**HOMER D. CARR,**

**Grievant,**

**v.** **Docket No. 98-31-401**

**MONROE COUNTY BOARD OF EDUCATION,**

**Respondent.**

## D E C I S I O N

Homer D. Carr (Grievant) was employed as a bus operator by Respondent Monroe County Board of Education (MCBE). He was dismissed from his position for alleged insubordination, willful neglect of duty, and immorality. He seeks reinstatement, retroactive wages, benefits, and seniority, interest on all monetary sums, and the removal of any reference to this dismissal from his personnel records.

MCBE held a disciplinary hearing on November 4, 1998. At that hearing, Grievant was represented by John Roush, Esq., and MCBE was represented by Rod Mohler, Esq. MCBE upheld Grievant's dismissal. A Level IV hearing was held before the undersigned administrative law judge at the Grievance Board's Beckley, West Virginia office on February 16, 1999. At that hearing, Grievant was again represented by John Roush, Esq., and MCBE was represented by Gregory W. Bailey, Esq. and Rod Mohler, Esq. The parties were given until March 10, 1999, to submit proposed findings of fact and conclusions of law, and this grievance became mature for decision on that date. The following Findingsof Fact are established by a preponderance of the evidence.

## FINDINGS OF FACT

1. Grievant was employed, for approximately four years, as a bus operator by MCBE. Immediately before this employment, Grievant was employed by MCBE as a substitute bus driver for approximately three years.

2. On or about November 2, 1995, Grievant was tried in Monroe County Circuit Court on one count of first degree sexual assault for an alleged incident involving a nine year old girl, S. (See footnote 1) During his trial, Grievant was placed on leave, and then suspended from his duties as bus

operator. There was a great deal of local publicity, and parents sought his dismissal. Grievant was acquitted of the charge by a jury.

3. Grievant's acquittal did not abate the substantial community sentiment against him, which included threats of physical assault upon Grievant, made at a meeting of MCBE, if he resumed his duties. Parents continued to seek his dismissal, and picketed the school board to that end. The isolated nature of Grievant's bus run, and the fact that it was hunting season, created concerns for Superintendent Lyn Guy (Guy) and MCBE over the safety of Grievant and his passengers. MCBE was concerned that Grievant's bus might be vandalized in such a way as to compromise its safety, and Grievant was told tocheck his brakes every day before picking up any students.

4. To assure concerned parents, to protect children, and to assure Grievant's safety, Grievant requested, and MCBE agreed, that a video camera, which could not be controlled by Grievant, would be installed on Grievant's bus. This camera would operate whenever students were on the bus.

5 MCBE also decided to install a cellular telephone on Grievant's bus, which would let him telephone for help, should the need arise, as a result of the threats from parents and people along his run.

6. A video camera was installed in Grievant's bus when he returned to work in 1995, but Grievant was later given a switch to operate the camera and access to the tapes. Grievant and drivers on other runs were then told to turn on the cameras only when students were on the bus. Grievant switched runs at the start of the 1996-1997 school year, and his new bus had no camera, although one was installed later that year. Grievant had a camera on his bus for the 1997-1998 school year.

7. At the start of the 1998 -1999 school year, Grievant's bus was not equipped with a camera.

8. At the start of the 1998 -1999 school year, MCBE had twelve cameras to share among thirty buses, with three new buses equipped with full-time cameras.

9. MCBE's video cameras were concealed inside black housings, so that students would not know when a bus was actually equipped with a camera.

10. Student bus passengers knew when the video camera was recording, because a red light could be seen from within the black box. 11. M., a ten year old girl, rode Grievant's bus. M.'s brother D., age nine, and sister K., age five, also rode Grievant's bus.

12. During the evening of September 15, 1998, M. reported to her mother that Grievant had, at

the end of the afternoon bus run, offered D. and K. gum if they would close the bus windows. M. told her mother that Grievant had then asked her to come to the front of the bus and, while she was standing in the aisle beside Grievant, had asked her repeatedly if she could keep a secret, and then offered her a dollar to lower her shirt or pants. M. told her mother that Grievant had touched her on the leg, at a point approximately six inches below her hip, to indicate how far her shirt or pants should be lowered.

13. M. was wearing a pink flowered pullover shirt and jeans.

14. Ronald J. Hubbard, Jr. (Hubbard) is M.'s stepfather.

15. M.'s mother, Rebecca Lowe (Lowe), called MCBE and the State Police to report what M. had said. After several calls, Ms. Lowe spoke with Guy. Guy called Transportation Director Bennie Comer (Comer), and directed him to retrieve the video tape from Grievant's bus.

16. Comer discovered that no such tape existed, because Grievant's bus was not equipped with a video camera.

17. On September 16, 1998, Trooper D.R. Butler videotaped an interview with M., in which she repeated the allegations she had made to her mother the evening before.

18. M.'s family moved to the area from Summers County, approximately two weeks before the school year began on August 26, 1998. 19. On September 15, 1998, M.'s house was the last stop on Grievant's run. The last stop Grievant's bus makes before M.'s house is the Cozort residence. S., the daughter of Sherry and Stoney Cozort, is the young girl Grievant was acquitted of molesting in his 1995 trial.

20. Sherry Cozort believed that Grievant had been wrongly acquitted of molesting her daughter. She felt he was a dangerous man, who should not drive a school bus, and picketed MCBE after he was reinstated following his acquittal.

21. Sherry Cozort “would do whatever it took legally to keep [Grievant] from working for [MCBE].”

22. The Cozorts own the house occupied by the Hubbard/Lowe family, and rent it to them.

23. The Cozort's nephew Andy, a high school student, rode Grievant's bus, but the Cozorts would not allow their two daughters to ride Grievant's bus.

24. Minnie McKinney (McKinney) lives across the road from the Hubbard/Lowe house. Not having a telephone, Lowe used McKinney's telephone to call Guy and Sergeant Butler to report

Grievant's alleged misconduct.

25. McKinney is the mother of Sherry Cozort, the grandmother of S., and attended the picketing at MCBE.

26. M.'s house is two-tenths of a mile beyond the Cozort house. Their road, which is not marked by a sign, is a winding, dead end, one lane county road, approximately ten feet wide, without a posted speed limit. A speed of 20 miles per hour is a reasonable speed for the portion of this road between the Cozort and Hubbard/Lowe houses. Attwenty miles per hour, it takes approximately one minute to drive from the Cozort house to the Hubbard/Lowe house.

27. The Hubbard/Lowe house is approximately fifteen feet from the road.

28. Grievant's home is located immediately below the Cozort home. Traveling uphill on the road, one first passes Grievant's house on the left, then the Cozort house on the left, then the Hubbard/Lowe house on the left, and finally McKinney's house on the right. Grievant's residence is three-tenths of a mile from the Hubbard/Lowe house. There are no other homes along this stretch of road.

29. Hubbard and Lowe were aware of Grievant's reputation in the area as a molester of young girls.

30. There is tremendous ill-will between Grievant and his neighbors.

31. Students sometimes did not remain seated while on Grievant's bus.

32. Some members of Grievant's family accuse him of molesting young girls, based on events alleged to have occurred approximately twenty-three years ago. Other members of Grievant's family accuse the afore-mentioned family members of harboring different alleged molesters.

33. There is abundant ill-will among Grievant's family. Grievant's family members had an altercation at the Level IV hearing, requiring the police to be called.

34. M.'s grandmother worked with Grievant's sister in Covington, Virginia, and was aware of Grievant's 1995 trial, and of his reputation as a molester of young girls.

35. Grievant has received good evaluations and has never been disciplined by MCBE. 36. Guy and her staff purchased Christmas presents in 1998 for the Hubbard/Lowe children. (See footnote 2)

## 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); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991), Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

MCBE dismissed Grievant for insubordination, for his failure to have a video camera on his bus; for willful neglect of duty, for allegedly permitting students to stand on his bus; and for immorality, as a result of the alleged incident described in Finding of Fact twelve. Grievant denies these allegations. Grievant also alleges that his due process rights wereviolated by the presentation at his disciplinary hearing of highly prejudicial evidence of off duty misconduct that was unrelated to the performance of his duties as a bus operator, by the presentation of highly prejudicial evidence of off duty misconduct of which he had not received notice in the written charges presented to him, and by the presentation of highly prejudicial evidence of off duty misconduct which had been the subject of criminal charges for which he had been tried and acquitted. Grievant seeks reinstatement, retroactive wages, benefits, and seniority, interest on all monetary sums, and the removal of any reference to this dismissal from his personnel records.

The authority of a county board of education to dismiss an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, and must be exercised reasonably, not arbitrarily or capriciously. Parham v. Raleigh County Bd. of Educ., 192 W. Va. 540, 453 S.E.2d 374 (1994); 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.

**INSUBORDINATION**

Insubordination is the "willful failure or refusal to obey reasonable orders of asuperior 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). Insubordination may also be found when an employee shows a willful disregard for the 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).

To prove 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). An employer also 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)). (See footnote 3)

MCBE dismissed Grievant for insubordination, alleging that he operated his buswithout a video camera. After his 1995 acquittal, Grievant requested, and MCBE agreed, that a video camera, which could not be controlled by Grievant, would be installed on Grievant's bus. This camera would operate whenever students were on the bus. This was done to assure concerned parents, to protect children, and to assure Grievant's safety. In a letter, dated November 7, 1995, Superintendent Guy wrote to MCBE members: “[w]e will install a video camera that turns on with the key and cannot be operated by Mr. Carr.” The evidence showed that a camera was installed in that manner when Grievant returned to work in 1995, but that Grievant was later given a switch to operate the camera and access to the tapes, because special extra-length tapes were needed to record the full length of Grievant's time on his bus, and because Comer had been spending too much time traveling to the site where Grievant parked his bus and retrieving and changing the tapes. Grievant and other drivers were then told to turn on the cameras only when students were on the bus. Grievant switched runs at the start of the 1996 -1997 school year, and his new bus had no camera, although one was installed

later that year. Grievant had a camera on his bus for the 1997-1998 school year.

Grievant credibly testified that, at the start of the 1998 -1999 school year, when he went to pick up his bus, the situation at the bus garage was chaotic, with the mechanics away starting buses. He picked up his fire extinguisher and chains, did not see any cameras, and assumed that the bus he was assigned had a camera. When he learned that it did not, he resolved to get one when he next brought the bus in for service, which was to occur soon, but after September 15, 1998. At the start of the 1998-1999 school year, MCBE had twelve cameras to share among thirty buses, with three new busesequipped with full-time cameras.

The evidence clearly establishes that MCBE never ordered Grievant not to drive without a video camera. Superintendent Guy testified at Grievant's disciplinary hearing that the fact that Grievant's bus lacked a camera was her fault, and Comer's fault, and resulted from a failure of communication. At that hearing, Comer also testified that he never told Grievant to always have a camera on his bus. At the Level IV hearing, Guy testified that she never gave a direct order to Grievant not to drive without a camera, and never gave a direct order to Comer that Grievant could not drive without a camera. Comer also testified, at Level IV, that he never ordered Grievant not to drive without a camera. The testimony of Guy and Comer on this issue was uncontradicted. The evidence also proved that Grievant had operated his bus without a video camera for substantial periods of time without objection from MCBE. Finally, a letter, dated February 20, 1996, from MCBE to Grievant informed him that a camera would soon be installed on his bus, but did not order him not to drive without a camera.

Of course, a video tape of what happened on Grievant's bus on the afternoon of September 15, 1998, would be of inestimable value. Guy had stressed to Grievant that a video tape would not only protect students, but would also protect him from any false charges that might be made by parents unhappy with his acquittal. It is regrettable that MCBE did not insure that the bus it assigned to Grievant remained equipped with a video camera, and that Grievant did not make sure that a video camera was always on his bus. However, because MCBE never ordered Grievant not to drive his bus without a video camera, MCBE has failed to prove the sort of willful failure or refusal to obey a reasonableorder of a superior entitled to give such an order inherent in a charge of insubordination. Riddle, supra. MCBE's insubordination claim must fail.

**WILLFUL NEGLECT OF DUTY**

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. Williams v. Cabell County Bd. of Educ., Docket No. 95-06-325 (Oct. 31, 1996); Jones v. Mingo County Bd. of Educ., Docket No. 95-29-151 (Aug. 24, 1995); Hoover v. Lewis County Bd. of Educ., Docket No.93-21-427 (Feb. 24, 1994). Willful neglect of duty encompasses something more serious than incompetence. Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120, 122 (1990); Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996). Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990).

MCBE dismissed Grievant for willful neglect of duty, alleging that he operated his bus with student passengers standing. The West Virginia School Transportation Regulations, 1994 Revised Edition, state that “[p]assengers shall remain seated and keep head and limbs inside the bus at all times.” They also state that “[t]he school bus operator shall be in charge of the bus, pupils, and other passengers.”

MCBE established that Grievant operated his bus with student passengers standing. Lowe, the mother of M., testified at Grievant's disciplinary hearing that she had driven behind Grievant's bus on State Route 12, and had seen children, including her own,standing up, and jumping from one side of the bus to the other. Ms. Lowe flashed her car's lights at Grievant's bus, which Grievant acknowledged occurred, but the students did not sit down. Grievant testified at his disciplinary hearing that this instance of standing took place. Grievant also testified, at Level IV, that he asked M. to move forward approximately four seats, and across the aisle, to prevent her little sister K. from leaning over a railing and falling into the stairwell of the bus. No testimony was presented to show that student passengers did not stand on Grievant's bus. No evidence was presented to show that Grievant had previously been disciplined for this offense.

Grievant's discipline for allowing students to stand on a bus may be unique. The undersigned has been unable to find any decision of this Grievance Board involving this infraction, although approximately 3,800 decisions have been issued. It appears that no bus operator has ever been dismissed for this offense. It is also noted that any student can create this infraction by suddenly standing while the bus is in motion, and that the infraction would continue until the bus operator

stopped the bus or the student sat down, and that allowing a bus operator to be dismissed for a first offense of permitting standing would place every bus operator's continued employment under the control of his passengers. (See footnote 4) However, MCBE has established that Grievant operated his bus with student passengers standing. West Virginia Board of Education Policy No. 5300(6)(a) provides that an employee's dismissal must be based upon an evaluation of job performance, and that the employee be given an opportunity to improve his performance. This policy is only applicable if the actions of the employee are correctable. An offense or conduct which affects professional competency is correctable, if the conduct or offense does not "directly and substantially affect the morals, safety, and health of the system in a permanent, non-correctable manner." Mason County Bd. of Educ. v. State Supt. of Schools, 165 W. Va. 732, 274 S.E.2d 435, (1980). The provisions of Policy No. 5300 must be strictly construed in favor of the employee to insure that the employee receives the full guarantee of protection intended to be encompassed by the policy. White v. Gilmer County Bd. of Educ., Docket No. 11-87-020-3 (Nov. 20, 1987).

"Failure by any board of education to follow the evaluation procedure in West Virginia Board of Education Policy No. 5300(6)(a) prohibits such board from discharging, demoting or transferring an employee for reasons having to do with prior misconduct or incompetency that has not been called to the attention of the employee through evaluation, and which is correctable." Syl. Pt. 3, Trimboli v. Bd. of Educ., 163 W. Va. 1, 254 S.E.2d 561 (1979); See also Holland v. Bd. of Educ. of Raleigh County, 174 W. Va. 393, 327 S.E.2d 155 (1985); Wren v. McDowell County Bd. of Educ., 174 W. Va. 484, 327 S.E.2d 464 (1985).

Examples of conduct that is not considered correctable, for which an employee can be disciplined without regard to Policy 5300, include a bus operator allowing students, including some elementary school students, to leave the bus with persons other than theirparents, without a note signed by a parent, Conner v. Barbour County Bd. of Educ., Docket No. 95-01-031 (Sept. 29, 1995); 200 W. Va. 405, 489 S.E.2d 787 (1997); a physical education teacher grasping the buttock of a female student, Edwards v. McDowell County Bd. of Educ., Docket No. 93-33-138 (July 13, 1994); a bus operator fighting with another bus operator, and incidentally injuring a student, Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); a classroom teacher sexually stimulating himself and having an erection in class, McCroskey v. Webster County Bd. of Educ., Docket No. 51-88-116 (Oct. 31, 1988); and a classroom teacher purchasing alcohol for and performing oral sex on a student,

Allison v. Kanawha County Bd. of Educ., Docket No. 20-86-273-1 (Dec. 30, 1986).

A bus operator may be dismissed for compromising the safety of his passengers in a significant manner. Conner v. Barbour County Bd. of Educ., Docket No. 95-01-031 (Sept. 29, 1995); 200 W. Va. 405, 489 S.E.2d 787 (1997).

The undersigned concludes that a first offense of permitting students to stand on a bus does not rise to the level of the misconduct described in these decisions. (See footnote 5) Because MCBE presented no evidence to prove that the safety of Grievant's passengers was compromised in a significant manner or that Grievant's behavior was not correctable, and because MCBE has not cited, and the undersigned has been unable to find, any exampleof a bus operator dismissed for a first offense of allowing his passengers to stand, the undersigned concludes that Grievant's driving his bus with passengers standing is correctable behavior, which does not, by itself, justify his dismissal. (See footnote 6) Accordingly, MCBE's dismissal of Grievant for allowing students to stand on his bus was in violation of Policy 5300 and thus improper.

**IMMORALITY**

The term "immorality," as used in W. Va. Code § 18A-2-8, connotes conduct "not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior." Golden v. Bd. of Educ. of County of Harrison, 169 W. Va. 63, 285 S.E.2d 665 (1981); Rovello v. Lewis County Bd. of Educ., 181 W. Va. 122, 381 S.E.2d 237 (1989). "Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires at least an inference of conscious intent." See, Hayes v. Kanawha County Bd. of Educ., Docket No. 94-20-1143 (June 28, 1995), aff'd, Circuit Court of Kanawha County, Civil Action No. 95-AA-171 (Oct. 24, 1995), citing, Youngman v. Doerhoff, 890 S.W.2d 330 (Mo. 1994).

Examples of immoral conduct warranting dismissal include a physical education teacher grasping the buttock of a female student, Edwards, supra; a teacher striking a student in the back of the head with a thrown chain, Wynne v. Kanawha County Bd. ofEduc., Docket No. 89-20-682 (Apr. 24, 1990); a classroom teacher sexually stimulating himself and having an erection in class, McCroskey, supra; and a classroom teacher purchasing alcohol for and performing oral sex on a student, Allison, supra. See Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997); Hayes v.

Kanawha County Bd. of Educ., Docket No. 94-20-1143 (June 28, 1995); Wirt v. Mercer County Bd. of Educ., Docket No. 92-27-431 (Apr. 28, 1993); Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May. 23, 1990); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). A teacher's sexually suggestive comments to students, which rise to the level of sexual harassment, may constitute immorality. Harry v. Marion County Bd. of Educ., W. Va. , 506 S.E.2d 319 (1998).

MCBE dismissed Grievant for immorality, alleging that he offered M. a dollar (See footnote 7) to lower her pants. In support of this allegation, MCBE presented the testimony of M., her mother Lowe, State Police Sergeant David R. Butler, (See footnote 8) and several members of Grievant's extended family, who accused him of molesting young girls, based on events alleged to have occurred approximately twenty three years ago. (See footnote 9) Prior to the Level IV hearing; Grievant, through counsel, filed a Motion To Exclude Testimony, dated December 17, 1998, requesting that evidence of his acquittal on a charge of first degree sexual assault, which occurred on November 2, 1995, and that the testimony of Erica Lynn Carr Smith, regarding her alleged sexual assault by Grievant, which allegedly occurred during the 1970's, be excluded.

A telephonic pre-hearing conference was held on December 22, 1998. Grievant was represented by Mr. Roush, and Respondent was represented by Gregory W. Bailey, Esq., who had previously submitted a Memorandum In Opposition To Motion To Exclude Evidence, dated December 21, 1998. The arguments of both counsel were heard.

Grievant's argument, that evidence of his acquittal should be excluded, was well taken and prevailed. MCBE did not produce, and the undersigned was unable to find, any authority for the proposition that such an acquittal has any relevance whatsoever in a subsequent grievance proceeding. Such fundamental legal concepts as the presumptionof innocence, double jeopardy, the separation of powers, and fairness, preclude an administrative law judge from substituting his judgment for that of a circuit court jury. While Respondent validly pointed out that a lower evidentiary standard, that of a preponderance of the evidence, applies in grievance proceedings, the undersigned declined to retry Grievant under this lowered standard, given these fundamental legal concepts, the amount of time this would have taken, the compelling evidence of Grievant's innocence reflected in the transcript of his disciplinary hearing, and given the adverse community sentiment that followed his acquittal. See Marie Carr v. Monroe County Bd. of Educ., Docket No. 96- 31-102 (Oct.

15, 1996). Furthermore, this Grievance Board has held that a criminal charge of child sexual abuse, later dismissed, is not worthy of consideration in a subsequent grievance proceeding. Adkins, supra. (See footnote 10)

MCBE's argument, that the testimony of Erica Lynn Carr Smith (Smith), regarding her alleged sexual assault by the Grievant, which allegedly occurred during the 1970's, not be excluded, was well taken and MCBE prevailed on this issue.

Although formal rules of evidence, such as the West Virginia Rules of Evidence, do not apply in Grievance Board proceedings, W. Va. Code § 18-29-6, they may reasonably be looked to for guidance in deciding evidentiary questions. (See footnote 11) These rules, as well asdecisions of the West Virginia Supreme Court of Appeals, permit the use, for certain purposes, of evidence such as Ms. Smith's. Huddleston v. United States, 485 U.S. 681, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988); TXO Production v. Alliance Resources, 187 W. Va. 547, 419 S.E.2d 870 (1992).

Respondent argued that it is permitted by Rule 404(b) of the West Virginia Rules of Evidence to use Smith's testimony to show Grievant's intent, or absence of mistake or accident. This is correct. Person v. Miller, 854 F.2d 656 (4th Cir. 1988). Accordingly, Ms. Smith's testimony, and the testimony of other similarly situated persons, (See footnote 12) was heard at Level IV and given the weight it appeared to merit. (See footnote 13)

Smith, Grievant's brother's daughter, testified at Level IV that in 1976, when she was ten years old, Grievant arranged to be alone with her; that he then told her that she had a bug in her pants, and put his hand in her pants, causing her to run away. She further testified that her uncles Walt and Fred were not molesters.

Delilah Hale (Hale), Grievant's sister's daughter, testified at Level IV that in 1976, when she was eight years old, Grievant arranged to be alone with her; that he then put hishand up her skirt and rubbed her. She testified that this occurred several more times, until she reached age 11; that Grievant tried to penetrate her; and that she was appearing at the Level IV hearing after being contacted by Ms. Smith. On cross-examination, Hale testified that there were other sexual abusers in her family; that their abuse was hushed up; that her mother was abusive; and that her aunt, Rebecca Carr Tingler, lives near her in Covington, Virginia.

Rebecca Carr Tingler (Tingler), Grievant's younger sister, testified at Level IV that when she was eight, nine, ten, or eleven years old, Grievant would pay her to feel her and inserted his penis into

her; that she told Lowe's mother (M.'s grandmother) of this when they worked together at a beauty shop in Covington; that they worked together there during Grievant's 1995 trial; and that Lowe's mother (the grandmother of M.) knew of Grievant's alleged history of molestation.

Bertia Tiede (Tiede), Smith's cousin, testified at Level IV that when she was young, she spent a great deal of time with Smith; that they were close; that Smith told her that Smith's uncles Walt and Fred had sexually abused her; and that Smith's family knew that Smith lied a lot.

Grievant's counsel objected to this testimony, stating that it was not specific and concerned events that happened so long ago that they were impossible to refute; that Grievant had no warning that two of these witnesses were going to testify; and that the alleged improper acts by Grievant constituted off the job conduct with which he had not been charged. It was during this testimony that Grievant's family members had an altercation, requiring the police to be called. As noted above, testimony such as that given by the members of Grievant's extended family may be used to show intent, or absence of mistake or accident. W. Va. R. Evid. 404(b). The proponent of such evidence must identify the specific and precise purpose for which it is offered. State v. McGinnis, 193 W. Va. 147, 455 S.E.2d 516 (1994). Having specified that it wishes to use its 404(b) evidence to show Grievant's intent, or absence of mistake or accident, MCBE's evidence may be used to show that if Grievant asked M. to lower her pants, he did so for an immoral reason, and not by mistake or for some innocent reason. (See footnote 14) Such testimony may not be used to prove that Grievant's character is such that his alleged prior bad acts make it more likely that MCBE's allegations of immorality are true. W. Va. R. Evid. 404(a).

In cases involving sexual abuse of children, evidence regarding prior bad acts may be used to show a lustful disposition towards children, provided that such acts occurred reasonably close in time to the incident at issue. State v. Edward Charles L., 183 W. Va. 641, 398 S.E.2d 123 (1990); reversing in part State v. Dolin, 176 W. Va. 688, 347 S.E.2d 208 (1986).

In order for such testimony to be used to show Grievant's intent, the alleged prior bad acts must be relevant. That is to say, they must be similar in nature and close enough in time to the matter at issue. Clearly, Grievant's alleged prior bad acts are similar innature to Grievant's alleged offense. However, they allegedly occurred some twenty three years ago. The West Virginia Supreme Court of Appeals has held that alleged prior bad acts, involving of the sexual molestation of a young girl, occurring twenty years earlier are inadmissible under Rule 404(b). State v. Jackson, 181 W. Va. 447,

383 S.E.2d 79 (1989); See United States v. Cole, 491 F.2d 1276 (4th Cir. 1974). Accordingly, Grievant's alleged prior misconduct is too remote in time to be of probative value, and may not be used to prove his intent during the alleged incident at issue.

However, evidence to prove intent is usually used when a person's intent cannot be inferred easily from his conduct itself. In other words, the issue of intent should be in dispute. Cleckley, Handbook on W. Va. Evidence, § 4-5(B)(4)(e). That is not the case in this grievance. There can be precious little doubt that if Grievant asked M. to lower her pants, he did so with immoral intent. Indeed, it is hard to conceive of a plausible reason for a school bus driver to ask a ten year old girl to lower her pants that is not immoral. The real issue is not Grievant's intent, but whether the alleged incident happened at all. (See footnote 15)

It is also noted that the testimony of Grievant's extended family was in sharp dispute. It served mainly to prove that Grievant's family feuds within itself, and is willing to trade allegations of child sexual abuse. Smith and Tingler maintained that Grievant was a molester, Hale and Tiede maintained that other family members were molesters. As noted above, their feelings against each other ran so high that the police had to be called. Even if such old allegations could be used to prove Grievant's intent, which is notnecessary, the manifest anger of the family witnesses for one another would lead the undersigned to view their testimony skeptically. Grievant's contentions that these alleged events were so distant in time as to make a defense against them nearly impossible, and constituted off the job conduct with which he had not been charged, are also well taken. The testimony of Grievant and M., concerning whether Grievant asked M. to lower her pants, was in sharp dispute. M. was the only eyewitness called by MCBE, although M.'s brother D., age nine, was also present on the bus on the afternoon of September 15, 1998. It is troubling that D. was not called, either at Grievant's disciplinary hearing, or at Level IV. MCBE presented no reason for its failure to call D. It is MCBE's responsibility to call critical witnesses in support of its case. Oxley v. Summers County Bd. of Educ., Docket No. 98-45-134 (Mar. 18, 1999); Jennings v. Wyoming County Bd. of Educ., Docket No. 98-55-379 (Mar. 10, 1999); Landy, supra. The unexplained failure of a respondent in a dismissal case to call a critical witness can justify reversing the grievant's dismissal. Sharp v. Bd. of Directors/W. Va. State College, Docket No. 97-BOD-497 (June 15, 1998).

Accordingly, the undersigned must make a credibility determination. In assessing the credibility of witnesses, some factors to be considered . . . 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. Harold J. Asher and William C. Jackson. Representing the Agency before the United States Merit Systems Protection Board 152-153 (1984). Additionally, the ALJ 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 ofthe witness's information. Id., Burchell v. Bd. of Trustees, Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

M. testified while seated beside her mother, touching her, but did not look towards her mother or speak to her while testifying. Testifying was obviously very difficult for M., who cried twice during her testimony. Due to her youth, the undersigned was required to ask M., before her testimony, a series of questions intended to assess her competence as a witness. (See footnote 16) State v. Wilson, 157 W. Va. 1036, 207 S.E.2d 174 (1974); State v. Farley, 126 W. Va. 266, 23 S.E.2d 616 (1942). M. indicated that she understood that by taking the oath, she had promised to tell the truth, and that she knew what it meant to tell the truth. She stated that no one had told her what to say, although she later testified that her mother helped her remember what happened on the bus by asking her questions, “about every month,” and did so before the Level IV hearing, but did not help her remember.

M. testified that she was ten and one-half years old, and also stated the name of her school, her teacher's name, and the sort of grades she earned in school. Children are presumed to be competent to testify. Wheeler v. United States, 159 U.S. 523 (1895); W. Va. R. Evid. 601; 25 Journal of Family Law 287 (1986-87); 40 U. Miami L. Rev. 245 (1985). In West Virginia, neither youth nor mental capacity precludes a victim of alleged sexual abuse from testifying. W. Va. Code § 61-8B-11(c); State v. Stacy, 179 W. Va. 686, 371 S.E.2d 614 (1988). The undersigned saw no indication that M. was not a competent witness. Assessing the credibility of M.'s testimony, the undersigned finds that her demeanor was as straightforward as a frightened young girl's could be, and that she had a good ability to observe the events on the bus and communicate them. Her reputation for honesty was unknown, and she made no admission of untruthfulness. There was no apparent bias, interest, or motive shown by M.

However, M.'s testimony at Level IV was inconsistent with her previous testimony, and in a very significant particular. After stating once, on direct examination, that Grievant had asked her to pull her

pants down, M. went on to testify during direct examination as follows:

BY MR. MOHLER:

Q M., when Mr. Carr had you up at the front of the bus, is there any chance that you misunderstood what he was asking you to do?

A. Yes.

Q What do you mean, how do you mean that?

A: He told me to pull my shirt down.

Q OK. And um, he told you to pull your shirt down. What kind of shirt did you have on, do you remember?

A A pink flowered shirt.

Q OK. Was your shirt pulled up or anything?

A No.

Q Um, now, you're indicating to us that, that what you believed he said was, wait, what you believed he meant was, for you to pull your pants down, is that right? A Yes.

Q Now, why do you believe that's what he meant?

A Because he's always messing up.

Q What do you mean he's always messing up?

A Sometimes he'll say the opposite word for something.

Q OK. Now, where he touched your leg, OK, now would your shirt reach down that far?

A No.

Q Uh, was there any, do you know of any reason why your shirt needed to be down that far?

A No.

On cross examination, M. testified as follows:

BY MR. ROUSH:

Q M., um, just a little while ago, you had indicated to us that you thought Homer had told you to pull your shirt down, that you thought he meant to pull your pants down. Why didn't you um tell us about this mistake you thought he made when we were at the board meeting there in Union rather than?

A I don't know.

Q But but you're, let me just make certain, you believe he said, asked you to pull your shirt down, correct?

A Yes.

Q OK. Later in her cross examination, explaining how she told her mother of the alleged incident on the bus, M. testified as follows:

BY MR. ROUSH:

Q Did you tell her that Homer had asked you to take your shirt down, or did you tell her he'd asked you to pull your pants down?

A I told her that he asked me to pull my shirt down.

Q Hmm. Did she suggest to you that he may have meant for you to pull your pants down?

A No.

Q You came up with that on your own, did you?

A Yeah.

Q But you did tell her, definitely, that he'd first asked you to pull your shirt down?

A Yes.

On redirect, M. testified:

BY MR. MOHLER:

Q M., when Mr. Carr asked you to pull down your shirt, what did you think he meant?

A His, he meant me to pull down my pants.

Q And you were sure of that on that day?

A Yes.

Q Are you sure of it today? A Yes.

This is a glaring inconsistency. M.'s stating that Grievant asked her to pull down her shirt, and not her pants, contradicts her testimony at Grievant's disciplinary hearing, as well as her video taped statement to Sergeant Butler. More importantly, the moral and sexual implications of asking a young girl to pull her shirt down are obviously vastly different than the implication of asking her to pull down her pants. It is also noted that, under the “shirt” version of events, the idea that Grievant was asking M. to lower her pants originated in M.'s mind, or perhaps in her mother's mind, as M. testified that she “definitely” told her mother “shirt.” (See footnote 17) If Grievant did not ask M. to lower her pants, MCBE's charge of immorality, based upon such a request, falls to the ground.

M.'s testimony was also implausible. Implausible circumstances do not help prove a charge of immorality. See Adkins, supra. The undersigned has viewed the road where Grievant, the Cozorts, and M., live. (See footnote 18) M.'s house is two-tenths of a mile past the previousbus stop, the Cozort house. The road Grievant's bus was traveling is a winding, dead end, one lane county road, approximately ten feet wide, without a posted speed limit. A speed of 20 miles per hour is a reasonable speed for the portion of this road between the Cozort house and M.'s house. At twenty miles per hour, it takes approximately one minute to drive from the Cozort house to M.'s house. M.'s house is approximately fifteen feet from the road.

The circumstances surrounding an alleged act of immorality must be very carefully considered, and these cases are very difficult to decide. Petry, supra. To credit M.'s version of events, the undersigned is asked to believe that within approximately one minute, Grievant, while driving a full-size school bus up a winding, one lane road, called M. to the front of the bus, distracted M.'s two siblings by asking them to close windows, asked her several times whether she could keep a secret, and offered her a dollar to lower her pants, having indicated by touching her leg that they were to be lowered approximately six inches. Taking M.'s testimony as true, Grievant would have arrived at M.'s house, which is located directly beside the road, with M. standing in the aisle beside his driver's seat, in full view from the bus door, her pants lowered, as her brother and sister were walking up the aisle to exit the bus. This is hard to believe. In fact, as Grievant's counsel argued, Grievant would be insane to do this. It is also noted that, to the extent the testimony of Grievant's family had any consistency, it described Grievant contriving to be alone with young girls.

Grievant testified that he had heard M. say that she had lost $1.50 on the bus; that her younger brother D. had offered to put up the bus windows in exchange for a stick ofgum; that he asked M. to move forward about four rows, and across the aisle, in order to prevent her little sister K., age 5, from falling over a railing into the bus stairwell; and that he gave M. the dollar when she left the bus, telling her that it was all the money he had found.

Grievant further testified that Ms. Cozort “hates my guts, period;” that McKinney had a property dispute with his wife's family that resulted in a court case; that McKinney picketed MCBE to prevent his reinstatement after his acquittal; that he had received two telephone calls, from persons he named in his disciplinary hearing testimony, warning him to watch out for the Hubbard/Lowe family because of McKinney, and that his neighbors had tried to prevent him from getting a loan to buy some

property. Grievant testified that he never asked M. to lower her pants or shirt.

During his testimony, Grievant's demeanor was forthright. He answered questions directly and without apparent evasion. He had a good ability to observe the events on the bus and communicate them. His reputation for honesty was unknown, and he made no admission of untruthfulness. Other than his inherent desire to prevail at Level IV, there was no apparent bias, interest, or motive shown. Grievant's testimony at Level IV was consistent with his testimony at his disciplinary hearing. Finally, Grievant's version of the events that took place between the Cozort house and M.'s house is simply more plausible than M.'s. Grievant was a more credible witness than M.

Lowe, M.'s mother, testified that their family moved to Monroe County at the end of August, 1998; that M. came home from school on September 15, 1998, and, about an hour later, told her that Grievant had offered her a dollar to lower her pants; and that she thencrossed the road to McKinney's house to call MCBE and the State Police because the Hubbard/Lowes do not have a telephone. Lowe testified that the Hubbard/Lowes rent their home from the Cozorts, and that she was unaware of Grievant's reputation in the area as a molester of young girls until this alleged incident took place.

During her testimony, Lowe's demeanor was less than forthright. She was defensive and argumentative, and answered some questions only after pausing at length. When questioned concerning her foreknowledge of Grievant's reputation, she responded with questions of her own. She was not present to observe the events on the bus. Her reputation for honesty was unknown, and she made no admission of untruthfulness. However, in addition to her inherent desire for her viewpoint to prevail at Level IV, there was apparent bias, interest, and motive shown.

Lowe's testimony, that she was unaware of Grievant's reputation in the area as a molester of young girls, was both inconsistent and implausible. Lowe testified at Grievant's disciplinary hearing that she lived in Covington, Virginia until 1996; that she had no prior knowledge or any prior concerns expressed to her regarding Grievant by anyone; that she wouldn't have believed any such concerns because she knew Grievant's sister; that her mother told her who Grievant's sister was; that they rent from the Cozorts; that McKinney is the mother of her landlord; that they had just moved to the area at the end of August; that she knows two of Grievant's sisters, Iris and Becky, very well; that she didn't know them until a week and a half ago; and that she knew Grievant's sister Becky a long time ago. It was at this point that Lowe began responding to her examination with questions. At Level IV,

Lowe testified that she knew nothing about Grievant, or his trial andacquittal, before this incident; that she knew he was her children's bus driver; that she had known Grievant's sister Iris McAllister for 15 years, having met her in Covington; that she had known Grievant's sister Becky Tingler for the same period of time and had not lost contact with her; that during this 15 year period she had never heard of Grievant; that Iris and Becky call Grievant David; that she knew of David; and that her mother worked with Becky Tingler for about five years at a beauty salon in Covington. When asked to reconcile her statement that she wouldn't have believed any concerns about Grievant because she knew Grievant's sister with her statement that she knew nothing of Grievant before September 15, 1998, Lowe again became defensive and argumentative, could not understand the question, and again began challenging and interrupting Grievant's counsel with questions of her own. Lowe never answered this question. Further, Lowe's testimony, that M. said “pants,” is inconsistent with M.'s testimony that she told her mother “shirt.” Lowe's significant inconsistencies cannot be ignored, and such inconsistencies undermine a charge of immorality. Wirt, supra.

It appears that, because Lowe was aware of Grievant's reputation in the area as a molester of young girls, she had apparent bias, interest, or motive against Grievant. Her statement that she knew nothing of Grievant and his reputation in the area as a molester of young girls is incredible.

The undersigned is asked to believe that the Hubbard/Lowe family moved to an isolated rural area, two weeks before school started, with their ten year-old daughter, andrented a house from leaders of the anti-Grievant faction in Monroe County. (See footnote 19) Yet their landlord and next-door neighbor, the Cozorts, whose child, S., Grievant had been acquitted of molesting, never told the Hubbard/Lowes that their daughter's school bus driver was, in their opinion, a molester of young girls. It must be remembered that Sherry Cozort testified at Grievant's dismissal hearing that she “would do whatever it took legally to keep [Grievant] from working for [MCBE],” and picketed against Grievant's reinstatement by MCBE. The undersigned is also asked to believe that the Hubbard/Lowes' closest neighbor, McKinney, whose telephone they rely on, who is the grandmother of S., and who had attended the picketing against Grievant at MCBE, also never told them about Grievant's reputation. All of this is impossible to believe, particularly given the fact that Grievant's sister Tingler testified that she told Lowe's mother (M.'s grandmother) about Grievant's alleged abuse of her, and about his 1995 trial, when they worked together at a beauty salon in Covington. Such information is likely to be communicated within a family. It is concluded that Hubbard and Lowe knew of the local sentiment

against Grievant, and that the testimony of Ronald J. Hubbard, Jr. and Rebecca Lowe was motivated by bias, interest and motive, and is not credible. Lowe's lack of credibility is significant, because it is reasonable to presume that she exercises considerable influence over M., and because Lowe conveyed M.'s statement, that Grievant had asked her to lower her pants, and not her shirt, to MCBE and the State Police, resulting in Grievant's dismissal. Thetestimony of a witness who is motivated against a grievant does not help establish a charge of immorality. Petry, supra.

Because Grievant's testimony regarding the events of September 15, 1998, was both more plausible and more credible than M.'s, and because the testimony of Lowe was inconsistent and motivated by bias, interest, and motive, Respondent MCBE has failed to meet its burden of proving, by a preponderance of the evidence, that Grievant committed the act charged and was properly dismissed for immorality.

As noted above, these cases are very difficult to decide. They require that the evidence be closely scrutinized. Wirt, supra, Adkins, supra. Cases involving disciplinary action against bus drivers often turn on the plausibility of the factual situation, and on credibility, as there may be few witnesses. See Johnson v. Wood County Bd. of Educ., Docket No. 95-54-471 (Mar. 28, 1996); Froats v. Hancock County Bd. of Educ., Docket No. 91-15-245 (Dec. 5, 1991). A charge of immorality is a very serious one, and one certain to arouse strong emotions. That happened here. There is no doubt that some parents of students who ride Grievant's bus are genuinely concerned that he is a molester of young girls. However, community sentiment, adverse to Grievant, cannot be allowed to replace a careful application of the relevant law to the significant facts. Adkins, supra; Whetstone v. Grant County Bd. of Educ., Docket No. 12-88-106 (Aug. 29, 1988); Milam v. Kanawha County Bd. of Educ., Docket No. 20-87-270-1 (May 2, 1988); Wigal v. Pocahontas County Bd. of Educ., Docket No. 38-86-069-2 (Oct. 15, 1987).

MCBE has failed to prove its charges of insubordination and immorality. It has, however, proven its charge of willful neglect of duty. Therefore, some degree of mitigationof the penalty, dismissal, assessed by MCBE against Grievant is appropriate.

Grievant bears the burden of demonstrating that his penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989). "When considering whether to mitigate the punishment, factors to be considered include the employee's

work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997).

Mitigation of a penalty is considered on a case by case basis. Conner, supra; McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and include consideration of an employee's long service with a history of otherwise satisfactory work performance. Pingley v. Div. of Corrections., Docket No. 95-CORR-252 (July 23, 1996). This Grievance Board has held that “mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of theemployee'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).

Applying the factors set forth in Phillips to this grievance, it is concluded that MCBE presented no evidence to show that Grievant had ever before been the subject of disciplinary action by MCBE. Grievant's testimony, at his disciplinary hearing, that he had received good evaluations was not contradicted by MCBE. Grievant had been clearly advised, by being given a copy of the Transportation Regulations, that permitting passengers to stand on his bus was prohibited. However, MCBE has apparently never disciplined another bus operator for this offense, and the penalty employed by MCBE for this offense, dismissal, is clearly disproportionate to the offense proven. The undersigned finds that, by a preponderance of the evidence, mitigating circumstances exist for Grievant. These circumstances support a reduction in the clearly excessive penalty assessed against Grievant, in the interest of fairness and objectivity, and considering his seven years of service with a history of otherwise satisfactory work performance. Pingley, supra.

Therefore, the only issue remaining to be resolved is what remedy should be granted. W. Va. Code § 18-29-5 provides that "[h]earing examiners are hereby authorized and shall have the power to

. . . provide such relief as is deemed fair and equitable in accordance with the provisions of this article, and such other powers as will provide for the effective resolution of grievances not inconsistent with any rules or regulations of the board or the provisions of this article." This provision was construed by the West Virginia Supreme Court of Appeals in Graf v. West Virginia University, 189 W. Va. 214, 429 S.E.2d 426 (1992), as follows: “[c]learly the Legislature intended to give the examiners who hearthe grievances the power to fashion any relief they deem necessary to remedy wrongs done to educational employees by state agencies.”

Consistent with this authority, this Grievance Board has ordered a board of education to either rescind an intervenor's written reprimand or issue written reprimands to the grievants, Yeager & Basford v. Kanawha County Bd. of Educ., Docket No. 98-20-362 (Dec. 30, 1998); ordered a college board of directors to grant a retroactive personal leave of absence, Olmsted v. Board of Directors/Bluefield State College, Docket No. 98-BOD-108 (Oct. 21, 1998); ordered a school board to schedule cleaning and maintenance of the air conditioning system and classroom at a grievant's school "consistent with industry standards," Guerin v. Mineral County Bd. of Educ., Docket No. 92-28-422/459 (Jan. 31, 1996); extended relief to an employee who was improperly dissuaded from intervening in a grievance, Stroud v. Mingo County Bd. of Educ., Docket No. 94-29-621 (June 30, 1995); granted relief to an employee assigned to a position for which she was not qualified, Roth v. Ohio County Bd. of Educ., Docket No. 35-89-025 (Feb. 28, 1990); restored sick leave to an employee whose misdiagnosis during an employer-directed medical examination had resulted in loss of 25 days' sick leave, Toney v. Lincoln County Bd. of Educ., Docket No. 22-87-047-1 (Apr. 30, 1987); ordered a school board to select an "appropriate employee," other than the grievant's principal, to render an independent evaluation of a grievant's performance, Burdette v. Summers County Bd. of Educ., Docket No. 45-86-280-4 (Dec. 16, 1986); and denied the remedy being sought by a grievant (instatement to a coaching position), substituting an alternate remedy (reposting and re-evaluation), Giammerino v. Raleigh County Bd. of Educ., Docket No. 41-86-165-1 (Dec.11, 1986).

As relief, Grievant requests reinstatement, retroactive wages, benefits, and seniority, interest on all monetary sums, and the removal of any reference to his dismissal from his personnel records.

Consistent with this Board's authority to fashion relief, the following relief is deemed fair and equitable in this grievance. Respondent MCBE will be ordered to reinstate Grievant to his position, with all back pay and interest thereon, seniority, benefits, and all scheduled pay increases to which

he would have been entitled had he not been dismissed. MCBE shall remove any reference to his dismissal from his personnel records. MCBE shall issue a warning to Grievant for his willful neglect of duty in permitting student passengers to stand on his bus. Finally, for the protection and assurance of all concerned, MCBE will be ordered to permanently install a video camera on Grievant's bus. MCBE shall issue a written direct order to Grievant that he is not to operate his bus with passengers present unless this video camera is recording.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

## CONCLUSIONS OF LAW

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); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. The authority of a county board of education to discipline an employee mustbe based upon one or more of the causes listed in W. Va. Code § 18A-2-8, and must be exercised reasonably, not arbitrarily or capriciously. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

3. W. Va. Code § 18A-2-8 states that a board of education 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.

4. 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). Insubordination may also be found when an employee shows a willful disregard for the 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).

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

6. Respondent MCBE failed to establish, by a preponderance of the evidence, that Grievant was guilty of insubordination. 7. To prove willful neglect of duty, an employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. Williams v. Cabell County Bd. of Educ., Docket No. 95-06-325 (Oct. 31, 1996), Jones v. Mingo County Bd. of Educ., Docket No. 95-29-151 (Aug. 24, 1995), Hoover v. Lewis County Bd. of Educ., Docket No.93-21-427 (Feb. 24, 1994).

8. Willful neglect of duty encompasses something more serious than incompetence. Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120, 122 (1990); Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996). Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990).

9. Respondent MCBE established, by a preponderance of the evidence, that Grievant was guilty of willful neglect of duty.

10. Immorality is defined as conduct not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior. Golden v. Bd. of Educ. of County of Harrison, 169 W. Va. 63, 285 S.E.2d 665 (1981).

11. Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires at least an inference of conscious intent. See Hayes v. Kanawha County Bd. of Educ., Docket No. 94-20-1143 (June 28, 1995), aff'd, Circuit Court of Kanawha County, Civil Action No. 95-AA-171 (Oct. 24, 1995), citing, Youngman v. Doerhoff, 890 S.W.2d 330 (Mo. 1994). 12. Respondent MCBE failed to establish, by a preponderance of the evidence, that Grievant was guilty of immorality.

13. Section 5300(6)(a) of the Policies, Rules and Regulations of the West Virginia Board of Education provides that an employee's termination must be based upon an evaluation of job

performance, and that the employee be given an opportunity to improve his performance. This policy is only applicable if the actions of the employee are correctable. Mason County Bd. of Educ. v. State Supt. of Schools, 165 W. Va. 732, 274 S.E.2d 435, (1980).

14. An offense or conduct which affects professional competency is correctable, if the conduct or offense does not directly and substantially affect the morals, safety, and health of the system in a permanent, non-correctable manner. Mason County Bd. of Educ. supra.

15. A first offense of allowing passengers to stand on a school bus represents correctable behavior.

16. When considering whether to mitigate a penalty, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997).

17. Dismissal was an excessive penalty in light of Grievant's seven years ofservice, the fact that he had never been disciplined by MCBE, his history of good evaluations, his otherwise satisfactory work performance, and the fact that MCBE has never disciplined any other bus operator for the offense of allowing passengers to stand on a bus.

18. W. Va. Code § 18-29-5(b) authorizes the undersigned to provide such relief as is fair and equitable. In this case, the undersigned concludes that the punishment, dismissal, leveled was too severe under the circumstances, but a lesser sanction is appropriate. See Gilmer County Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990).

Accordingly this Grievance is hereby **GRANTED IN PART,** and Respondent MCBE is **ORDERED** to reinstate Grievant to his position, with all back pay and interest thereon, seniority, benefits, and all scheduled pay increases to which he would have been entitled had he not been dismissed, and to remove any reference to his dismissal from his personnel records. MCBE is **ORDERED** to issue a warning to Grievant for his willful neglect of duty in permitting student passengers to stand on his bus. MCBE is **ORDERED** to permanently install a video camera on Grievant's bus. MCBE is **ORDERED** to issue a written direct order to Grievant that he is not to operate his bus with passengers present unless this video camera is recording.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monroe 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 tosuch 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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**ANDREW MAIER**

**ADMINISTRATIVE LAW JUDGE**

**Dated April 12, 1999**

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Footnote: 1

*The students involved in this matter have been identified only by initials, consistent with this Board's practice respecting the privacy of individuals in such circumstances. See, e.g., Jennings v. Wyoming County Bd. of Educ., Docket No. 98-55- 379 (Mar. 10, 1999); Brown v. Mercer County Bd. of Educ., Docket No. 98-27-113 (July 30, 1998); Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Edwards v. McDowell County Bd. of Educ., Docket No. 93-33-118 (July 13, 1994).*

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Footnote: 2

*Counsel for Grievant questioned, at Level IV, whether these gifts were appropriate, considering that M. had testified against Grievant at his dismissal hearing, and was certain to be called as a witness again at Level IV. Ms. Guy testified that the local Head Start Director had visited the Hubbard/Lowe home, found them living in extreme poverty, and concluded that the Hubbard/Lowe children would receive no Christmas gifts unless the local "Angel Tree" program provided them. Guy and her staff provided the gifts anonymously, and the undersigned declines to find these gifts inappropriate.*

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Footnote: 3

*See Maxey v. McDowell County Bd. of Educ., Docket No. 97-33-208 (Apr. 30, 1997) (Grievant held insubordinate for stomping on her evaluation and threatening to blow her principal's head off with a shotgun); Dilley v. Cabell County Bd. of Educ., Docket No. 97-06-164 (Sep. 19, 1997)(Grievant held insubordinate for falsifying student records); Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996)(Grievant held insubordinate for grabbing, threatening, and cursing student); Thompson v. Logan County Bd. of Educ., Docket No. 95-23-127 (July 17, 1995)(Grievant held insubordinate for refusing to meet with his supervisor and refusing to acknowledge his refusal);*

*Arbaugh v. Putnam County Bd. of Educ.*, *Docket No. 90-40-437 (May 22, 1991)(Grievant held insubordinate for refusing to work).*

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*Footnote: 4*

*The Transportation Regulations do not require passengers to remain seated when the bus is moving, but at all times, an impossibility. It has been noted that these regulations can be self-contradictory and cannot always be completely obeyed. Conner v. Barbour County Bd. of Educ., Docket No. 95-01-031 (Sep. 29, 1995); 200 W. Va. 405, 489 S.E.2d 787 (1997).*

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*Footnote: 5*

*It is noted that, under Grievant's version of events, he requested M. to change her seat to prevent her sister from being injured. The Transportation Regulations do not seem to contemplate that a passenger might have to rise from her seat to prevent another passenger's safety from being compromised in a significant manner. Conner, supra.*

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*Footnote: 6* *MCBE conceded, in its proposed findings of fact and conclusions of law, that this offense "may not provide a basis for termination."*

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*Footnote: 7*

*Testimony regarding the alleged offer of the dollar was inconclusive. As a determination of whether Grievant offered to return a dollar that M. had lost, as Grievant maintains, or offered her a dollar to lower her shirt or pants is not necessary to the outcome of this grievance, this issue will not be decided.*

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*Footnote: 8*

*Sergeant Butler testified that he videotaped an interview with M., during which she reiterated that Grievant had offered her a dollar to lower her pants.*

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*Footnote: 9* *MCBE also presented the testimony, over the objection of Grievant, of Ronald J. Hubbard, Jr. (Hubbard), the stepfather of M., to the effect that Grievant had attempted to intimidate a witness, M. Hubbard testified that as Grievant drove past the Hubbard/Lowe house on December 1, 1998, Hubbard left his house and "said," loudlyenough for Grievant to hear while driving by, "you're sick" to Grievant, which provoked a confrontation. Hubbard then called Grievant a child molester, which allegedly caused Grievant to threaten to either shoot or "whip" Hubbard. Hubbard, "boiling mad," picked up a brick ("damn right!") to throw at Grievant, but could not, because his shoulder was broken and his arm in a sling. Hubbard alleged that Grievant was preparing to either look in his windows with binoculars, or kidnap his children, and had no right to travel the public road. Hubbard's inconsistent testimony is deemed not credible. Hubbard initiated the alleged confrontation and continued it, and repeatedly contradicted himself on cross examination, stating that he has no problem with Grievant, that he forgives him and only wants help for him, and that Grievant never left his truck or showed him any type of weapon. Hubbard also conceded that Grievant, who lives three tenths of a mile away, has business and kin up the road. Because of Hubbard's lack of credibility, because his testimony was motivated by bias, interest and motive, discussed below, and because the alleged conduct occurred after September 15, 1998, his testimony*

*will be given no weight.*

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*Footnote: 10* *Respondent MCBE requested to vouch the record with a transcript, dated June 20, 1995, of an interview with S. conducted by Sergeant Butler. For the reasons noted above, this transcript was given no weight.*

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*Footnote: 11* *It should be noted that these evidentiary issues were argued and decided solely by lawyers, so that the risk that a pro se grievant might be placed at a disadvantage by using formal rules of evidence was not present.*

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*Footnote: 12* *As noted below, witnesses who did not testify at Grievant's disciplinary hearing, but who wished to testify at Level IV, were permitted to testify. The undersigned applied the reasoning set forth above to those witnesses as well.*

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*Footnote: 13* *After the above-described motion was decided, The Beckley Register- Herald requested that its reporter be allowed to attend Grievant's Level IV hearing. Such hearings "may be public," W. Va. Code X 18-29-3(m), and the decision to open a hearing to the public is within the discretion of the administrative law judge. Procedural Rule 156-1-4.3.*

*Over the objection of Grievant, and the partial objection of MCBE, the hearing was opened to the newspaper, which has a policy of not identifying participants such as M.*

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*Footnote: 14* *In a trial before a jury, a judge must conduct an in camera hearing to determine whether the proponent of such evidence has proven, by a preponderance of the evidence, that the acts or conduct occurred and that the defendant committed the acts. State v. McGinnis, 193 W. Va. 147, 455 S.E.2d 516 (1994). However, because there is no jury in a Level IV hearing, and because a such a determination is not necessary to the outcome of this grievance, no such determination need be made here.*

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*Footnote: 15* *This analysis also applies to the possibility that Grievant might have made such a request by mistake or accident.*

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*Footnote: 16* *Due to the error of the undersigned, this portion of M.'s testimony was not recorded.*

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*Footnote: 17* *M.'s testimony, that Grievant is always messing up and sometimes uses the opposite word for something, is unsupported by the evidence. M. had ridden Grievant's bus for approximately two weeks before September 15, 1998, and no evidence was presented of any conversations between Grievant and M. during that time, that would allow M. to reach this conclusion. Further, Grievant's testimony at his two hearings revealed no tendency to use words of a meaning opposite than he intended.*

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*Footnote: 18* *The undersigned found this view helpful, but only marginally relevant to the central issue in this grievance, credibility. Transportation Director Comer testified at Level IV that the road between the Cozort house and the Hubbard/Lowe house was three-tenths of a mile long; that a speed of ten miles per hour was appropriate, and that it takes two minutes and eight seconds to drive this stretch of road. Grievant testified at Level IV that a speed of greater*

*than ten miles per hour was appropriate, and that it takes about 90 seconds to drive this stretch of road.*

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*Footnote: 19* *In addition to Grievant's testimony regarding his neighbors' attitudes toward him and Ms. Cozort's testimony at Grievant's disciplinary hearing, Sergeant Butler identified McKinney and the Cozorts as being motivated against Grievant after his 1995 acquittal.*