NORMAN LILLY,

Grievant,

v. **Docket No. 97-10-084**

FAYETTE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant Norman Lilly, a regularly employed bus operator, grieves his ten-day suspension for insubordination and willful neglect of duty. He alleges the Fayette County Board of Education ("FCBOE") violated W. Va. Code §§ 18-29-2(p) and 18A-2-8 in suspending him and requests back wages, interest, benefits, seniority, and removal of documents pertaining to this suspension from his personnel file. Grievant received notice of a hearing on his suspension before FCBOE, but chose instead to file this grievance directly at Level IV. A Level IV hearing was held on April 15, 1997. This case became mature for decision on June 4, 1997, the date of the parties' final submissions.

After a review of the complete record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1 1. Grievant has been employed by FCBOE since August 25, 1982. He is currently employed as a Bus Operator and works out of the Fayetteville High School bus center.

2 2. On September 6, 1996, Grievant filed a grievance over two issues. He alleged the Supervisor of Transportation, Mr. Galen Horrocks, was working out of classification by "being over the Oakville Bus Center." He also alleged bus operators were being discriminated against "under current school levy payments." (See footnote 1)

3 3. On January 17, 1997, Mr. Horrocks sent a memo to bus operators whose buses would be inspected on January 30, and 31, 1997. Grievant's bus was to be inspected January 30, 1997.

4 4. Grievant received a copy of this memo. (See footnote 2)

5 5. Grievant transported students using his bus to two basketball games in Charleston, West Virginia, on Saturday, January 25, 1997. He returned from this trip at approximately 11:00 p.m.

6 6. On the way home from this trip, the occupants of the bus ate at McDonald's. 7 7. On Tuesday, January 28, 1997, Grievant used the dial-in computer system to arrange for a substitute driver for his route for January 29, and 30, 1997. When a driver calls for a substitute, he is responsible for informing his replacement of any special data relating to the bus or its run. The computer system has a section dedicated to this type of information.

8 8. Grievant told his substitute he would need to take his vocational run if no one else wanted it, but did not inform the substitute that the bus was due for state inspection on January 30, 1997. Grievant believed he had no duty to inform the substitute of the inspection because imparting this information would be giving orders and such supervisory duties were not included in his classification. Grievant believed it was Mr. Horrock's duty to inform the substitute of the inspection.

9 9. Mr. Mark Aliff was assigned by the computer to complete Grievant's run on January 29, and 30, 1997.

10 10. All bus operators are required to sweep out their bus every day. They are also required to clean the outside and inside of their bus on a weekly basis. This weekly cleaning includes mopping the floors, wiping the seats with a damp cloth, and thoroughly cleaning the outside of the bus.

11 11. On January 29, 1997, in between the a.m. and p.m. runs, Mr. Aliff started to sweep out Grievant 's bus as he is required to do, but stopped and did not complete the task because the bus was so filthy he felt he was being taken advantage of by Grievant. 12 12. After the a.m. run on January 30, 1997, Mr. Aliff returned to the bus garage and found out Grievant's bus was immediately due for

inspection. He went at once to Mr. Horrocks and told him the bus was dirty, and he did not think it would pass inspection. Mr. Aliff did not sweep the bus. He was not asked to "deep clean" the bus as he had previously been scheduled to leave for a period of time after the a.m. run.

13 13. Mr. Horrocks asked Mr. Roger Hanner, the Shop Foreman, to assign one of his mechanics to sweep the bus.

14 14. Mr. Michael Holstein, a mechanic who was repairing a bus that did not pass inspection, was assigned to clean the bus, and did so under protest. He swept four boxes of trash from the bus, and it was then presented for inspection. (See footnote 3)

15 15. The four boxes of trash included drink cups and food wrappers from McDonald's. The schools that Mr. Aliff drove to in the three runs he had the bus are closed campuses and are not close to a McDonald's. Mr. Aliff did not go to McDonald's.

16 16. The bus failed inspection because it was not clean, and it was red tagged. (See footnote 4) 17 17. Mr. Aliff received a reprimand for his failure to sweep out the bus as required.

18 18. The next day, January 31, 1997, was Faculty Senate Day. On Faculty Senate Days, bus operators are paid a full day's wages to clean their buses thoroughly and complete paper work and reports. (See footnote 5)

19 19. Grievant arrived at the bus garage at 10:30 a.m. with his four-year-old stepdaughter. Mr. Horrocks informed Grievant his bus had failed inspection, and he was to clean it that day so it could be checked by the inspector before he left.

20 20. Grievant refused to clean his bus stating it had been the substitute's duty to clean the bus as he was the operator who presented it for inspection. Grievant indicated it would be unfair for him to have to clean the bus, and he was not going to clean the "damn bus." He also indicated he would like to have a word with the "dumb ass" inspector who failed his bus so he could "line him out." Grievant did speak with the inspector who confirmed that the bus had failed because it was dirty.

21 21. After refusing to clean the bus, Grievant left the bus garage and went to Fayetteville High School to file a grievance with his immediate supervisor, Mr.

Charles Gavin, the principal at Fayetteville High School. In that grievance, Grievant made three allegations. First, Grievant alleged Mr. Horrocks had threatenedGrievant with insubordination, and that he had been harassed, discriminated against, and threatened with reprisal for a situation that occurred on a day he was not at work. Grievant stated he was treated in this manner because he has a current grievance filed against Mr. Horrocks. (See footnote 6) Grievant also stated in this grievance that some bus operators, who park their buses at home, are allowed to clean their buses at home on Faculty Senate Days and this was unfair. Grievant's third allegation was that bus operators and mechanics are paid overtime differently and this was incorrect.

22 22. After Grievant refused to clean the bus, several school administrators examined the bus, including Superintendent Larry Coleman and Associate Superintendent Kenneth Carson. Mr. Hanner made a videotape of the condition of the bus which was submitted into evidence and viewed at the hearing.

23 23. The videotape demonstrated the bus was filthy. The film showed several papers by the dimmer switch which had been there so long they had turned brown with dirt; areas which appeared to have snuff juice and tobacco stuck to the bus walls; litter on the floor such as gum, other papers, and pencils; and areas of caked dirt on the wall rail. When the emergency doors at the back of the bus were opened, large areas of sticky, black dirt were revealed which could not haveaccumulated in the three trips Mr. Aliff drove the bus and in the period of time of one and ½ days.

24 24. On January 31, 1997, after Grievant took his "good ole time" filling out the grievance, he talked to Principal Gavin for fifteen minutes between noon and 1:00 p.m.. Principal Gavin remembered this conversation and remembered that Grievant still had his stepdaughter with him. He reviewed the grievance and recommended that Grievant comply with the request and then file a grievance. Grievant did not follow this advice and did not return to the bus garage, but went home after his discussion with Mr. Gavin.

25 25. After Grievant refused to clean his bus, Mr. Horrocks called his supervisor, Mr. Carson, and received directions to contact Grievant on Monday to discuss the situation and to again make clear he was expected to clean the bus.

26 26. On February 3, 1997, the following Monday, Mr. Horrocks met with Grievant in the presence of Mr. Jerry Sizemore, the Principal of the Fayette/Plateau Vocational School. Mr. Horrocks explained he expected Grievant to clean his bus. Grievant's response was the issue was under grievance, and it would be inappropriate for Mr. Horrocks to talk to him, as he was not his immediate supervisor; that he was protected from any further action by FCBOE; and he had no comment, as he was precluded from speaking on the issue because of the filed grievance. Mr. Horrocks indicated he knew the grievance was filed, but stated the bus still needed to be cleaned, and he expected Grievant to clean it. Mr. Sizemoreattempted to clarify the situation and asked Mr. Horrocks if he was giving Grievant a direct order to which the response was "yes." Mr. Sizemore then asked Grievant if he was refusing to follow this direct order. Grievant's response was "no comment."

27 27. On February 4, 1997, after Grievant had completed his evening run, Mr. Horrocks handed Grievant a letter dated February 3, 1997, which directed Grievant to clean his bus so that it could be inspected on February 5, 1997. This letter further indicated that failure to do so would leave Mr. Horrocks with no option, but "to recommend disciplinary action for repeated insubordination and willful neglect of duty."

28 28. After Grievant received this letter, he got a substitute driver, Mr. Rick Pettry, to agree to clean his bus for $20.00. He informed Mr. Horrocks and Mr. Hanner of this state of affairs and stated, "I told you I was not going to clean that damn bus, ha ha."

29 29. After leaving the bus garage he called back and asked Mr. Hanner to explain to Mr. Pettry exactly what needed to be done to clean the bus. Mr. Hanner said he would tell Mr. Horrocks to tell Mr. Pettry, but Grievant asked Mr. Hanner if he would do this favor for him, and Mr. Hanner took Mr. Pettry to the bus and showed him what needed to be done to get the bus ready for inspection. 30 30. Shortly thereafter, Mr. Pettry returned to the bus garage office, clarified when the bus needed to be cleaned, and then told Mr. Horrocks he was not going to clean the bus, and he would return Grievant's money.

31 31. Grievant had a doctor's appointment on February 5, 1997, and took sick days for a sinus infection on February 5, 6, and 7. He had a doctor's excuse for these days.

32 32. Grievant found out on the morning of February 5, 1997, that Mr. Pettry was not going to clean the bus, and Mr. Pettry had spent considerable time on February 4, 1997, looking for him to tell him so.

33 33. Grievant did not call Mr. Horrocks to make any other arrangements to clean the bus.

34 34. On February 6, 1997, Superintendent Coleman wrote Grievant stating he would be suspended for ten days from February 10, 1997, to February 21, 1997, for insubordination and willful neglect of duty. He further directed Grievant must clean his bus within two days of his return to duty in order that it would pass inspection. (See footnote 7)

35 35. Grievant cleaned his bus for approximately three hours on Sunday the 23d and for approximately two hours on Monday the 24th. 36 36. When the bus was taken to another county for inspection, it passed.

Issues

The issue in this case is whether Grievant was guilty of insubordination and willful neglect of duty when he repeatedly refused to clean his bus after being given direct orders to do so. (See footnote 8) There is no dispute that Grievant did not clean the bus after being given these orders. Although Grievant says he did not refuse to clean the bus, it is clear he did not clean the bus; therefore, whether he verbally refused to so do is of no consequence and can be seen as merely a matter of semantics.

The question of whether Grievant gave the bus to the substitute in a clean or dirty state is a secondary issue, as the February letter to Grievant from Mr. Horrocks indicates that Mr. Horrocks thought the amount and type of dirt in the bus was the result of accumulation over time and not the result of improper care by the substitute on January 29, and 30, 1997. He further clarified he would be forced to recommend disciplinary action if the directive to clean the bus was not followed. Thus, Grievant's

suspension resulted from his failure to follow the order to clean his bus, not the fact that his bus was dirty when he gave it to the substitute.

In order to decide the second issue, whether the bus was dirty when given to Mr. Aliff, it will be necessary to resolve the issue of witness credibility, asGrievant's testimony contradicts the testimony of Respondent's witnesses. An Administrative Law Judge is charged with assessing the credibility of the witnesses that appear before her. Lanehart v. Logan County Bd. of Educ., Docket No. 95-23- 235 (Dec. 29, 1995); Perdue v. Dept. of Health and Human Res./Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). The fact that some testimony is offered in a form other than verbal testimony does not alter this responsibility. Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996). The United States Merit System Protection Board Handbook ("MSPB Handbook") is helpful in setting out factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984). Some factors to consider in assessing a witness's testimony are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Id. Additionally, an administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id.

Since the issue of credibility is important in deciding this case, it will be examined first. The undersigned Administrative Law Judge finds Grievant's testimony about the state of his bus when it was received by Mr. Aliff, to be false. This finding based is on several factors. First, Grievant's testimony that he cleanedthe bus on Saturday before the trip, and that after this day long trip, including a stop for food at McDonald's, the bus was as clean as when he started, is implausible. Second, McDonald's cups and wrappers were on the bus when Mr. Holstein was required to sweep it, and, neither Mr. Aliff, nor the students went or had access to this fast food restaurant. Third, Grievant was frequently evasive in answering the questions he was asked and had to be

reminded to answer the questions. Only after being asked the question three or four times, did he finally admit he came to work on Friday, January 31, 1997, to "check" his bus, and that he really had no intention of cleaning it that day. Fourth, Grievant's testimony that the substitute's inability to discipline the students resulted in the state of the bus was implausible. Multiple witnesses testified, and the videotape clearly demonstrated, that the dirt in question was caked on and would take some time to accumulate as it had, especially in the area of the rear doors. Fifth, Grievant was evasive in his testimony of whether he had received any of the memos relating to the duties of bus operators on Faculty Senate Days. On November 14, 1994, Grievant filed a grievance relating to bus operators' duties on Faculty Senate Days, and several of these memos were placed into evidence to prove his case. Lilly v. Fayette County Bd. of Educ., Docket No. 95-10-114 (June 29, 1995).

Additionally, the question of whether Grievant did implicitly threaten Mr. Aliff must be addressed. The undersigned Administrative Law Judge finds that on April 11, 1997, Grievant did walk onto Mr. Aliff's bus and tell him he'd better rememberwho he was protecting down there at the hearing, and continued this conversation by stating he liked to needle people, and that he had been a deputy sheriff for three years and had received training at the police academy about how to needle people. The undersigned Administrative Law Judge believed this report by Mr. Aliff because he gave details of this conversation, had made notes of this conversation shortly after it occurred, and utilized these notes to refresh his memory at hearing. Because Grievant denied that conversation took place, this fact calls into question Grievant's veracity.

Grievant has raised the issue of reprisal or retaliation and states Mr. Horrocks ordered him to clean his bus because he had filed a grievance against him six months previously. This defense would be appropriate only if the undersigned Administrative Law Judge finds the direct order issued to Grievant was somehow unreasonable, as issuing a direct order to a person who has the responsibility to follow it is, does not meet the definition of reprisal and cannot be seen as retaliation.

Discussion

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). "County boards of education have substantial discretion in matters relating to the hiring,assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Kitzmiller v. Webster County Bd. of Educ., Docket No. 90-51-352 (Dec. 28, 1990), citing Dillon v. Bd. of Educ., 351 S.E.2d 58 (W. Va. 1986); Albani v. Mineral County Bd. of Educ., Docket No. 90-28-016 (Nov. 30, 1990). Moreover, 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. 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).

W. Va. Code §18A-2-8 provides, in pertinent part:

> 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 of nolo contendere to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article.

The suspension letter from Superintendent Coleman indicates Grievant was suspended for insubordination and willful neglect of duty for failure to clean his bus when directed to do so on January 31, 1997, February 3, 1997, and February 4, 1997. Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Directors/So. W.Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). This Grievance Board has previously recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions

of an employer." Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988) (citing Weber v. Buncombe County Bd. of Educ., 266 S.E.2d 42 (N.C. 1980)). 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. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). Insubordination can be shown through an employee's "blatant disregard for the authority" of his second-level supervisor. Sexton, supra at 10.

This view of insubordination is consistent with the treatment accorded insubordination by arbitrators in the private sector. The scope of insubordination as an offense was addressed extensively in Burton Manufacturing Co. v. Boilermakers Local 590, 82 Lab. Arb. (BNA) 1228 (1994) (Holley, Arb.). There, Arbitrator Holley noted:

> In general, if an employee refuses to obey an order or defies the authority of Management, he is guilty of insubordination. This is a serious offense and may justify disciplinary measures, includingdischarge. An employee may be charged with insubordination not only if he willfully disobeys an order, but also if he . . . uses abusive, threatening, or profane language in speaking to Management; or assaults a representative of Management.

Burton, supra at 1234 (citing Trotta, Arbitration of Labor-Management Disputes 282-283 (1974)).

An employee's belief that management's decisions are incorrect, absent a threat to the employee's health or safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. See Parker v. W. Va. Dept. of Health and Human Resources, Docket No. 97-HHR-042B (Sept. 30, 1997). See generally, Meckley v. Kanawha County Bd. of Educ., 383 S.E.2d 839 (W. Va. 1989) (per curiam). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha- Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990) (citing Meads v. Veterans' Admin. 36 M.S.P.R. 374 (1988)). Additionally, an employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their

status, prestige, and authority . . . ." McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992) (citing In re Burton Mfg. Co. 82 L.A. 1228 (Feb. 2, 1984)).

"Few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later." Hundley v W. Va. Div of Corrections, Docket No. 96-Corr-399 (Oct. 27, 1997): See Maxey v. W. Va. Dept. of Human Resources, Docket No. 93-HHR-424 (Feb. 28,1995). "Generally, an employee must obey a supervisor's order and then take appropriate action to challenge the validity of the supervisor's order." Reynolds, supra. "An employee may not disregard a direct order of a superior based upon the belief that the order is unreasonable." McKinney, supra. "Essentially, an employer can meet its burden [of proof] by showing that the person giving the order had the authority to do so, and that the order did not require the employee to act illegally or place himself or co-workers at unnecessary risk." Surber v. Mingo County Bd. of Educ., Docket No. 96-29-15 (Dec. 12, 1996). See Hundley, supra; Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995).

When an employee is disciplined for willful neglect of duty, the respondent must also prove its case by a preponderance of the evidence. Arbaugh v. Putnam County Bd. of Educ., Docket No. 90-40-437 (May 22, 1991). To prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990). Although the West Virginia Supreme Court has not formulated a precise definition of "willful neglect of duty," it does encompass something more serious than incompetence and imports "a knowing and intentional act, as distinguished from a negligent act." Chaddock, supra. Given the facts of the case, it is clear Grievant is guilty of insubordination and willful neglect of duty. Grievant was directed by his supervisor three times to clean his bus, and Grievant did not do so. Mr. Horrocks had the authority to issue the order to Grievant, and the order did not require Grievant to place himself or others in danger, did not require Grievant

to act in an illegal manner, and did not place Grievant's health at risk. Thus, Grievant was required to perform the directive, and if he felt this order was incorrect, he could file a grievance later. By his actions, Grievant prevented the bus from being inspected on January 31, 1997, and February 5, 1997, and forced FCBOE to take the bus to another county for inspection. Also by his actions, Grievant "manifest[ed] disrespect toward supervisory personnel which undermine[d] their status, prestige, and authority . . . ." McKinney, supra. Further Grievant's act was knowing and intentional. He knew that on Faculty Senate days he was paid to clean his bus, and he knew the inspector was still there and would be available to check his bus after it was clean.

As for Grievant's claim of reprisal, it is important to examine the definition of the word and the elements necessary to prove the charge. Reprisal is defined in W. Va. Code § 18-29-2(o) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;

2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989);

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Gruen v. Bd. of Directors/Concord College, Docket No. 95- BOD-281 (Mar. 6, 1997). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

Grievant has failed to establish a prima facie case of reprisal. Although Grievant did file a grievance challenging Mr. Horrocks' authority to perform certain duties, this filing was six months before this incident. Additionally, he was not treated in an adverse manner by Mr. Horrocks. Grievant was given a reasonableorder by his supervisor. He was directed to clean his bus on a day he was to get paid for cleaning his bus. Also it must be noted that another bus failed inspection for lack of cleanliness, and that bus operator was directed to clean his bus that day. He did so, and the bus was inspected and passed. Even if Grievant is seen as proving a prima facie case, the employer has demonstrated a legitimate non- retaliatory reason for requiring Grievant to clean his bus. It was dirty and Grievant's duty for that day was to clean his bus. Thus, Grievant has failed to prove FCBOE engaged in reprisal or retaliation.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1 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 2. "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Kitzmiller v. Webster County Bd. of

Educ., Docket No. 90-51-352 (Dec. 28, 1990), citing Dillon v. Bd. ofEduc., 351 S.E.2d 58 (W. Va. 1986); Albani v. Mineral County Bd. of Educ., Docket No. 90-28-016 (Nov. 30, 1990).

3 3. Moreover, 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. 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).

4 4. W. Va. Code §18A-2-8 provides, in pertinent part:

> 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 of nolo contendere to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article.

5 5. Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Directors/So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989).

6 6. Insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988) (citing Weber v. Buncombe County Bd. of Educ., 266 S.E.2d 42 (N.C. 1980)).

7 7. An employee's belief that management's decisions are incorrect, absent a threat to the employee's health or safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. See Parker v. W. Va. Dept. of Health and Human Resources, Docket No. 97-HHR-042B (Sept. 30, 1997). See generally, Meckley v. Kanawha County Bd. of Educ., 383 S.E.2d 839 (W. Va. 1989) (per curiam).

8 8. "Employees are expected to respect authority and do not have the

unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990) (citing Meads v. Veterans' Admin. 36 M.S.P.R. 374 (1988)).

9 9. An employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . . ." McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992) (citing In re Burton Mfg. Co. 82 L.A. 1228 (Feb. 2, 1984)).

10 10. "Few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later." Hundley v. W. Va. Div. of Corrections, Docket No. 96-CORR-399 (Oct. 27,1997). See Maxey W. Va. Dept. of Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995); McKinney, supra; Reynolds, supra.

11 11. "Essentially, an employer can meet its burden [of proof] by showing that the person giving the order had the authority to do so, and that the order did not require the employee to act illegally or place himself or co-workers at unnecessary risk." Surber v. Mingo County Bd. of Educ., Docket No. 96-29-15 (Dec. 12, 1996). See Hundley, supra; Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995).

12 12. 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. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

13 13. To prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990).

14 14. "Willful neglect of duty," it encompasses something more serious than incompetence and imports "a knowing and intentional act, as distinguished from a

negligent act." Chaddock, supra. 15 15. Reprisal is defined in W. Va. Code § 18-29-2(o) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it."

16 16. To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;

2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989) and Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Gruen v. Bd. of Directors/Concord College, Docket No. 95- BOD-281 (Mar. 6, 1997).

17 17. If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatoryreasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are

merely pretextual. Webb, supra.

18 18. Respondent has met its burden of proof by a preponderance of the evidence and has demonstrated that Grievant is guilty of insubordination and willful neglect of duty.

19 19. Grievant did not meet his burden of proof and demonstrate that Respondent engaged in retaliation when it directed him to clean his bus.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Fayette 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.

_____

JANIS I. REYNOLDS

Administrative Law Judge

Dated: February 11, 1998

Footnote: 1

The current status of this grievance is unknown.

Footnote: 2

Grievant testified he did not receive this memo, but a copy of this memo was found on the dash of his bus when it was cleaned.

Footnote: 3

These four boxes were 12 inches by 12 inches by 12 inches.

Footnote: 4

When a bus fails inspection it cannot be driven again until it has been rechecked by the inspector and

passed this inspection.

Footnote: 5

Multiple exhibits were submitted by Respondent that confirmed this had been the expectation for several years.

Footnote: 6

FCBOE agreed that this portion of this grievance could be considered in the instant grievance, and it would assume the burden of proof. Although Grievant's counsel apparently agreed to this idea, Grievant did not, and stated he wished to keep these grievances separate. The current status of this grievance is unknown.

Footnote: 7

Although not germane to this grievance, Grievant incorrectly read this letter to indicate that he must clean his bus on either Saturday or Sunday before he returned to work on the following Monday, February 14, 1997. He called Mr. Horrocks at 7:00 a.m. on Sunday to make these arrangements. FCBOE did accommodate Grievant in this regard, and had someone grant him access to his bus on that Sunday.

Footnote: 8

At hearing the undersigned Administrative Law Judge clarified the issue of willful neglect of duty as Grievant's focus was on the state of the bus when he gave it to the substitute.