THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

CARL SPESSERT,

Grievant,

v. **Docket No. 06-42-446**

Sue Keller

Senior Administrative Law Judge

RANDOLPH COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

On December 1, 2006, Carl Spessert ("Grievant"), employed by the Randolph County Board of Education ("RCBE") as a bus operator, filed a grievance directly to level four, as is permitted by *W. Va. Code* § 18A-2-8, after he received a one-day suspension for neglect of duty and insubordination. For relief, Grievant seeks compensation for his lost wages with interest, the restoration of his seniority, and removal of any reference to the suspension from his personnel file. A level four hearing was conducted in the Grievance Board's Elkins office on March 22, 2007, to supplement the predisciplinary hearing record. (See footnote 1) Grievant appeared *pro se*,and RCBE was represented by Gregory W. Bailey, Esq., of Bowles Rice McDavid Graff & Love, LLP. The grievance became mature for decision on April 13, 2007, the due date for filing proposed findings of fact and conclusions of law. (See footnote 2)

Synopsis

___Grievant challenged a one-day suspension imposed after he refused to transport a student for two consecutive days. RCBE asserts that Grievant engaged in willful neglect of duty and insubordination when he refused to transport the student after being directed to do by an Assistant Principal.

The evidence establishes that due to medical reasons, Grievant was directed to transport a student on his morning run as well as on afternoon run. The student was given a note, written on

school letterhead stationery, to give Grievant. Grievant offered no basis for his belief that the note was forged, and did not call the Transportation Director or the school to verify its authenticity. RCBE met its burden of proving that Grievant's failure to follow a legitimate direction constituted willful neglect of duty and insubordination. Because the recommended suspension was reduced from two days to one, further mitigation is not warranted.

The following facts essential to this case are undisputed, and set forth as formal findings of fact.

Findings of Fact

1. Grievant has been employed by RCBE as a bus operator at all times pertinent to this grievance.

2. On or about October 12, 2006, a female student ("J. C.") presented Elkins High School Assistant Principal Terry Gainer a note from her physician, statingJ.C. has had a longstanding history of emotion/behavioral instability. Please allow her to ride Bus 11-A as she reports difficulties with changes. She will medically require as much consistency as possible. (See footnote 3)

3. Mr. Gainer contacted Transportation Director John Daniels regarding the request. Mr. Daniels confirmed that compliance with the physician's request could be arranged by adjusting Grievant's morning run to include her. Grievant already transported J.C. in the afternoon.

4. Mr. Gainer then drafted a note to Grievant on school letterhead, stating

Bus 11-A - Mr. Spessert

After receiving a doctor's request and talking to John Daniels, [the student] has permission to ride 11-A to and from EHS.

Mr. Daniels asked me to write this note so J. C. could give it to you Friday 10/13/06.

Thanks,

Terry Gainer

5. Mr.Gainer gave the note to J. C. to give to Grievant. Neither Mr. Gainer nor Mr. Daniels made any other contact with Grievant regarding the change in transportation for the student.

6. J. C. attempted to give the note to Grievant on Thursday afternoon; however, Grievant believed the document was forged, and did not allow her to board the bus on Friday, October 13, 2006, or Monday, October 16, 2006.

7. Grievant made no attempt to authenticate the note prior to denying the student transportation to school. 8. On Monday, Grievant reported to the Transportation office and advised Mr. Daniels that J. C. was not on his scheduled morning route, and that it would be six miles out of his way to transport her in the mornings.

9. On October 23, 2006, RCBE Superintendent Susan Hinzman met with Grievant and Mr. Daniels. By letter dated October 25, 2006, Superintendent Hinzman notified Grievant that she would recommend that he be suspended without pay for two days due to his refusal to transport J.C. for two days.

10. Following a hearing on November 27, 2006, RCBE approved a one-day suspension without pay for his act of wilful neglect of duty and insubordination.

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).

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, unsatisfactoryperformance, 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 (Sept. 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).

RCBE argued that Grievant's conduct constitutes insubordination and willful neglect of duty. 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 (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). "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).

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 CountyBd. 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 given an order, written on school letterhead stationery, to transport J. C. in the mornings as well as the afternoon. He admits that he intentionally did not comply with the direction based on an erroneous belief that the letter had been forged. Grievant offered no basis for his belief, and did not take any action to confirm his suspicions. Given that the note was on school stationery, it would seem more likely than not to have been authentic, and Grievant's later comment that it would add miles to his run indicates that to be his real concern. Therefore, RCBE has established the charges of insubordination and willful neglect of duty.

Grievant contends that he was not properly informed that he was to transport J. C. This argument is essentially that the discipline should be mitigated due to a contributing fault of RCBE. The

argument Grievant's suspension is excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the 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 v. Barbour County Bd. of Educ.*, Docket No. 95-01-031 (Sept. 29, 1995); *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 also include consideration of an employee's long service with a history of otherwise satisfactory work performance. *Pingley v. Div. of Corr*., 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 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). The undersigned cannot find that the one-day suspension was disproportionate to the act of insubordination/willful neglect of duty. Additionally, RCBE has already mitigated the damages by reducing the recommended suspension. No further mitigation is warranted in this case.

In addition to the foregoing findings of fact and discussion, 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." *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 one-day suspension was not arbitrary and capricious or an abuse of the Board's discretion.

Accordingly, this grievance is **DENIED**.

This decision is final upon the parties and is enforceable in the Circuit Court of Kanawha County. Any party may appeal this decision to the Circuit Court of Kanawha County within thirty days of receipt of the decision. This decision is not automatically stayed pending the outcome of the appeal. *W. Va. Code* § 6C-2-5(c). Neither the West Virginia Public Employees Grievance Board nor any of its

administrative law judges is a party to such appeal and should not be so named.

DATE: APRIL 23, 2007

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.There was no transcript made of the hearing due to an equipment malfunction; however, correspondence to the Grievant advising him of the charges against him, the Superintendent's recommendation, and the final imposition of the suspension were provided.

Footnote: 2 *Grievant elected not to file post-hearing proposals.*

Footnote: 3

[3]Consistent with Grievance Board practice, the student will be identified only by her initials.