WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

TERRYN RISK,

Grievant,

v.

Docket No. 07-15-048

HANCOCK COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Terryn Risk, employed as a bus operator by Hancock County Board of Education (HCBE) filed a grievance on October 3, 2005, in which he challenged a letter issued to him by Dan Kaser, Superintendent of Hancock County Schools. Specifically, Grievant's Statement of Grievance states:

> **I disagree with a letter of reprimand. This disagreement is a violation of WV Code 18-29-2a.**

Grievant disagrees with a September 22, 2005 correspondence, which he identifies as a letter of reprimand. (See footnote 1) **As relief, Grievant requests the document be removed from his personnel file.**

This grievance was denied at Level I, on October 3, 2005, by Transportation Coordinator Jerry Durante. Subsequently, a formal Level II Hearing was held on January 31, 2007, with a decision denying the grievance issued on February 2, 2007. (See footnote 2) Level III wasby passed. Grievant appealed to Level IV on February 7, 2007, and the parties agreed to submit the case on the record developed below. Grievant was represented by Owens Brown of the West Virginia Education Association, and Respondent HCBE was represented by William T. Fahey, Esq., Assistant Prosecuting Attorney. The matter became mature for decision on May 31, 2007, the deadline for filing of the parties' proposed findings of fact and conclusions of law. This case was transferred to the undersigned on August 31, 2007, for administrative reasons.

Synopsis

Grievant asserts he incorrectly received a "letter of reprimand." As relief, he requests the document be removed from his personnel file. Grievant maintained his job performance is effective and consistent with acceptable bus operator conduct. He contends the disciplinary action by Respondent is retaliation because his wife recently filed an Equal Employment complaint against the HCBE.

Respondent maintains that issuing a warning letter, given the facts of this case, is warranted and not a violation of any applicable rule, regulation, or statute.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant, Terryn Risk, is employed by the HCBE Transportation Department as a bus operator. When this grievance was filed, Grievant had been employed for approximately seven years. 2. In 2005, HCBE received complaints concerning operation of Grievant's bus in terms of student discipline and failure to adhere to the schedule for pick-up and delivery of students.

3. Complaints regarding Grievant were in the form of e-mails, phone calls to administrators and board members, and the appearance of a parent at a board meeting to

register a complaint. Complaints from administrators, educators, parents, and students were consistent and indicated a problem in the work performance of Grievant.

4. Complaints included excessive discipline and expecting the students' behavior on the bus, to mirror classroom behavior to the extent of not speaking or speaking only in whispers.

5. Grievant views discipline on the school bus as a safety issue. Further, Grievant felt that his authority to discipline students on his bus was being undermined by some of the principals to whom he would refer the student for further discipline. **(See footnote 3)**

6. Assistant Principal, Fay Stump attempted to address multiple disciplinary reports received from Grievant regarding students by requesting corresponding videotape from Grievant's bus. Grievant failed to provide her with the proper tapes.

7. Dan Kaser, Superintendent of Hancock County Schools, monitored Grievant's bus route, on September 14, 2005, by following the bus and found that;

> **a) Grievant dropped off students at Weir High School at 7:06 a.m., when they were not scheduled to arrive until 7:20 a.m., this being prior to staff arrival at Weir High School.**
>
> **b) Grievant dropped off students at Liberty Elementary School at 7:30 a.m., when they were not scheduled to arrive until 7:40 a.m., this beingprior to adequate supervisory staff being in place at Liberty Elementary School.**

8. There were thirty-eight students assigned to Grievant's bus. However, on the day Superintendent Kaiser personally monitored Grievant's route, only 18 students got off the bus (multiple students were not on the bus).

9. Superintendent Kaiser verified that no students assigned to Grievant's bus were absent from school on that day.

10. Alternative transportation was arranged for numerous students assigned to Grievant's bus on September 14, 2005; however, the record does not conclusively establish that this was the result of erratic timing of Grievant and/or the behavior of Grievant towards students.

11. WCBE Transportation Department is equipped with a GPS tracking system and records for Grievant's bus were pulled for September 15, 16, 19, and 20. The records

confirmed Grievant consistently did not follow the mandated schedule for his bus run.

12. Grievant's erratic scheduling was disruptive to the schools, parents, and students.

13. At the beginning of each school year, adjustments and variations to the published bus schedule are made. This process is a collaborative effort and excluding minor changes, bus operators are expected to follow the approved time scheduled for their bus route. **(See footnote 4)**

14. On September 22, 2005, in the presence of the Transportation Coordinator, Superintendent Kaiser hand-delivered Grievant a letter outlining complaints received, investigation performed, job performance expectations, and the disciplinary repercussions for subsequent inappropriate actions.

15. The September 22, 2005 letter is a two page document, which concluded with the following language:

> **This is a warning to you that the issues addressed in this letter will no longer be tolerated and if you choose not to correct these issues, further discipline [sic] actions will be taken. Let me make it very clear that there will be no more verbal or written reprimands. Further disciplinary action means recommending you for time off without pay or dismissal.**

(Griev. Level II Exhibit #2)

16. As a result of the September 22, 2005 letter, Grievant sustained no change in wage, grade, schedule, or other compensation.

17. Grievant was presented with the opportunity to respond personally to Superintendent Kaiser on September 22, 2005, and/or to reply in writing at a later date, after a more detailed review of the letter's contents.

DISCUSSION

The Grievance Board **(See footnote 5)** **has held that a letter which alleges misconduct by an employee and states that it constitutes a warning, is a letter of warning or reprimand and is considered a disciplinary action. Runyon v. Dep't of Corr., Docket No. 95-CORR-414(Jan. 31, 1996). Accordingly, the September 22, 2005 correspondence, whether it is characterized as a warning letter or a written reprimand, the effect is disciplinary in nature.** **(See footnote 6)**

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. 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).

The next issue to address is whether the letter was warranted. Respondent had received complaints concerning the operation of Grievant's bus in terms of student discipline and failure to adhere to the schedule for pick-up and delivery. (See footnote 7) **A variety ofcomplaints prompted Respondent to investigate the matter and first hand observations, confirmed Grievant was not following the mandated bus schedule. See Findings of Facts 6-12. Superintendent, Kaser, personally observed Grievant's bus run, and reviewed the data from the GPS tracking system from September 15, 16, 19, and 20th. Respondent, further confirmed Grievant's erratic scheduling was disruptive to the schools, parents, and students.**

Grievant referred numerous students to school administration for discipline. A school administrator requested the tapes from Grievant's bus to substantiate disciplinary actions. Grievant did not supply the appropriate tapes. While Grievant testified, that he felt his authority to discipline students was being undermined by some principals and discipline is an important part of a bus operator's responsibility, it is unrealistic to require students on a school bus to communicate with each other above a whisper. Respondent has met its burden of proof and established the September 22, 2005, letter was warranted.

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. 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.**

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). HCBE provided Grievant written notice of areas of concern. The September 22, 2006, WarningLetter outlined with some specificity, complaints received, readily verified facts, job performance expectations, and the disciplinary repercussions for subsequent inappropriate actions.

Grievant's repeated failure to adhere to the bus schedule can best be described as willful neglect of duty. As previously stated, WCBE must prove a charge of willful neglect of duty 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.

While Grievant testified bus operators are empowered to make changes in the schedules, and the bus schedule was inaccurate, the undersigned Administrative Law Judge is not persuaded. Grievant knowingly and consistently did not follow the mandated schedule for his bus run. Respondent has met its burden of proof by a preponderance of the evidence.

Lastly, Grievant contends the disciplinary action by Respondent is retaliation because his wife had recently filed an Equal Employment complaint against the HCBE, and his performance of assigned duties are no more inconsistent, erratic or different than in previous years. Grievant has the burden of proof regarding this allegation. Reprisal is defined in W. Va. Code § 18-29-2(p) as "the retaliation of an employer or agent toward agrievant or any other

participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the fundamental elements: 1) protected activity; 2) subsequently adverse treatment by the employer or an agent; 3) constructive knowledge of employer's official or agent; 4) causal connection between the protected activity and the adverse treatment; and/or 5) within such a period of time that retaliatory motivation can be inferred. See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); Conner v. Barbour County Bd. of Educ., Docket Nos. 93- 01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Gruen v. Bd. of Directors/Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

The instant Grievant has failed to establish that he was the victim of retaliation or reprisal by Respondent HCBE. Grievant made brief reference to this allegation during his testimony at the Level II hearing, but he did not present any credible evidence to substantiate this assertion. Mere accusation by a grievant does not establish wrong doing by Respondent. See Baker v. Bd. of Trustees/WVU-Parkersburg, Docket No. 97-BOT-359 (Apr. 30, 1998).

The following conclusions of law support this discussion:

Conclusions of Law

1. A letter which alleges misconduct by an employee and states that it constitutes a warning, is a letter of warning or reprimand and therefore is a disciplinary action. Runyon v. Dep't of Corr., Docket No. 95-CORR-414 (Jan. 31, 1996).

2. ___In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. 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 Resources, 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).

3. 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. 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.**

4. 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).

5. A board of education must prove a charge of willful neglect of duty 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.

6. Respondent has met its burden of proof by a preponderance of the evidence.

7. Grievant's actions constituted willful neglect of duty.

8. Reprisal is defined in W. Va. Code § 18-29-2(p) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

> **1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;**
>
> **2) that he/she was subsequently treated in an adverse manner by the employer or an agent;**
>
> **3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;**
>
> **4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or**
>
> **5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.**

See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Gruen v. Bd. of Directors/Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997).

9. Grievant failed to prove that Respondent retaliated against him by issuing the September 22, 2005 Warning Letter.

10. Mere allegations alone without substantiating facts are insufficient to prove a grievance. Baker v. Bd. of Trustees/WVU-Parkersburg, Docket No. 97-BOT-359 (Apr. 30, 1998).

11. Grievant failed to prove by a preponderance of the evidence that the disciplinary action of Respondent was unwarranted, or retaliatory.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. See W. Va. Code § 18-29-7 (repealed)(but see Executive Order No. 2-07, May 8, 2007). 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

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Landon R. Brown

Administrative Law Judge

Date: October 3, 2007

Footnote: 1

Hancock County School's Superintendent maintains the correspondence was a warning letter.

Footnote: 2

The record offers no discernable explanation for the year and three month delay between Level I and Level II proceedings. Both parties imply the delay should be deemed detrimental to the other. After Grievant had filing the Level II appeal, the parties, in writing, agreed to waive the time requirements. There is no indication that either party acted in bad faith regarding the setting of the Level II Hearing, however this ALJ is left wondering why there was more than a year delay before the Level II hearing actually transpired. Nevertheless, the parties agreed to waive statutory time limits, both proceeded with the Level II hearing in its entirety. In the instant matter, neither party has present sufficient evidence to sustain an affirmative defense that one or the other should prevail on the grounds of default, timeliness and/or abandonment. This grievance matter will be decided on the merits.

Footnote: 3

Grievant maintains that he did not mistreat the students on his bus and was acting within the scope of his authority in disciplining or managing the students on his bus. Grievant's level II testimony.

Footnote: 4

Minor adjustments of the schedule which Grievant identified were in the nature of no more than five (5) minutes, while the evidence from the Superintendent demonstrated inconsistencies of fourteen (14) minutes, or more. These observations were weeks into the school year, and the time to make minor adjustments had passed.

Footnote: 5

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18- 29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes and rules, which continue to control the proceedings in this case.

Footnote: 6

Upon issuance of the letter, Grievant was presented with ample opportunity to respond either personally to Superintendent Kaiser, or in writing after a more detailed review of the letter's contents. Evidence of record does not establish Respondent acted in bad faith or deprived Grievant of due process protection.

Footnote: 7

The record tends to indicate the allegations of excessive discipline stem from bilateral misunderstanding(s), regarding what is appropriate student conduct on Grievant's bus. Whether the students are too loud/distractive, and whether expecting students' behavior to mirror classroom behavior is to the extent of not speaking or speaking only in whispers.