after seeing what was happening, stopped the bus and questioned the students in order to find out who started passing around the tampon. He also believed that the students were acting too boisterous and attempted to quiet them down. Apparently, Grievant lost his patience and his temper, and told the students something similar to the phrase "sit your asses down and shut your damn mouths."

Grievant decided that he needed help in bringing the students under control. He turned the bus around and drove back to AndrewJackson Middle School where Vice Principal Michael Cardinal came on the bus to diffuse the situation. At some point, Summer Ball, one of the students, admitted to having started passing around the tampon. Grievant left Andrew Jackson a second time to drop off the students but was approximately one-half hour late in making his scheduled stops. On the Friday following this incident, Grievant telephoned the Ball residence to talk to Summer. He informed her that he did not believe that she had initiated the commotion on the 20th, and that he was sorry if he had caused her to get into trouble.

Shortly thereafter, the Board received written complaints from Ms. Kathy Ball (Summer's mother) and Ms. Patty Saunders, the mother of Amy Saunders, another student on the bus. Ms. Ball, in her October 27, 1994 letter, complained of the following behavior attributed to Grievant: 1) that he drives too fast and in a reckless manner; 2) that he had received a speeding ticket while driving his bus; 3) that he was late getting the children home on October 20th; 4) that he has referred to her daughter and another student as "sugar butt" and has also commented on their legs; 5) that he had attempted to have Summer wear his ring; and 6) that on one evening he had inappropriately expelled her son, Michael, from the bus without sending home the proper paperwork for her to sign.

Ms. Saunders' letter of October 26, 1994, referred to many of the same complaints as had Ms.

Ball and, in addition, noted the following: that Grievant had upset her daughter when he had called Summer Ball concerning the tampon incident by alleging that she(Amy Saunders) had been the instigator of the trouble; and that Grievant neither stops at railroad crossings nor opens his door to look for an oncoming train. Ms. Saunders also referred to Grievant's use of the term "sugar butt."

The Board had received other complaints about Grievant concerning both his driving habits and language prior to the receipt of these two letters but, after reviewing the contents of these two complaints, George Beckett, Transportation Director, decided to investigate Grievant's behavior. On October 27, 1994, twelve of Grievant's passengers were asked to respond in writing to a set of questions about his performance. Grievant was allowed to choose six students to respond to the questions and the parents were allowed to choose the other six. The following statements or questions were presented to the students:

> Please write what you know or recall about any of these situations with your bus & driver:
>
> 1) Improper language to students?
>
> 2) Calling a student a name?
>
> 3) What happens at railroad crossings?
>
> 4) Any reference to a girl's bust size?
>
> 5) Was a stop sign hit by the bus?
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> 6) Do you recall a speeding ticket last year?
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> 7) Did the driver give a student some jewelry last year? What?

As one might guess, the six students picked by Grievant answered these questions generally denying that Grievant had acted inappropriately; three of the students answered "No" to all of the questions. However, the students picked by the parents generally answered in such a manner as to support the allegations ofwrongdoing brought up by Ms. Ball and Ms. Saunders. (See footnote 1) Interestingly, in response to question number 3, some students responded that Grievant **never** stops at railroad crossings and **never** opens his door as is required, while other students indicated that he **always** stops at railroad crossings and **always** opens his door.

On October 27, 1994, a conference was held by Mr. Beckett with Ms. Saunders, Ms. Ball, the principal at Andrew Jackson Junior High School, Grievant's immediate supervisor and Grievant to discuss the nature of the complaints. Thereafter, Mr. Beckett prepared a memorandum dated November 9, 1994, to be sent to Superintendent Marple, detailing the nature of the complaints against Grievant. On November 10, 1994, Superintendent Marple requested that a hearing be conducted to take the testimony of various individuals upon which a decision would be based on whether or not to discipline Grievant.

A hearing was held before the Board on November 21, 1994, at which time the following individuals presented testimony: Mr. Beckett; Summer Ball; Kathy Ball; Amy Saunders; Grievant; and Paul Taylor. Mr. Richardson, the hearing examiner, followed with a recommendation to Superintendent Marple that Grievant be suspended for ten days and also be given a plan of improvement. Grievant was suspended with pay for ten days by letter from Superintendent Marple dated December 13, 1994. Thereafter a second hearing was conducted on January 12, 1995, whereby testimony was taken fromKristy Wilson, Gary Bowles and Grievant. (See footnote 2) Afterwards, Mr. Richardson again submitted to Superintendent Marple his findings of fact and conclusions of law on January 20, 1995, concluding with the recommendation that Grievant be dismissed. Ms. Marple accepted this recommendation and presented same to the Board at its meeting on January 31, 1995. Grievant was notified by letter dated February 1, 1995, that the Board had voted to terminate his employment. The transcript of the testimony taken before the Board and corresponding exhibits were made a part of the record in this case.

Parties' Arguments

The Board contends that Grievant has engaged in misconduct since he was suspended in 1991 which warranted his termination. It argues that it has proven the following by a preponderance of the evidence: that Grievant has not followed the proper driving procedures when encountering railroad crossings; that he had improperly expelled a student from his bus; that he had used inappropriate language, i.e., profane language; that he had used improper, sexually suggestive nicknames and phrases to refer to students on his bus; and that he had given a ring to one of his students to wear which was inappropriate conduct.

Grievant testified that since 1991, he has fully complied with the State's Transportation Regulations guiding how a bus operator acts upon encountering a set of railroad tracks, except for the fewtimes during a year when the weather makes it impractical to do so. He denies that he has ever referred to any of his students by the use of sexually suggestive names or that he has ever referred to any of his students by reference to their anatomy. He admitted to using profane language on limited occasions but not as often as the Board attempted to demonstrate. Finally, he denies that he improperly expelled a student from his bus by asserting that he had filled out the only form that he had on the bus at that time and told Michael to have his mother sign it.

At both hearings in this matter, there were many inconsistencies between the testimony of the two sides' witnesses and also within each party's own case; there was very little uncontradicted testimony offered. Therefore, appropriate findings of fact must be based, in large part, on determinations of the various witnesses' credibility. In an attempt to make the discussion clear, the testimony offered regarding each of the charges against Grievant will be summarily discussed separately, in relation to the charges made against Grievant.

1. Failure to abide by established State driving regulations

Mr. Beckett testified regarding the Board's established regulations and requirements that each bus operator must follow when arriving at a railroad crossing. In summary, he testified that on each occasion, the bus operator must make a complete stop at the tracks, fully open the window on his left side and fully open the door on his right, look and listen for an oncoming train, then proceed with caution over the tracks. He testified that thisprocedure is both taught to and stressed with all of the drivers at least once each school year. The Board offered the testimony of Summer Ball, Kristy Wilson and Amy Saunders on this issue. All three students stated that Grievant never stops at railroad tracks and never opens the bus door. Their testimony regarding this issue was the same at

both hearings. In response to the same question posed to both Ms. Wilson and Ms. Saunders prior to the hearing before the Board (Q.3 above), each student simply indicated that he never opens the bus door.

Grievant's testimony at both hearings was substantially similar. He testified that he normally stops, opens both his left side window and the door fully prior to crossing railroad tracks. He testified that on those days when it is severely cold or when it is raining sufficiently that if he opens his door all the way the rain will come in, he only opens the door six to eight inches prior to crossing the tracks. Grievant offered the testimony of Student Paul Taylor who testified that he always stops, opens the door fully, then proceeds over the tracks, even when the weather is bad. Grievant further stated that the left window is generally open.

At level four, Grievant also presented the testimony of students Clarica and Leslie Saffel. Clarica testified that Grievant always stops and opens his door prior to crossing railroad tracks. During the investigation and in response to question 3, she stated that he sometimes opens his door. On cross-examination, she stated that she meant he always opens the door. Leslie Saffeltestified at level four that Grievant stops at railroad tracks and opens the door except when it is raining.

On this issue alone, it is not necessary to make a determination as to the witnesses' credibility. Even assuming that Grievant is telling the truth, the fact that he does not open his door completely on every occasion he approaches a railroad track is sufficient cause to find him in violation of the applicable regulation and his transportation department's mandate. It was not established that there are any exceptions to the requirement that a bus operator must always fully stop, open his window and door, then drive over the tracks. It only makes sense that it would be more important to perform in this manner on days when the weather would be extreme because one's visibility would be decreased. The Board has established that Grievant has failed to comply fully with his responsibilities as a Bus Operator.

2. Expulsion of student from bus

The Board does not dispute that Grievant had experienced some disciplinary problems with Michael Ball (Summer's brother) on the bus. On one Friday, prior to October 20, 1994, while Grievant was driving his p.m. run, Michael Ball began to act in a manner which Grievant believed was inappropriate and Grievant attempted to impose discipline on him. The ultimate result was that Grievant suspended him from the bus for the following three days (Monday, Tuesday and

Wednesday).

Grievant contends that he attempted to expel Michael from his bus for three days but that he changed his mind after Kathy Ball,Michael's mother, spoke with him on the following Monday and convinced him that Michael not riding the bus would create a hardship on her. The Board asserts that Grievant did not comply with the applicable policy of the Board for the expulsion of students from its buses. Mr. Beckett testified regarding the proper procedure all Bus Operators must follow to expel a student from their bus. First, the drivers must counsel the student. Second, the driver must prepare a misconduct form which is sent to the parent and the principal. Third, a conference may be held with the student and his/her parents with either the principal or the Transportation Director. Finally, no expulsion is to take place, absent a life-threatening situation, unless the Director of Transportation makes said determination. In essence, Mr. Beckett's testimony establishes that a Bus Operator does not have the authority to expel a student from his/her bus unless the safety of the student, the other students, the public or the driver is threatened.

Grievant testified that he filled out the only form (a short form) that he had on the bus at that time and gave it to Michael to give his parents. He also opined that it should not be determined that he acted inconsistent with the Board's practice concerning the expulsion of students from buses because Michael was never prohibited from riding the bus. Kathy Ball testified that Michael did not bring any form home indicating that he had been expelled from the bus.

Although there was no written policy presented detailing the procedure which bus operators must use in order to expel a student from their bus, Mr. Beckett's testimony regarding such steps was not challenged. Therefore, given that Grievant attempted to expel a student from his bus for three days in nonconformance with the procedure apparently established within the County, it must be determined that he acted in violation of the Board's policy. It was not demonstrated that a life-threatening situation existed which could have justified Grievant's actions. It does not matter whether Grievant sent a form home with Michael or not, or whether the expulsion was actually imposed for more than just Monday morning; Grievant still did not follow the proper procedures.

3. Inappropriate language

Simply stated, Grievant is accused of having used profane language on a regular basis while driving his bus. The Board again relies upon the testimony of the same three students, Summer Ball, Kristy Wilson and Amy Saunders, to meet its burden on proof on this charge. Grievant also testified

that on at least two occasions he did swear by using the words "damn" and "ass." He also testified concerning the chain of events which led him to use such language.

It is clear from the record that Grievant has, on occasion, used profane language while in the presence of his students on his bus, although the Board has not established that he frequently or routinely uses such obscenities. The testimony of the three students was entirely conclusory in nature and not as persuasive as that of Grievant's on this issue. Notice is taken that driving abus normally occupied by young, teenage students, will at times, become a frustrating job. However, it is also recognized that all county board of education employees (be they professional or service) must exhibit restraint in tempering their actions and language so as not to set bad examples of behavior for the students with whom they come in contact.

Grievant's candor concerning his use of profane language and his overall demeanor indicates that he does not regularly expose the students on his bus to language any fouler than that which they use themselves. The profane language which he has admitted to using occurred at times when it is apparent that he had lost his temper. And while Grievant's language or choice or words cannot be condoned, this charge upon which the Board uses to support his termination must be viewed as a minor one. The next two allegations of misconduct against Grievant will be addressed together as the same credibility determinations affect the conclusions on the Board's proof of the charges.

4a. Improper communication of a sexually suggestive nature

Kristy Wilson testified that Grievant has referred to her as "sugar butt" on one occasion and as "hot lips" on a regular basis. She testified that he sometimes tugs at her coat or purse as she is leaving the bus in order to get her attention so that he can speak to her. She also testified that some of the boys on the bus kid her about stuffing her bra with toilet paper, and therefore, they refer to her as "T.P." She stated that Grievant refers to her by this name on occasion. Summer Ball testified that Grievant hascalled her "sugar butt" once or twice and also calls her other names such as "red" because she has red hair. Amy Saunders testified that she has heard Grievant call Summer "sugar butt" one or two times. The Board also presented the testimony of some of the students who had ridden Grievant's bus in the past. These students testified very generally concerning statements they attributed to Grievant having made about the size and movement of girls' butts and breasts.

Grievant denies that he has ever used the terms "sugar butt" or "hot lips." He testified that he has asked Ms. Wilson what the nickname "T.P." stood for but that he does not refer to her as "T.P." The

students who testified on behalf of Grievant stated that they had not heard Grievant use any of the names mentioned above. The other students also testified that they were not familiar with the term "T.P." Grievant also presented character witness testimony of a long-time acquaintance in order to establish that his reputation within the community for truthfulness, honesty and appropriate behavior around students is favorable.

4b. Giving a ring to a student

It has been alleged that sometime around September 1992, Grievant gave Summer Ball his ring to wear, similar in manner to the custom that other students typically do to signify that they are "going steady." The testimony relating to this charge was from Summer and her Mother, Kathy Ball. Summer testified very generally that Grievant gave her a ring, similar in design to most class rings, with a blue stone on the top, one day as she wasexiting the bus. She stated that she took the ring, got in the car with her mother, told her what had happened, and that she planned on giving the ring back to Grievant the following day. Summer stated that she did give return the ring to Grievant the following morning. Kathy Ball's testimony was consistent with that of her daughter. She stated that she told Summer to give the ring back to Grievant and not to keep it. Kristy Wilson also attempted to corroborate that Grievant gave Summer his ring.

Grievant denies that he ever gave Summer a ring to wear for any purpose. At the hearing, Grievant was wearing a ring which looks like a typical class ring, and which does have a blue stone with the number 20 encased within the stone. Grievant testified that he received this ring in recognition for serving as an umpire for high school boys baseball for over twenty years. He further stated that he did not believe Summer rode his bus during the time period in question. At the hearing, neither Summer nor her mother could identify Grievant's ring as the one which he had supposedly given Summer. The witnesses who testified on behalf of Grievant stated that they were unaware of Grievant having attempted to give Summer Ball a ring in 1992.

As noted earlier, the Board's testimonial evidence introduced to prove these two charges was almost entirely contradicted by the evidence presented by Grievant in his case-in-chief. Therefore, the issue as to the credibility of the various witnesses is crucial to the Board's case. The following analysis of the evidence and the witnesses' demeanor at hearing is appropriate.

With regard to the alleged name-calling by Grievant, the Board's major witnesses were the three students discussed above. To a large extent, the testimony of all of these witnesses was dramatically

general and conclusory in nature, lacking any specifics concerning the scenarios involved where Grievant is alleged to have acted inappropriately. While their testimony was generally consistent, it was also very rote and appeared to be the product of "coaching." Further, they did not appear at all to be uncomfortable in testifying concerning issues which might make the normal young, teenage, female student somewhat apprehensive.

It is significant that the focus upon Grievant's behavior was initiated by the letters sent to the Board by Kathy Ball and Patty Saunders, which letters where almost entirely based upon allegations made by the daughters of these two parents, and that more than one of the allegations brought out by these students were virtually "written off" by the Board as it was deemed that they were unfounded in fact. It was initially alleged that Grievant had hit a stop sign with his bus, that he had received a speeding ticket while driving the bus and that he consistently drives too fast. The record does not establish that much attempt was made by the Board to verify the accuracy of these allegations which could easily have been done. The nature of the acts underlying these allegations appear to be the type that could readily be verified. Instead, the Board dropped any reliance upon these charges in support of its termination of Grievant but still contends that its witnesses, the proponents of these allegations, are entirelycredible because their testimony was consistent at the two hearings.

Further, with regard to the allegation concerning the ring, Grievant contends that Summer Ball was not assigned to his bus during the time period in which he supposedly gave her his ring. Amy Saunders testified that she did not ride Grievant's bus prior to the 1994-1995 school year and Kristy Wilson testified at the Board's hearing that Grievant gave Summer the ring during the 1993-1994 school year. Upon a review of the Board's evidence, it is not established exactly what period of time Summer rode the bus. It was conclusively established that she had not ridden the bus consistently because she has often skipped school, lived with either her mother or her father who are divorced, or did not attend school at all as she was sentenced for a six month period of time to a youth correctional facility in Huntington, West Virginia, because she had been a runaway.

As Grievant's counsel points out, it does seem very strange that the allegation concerning an adult, middle-aged man giving a young, teenage girl in the seventh grade a ring which is customarily symbolic of a "boyfriend-girlfriend" relationship, never surfaced until some extended period of time after it allegedly happened, especially since her mother knew of the incident at the time it allegedly happened. This, coupled with the fact that the ring at issue has some sentimental value to Grievant,

makes it difficult to conclude that the incident ever really took place.

It is true that Grievant's witnesses' testimony was also not entirely consistent with his own testimony. This is basically true with respect to their testimony concerning his procedures observed at railroad crossings. However, being that Grievant admitted that he did not always open his door completely before crossing a railroad crossing, his credibility is enhanced due to his open honesty even though his own witnesses apparently testified differently in an attempt to lend support to his case. Grievant's testimony generally appeared to be sincere and he had detailed explanations for the inferences brought into light by the Board's witnesses on several issues.

Concerning Kathy Ball's testimony, the only evidence which she presented that she had first hand knowledge of, and which was contradicted by Grievant, was that concerning Summer having received a ring from him. The inference from the record is that Ms. Ball was not entirely happy with Grievant after he had attempted to expel her son from the bus, thereby causing her hardship in assuring that he would have a way to school. Also, she was upset by the incident where Grievant was late delivering his students to their assigned stops because he had returned to the school for assistance from the principal. Further, it is possible that she was upset at Grievant for having called her house to talk to Summer about the "tampon incident" for whatever reason. Ms. Ball had at least some motivation for testifying against Grievant and supporting her daughter's story concerning the ring, if nothing more than to show support for her daughter. Based upon adetermination of Summer's credibility, it is conceivable that she had a ring at some point and showed it to her mother while pretending that it was Grievant's, meanwhile, Ms. Ball would have no way of knowing to whom the ring actually belonged.

Additionally, the Board attempted to impeach Grievant's testimony and that of his witnesses by eliciting the testimony of two former students who rode his bus. The testimony elicited from these two witnesses again, while supportive of the Board's arguments, totally lacked any specificity with regard to statements attributed to Grievant for the time periods, to the extent that it cannot be found that Grievant more likely than not acted inappropriately with regard to the allegations used to support his termination. Even though Grievant was disciplined in the past for inappropriate language, this in and of itself does not establish by a preponderance of the evidence that he had used language of a sexually suggestive nature.

Upon a thorough review of the evidence, it is determined that Grievant was a more credible

witness than Summer Ball, Kathy Ball, Kristy Wilson or Amy Saunders. This is based upon the witnesses' demeanor at the hearing; their reputation for honesty; the existence of bias and/or motivation to fabricate a story against Grievant; their statements made during the Board's investigation into Grievant's conduct; and the plausibility of their stories. And based upon this credibility determination, it is concluded that Grievant did not refer to either Summer Ball or Kristy Wilson bysexually connotative nicknames nor did he attempt to have Summer Ball wear a ring which he owns.

Findings of Fact

1. Grievant was a Bus Operator for the Kanawha County Board of Education from 1989 until his termination by Board vote on January 31, 1995.
2. Grievant's termination was based upon five charges of inappropriate conduct and his improper driving habits.
3. Grievant's has a habit of not fully opening his bus door prior to crossing a set of railroad tracks.
4. Grievant acted in contradiction to the Board's established policy on the subject of a Bus Operator's ability and procedure to expel a student from his/her bus.
5. Grievant has on more than one occasion lost his temper and used profane language in the presence of his students.
6. Grievant has not referred to any of his students by the terms "sugar butt" or "hot lips."
7. Grievant has referred to the nickname "T.P." which was given to one of the female students on his bus by other male students; however, Grievant's use of this term was not established to be inappropriate.
8. Grievant did not give Summer Ball his ring to wear.

Conclusion of Law

The Kanawha County Board of Education has the burden of proving the facts supporting its claim by a preponderance of the evidence. W. Va. Code §18-29-6. The Board has failed to meet thisevidentiary burden on two of the five charges relied upon in support of Grievant's termination.

Conclusion

The Board has not established all of the charges upon which Grievant's termination from employment was based. Further, one of the charges which was proven, that Grievant has used profane language, does not appear to be as serious a charge as the other two established. Therefore, the Undersigned hereby remands this case to the Board for reconsideration of the penalty which was imposed upon Grievant consistent with the findings and conclusions herein. Further, consistent with the well-established principle of administrative law that an Administrative Law Judge may not substitute his/her judgment for that of the employer, Grievant's termination may not be affirmed or denied.

Therefore, this grievance is hereby **GRANTED** and the case is to be **REMANDED** to the Kanawha County Board of Education for reconsideration of the appropriate penalty to be assessed given the charges against Grievant which have been proven by a preponderance of the evidence during this proceeding. In the event that Grievant is reinstated with no penalty or a lesser penalty than termination, he is entitled to all back pay and benefits, including seniority, that he would have been entitled to had he not been dismissed from employment, less any appropriate set off, for the period of time beginning with his initial suspension to the date when any proper penalty is determined to have been imposed consistent with this Decision.

Any party may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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ALBERT C. DUNN, JR.

Administrative Law Judge

June 5, 1995

Footnote: 1Summer Ball did not respond to this "questionnaire" as she was not present at school the day the survey was conducted.

Footnote: 2Both Paul Taylor and Kristy Wilson were students on Grievant's bus. Mr. Bowles was a character witness for Grievant.