THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

DON ARBOGAST, JR.,

Grievant,

v. **Docket No. 06-42-463**

Denise M. Spatafore

Administrative Law Judge

RANDOLPH COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Don Arbogast, Jr., ("Grievant") filed this grievance directly at level four on December 14, 2006, following the termination of his employment as a bus operator for Respondent Randolph County Board of Education. A level four hearing was conducted in Elkins, West Virginia, on April 30, 2007. Grievant was represented by Eric M. Gordon, Esquire, and Respondent was represented by Gregory W. Bailey, Esquire. This matter became mature for consideration upon receipt of the parties' fact/law proposals on May 14, 2007.

Synopsis

Grievant was terminated from his position as a bus operator for Respondent for willful neglect of duty, as a result of his discharging of students at an undesignated bus stop and failing to complete his normal bus run on November 17, 2006. Grievant contended that, after being stopped in traffic for an extended period of time, he discharged the students in the care of an adult within eyesight of the

school building, after obtaining permission from an office employee. He also contended that he attempted to complete his run after traffic cleared, but that the students were no longer waiting to be picked up. Respondent established by a preponderance of the evidence that Grievant did not take proper measures to insure the safety of the students he discharged from the bus, at a distance of over 350 feet from the school building, and that he did not obtain appropriate permission from a designated supervisor. It was also proven that Grievant failed to complete his run, because he went home to drive his own son to school. Respondent has proven Grievant's conduct constituted willful neglect of duty, and that termination was not inappropriate.

Findings of Fact

1. Grievant was regularly employed by Respondent as a bus operator for approximately thirteen years.

2. On November 17, 2006, two traffic accidents occurred on U.S. Route 219 near Beverly, West Virginia, blocking traffic in both directions.

3. Grievant's normal morning bus run requires him to pick up students south of Beverly. He then travels north on Route 219, passing Beverly Elementary School, to pick up additional students who live north of Beverly. He then travels south again to the school and drops all the students off at Beverly Elementary at approximately 8:00 a.m.

4. Because of the accidents on November 17, Grievant's bus was stopped in traffic after he had only picked up the three students who live south of Beverly. Two of the students were five years old, and the other was ten years old.

5. After sitting in traffic for approximately 15 minutes, Grievant radioed the bus garage and spoke to William Workman, a mechanic and bus operator. Grievant asked Mr. Workman if he could go ahead and let the three students off the bus, since he was lessthan 400 feet from the school and could see the building. Mr. Workman responded that he did not have that authority.

6. After talking with Mr. Workman, Grievant radioed the transportation office and spoke with Sheila Himes, secretary to the Director of Transportation. He explained to Ms. Himes that he was stopped in traffic and would not be able to get the students to school on time.

7. As Grievant was talking to Ms. Himes on the radio, he saw an adult walking up the sidewalk with a child. Grievant let the three students off his bus, assuming that this adult would take

responsibility for walking them into the school. However, he did not speak to this person or ask them to take the children to the school, or even ask if they were going to Beverly Elementary.

8. The three students walked over 350 feet from Grievant's bus to Beverly Elementary School without adult supervision.

9. Traffic on Route 219 cleared sometime after 8:10 a.m., so that one lane of traffic was moving.

10. Students at Grievant's bus stops north of Beverly waited until approximately 8:45 a.m., at which time parents drove them to school.

11. Grievant returned to the bus garage at approximately 8:30 a.m. and collected his paycheck.

12. After hearing about the events that occurred on November 17, 2006, Superintendent Susan Hinzman called Grievant into her office for a meeting. Upon being confronted with the allegation that he let students off the bus at an undesignated location, Grievant stated that he “messed up” and was sorry. Upon being asked why he had donethis, Grievant told the superintendent that he was running late and needed to get home to take his own son to school, so that he would not get into an argument with an official at his son's school. Grievant also stated in this meeting that he felt certain individuals were trying to get him into trouble and that he was going to “kick” someone's “ass.” At no time during this discussion did Grievant mention asking for or being granted permission to drop the students off.

13. Superintendent HInzman called Grievant in for a second meeting, after she was informed that Grievant did not complete his run on November 17. She informed Grievant that she would be recommending his termination. Grievant reacted angrily and told the superintendent, for the first time, that Sheila Himes had given him permission to drop the students off down the street from the school.

14. Following a Board hearing on December 13, 2006, Grievant's employment was terminated, effective on that date.

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). 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. “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 mustbe 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).

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).

In this case, there are several differing versions of the events that took place on November 17, 2006. Grievant testified that when he radioed Ms. Himes, he informed her that there was “a parent walking up the sidewalk” and asked her if it would be all right to let the children off the bus, to which she immediately responded “okay.” However, Ms. Himes testified that Grievant only told her he was stuck in traffic and the students were going to be late for school, prompting her to call the school and inform them of the same. She stated that Grievant never asked permission to let the students off, and that she could not have granted it even if he had. 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*.

Grievant brought several other bus drivers to testify at the Board hearing in this matter, all of whom stated that they overheard Grievant's conversation with Ms. Himes over the radio. Without exception, all of them stated that Grievant asked permission to let the students off, Ms. Himes said she would find out, then came back on the radio a few minutes later to grant Grievant's request. What makes this testimony so interesting is that it differs from Grievant's own testimony, in that he did not discuss any waiting time whileMs. Himes “checked” with someone else to get authority to grant the request, but merely stated it was okay to drop off the students. Moreover, at least one driver admitted during his testimony that he and the other drivers had “conferred” about their recollections of what they heard on the radio that day, which could explain why their “recollections” were nearly identical, yet different from Grievant's.

There are other areas of testimony where there are significant differences between Grievant's and other witnesses' versions of events. While others who allegedly overheard Grievant's conversation with Ms. Himes testified that he told Ms. Himes a parent had offered to escort the students into the school, Grievant himself stated that he never spoke to that person and only assumed that he or she was a parent walking toward the elementary school. Another glaring discrepancy involves whether or not Grievant actually finished his normal run after traffic cleared. Grievant testified that he went past all his usual stops, but the children were no longer there. However, when confronted with not finishing his run by the Superintendent only a few days later, Grievant told her that he was running late and had to hurry home to drive his own son to school on time. In addition, testimony indicated that Grievant returned to the bus garage and picked up his paycheck sometime around 8:30, presumably after finishing his run, but students were still waiting at his bus stops at 8:45, as testified

to by the parent of some of those children.

The undersigned finds that Grievant's testimony as to certain matters simply is not credible. His statements and conduct during his meeting with the superintendent, only a few days after the events at issue, is deemed more reliable than the testimony given at hearings some time later. He admitted to the superintendent that letting the students off the bus before reaching the school was wrong, and he also admitted that, after trafficcleared, he hurried home to drive his son to school, indicating that he actually did not finish his morning run. As to the other drivers, their testimony is also not credible in some regards, particularly their identical recollections that Ms. Himes left Grievant waiting on the radio while she “checked with someone,” then gave him permission to let the students off the bus. Grievant's version of this differed in that she immediately told him it was okay to let the students walk up the sidewalk with a “parent.”

Respondent has proven by a preponderance of the evidence that Grievant knowingly let very young students off his bus at an undesignated stop without proper permission from a supervisor, and he also endangered those students by neglecting to obtain adult supervision for them. Grievant's “assumption” that the unidentified person walking by was a parent going to the elementary school was hardly sufficient to ensure that the children would be properly and safely escorted to the school. In addition, the evidence establishes that, once traffic cleared, Grievant failed to finish his morning run, leaving students waiting at bus stops for approximately an hour. Grievant's conduct was intentional and willful, constituting willful neglect of duty.

Grievant has also argued that, even if the charges against him were proven, termination was too severe a penalty. He attempted to prove evidence that other bus operators had committed more egregious offenses, such as leaving a student on the bus at the end of their run, and had not been terminated. Although Grievant did not specifically argue discrimination, it appears that this is what he is attempting to prove by these allegations. “*W. Va. Code* § 18-29-2(m) defines 'discrimination' as 'any differences in the treatment of employees unless such differences are related to the actual jobresponsibilities of the employees or agreed to in writing by the employees.'” *Hogsett, et al., v. Wayne County Bd. of Educ.*, Docket No. 01-50-056 (Apr. 5, 2001).

In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

The Bd. of Educ. of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

The evidence Grievant introduced regarding other bus drivers was largely based upon speculation, conjecture and hearsay. The transportation director testified that, over the past year, there had been no incidents of students being left on buses. He also stated that, when employees are disciplined, it is usually kept private, so Grievant would have no knowledge of the actual disciplined imposed upon another employee, absent that person's own testimony. Accordingly, Grievant has failed to establish that he is similarly situated to any other employee who was treated differently.

As to the severity of the penalty imposed, this is an affirmative defense. 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). Under the circumstances presented, the undersigned cannot find that termination was too severe a penalty. Grievant knowingly placed two five-year-old children in danger by letting them off the bus before reaching the school, failing to take proper precautions for their safety and/or supervision. Moreover, he left several students waiting at their bus stops for an extensive period of time, and tended to personal matters rather than performing his required job duties. Accordingly, termination was not inappropriate.

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. If the disciplinary action is taken for unsatisfactory performance, it must follow an employee performance evaluation. 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. 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).

5. Respondent has proven by a preponderance of the evidence that Grievant's conduct on the day in question constituted 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 Randolph 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: June 6, 2007

_____**DENISE M. SPATAFORE**

Administrative Law Judge