WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

THOMAS E. GEHO,

Grievant,

v. **Docket No. 2008-1395-MarEd**

MARSHALL COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Thomas E. Geho ("Grievant") filed this grievance at level three on April 1, 2008, following the termination of his employment as a bus operator for the Marshall County Board of Education ("the BOE"). A hearing was held in the Grievance Board's office in Westover, West Virginia, on August 18, 2008. Grievant was represented by counsel, Nicholas A. Wininsky, and the BOE was also represented by counsel, Richard S. Boothby. This matter became mature for consideration upon receipt of the parties' written arguments on September 25, 2008.

Synopsis

Grievant's employment was terminated after an incident which occurred while he was performing his duties as a bus operator, driving students to a tennis practice at Wheeling Park. While waiting for the students to complete their practice, Grievant urinated from the bus stairwell into the parking lot of the facility. Although Grievant attempted to prove that his actions were caused by an uncontrollable medical condition, he failed to establish that his behavior should be excused. Because Grievant had several disciplinaryactions in his work history and a less than exemplary performance record,

Respondent did not abuse its discretion by determining that his employment should be terminated. The grievance is denied.

Findings of Fact

1. Grievant was employed by the BOE as a bus operator for 23 years prior to his termination.

2. On Saturday, March 1, 2008, Grievant was assigned to drive the John Marshall High School tennis team to a practice at the tennis "bubble" (See footnote 1) at Wheeling Park. 3. The facilities where the bubble is located include a building known as the "Stone Room," where recreational activities occur, along with a business office where fees are taken for golf and other activities. There are restrooms in the Stone Room, but not in the bubble. People who participate in activities at the bubble walk next door to the Stone Room to use the restroom facilities.

4. The tennis team's practice was to take place from 3:00 until 5:00. The bus left John Marshall at approximately 2:30 to go to Wheeling Park.

5. Grievant parked the bus in the parking lot in front of the Stone Room and waited on the bus while the students attended the tennis practice. At approximately 3:30, Grievant realized that he needed to urinate, after having had about three cups of coffee since the beginning of the trip. He left the bus in search of a restroom, trying the front doors of the Stone Room, which were locked. 6. Although Grievant had seen people entering and exiting the Stone Room through doors on the right side of the building closest to the bubble (and had done so himself on previous occasions), he did not try to enter the building through those doors, because "they were really far away." Grievant's testimony, Level Three. Grievant tried a set of doors to the left of the front doors, which were also locked.

7. Grievant returned to the bus, where he sat until approximately 4:30, when he could no longer wait to urinate. He opened the door of the bus, stood in the stairwell, and urinated in the parking lot just in front of the bus door.

8. Karen Mercer is a BOE employee and had driven her daughter, who attends John Marshall High School, to the tennis practice on March 1, 2008. She left Wheeling Park and returned at approximately 4:00. Approximately a half hour later, she saw Grievant urinating from the bus stairwell (See footnote 2) and called the police a few minutes later.

9. Local police arrived at approximately 5:00 p.m. and questioned Grievant regarding his

conduct. After initially denying that he urinated, Grievant admitted what he did, and the police issued a citation for public urination.

10. Robin Fitzsimmons, the BOE's Personnel Director, met with Grievant on March 4, 2008, along with the transportation supervisor and Superintendent Fred Renzella. They informed Grievant of the report that he had urinated in public while performing his duties as a bus operator, explaining that an investigation was ongoing, and allowing him to respond to the allegation. Grievant was asked if there was any medical condition whichwould have caused him to behave in this manner, and he replied: “Nothing that would affect my ability to perform my job duties.”

11. After the March 4, 2008, meeting, Superintendent Renzella informed Grievant, by letter of the same date, that he was suspending him from his job duties, pending an investigation into the allegations against him.

12. Grievant saw his family physician, Dr. David Nally, on March 3, 2008, for an orthopedic problem. (See footnote 3) He asked Dr. Nally to refer him to a urologist, but he did not specifically discuss any particular urinary symptoms with Dr. Nally. An appointment was scheduled for March 13, 2008, with Dr. Luna, a urologist.

13. On March 7, 2008, William Kasserman, Grievant's attorney at that time, wrote to Superintendent Renzella, stating that Grievant was sorry and embarrassed about his conduct and was hopeful that the suspension would be the only discipline given. He went on to state that Grievant had “begun to suffer from prostate problems that have caused urgent episodes of urination.”

14. As of March 7, 2008, Grievant had not discussed an urgency issue with Dr. Nally and had not yet been examined by Dr. Luna.

15. Grievant has never been diagnosed with a prostate problem.

16. Grievant met with Superintendent Renzella, BOE counsel, Ms. Fitzsimmons and his own attorney on March 10, 2008. Grievant and his counsel asked that the suspension be reconsidered, and he apologized for and acknowledged his behavior. Although Grievant was scheduled to see a urologist a few days after this meeting, it wasthe administration's perception that there was no confirmed medical excuse for his behavior, so the existence of that appointment did not persuade the superintendent to reconsider disciplining Grievant.

17. By letter dated March 12, 2008, Superintendent Renzella informed Grievant that he would be recommending that Grievant's employment be terminated as a result of his behavior on March 1,

2008. In addition, the letter stated as follows:

> After meeting with you on Monday, March 1, 2008 and considering your service record, I find no reason to mitigate this punishment. First, your work history reveals a number of written reprimands and suspensions, including . . .:
>
> Sept. 3, 2004 _ Insubordinate Conduct and Disregard of Job Duties (Repeatedly late for work). Written reprimand, after previous verbal reprimands.
>
> Oct. 20, 2004 _ Insubordinate Conduct and Disregard of Job Duties (Failed to report bus accident _ hit another vehicle and left scene of accident). Suspended 3 days without pay.
>
> Feb. 8, 2006 _ Disregard of Job Duties (Failure to clean bus; presence of driver's tobacco spit cup). Written reprimand.
>
> September 25, 2007 _ Willful Violation of School Bus Transportation Policy (Falsifying pre-trip inspection log and driving with a bald left front tire; failure to clean bus; neglect of maintenance issues). Suspended one day without pay.

Superintendent Renzella described these incidents as “a disturbing record of willful behavior” and stated that “termination is a proportionate response to your inexcusable misconduct.”

18. Grievant did not file grievances regarding any of the previous reprimands or suspensions he received while employed by the BOE.

19. A hearing was held before the BOE on March 25, 2008, at which Grievant was present and represented by counsel. Following that hearing, the BOE voted toterminate Grievant's employment, which was communicated to him by letter dated March 26, 2008.

20. Grievant first mentioned his problem with extreme urgency to Dr. Nally on April 30, 2008, after his termination.

21. As described by Dr. Nally, a patient diagnosed with overactive bladder (See footnote 4) will need to void within a few minutes of realizing that he needs to urinate. The need becomes extreme and controlled within moments, and the patient will have to void within a minute or two.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. 156 C.S.R. 1 § 3 (2008); *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 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).

Respondent contends that Grievant's conduct on March 1, 2008, constitutes insubordination, in that Grievant knew that urination in public while on duty as a bus operator was unacceptable behavior. It also argues that his behavior violates the BOE's Code of Conduct for employees, which requires them to, among other things, maintain “a high standard of conduct, self-control, and moral/ethical behavior.” (See footnote 5) 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)(*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). "[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*.

Grievant's defense to the allegations against him is that the incident was entirely the result of an uncontrollable medical condition, i.e. overactive bladder, so his conduct was neither willful nor intentional. He admits what he did, but he contends that he hasestablished, through his family doctor's testimony, that he had no control over his actions; thus, he should not have been terminated

for his unintentional conduct.

As Respondent has noted and Ms. Fitzsimmons testified, when first confronted regarding the incident, Grievant gave no explanation that involved a medical justification for his conduct. In addition, the reason for the incident has periodically changed. Initially, Grievant's counsel claimed that he was suffering from prostate problems, before he had ever consulted a physician regarding his alleged symptoms. Frankly, the undersigned is somewhat mystified by Dr. Nally's testimony that on March 3, Grievant requested a referral to a urologist, but did not explain the reason why. In fact, the first time Grievant ever discussed his alleged urgency problem with Dr. Nally was on April 30, more than a month after he was terminated.

Unfortunately, the evidence submitted by Grievant simply does not lead to the conclusion that the March 1 incident was the result of a medical condition or was otherwise “uncontrollable.” While Grievant testified that he had experienced an urgency problem on two occasions in the months prior to the March incident, he had not consulted a physician; moreover, he did not even describe the problem to Dr. Nally when he saw him two days later. Most importantly, per Dr. Nally's description of the symptoms of overactive bladder, the events of March 1, 2008, as described by Grievant, do not appear to be the result of such a diagnosis. As set forth above, Grievant admitted consuming three cups of coffee prior to and during the trip to Wheeling Park, which would seem to be something which an overactive bladder patient would avoid. (See footnote 6) After first allegedly feeling the need to urinate atapproximately 3:20, Grievant proceeded to look for a restroom, return to the bus and sit until at least 4:30 before partially wetting his clothes, then stepped down into the bus stairwell and urinated out the door. Therefore, Grievant was able to “hold it” for at least an hour, which simply does not comport with the description of overactive bladder, which Dr. Nally stated causes a need to void within a couple of minutes.

As has been previously held by the Grievance Board, an employee who violates the Code of Conduct has engaged in conduct constituting insubordination. *Marl v. Marshall County Bd. of Educ.*, Docket No. 06-25-112 (June 29, 2006); *Booth & Ware v. Randolph County Bd. of Educ*., Docket No. 04-42-418 (Mar. 28, 2005); *Domingues v. Fayette County Bd. of Educ.*, Docket No. 04-10-341 (Jan. 28, 2005). It is only common sense, and Grievant himself acknowledges, that urinating in a public place is unacceptable conduct, especially from a bus driver who is in the middle of an assignment and charged with the transportation and care of school students. Grievant knew he should not have

committed the act, so his conduct was insubordinate. In addition, his conduct may also be characterized as willful neglect of duty, which is conduct constituting a knowing and intentional act, rather than a negligent act. (See footnote 7) *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).

Since Respondent has established that Grievant has committed the offense alleged, which constitutes reason for discipline as contemplated under W. Va. Code § 18A-2-8, it must be determined whether termination of Grievant's employment was appropriate. (See footnote 8) The 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). "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).

In the instant case, the BOE reviewed Grievant's employment record and the various disciplinary actions against him, reaching the conclusion that his establishedpattern of conduct was unacceptable for continued employment. Grievant offered testimony in an attempt to explain and challenge each of the prior disciplinary incidents. However, he did not grieve or otherwise challenge those incidents at the times they occurred. As most recently noted in *Taylor v. Doddridge County Board of Education*, Docket No. 06-09-451 (Mar. 26, 2007), when an employee does not grieve prior discipline, the merits of that action cannot be challenged in a later, unrelated grievance, and the substance of the

allegations must be presumed to be true. *See Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT- 256 (Oct. 27, 1997); *Jones v. W. Va. Dept. of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Stamper v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR- 144 (Mar. 20, 1996); *Womack v. Dept. of Admin.*, Docket No. 93-ADMN-430 (Mar. 30, 1994); *Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994).

Accordingly, the undersigned concludes that Respondent did not abuse its substantial discretion in disciplinary matters when it determined that Grievant's disciplinary history, culminating in the March 1, 2008, incident, warranted termination. Grievant's behavior was unacceptable for any school employee, and he has less than an exemplary work record. Clearly, this was a difficult and embarrassing situation for Grievant, but the evidence does not support a conclusion that the BOE's substantial discretion has been abused under these circumstances.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. 156 C.S.R. 1 § 3 (2008); *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. “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).

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." *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)(*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. Willful neglect of duty encompasses conduct constituting 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 engaged in behavior constituting insubordination and willful neglect of duty.

6. "[M]itigation 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).

7. Respondent did not abuse its discretion in determining that mitigation was not appropriate under the circumstances presented in this case.

Accordingly, the grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. Va. Code § 6C-2-5. 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy ofthe appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: October 30, 2008

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The building is apparently referred to by this name because of its circular, dome type of shape.

Footnote: 2

Ms. Mercer testified that she did not see Grievant's "private parts," but she could see the side of his leg, and it was obvious what he was doing.

Footnote: 3

The specific condition was not discussed or described in the record.

Footnote: 4

Although Dr. Nally testified that Grievant had been diagnosed with this condition, no medical reports were submitted to verify the diagnosis, and the symptoms described by Grievant on March 1 do not seem to comport with Dr. Nally's description of the condition.

Footnote: 5

This mirrors provisions in the State Board of Education's policies at 126 C.S.R. 162 § 4.

Footnote: 6

In fact, Grievant testified that, even after arriving at Wheeling Park, he sat on the bus, continuing to drink coffee.

Footnote: 7

"It is not the label a county board of education attaches to the conduct of the employee . . . that is determinative. The critical inquiry is whether the board's evidence is sufficient to substantiate that the employee actually engaged in the conduct." Allen v. Monroe County Bd. of Educ., Docket No. 90-31-021 (July 11, 1990); Duruttya v. Mingo County Bd. of Educ., Docket No. 29-88-104 (Feb. 28, 1990).

Footnote: 8

Since Grievant has admitted his behavior, but has argued that he should not have been terminated for it, a mitigation argument is presumed.