DAVID JENNINGS,

Grievant,

v. **DOCKET NO. 98-55-379**

WYOMING COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

David Jennings (Grievant), is employed by Respondent, Wyoming County Board of Education (WCBE), as a bus operator. Grievant alleges that WCBE improperly suspended him for three days without pay. As this was a disciplinary action, Grievant appealed directly to Level IV pursuant to W. Va. Code § 18A-2-8. A Level IV hearing was held on January 14, 1999, before the undersigned Administrative Law Judge, at the Grievance Board's Beckley office. Grievant was represented by John Roush, Esq., and WCBE was represented by Kathryn Bayless, Esq. The parties were given until March 1, 1999, to submit proposed findings of fact and conclusions of law, and this grievance became mature for decision at that time.

FINDINGS OF FACT

1. Grievant has been employed by Respondent as a bus driver for approximately ten years.

2. K., (See footnote 1) 17 years of age, attends Wyoming East High School. K. rides a bus from there to Herndon Consolidated Grade School, where he transfers to Grievant's bus.

3. On September 15, 1998, Grievant was driving his bus, carrying 19 students, including K., home from Herndon Consolidated Grade School.

4. K. argued with Grievant over Grievant's refusal to play some music. Grievant refused to play the music because the student passengers of the bus were too loud. While standing directly behind Grievant, K. threatened to “whip” Grievant's “ass.”

5. Grievant lost his temper, pulled his bus to the side of the road, turned off the engine,

removed the keys, and set the parking brake. Grievant ordered K. to leave the bus.

6. K. refused, and Grievant told him to sit quietly for the last six miles of his trip home. K. did so.

7. As K. left the bus at his stop, he again threatened to fight with Grievant. When Grievant returned to K.'s stop on his second afternoon run, K. again “dared him off the bus” to fight. K. forced his way onto Grievant's bus, through the elementary school students leaving the bus, using foul language to Grievant. When Grievant left the last hollow of his run, K. was standing in the center of the road, blocking it. Grievant stopped his bus to avoid hitting K., and K. again “dared him off the bus” to fight.

8. K. had been disciplined numerous times for misbehavior on Grievant's bus. K.'s misbehavior included hanging out the bus window and refusing an order from Transportation Director Jimmie Graham (Graham) to get back inside the bus, whichresulted in K. being suspended from the bus for three days; flashing, grabbing, and fondling female and male student bus passengers; lowering his pants and urinating into the hat of a student bus passenger; using foul language; and fighting with student bus passengers. Grievant had filed at least ten disciplinary reports on K., including four in 1998.

9. On September 16, 1998, Grievant called Graham, and reported the incident with K.

10. By letter dated September 24, 1998, WCBE Superintendent Frank L. Blackwell (Blackwell) suspended Grievant for three days without pay for unprofessional behavior.

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). 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.

As a result of the incident described in Findings of Fact four, five, and six, WCBE suspended Grievant for three days without pay for unprofessional behavior, alleging Grievant challenged K. to a fight. Grievant denies this. Grievant also alleges thatSuperintendent Blackwell was without authority to suspend him prior to WCBE's action on Blackwell's recommendation of suspension; that Grievant was not given a hearing prior to his suspension; that WCBE did not act on Grievant's suspension within statutory time limits; that Blackwell's letter suspending Grievant lacked information as to how Grievant could challenge his suspension; and that Grievant was the victim of discrimination, in that lesser disciplinary penalties were imposed on similarly situated employees. (See footnote 2) Grievant seeks reimbursement of his lost wages, benefits, interest, removal of references to this suspension from his file, and seniority.

The authority of a county board of education to suspend 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 nolocontendere 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.

As noted above, Grievant was suspended for unprofessional behavior. Clearly, unprofessional behavior, as such, is not named as a cause for suspension or dismissal under W. Va. Code § 18A-2-8. However, because WCBE's contention that Grievant challenged a student to fight may fairly be viewed as an allegation of either insubordination or willful neglect of duty, and because the grievance procedure is intended to provide “a simple, expeditious and fair process for resolving problems. . .,” WCBE's charge of unprofessional behavior will be considered an allegation of insubordination or willful neglect of duty. W. Va. Code §18-29-1.

Insubordination is 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).

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 toexpect 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)

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).

In support of its allegation that Grievant behaved unprofessionally in challenging K. to leave his bus and fight, WCBE presented the testimony of Superintendent Blackwell, and proffered the statements of five students who were present on Grievant's bus for theincident. Blackwell obtained his knowledge of the incident from WCBE Transportation Director Graham, who obtained his knowledge of the incident from Grievant. The student statements were obtained by Blackwell from Graham and Assistant Principal Robert Hagerman, who interviewed the students. As such, both Blackwell's testimony and the student statements are double hearsay, or “hearsay within hearsay.”

Under W. Va. Code § 18-29-6, formal rules of evidence are not applicable in grievance

proceedings, except for the rules of privilege recognized by law. Hearsay evidence is generally admissible in grievance proceedings. The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings. Seddon v. W. Va. Dep't of Health, Docket No. 90-H-115 (June 8, 1990). Accordingly, an administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. See Miller v. W. Va. Dep't of Health and Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Harry v. Marion County Bd. of Educ., Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996); Seddon, supra.

There are several factors to consider in determining the weight to be allocated to hearsay evidence, including: the availability of persons with first-hand knowledge to testify at the hearing; whether the declarant's out-of-court statements were in writing, were signed, or were in affidavit form; the employer's explanation for failing to obtain signed or sworn statements; whether the declarants were disinterested witnesses to the events and whether the statements were routinely made; the consistency of the declarants' accounts with other information in the case, their internal consistency, and their consistency witheach other; whether corroboration for the statements can otherwise be found in the employer's records; the absence of contradictory evidence; and the credibility of the declarants when they made the statements attributed to them. See Borninkhof v. Dep't of Justice, 5 M.S.P.B. 150 (1981).

Applying these factors, the undersigned determines that Blackwell's testimony and the student statements are entitled to virtually no weight. With regard to Blackwell's testimony, he was not present for the incident, and obtained his knowledge of it from another person, Graham, who was also not present. (See footnote 4) None of the 19 persons with first-hand knowledge, the student bus passengers, was subpoenaed by WCBE to testify at the Level IV hearing. Graham's out-of-court statements to Blackwell were not in writing, were not signed, nor were they in affidavit form. WCBE gave no explanation for failing to obtain a signed or sworn statement from him. Graham, as an employee of WCBE, which bears the burden of proof in this matter, could not reasonably be seen as a disinterested witness to the event. In fact, Graham did not witness the event at all. His statement was not routinely made, but was the result of WCBE's investigation into this incident. No corroboration for his statement was offered from WCBE's records; his statement was contradicted by

the testimony of Grievant; and the credibility of the declarant when he made the statement could not be assessed.

The student statements were reduced to writing by an unidentified person, were anonymous and not signed, and were not sworn, notarized, or otherwise in affidavit form. Again, WCBE gave no explanation for failing to obtain signed or sworn statements, or for its failure to subpoena the student witnesses for the Level IV hearing. The statements were not routinely made, but were the result of WCBE's investigation into this incident. As with Blackwell's testimony, no corroboration for these statements was offered from WCBE's records; the statements were contradicted by the testimony of Grievant; and the credibility of the declarants when they made the statements could not be assessed.

It is Respondent's responsibility to call critical witnesses in support of its disciplinary case. Sharp v. Bd. of Directors/W. Va. State College, Docket No. 97-BOD-497 (June 15, 1998); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). WCBE's double hearsay evidence, which constituted the whole of its case, fails to meet its burden of proof.

Grievant credibly testified that he ordered K. from the bus because K. was causing a danger to Grievant and the other student passengers. Grievant credibly testified that he had been trained to remove such students from the bus, and WCBE did not offer any policy to contradict him. Grievant credibly testified that he did not have the option of returning K. to his school, because that was not the school where K. boarded Grievant's bus, and because K.'s school would have been closed by that time. Grievant credibly testified, again without contradiction by WCBE, to K.'s long history of exceedingly rotten behavior, for which K. had been repeatedly disciplined.

Perhaps most importantly, Grievant gave a reasonable explanation for WCBE's perception that he challenged K. to a fight. Grievant credibly testified that, in southern West Virginia, ordering K. to leave the bus would be perceived by witnesses as an invitation to “step outside” or, in other words, to settle their differences in a fist fight. Significantly, Superintendent Blackwell agreed, testifying that Grievant's order for K. to step off the bus would be viewed by onlookers as a fight challenge. The undersigned concludes that K.'s threat to “whip” Grievant's “ass,” combined with Grievant's stopping his bus and ordering K. from it, created an impression that Grievant issued a fight challenge to K.

WCBE attempted to support its case against Grievant by claiming that he has a problem controlling his temper. However, WCBE was unable to show that he was ever disciplined for losing his temper. A true temper control problem, particularly one that has existed for many years, is likely to

create a “paper trail,” making it capable of documentation by an employer. See Brown v. Mercer County Bd. of Educ., Docket No. 98- 27-113 (July 30, 1998). In fact, WCBE's counsel cross-examined Grievant in an unusually aggressive, loud, and combative manner, but Grievant remained calm throughout his testimony. Grievant admitted that he lost his temper while ordering K. from his bus, but credibly denied challenging K. to fight. The evidence strongly supports Grievant's position. WCBE did not prove the sort of willful disregard for the implied directions of an employer inherent in a charge of insubordination, or demonstrate the intentional and inexcusable failure to perform a work-related responsibility inherent in a charge of willful neglect of duty. WCBE has failed to meet its burden of proof.

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); Landy v. Raleigh County Bd.of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

2. 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, 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. To prove willful neglect of duty, an employer must establish that theemployee'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).

7. 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).

8. WCBE failed to meet its burden of proof and demonstrate, by a preponderance of the evidence, that Grievant was guilty of insubordination or willful neglect of duty.

Accordingly, this grievance is **GRANTED**, and Respondent Wyoming County Board of Education is **ORDERED** to reimburse Grievant for his lost wages and benefits, with interest; to restore his seniority; and to remove any reference to this suspension from his file.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wyoming 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 preparedand transmitted to the appropriate court.

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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated: March 10, 1999

Footnote: 1

The student involved in this matter has been identified only by a letter, consistent with this Board's practice respecting the privacy of individuals in such circumstances. See, e.g., 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).

Footnote: 2

Due to the outcome of this grievance, Grievant's allegations that Superintendent Blackwell was without authority to suspend him prior to WCBE's action on Blackwell's recommendation of suspension; that Grievant was not given a hearing prior to his suspension; that WCBE did not act on Grievant's suspension within statutory time limits; that Blackwell's letter suspending Grievant lacked information as to how Grievant could challenge his suspension; and that Grievant was the victim of discrimination, in that lesser disciplinary penalties were imposed on similarly situated employees, will not be addressed.

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).*

Footnote: 4 *Blackwell testified at Level IV that he first learned of this incident September 17, or September 18, 1999. This is either two or three days after the incident took place.*