MARTIN TOLLIVER,

Grievant,

v. **DOCKET NO. 01-31-493**

MONROE COUNTY BOARD

OF EDUCATION,

Respondent.

LEVEL IV DECISION

Grievant Martin Tolliver filed this grievance directly at Level IV on September 4, 2001, alleging that he was improperly terminated from his position as a regularly-employed school bus operator. Grievant alleges violations of W. Va. Code § 18A-2-8 and W. Va. Board of Education Policy No. 5300. Grievant seeks to be reinstated in his former position and to be compensated for all lost wages and benefits, with interest, and to have the record of the termination expunged from his personnel file.

Following a pre-termination hearing held on August 28, 2001 (See footnote 1) , Respondent voted to uphold a recommendation by Monroe County Superintendent of Schools Lyn Guy that Grievant's contract be terminated. At the Level IV hearing held on November 6, 2001 at the Grievance Board's Beckley Office, Grievant was represented by WVSSPA Representative John E. Roush, Esq. and Respondent was represented by Gregory W. Bailey, Esq. of Bowles, Rice, McDavid, Graff & Love. Following the hearing, it was agreedthat the parties would mail their proposed findings of fact and conclusions of law by December 10, 2001, whereupon the matter became mature for a decision.

Based on a preponderance of the credible evidence adduced at the Level IV hearing, the undersigned makes the following factual findings:

FINDINGS OF FACT

1. Grievant was originally hired for an eight-month assignment as a substitute bus operator, but has been in a regular bus operator position for the past seven years. In addition to his regular bus run, Grievant was employed in the summer of 2001 in a position posted on May 16, 2001 as an extra-duty bus operator in connection with summer school programs.

2. Grievant's extra-duty assignment involved morning and afternoon regular runs for student pick-up and drop-off, as well as very frequent midday field trips. [Resp. Exh. 1]

3. Randy Weddle, Director of the 21st Century Grant Program at James Monroe High School, is responsible for organizing this summer program, including scheduling field trips and arranging transportation, and was Grievant's direct supervisor for the Summer, 2001 program. On or about July 17, 2001, he directed Grievant to be available for a field trip the next day, but Grievant refused, citing "short notice."

4. On July 30, 2001, Grievant was expected to take a group of summer school students on a field trip after his regular morning run; however, after his regular run he left the school and returned home, leaving the students without bus transportation for their field trip. 5. As a result of the second missed field trip, Mr. Weddle informed Superintendent Guy of both incidents. Superintendent Guy subsequently informed Grievant by letter dated August 7, 2001, that she would recommend to the Board that Grievant be dismissed from his employment. [Resp. Exh. 4]

6. Superintendent Guy's letter also cited a May 31, 2001, accident in which Grievant's bus was damaged when he backed into a light pole while parking at James Monroe High School. While Grievant immediately reported the accident to his supervisor, he failed to submit a written report of the accident within five days, as required by West Virginia State Board of Education Policy 4336. Even though Grievant's supervisor informed him, in writing, on June 14, 2001, that the report had been due within five days of the accident and directed him to submit the report immediately, Grievant did not submit the report until approximately one week later.

7. Ms. Guy's August 7 letter mentioned Grievant's past disciplinary history and another incident in which Grievant failed to file a written accident report within five days of the accident.

8. On August 24, 2001, Ms. Guy sent another letter to Grievant to "provide [Grievant] with a supplemental notice of charges with respect to [her] recommendation for dismissal." [Resp. Exh. 5] This letter identified the May 31, 2001 accident as another neglectful act. Ms. Guy further identified three previous suspensions imposed on Grievant for "neglect of duty," in May, 1998, September, 2000 and March, 2001. Ms. Guy stated that her recommendation was based on the 2001 accident and missed field trip not in isolation, but in addition to the previous disciplinary actions. 9. Grievant's most recent written performance evaluation, dated May 18, 2000, gave him an overall rating of "Meets Standards." In the 25 areas evaluated, Grievant was rated "Meets

Standards" in 21 and "Exceeds Standards" in four. The only recommendation made was in the "Performance" section, which stated: "[H]ave had several discipline problems (worked out.) [H]ave had several call-ins." [Gr. Exh. 1]

10. Grievant has accumulated a lengthy history of disciplinary actions, none of which he has challenged through the grievance procedure. These are:

A. On May 14, 1998, Grievant was suspended for two days for neglect of duty in failing to stop at the scene of an accident involving damage to the school bus he was driving. [Resp. Exh. 6]

B. On September 8, 2000, Grievant was suspended for five days for willful neglect of duty in connection with an incident involving an injury to a student who was standing while the bus was moving. [Resp. Exh. 7] This letter further informed Grievant that "coupled with an awareness of previous disciplinary action against you . . . an additional offense of this nature can warrant a recommendation for dismissal. Quince Galford, Transportation Coordinator, is effecting an improvement plan in addition to this disciplinary action."

C. On October 4, 2000, Mr. Galford gave Grievant an unsatisfactory Personnel Evaluation that was marked "Does Not Meet [Standards]" in the only categories rated, namely: "Safety practices," "Compliance with rules, policies or regulations," "Operation and care of equipment," and "Maintains good discipline." [Res. Exh. 3A] Grievant was given a 30-day improvement plan with the evaluation, that required him to:

1. Read school bus transportation regulations;

2. Practice safe driving habits;

3. Practice handling of bus safely; [and]

4. Have strict discipline on bus - students not moving around while bus is in motion.

[Res. Exh. 3B] After the 30-day improvement period, Mr. Galford noted on the original evaluation, "I have observed Martin over the 30 day period and he has satisfactorily improved on actions named in the improvement plan."

D. On March 6, 2001, Grievant was suspended for 30 days for willful neglect of duty and attempting to obtain sick leave benefits under false pretenses. [Resp. Exh. 8 & 9] In Superintendent Guy's letter to Grievant informing him of the suspension, she refers to Grievant's prior disciplinary actions, the expectation that he would improve following successful completion of the improvement plan, and her prior warning that further infractions could result in dismissal.

11. In a second letter to Grievant in connection with his most recent suspension, dated March 21, 2001, Ms. Guy informed Grievant,

> You need to know that upon your return to work, your work must be beyond reproach. Any incident involving a neglect of duty or a failure to adhere to regulations, or a failure to practice good safety management according to policy shall result in a recommendation from me to the Board of Education to terminate your contract.

[Resp. Exh. 9]

DISCUSSION

In this disciplinary action, Respondent bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6. An employee may not be dismissed unless it is for one of the reasons listed in W.Va. Code § 18A-2-8. DeVito v. Bd. of Educ., 169 W. Va. 53, 285 S.E.2d 411 (1981). Superintendent Guy's August 7 lettercharacterizes Grievant's failure to be available for the field trips as neglect of duty, which W. Va. Code § 18A-2-8 makes a dismissible offense only if it is willful. The same letter did not attribute an 18A-2-8 ground to the Grievant's failure to timely file a written accident report, although the superintendent's August 24 letter does imply that this act and the circumstances surrounding the incident were also neglectful.

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). 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). 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). This is a fairly heavy burden, given that Respondent must not only prove that the acts it alleges did occur, but also that the reason for Grievant's neglect of duty was more than simple negligence.

Grievant contends that Respondent failed to observe the proper procedural safeguards that protect an employee from loss of a continuing contract without an opportunity for a hearing prior to dismissal. While W. Va. Code § 18A-2-8 only requires discipline based on unsatisfactory performance to be based on a performance appraisal, W. Va. State Board of Education Policy No. 5300 suggests, “Any decision concerning . . . termination of employment should be based upon [an open and honest evaluation of his/her performance], and not upon factors extraneous thereto,” and further states, “Every employee is entitled to 'due process' in matters affecting his/her employment, transfer, demotion or promotion.” 126 W. Va. C.S.R. 141 §§ 2.6 and 2.7 (1993). Grievant argues that the due process required by Policy 5300 is a system of regular, formal evaluations prior to the disciplinary action. The West Virginia Supreme Court of Appeals has held that, “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. of the County of Wayne, 163 W. Va. 1, 254 S.E.2d 561 (1979). The same court has declined, though, to "adopt such a constrictive view of the Policy 5300 evaluation process." Hare v. Randolph County Bd. of Educ., 183 W. Va. 436, 396 S.E.2d 203 (1990). Instead, it is sufficient that the employee received feedback informing him of the error of his ways, the harm misconduct causes, directions on how to improve, and the potential consequences of continued misconduct. Grievant received such input from his employer, and was given every break imaginable, yet he continued to neglect his duties as a bus operator. This substantial compliance with Policy 5300 is enough to support Grievant's termination.

Grievant also argues that his latest infraction, missing a field trip, was the result of a simple misunderstanding and was not willful, and the problem could have been avoided if his request for a written schedule had been honored. Grievant's account of this incident differs from that of the other person involved, Mr. Weddle, who is responsible for organizing this summer program, including scheduling field trips and arranging transportation. This was the program for which Grievant provided morning and afternoon regular transportation, along with regular field trips. In the posting for extra duty bus runs that Grievant applied for to attain this job, applicants are informed that "[t]he rate includes daily field trips as needed." In the first instance of Grievant's missing a field trip, Mr. Weddle testified that he asked Grievant that morning when he was dropping off his students to be available for a field trip that day. Mr. Weddle said that Grievant told him he could not do it on such short notice. While Grievant does not remember saying this, he did not deny it, and the fact remains that Grievant was not there for the field trip. Given the nature of the job and the specific "daily field trips as needed" language in the posting, Grievant's refusal to transport students at Mr. Weddle's request, whatever his reason for doing so, was an intentional and inexcusable failure to perform a work-related responsibility.

The differences in Grievant's and Mr. Weddle's accounts of how Grievant missed the second field trip appear to be based on a misunderstanding rather than an issue of whether one person is more credible than the other. Mr. Weddle testified that on Thursday, July 26, he spoke to Grievant and told him to be available on Monday the 30th for the last field trip of the summer. Grievant remembers that

Mr. Weddle told him to be there on Tuesday. Grievant stated he remembers this because at the time he wrote it down on a piece of paper. He further stated that on most days he asked the students when he dropped them off in the morning if they had a field trip that day, or Mr. Weddle or another man would come out and tell him there was a trip that day. On the 30th, Grievant did not ask because he had written down that the trip was on the following day.

Grievant stated that at the beginning of the summer job, he asked Mr. Weddle for a written schedule of the planned field trips, but he never got one. Mr. Weddle stated that Grievant merely said that a written schedule “would be best for him,” and somehow hefailed to see this as a request. In any event, Mr. Weddle felt there was no need for a schedule, and never provided one. He thought that Grievant and the other driver hired for the summer used a rotation schedule, but on the 30th the other driver had a trip with another class. Grievant said there was no rotation schedule, someone would just come out and tell them where to go. Grievant gets a written schedule on the first of each month for his regular bus run during the school year, and has never had a problem with a missed trip.

Nevertheless, Grievant was on notice that his work performance was under intense scrutiny, and knowing that part of his summer job was to be available for daily field trips, he failed on Monday, July 30, 2001, to ensure that he was not needed. Since he contends there was no rotation schedule, if he had in fact had a trip on Tuesday, it would not have meant there was no trip on Monday. It was Grievant's duty to be there when he was needed, and his failure to use as much care as possible to perform this duty, especially in light of his past disciplinary history, can be characterized as an intentional disregard for his employer's reasonable expectations.

The May 31, 2001 accident in which Grievant's bus was damaged when he backed into a light pole while parking at James Monroe High School also bears on Grievant's dismissal, because it was mentioned as an additional reason for his dismissal. Grievant had arrived at the school early in order to pick up students after their after-school athletic practice, and was parking his bus so that he could observe the ball field. As he was backing the bus into position, it struck a light pole and was damaged. While Grievant immediately reported the accident to his supervisor, he failed to submit a written report of the accident within five days, as required by West Virginia State Board of Education Policy 4336. Even though Grievant's supervisor informed him, in writing, on June 14, 2001 thatthe report had been due within five days of the accident and directed him to submit the report immediately, Grievant did not submit the report until approximately one week later. Given that

Grievant's prior improvement plan required him to re-read the transportation regulations under which he works, and given the direct, written order to submit the report, Grievant's failure to timely do so is inexcusable.

The following conclusions of law are appropriate to the above discussion:

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). 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.

2. 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). 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). Grievant's continued failure to perform his work-related responsibilities was willful neglect of duty.

4. “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. of the County of Wayne, 163 W. Va. 1, 254 S.E.2d 561 (1979).

5. West Virginia State Board of Education Policy 5300, 126 W. Va. C.S.R. 141 § 2.6, is substantially complied with if an affected employee's misconduct is evaluated in writing, the employee is informed as to how to improve his conduct and is informed of the potential consequences of a failure to improve. See, Hare v. Randolph County Bd. of Educ., 183 W. Va. 436, 396 S.E.2d 203 (1990). Through several disciplinary actions, priorevaluations and an improvement plan, Respondent substantially complied with Policy 5300.

6. Respondent properly dismissed Grievant for willful neglect of duty.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Monroe County. Any 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. 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Dated: December 26, 2001 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Grievant also asserts he was denied the opportunity to present relevant witnesses at this hearing, but any procedural errors at that level are remedied by the hearing de novo at Level IV.