THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BLAINE MILAN,
Grievant,

v. **DOCKET NO. 2010-0904-JacED**

JACKSON COUNTY BOARD
OF EDUCATION,
Respondent.

DECISION

Grievant Blaine Milan filed this grievance on January 14, 2010, stating, "Grievant, a regularly employed bus operator, has been suspended for 2 days without pay on the grounds of insubordination and willful neglect of duty. Grievant denies both allegations. Grievant alleges a violation of West Virginia Code 18A-2-6 and 18A-2-7." His stated relief sought is "Reimbursement of all lost wages, benefits and seniority. He also seeks removal of any reference of this suspension from any records maintained by the Respondent and an award of interest on all monetary sums."

A level three hearing was held in the Grievance Board's Charleston office on March 30, 2010. Grievant was represented by John Roush, Esq. of the W. Va. School Service Personnel Association, and Respondent was represented by Howard E. Seufer, Esq. of Bowles Rice McDavid Graff & Love, LLP. The matter became mature for decision on May 7, 2010, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant was suspended for insubordination when he failed to make a required bus stop despite a properly-given directive that he do so every day, regardless of whether he

believed the children were on the bus. Respondent met its burden of proving the directive was lawful, but did not prove Grievant's actions were willful or insubordinate, so the Grievance is Granted.

Findings of Fact

Based on a preponderance of the evidence, I find the following material facts have been proven:

1. Grievant is employed by Respondent as a Bus Operator and has been so employed for close to 31 years.

2. At the time of the grievance filing, Grievant was driving a new route for the first year; he had been driving a different route continuously for the previous 25 years.

3. On this route, there are two stops about 100 feet apart, the second of which is known as the Haynes Wrecker Service stop on Route 87, where three children are to be dropped off.

4. Near the beginning of the year, Grievant failed to stop at this stop because he did not see any of the three children on the bus, although they were.

5. When he realized the children were still on the bus, he continued on his route to Cottageville where he was to meet with another bus to transfer students, and then brought the children home 15-20 minutes later than usual.

6. Grievant made no effort to contact the bus garage to have someone contact the parents of the students, to advise them the children were still on the bus.

7. Following this incident, the parents complained. Transportation Supervisor Janine Durbin contacted Grievant by phone about the incident, and Grievant admitted he had

missed the stop. Grievant at that time advised Ms. Durbin that the Haynes stop was too close to the previous stop.

8. Shortly thereafter, Grievant again missed the stop and Ms. Durbin verbally directed him to, in the future, make the Haynes stop every time, regardless of whether he thought the children were on the bus.

9. Some time after he was directed to make the stop every day, Grievant missed the Haynes stop again, also because he did not believe the children were on the bus. This time, Grievant turned around at the top of the hill and dropped the children off as soon as he realized his mistake, and the children were only on the bus about five extra minutes.

10. The parents again complained to the transportation supervisor, and she held a conference with Grievant, reminding him of her previous direction and notifying him in writing that failure to stop at the Haynes stop in the future would be considered insubordination.

11. Less than a week after the third incident, Grievant again missed the Haynes stop because he did not see the children on the bus, but quickly realized his mistake and did stop the bus no more than a bus length away from the regular stop.

12. The parents again complained, and Grievant was suspended for two days, giving rise to this grievance.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a

preponderance of the evidence.[1] "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."[2] WEST VIRGINIA CODE §18A-2-8 identifies the types of action 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.

Grievant was suspended for "insubordination" and "willful neglect of duty" when he failed to comply with his supervisor's express and unequivocal direction to stop at the Haynes stop every day, regardless of whether he believed the children were on the bus. Insubordination includes "willful failure or refusal to obey reasonable orders of a superior entitled to give such order."[3] In order to establish insubordination, the employer must not only demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, but that the employee's failure to comply was sufficiently

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[1] *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] *Graham v. Putnam County Bd. of Educ.*, Docket No. 99-40-206 (Sep. 30, 1999).

[3] *Riddle v. Bd. of Directors*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989).

knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination.[4]

Although Respondent proved, through Grievant's own admissions, that Grievant continued to miss the Haynes stop after he was properly directed to stop there every day, it did not met its burden of proving Grievant's conduct rose to the level of insubordination or willful neglect of duty. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions."[5] However, insubordination requires something more than simple inadvertence, even if repeated. Although the cases are not clear as to what constitutes "willfulness," the cases seem to suggest that for a refusal to obey to be "willful," the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order.[6] In this case, Grievant was driving a new and unfamiliar route, and the stop he missed was extremely close to a prior stop. Both Grievant and Ms. Durbin testified that State Transportation Department guidelines[7] call for stops to be no closer than 2/10 mile, and these stops are about 100 feet apart.[8] Grievant complained about the location of the stop, and it has now

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[4]*Jones v. Mingo Co. Bd. of Educ.*, Docket No. 95-29-151 (Aug. 24, 1995); *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995).

[5]*Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990).

[6]*See* Annotation, Dismissal of Teacher - "Insubordination", 73 A.L.R.3d § 3 (1977), *Butts v. Higher Educ. Governing Bd./Shepherd College* 212 W. Va. 209, 569 S.E.2d 456 (W. Va. 2002).

[7]126 C.S.R. 92 § 10.

[8] 2/10 mile = 1056 feet.

been changed. All evidence points to the fact that the location of this stop was problematic, and at least partially to blame.

Respondent presented no evidence that Grievant's mistake in failing to stop the fourth time was willful or in any way intended to defy the authority of his supervisor's directive. Despite Grievant's history with the stop, the suspension was based on this last incident, in which Grievant missed the stop by about 20 feet. Grievant did actually stop within a bus length of the intended stop, and although Respondent appears to characterize this as a failure to stop, it clearly was not. The children had to walk an extra 20 feet beside the road to their home, but there was no evidence this placed them in any particular danger at the time.

The following conclusions of law support this discussion:

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee 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).

2. 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, 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).

3. 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. W. VA. CODE § 18A-2-8.

4. Insubordination includes "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). In order to establish insubordination, the employer must not only demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, but that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Jones v. Mingo Co. Bd. of Educ.*, Docket No. 95-29-151 (Aug. 24, 1995); *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995).

5. For a finding that an employee's disobedience to an order is "willful," there must be some evidence that the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order. *See* Annotation, Dismissal of Teacher - "Insubordination," 73 A.L.R.3d § 3 (1977), *Butts v. Higher Educ. Governing Bd./Shepherd College* 212 W. Va. 209, 569 S.E.2d 456 (W. Va. 2002).

6. Respondent did not meet its burden of proving Grievant's failure to comply with his Supervisor's direction was willful or insubordinate.

For the foregoing reasons, this grievance is hereby **GRANTED**. Respondent is ordered to restore to Grievant any lost seniority, pay or other benefits lost as a result of his suspension, together with legal interest thereon, and to expunge his personnel file of the disciplinary action.

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 of the 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).

June 30, 2010

M. Paul Marteney
Administrative Law Judge