THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

JACK SCOTT,

Grievant,

v. **Docket No. 06-52-289**

Denise M. Spatafore

Administrative Law Judge

WETZEL COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Jack Scott ("Grievant") filed this grievance directly at level four on August 18, 2006, challenging a 60-day suspension without pay. Since Grievant resigned from his employment during the suspension period, he is seeking reimbursement for the 29 days of income he lost prior to his resignation. A hearing was conducted at the Wetzel County Board of Education's ("Board") offices in New Martinsville, West Virginia, on November 13, 2006. Grievant was represented by counsel, John E. Roush of the School Service Personnel Association, and the Board was represented by counsel, Richard S. Boothby. This matter became mature for consideration upon receipt of the parties' fact/law proposals on December 12, 2006.

The following material facts have been proven by a preponderance of the evidence of record.

Findings of Fact

1. Grievant was employed by the Board as a regular bus operator for approximately nine years.

2. Grievant performed the same run throughout his regular employment. The last portion of the run (in the afternoon) consists of about three and a half miles on a narrow dirt road (Carney Run), where Grievant stops for approximately six to eight students.

3. Because the end of Grievant's bus run was on a difficult road, he and his students transferred to a small bus prior to reaching that area, because a full-size bus cannot turn around on that particular road.

4. During the 2005-2006 school year, J.E. (See footnote 1) was a thirteen-year-old student who lived on the Carney Run portion of Grievant's route.

5. On at least two occasions, J.E. jumped off the bus while it was still moving at an extremely low rate of speed. In order for J.E. to do this, Grievant would have to have at least begun to open the doors while the bus was moving, and he also allowed J.E. to stand up prior to the bus coming to a stop. One of these incidents, on May 23, 2006, was captured on videotape by J.E.'s stepfather. (See footnote 2)

6. J.E.'s grandfather, Bobby Dorton, witnessed the May 23, 2006, incident, and scolded J.E. for jumping off the bus before it had come to a complete stop. 7. The handle which the bus operator must activate in order to open the bus doors has a locking mechanism. Therefore, no one could “force” the bus doors open until the driver has at least unlocked the handle and has begun to open the doors.

8. When Grievant is driving the dirt road portion of his run, he does not always activate the bus's warning lights, which state regulations require to be activated when the bus is stopping to unload students “on or adjacent to a street or highway.” Grievant does not always do this, because there are very few vehicles on the road, and he does not believe the dirt road is a “street or highway.”

9. At a Board meeting on August 14, 2006, the Superintendent's recommendation that Grievant be suspended for 60 days without pay was approved. The suspension period began at the beginning of the school year, in late August.

10. Grievant resigned from his employment on October 2, 2006. He served 29 days of the suspension period.

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). "The 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 employerhas 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).

W. Va. Code § 18A-2-7 states that "[t]he superintendent, subject only to approval of the board, shall have authority to . . . suspend school personnel." In turn, *W. Va. Code* §18A-2-8 identifies the types of conduct that can result in disciplinary action and 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. . . .

"The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code §18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991). *See Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975)." *Graham v. Putnam County Bd. of Educ.*, Docket No. 99-40- 206 (Sep. 30, 1999). 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).

Respondent has argued that Grievant's conduct constitutes 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." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Butts v. Higher Educ. Interim Governing Bd.,* 212 W. Va. 209, 569 S.E.2d 456 (2002). *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). "[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 clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990).

As Respondent has pointed out, Grievant has been trained regarding the state's regulations governing the operation of school buses, which clearly require that the amber and red lights be activated when students are being unloaded. Grievant's contention that he did not believe the dirt road portion of his route to be contemplated by this rule, along with his belief that he did not need to activate the lights when there are few cars present, do not justify his clear failure to follow these regulations.

In addition, Grievant does not appear to dispute the fact that it would be a clear violation of all basic safety principles to allow a student to exit the bus while it is still moving. In fact, he admitted that students are required to remain in their seats until the bus is fully stopped. Grievant's testimony in this regard was somewhat equivocal. At one point he stated that J.E. ran down the steps and forced the doors open on his own, and at another time he stated that he may not have even been working on the day which was videotaped. However, Grievant cannot and did not dispute the video footage of his bus merely coming to a “rolling stop” when J.E. jumped off. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res*., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ*., Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp*., Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of

prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999); *Perdue, supra*.

Superintendent Barcus testified that he checked the Board's personnel records, and there was no question that Grievant was driving his bus on May 23, 2006. Moreover, J.E. himself testified that he did, in fact, jump off the bus while it was still moving that day and that Grievant opened the doors for him. This testimony is credible, and Grievant's testimony is not. Indeed, Grievant attempted to claim at one point that J.E. pushed the doors open himself that day, which contradicts his own contention that he may not haveeven been working. Moreover, as was demonstrated to the undersigned during the level four hearing in this matter, (See footnote 3) the driver has to at least begin to open the doors before anyone else can “push” them open. Accordingly, one must conclude that Grievant was driving that day, and began to open the bus doors before he had stopped the bus, along with allowing J.E. to get up from his seat while the bus was in motion.

Grievant's behavior can also be labeled 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).

Grievant was an experienced driver, well-versed in safety regulations applicable to school bus operation. His actions, i.e. not activating his safety lights on multiple occasions and allowing a student to exit the bus while it was still moving, were knowing and intentional. Moreover, J.E.'s credible testimony was that he had jumped off the bus undersimilar conditions “more than once,” although he seemed unsure whether it had occurred twice or more than twice. Nevertheless, Grievant's conduct was beyond careless and was of a very serious nature, putting the safety of students at risk.

Grievant contends that suspension was inappropriate under the circumstances presented here.

He argues that he did not knowingly violate safety regulations regarding use of warnings lights, because he did not believe the rule applied to the road in question. He also believes that the evidence only establishes that J.E. exited the bus while in motion during an “isolated incident,” and more of J.E.'s volition than his own, absolving Grievant of responsibility. Unfortunately, the undersigned cannot agree. Grievant's actions had serious and potentially tragic consequences, and it was not an abuse of the Board's discretion to impose a suspension without pay for these offenses. “Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation.” *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute her judgement for that of the employer. *Jordan v. Mason County Bd. of Educ*., Docket No. 99-26-8 (July 6, 1999); *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). What eventually became a 29-day suspension was not inappropriate under these circumstances.

The following conclusions of law support this Decision.

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. An employee of a county board of education may be suspended or dismissed only 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. W. Va. Code § 18A-2-8.

3. “The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code §18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991). *See Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975).” *Graham v. Putnam County Bd. of Educ.*, Docket No. 99-40-206 (Sep. 30, 1999).

4. 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." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Butts v. Higher Educ. Interim Governing Bd.,* 212 W. Va. 209, 569 S.E.2d 456 (2002). *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). 5. 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).

6. Respondent has proven by a preponderance of the evidence that Grievant's conduct constituted insubordination and willful neglect of duty, for which a 29-day suspension was not arbitrary and capricious or an abuse of the Board's discretion.

Accordingly, this grievance is **DENIED**.

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

Date: January 3, 2007

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

In accordance with longstanding Grievance Board practice, only the initials of minor children will be used in this

Decision.

Footnote: 2

Apparently, J.E.'s stepfather has a 24-hour video camera in operation, which constantly records various views of his property, in order to monitor animals that enter the property.

Footnote: 3

The parties, their counsel, and the undersigned viewed the bus Grievant was driving that day, and a brief demonstration of the door locking mechanism was conducted. These proceedings were not recorded.