WENDELL WILLIAMSON,

Grievant,

v. Docket No. 05-22-089

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent,

D E C I S I O N

Grievant, Wendell Williamson, is employed by the Lincoln County Board of Education ("LCBOE") as a bus operator. He filed this grievance on March 15, 2004, asserting his five-day suspension was incorrect. His Statement of Grievance states:

> **Grievant is currently a regular bus operator. Respondent suspended Grievant for [five] days without pay for receipt of a warning citation from a law enforcement officer. Grievant contends that these actions violated West Virginia Code §§ 18A-2-7 (See footnote 1) and 18A-2-8.**
>
> **Relief sought: Grievant seeks compensation for [five] days salary, return of lost seniority, and the expunging of his record of all references to the [five] day suspension. (See footnote 2)**

This grievance was filed directly to Level IV on March 15, 2005. A Level IV hearing was held on May 5, 2005. This case became mature for decision on May 25, 2005, after receipt of the Grievant's proposed findings of fact and conclusions of law. (See footnote 3)

Issues and Arguments

Respondent asserts Grievant received a Warning Citation for speeding while driving a school bus. LCBOE notes the West Virginia School Bus Transportation Policy and Procedures Manual (Policy 4336) at Section 13.5 requires all school bus operators to observe all speed limits. Additionally, Respondent notes Grievant admits he received a warning citation for this act, and cannot attest that he was not speeding. Grievant was not disciplined for his failure to report this citation.

Grievant asserts Respondent did not "establish that Grievant violated any rule or regulation which would justify a suspension without pay for five days." Grievant's post-hearing proposals. Grievant maintained that because Respondent did not produce the officer who issued the warning citation, the issue of speeding was not proven. At the pre- disciplinary hearing, Grievant indicated there was an issue of discrimination, but this was not addressed in the grievance form or the Level IV hearing, so this issue will be deemed abandoned.

Grievant also noted there was no duty to report the warning citation, and he is correct. Policy 4336 requires a bus operator to report a conviction for a traffic violation. Since Grievant received a warning citation and was not convicted of a traffic violation, there was no requirement in Policy 4336 to report this warning. It should be noted Grievant was not disciplined for his failure to report the citation.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact. The parties agreed to submit the pre- disciplinary hearing and its exhibits as a part of the record at Level IV.

Findings of Fact

1. Grievant has been employed as a regular bus operator since 2000. Before that time he was a substitute. He recently received a certificate for five years of accident- free driving. Ninety to ninety-five percent of LCBOE's bus operators receive these awards.

2. On November 19, 2005, at 2:00 p.m., Grievant was on his way from his house to pick up students for his 2:10 p.m. afternoon run. The bus was empty.

3. Grievant was stopped by a State Trooper and issued a Uniform Warning Citation for speeding. Test. Grievant, Level IV Hearing; Resp. Exh. at pre-disciplinary hearing. This Warning Citation states the "Violation" as "Speeding," and notes the driver is being warned, but not arrested for the cited violation. Resp. Exh. at pre-disciplinary hearing.

4. Grievant was not looking at his speedometer at the time, and he "honestly" could not say whether he was speeding or not. Grievant was aware of the speed limit in that section of the road. Test. Grievant, pre-disciplinary hearing at 7.

5. The trooper asked for Grievant's driver's license and Grievant refused to give it to him. No clear explanation was given for this refusal. Test. Grievant, Level IV Hearing.

6. Grievant did not argue with the trooper or ask him how fast he was going, because he

"didn't want to hit him." Test. Grievant, pre-disciplinary hearing at 7.

7. West Virginia School Bus Transportation Policy and Procedures Manual (Policy 4336) states at Section 13.5 that "[t]he school bus operator shall observe all speed limits. Truck speed limits apply to school buses. Adverse weather conditions require reduced speeds."

8. Grievant did not report that he had received a Warning Citation to LCBOE because he did not think he was required to do so. 9. Parents called Superintendent Grizzell after they saw the bus pulled over by the trooper. Superintendent Grizzell investigated, found out the Warning Citation had been issued, and requested and received a copy. Resp. Exh. at pre-disciplinary hearing. **(See footnote 4)**

10. When called in to discuss the matter, Grievant admitted to LCBOE's Director of Transportation that he had received a Warning Citation for speeding.

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 evidence 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. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met itsburden. Id.; See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

I. Credibility

Grievant averred at hearing that credibility could be an issue. Since a credibility determination is only needed where the existence or nonexistence of certain material facts hinges on witness credibility, no credibility determination need be made here. In this case Grievant admitted he received a Uniform Warning Citation for speeding, and he could not testify under oath that he was not speeding.

II. Merits of the case

The next issue to decide is whether LCBOE has proven the charge against Grievant. At hearing, Grievant testified he honestly could not say whether he was speeding or not, as he did not look at his speedometer. Obviously, the trooper found Grievant was speeding, or he would not have issued the Warning Citation. Since Grievant admitted he received the Warning Citation, and Grievant could not dispute or rebut the finding of the trooper, it is found by a preponderence of the evidence that Grievant was speeding.

The next question is whether Grievant's act was in violation of W. Va. Code § 18A- 2-8, which identifies the types of action that can result in disciplinary action. 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). This Code Section 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 or a 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.**

Grievant's behavior can be viewed as insubordination or willful neglect of duty. "It is not necessary for a board of education to identify an employee's offenses by the exact terms utilized in W. Va. Code § 18A-2-8, as long as the required written notice of charges specifically identifies the alleged acts of which the employee is accused." Jordan v. Mason County Bd. of Educ., Docket No. 99-26-080 (July 6, 1999).

Grievant's speeding can be labeled insubordination. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule,

regulation, or order issued . . . [by] an administrative superior." Butts v. Higher Educ. Interim Governing Bd., 212 W. Va. 209, 569 S.E.2d 456 (W. Va. 2002)(per curiam). See 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 "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." Butts, supra. See Riddle, supra; Webb, supra. "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." Butts, supra. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clearinstructions." Reynolds v. Kanawha-Charleston Health Dep't, Docket No. 90-H-128 (Aug. 8, 1990).

Respondent has met its burden of proof by a preponderence of the evidence. West Virginia School Bus Transportation Policy and Procedures Manual at Section 13.5 states, "[t]he school bus operator shall observe all speed limits." This Manual is given to all bus operators. Additionally, all drivers are aware they are to obey the posted speed limits. In this case, Grievant did not follow a known, reasonable, and valid regulation. His excuse that he was not looking at the speedometer, so he does not know if he were speeding, will not rebut this finding.

Grievant's behavior could also be labeled willful neglect of duty. Again, Respondent must prove this charge by a preponderance of the evidence. Arbaugh v. Putnam County Bd. of Educ., Docket No. 90-40-437 (May 22, 1991). Although the West Virginia Supreme Court of Appeals has not formulated a precise definition of "willful neglect of duty," it does encompass something more serious than incompetence and imports "a knowing and intentional act, as distinguished from a negligent act." Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990). Hence, to prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Chaddock, supra. Grievant's assertion that he didn't know if he was speeding because he was not checking his speedometer will not excuse him from his action. Drivers are responsible for

knowing the speed of the vehicles they drive. (See footnote 5) The above-discussion will be supplemented by the following Conclusions of Law.

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). "A preponderance of the evidence is evidence 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. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id. See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

2. W. Va. Code § 18A-2-8 identifies the types of behaviors for which a board may suspend or dismiss an employee. These behaviors are identified as: "Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge. . . ."

3. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." Butts v. Higher Educ. Interim Governing Bd., 569 S.E.2d 456 (W. Va. 2002)(per curiam). See 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).

4. Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle, supra; Webb, supra.

5. In order to establish insubordination, an employer must demonstrate 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. "Willful neglect of duty," encompasses something more serious than incompetence and imports "a knowing and intentional act, as distinguished from a negligent act." Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990). Hence, to prove willful neglect of duty, the employer must establish that the employee's conductconstituted a knowing and intentional act, rather than a negligent act. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Chaddock, supra.

7. Respondent established Grievant was insubordinate and willfully neglected his duty when he drove above the speed limit in a school bus.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Lincoln 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 Educationand 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: June 30, 2005

Footnote: 1

This Code Section was not addressed and will be deemed abandoned.

Footnote: 2

The grievance form originally said the suspension was three days, but this information was later corrected to five days.

Footnote: 3

Grievant was represented by John Roush, Esq., from the West Virginia School Service Personnel Association, and Respondent was represented by William Grizzell, LCBOE Superintendent. Superintendent Grizzell elected not to submit proposals.

Footnote: 4

This document was admitted at the pre-disciplinary hearing.

Footnote: 5

While a suspension of five days in this case may seem too severe, Grievant did not request mitigation, Respondent has substantial discretion to determine a penalty in thesetypes of situations, and the undersigned Administrative Law Judge should not substitute her judgment for that of the employer. Tickett v. Cabell County Bd. of Educ., Docket No. 97-06-233 (Mar. 12, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997).