THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ELAINE PRICKETT,
Grievant,

v. **Docket No. 2010-0312-MonED**

MONONGALIA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant Elaine Prickett, employed by the Monongalia County Board of Education as a bus operator, filed this grievance on November 11, 2009, challenging the disciplinary action of her employer. By letter dated July 31, 2009, Superintendent Frank Devono notified Grievant that he would recommend to the Board of Education that Grievant be suspended for two days without pay. Grievant requested a hearing on this recommendation. On September 8, 2009, the Board of Education conducted a hearing on Grievant's proposed suspension. By letter dated September 10, 2009, Superintendent Devono notified Grievant that the Board of Education had approved his recommendation of a two-day suspension without pay. This grievance was filed directly to level three as permitted by W. VA. CODE § 6C-2-4(a)(4).

Grievant contends in her grievance that: 1) she is not guilty of any misconduct that would justify suspension or other disciplinary action; 2) she is the victim of retaliation/reprisal for her past activities of filing grievances and assisting of other employees with employment concerns as an officer in the Monongalia County School Service Personnel Association; and 3) her due process rights were violated by the failure

of the Board of Education to vote to approve her suspension at an open board meeting. Grievant alleges a violation of W. VA. CODE §§ 18A-2-7, 18A-2-8, 18A-2-12a, 6C-2-2(o), 6-9A-3, and 6-9A-4(b)(2)(B).[1] For relief Grievant seeks compensation for lost wages; restoration of lost seniority and all other benefits, pecuniary and non pecuniary; removal of all references to the suspension from Grievant's file.

The undersigned Administrative Law Judge conducted a level three hearing on January 20, 2010, and on March 12, 2010, in the Grievance Board's Westover office. Grievant appeared in person and by her counsel, John Everett Roush, West Virginia School Service Personnel Association. Respondent appeared by its counsel, Jennifer S. Caradine, Dinsmore & Shohl, LLP. This matter became mature for consideration upon receipt of the parties' proposed findings of fact and conclusions of law on April 13, 2010.

Synopsis

Grievant is employed as a bus driver by the Monongalia County Board of Education. Grievant admitted to grabbing a student by the arm while this student was outside of a bus to which she was not assigned. The student was slamming some objects in her hands on the side of the bus windows and passing materials through the windows to students on the bus. Grievant approached the student and took hold of her arm and pulled her arm down from the window by the wrist. The student had flyers related to a campaign against her

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[1]Grievant's claim asserting a violation of her due process rights was not argued during her hearing before the Monongalia County Board of Education, at level three before the undersigned, or in her proposals. It is deemed abandoned. The Grievance Board has long held that elements or allegations of the grievance which are raised, but not pursued or developed will be considered abandoned. *Church v. McDowell County Bd. of Educ.*, Docket No. 33-87-214 (Nov. 30, 1987).

current bus driver. Bus drivers are provided training two to three times a year and are instructed that Respondent has a strict hands off policy with regard to students. Grievant's disregard for the mandates of this policy amounts to insubordination and willful neglect of duty. Respondent met its burden of proof in establishing that Grievant was insubordinate in her disregard for the clear policy that students should not be touched. Grievant failed to establish that she was the subject of reprisal. This grievance is denied.

After a review of the record developed before the Board of Education and the record developed at level three the undersigned makes the following findings of fact.

Findings of Fact

1. Grievant has been employed as a bus operator by Respondent for the past twenty years. One of her duties is an afternoon run transporting students home from University High School.

2. Grievant is an officer of the Monongalia County School Service Personnel Association and has been for a number of years. She has filed several grievances on her own behalf and joined group grievances with similarly situated employees on many occasions.

3. In May 2009, John Dolog took over a bus run in Grievant's area. The substitute bus operator who had previously driven the run on a long term basis was popular with the students riding the bus. The students on Mr. Dolog's bus run gave him a very difficult time when he began the assignment.

4. Mr. Dolog appealed to the administration for assistance and received some help; however, Mr. Dolog and Grievant felt that it was not sufficient. Mr. Dolog also

appealed to the other bus operators, including Grievant, for advice in gaining control of the disciplinary problem on the bus.

5. Every afternoon there are three principals and up to five teachers present in the bus loading area at University High School to provide for supervision of students from the school to their buses. Assistant Principal Charlene Brown stands in close proximity to Grievant's bus as Ms. Brown is at the front of all buses to give them the okay to depart.

6. Every school bus is equipped with a radio that the drivers can use to radio the transportation facility or other drivers to report any problems. Drivers customarily use the radios to report incidents to the transportation facility, which then calls the school.

7. On May 21, 2009, Grievant observed a female student standing at the side of Mr. Dolog's bus in the loading area at University High School. The student was placing some papers in her hands on the side of the bus windows and passing papers through the windows to students on the bus.

8. Grievant approached the student and took hold of her shoulder and then pulled her arm down from the window by her wrist. Grievant did not ask about the situation prior to grabbing her arm. It appeared that all that the students had were flyers related to the student based campaign for the removal of Mr. Dolog as their bus driver. Grievant told the student that what she was doing was wrong. Grievant then boarded the bus to tell the students on the bus that they were not acting properly.

9. Grievant attempted to justify her behavior by insisting she thought the student had passed a weapon onto the bus. Grievant asked no one about the possible existence of a weapon; in fact, after she grabbed the student outside of the bus, she entered Mr.

Dolog's bus only to find that other students were holding flyers in protest of Mr. Dolog being their bus driver.

10. After Grievant exited the bus, Assistant Principal Brown entered the bus, collected the flyers and admonished the students that the behavior would not be tolerated.

11. Bus operators are provided training throughout the year and they are instructed that there is a strict hands off policy with regard to students.

12. On September 8, 2009, the Board of Education conducted a hearing on Grievant's proposed suspension. By letter dated September 10, 2009, Superintendent Devono notified Grievant that the Board of Education had approved his recommendation of a two-day suspension without pay.

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

The grounds upon which a Board may discipline any person in its employment are immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty,

unsatisfactory performance substantiated by an employee performance evaluation or conviction on a felony charge. W. VA. CODE § 18A-2-8. The authority of the Board 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 and capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991).

Grievant argues in her submissions that Respondent has not met its burden of proof. Grievant asserts that Respondent has not established that Grievant's actions on May 21, 2009, were in anyway wrong or ill motivated much less constituting any of the statutory grounds upon which discipline must be based. In short, Grievant realized the pressure that Mr. Dolog was enduring and she saw a potentially tragic circumstance. Grievant acted in an appropriate and measured way. The undersigned disagrees.

Grievant's admitted actions amounted to a willful neglect of duty under the circumstances and constituted insubordination. The facts of this case make it clear that Grievant's actions fall within the statutory grounds for disciplining school service personnel. The record of this case is clear that Grievant became angry with the actions of the students and then grabbed a student by the arm. Grievant had alternatives available to her, but out of her frustration with the students on Mr. Dolog's bus, Grievant approached and grabbed the student instead of acting appropriately. Nothing about Grievant's actions in this instance are acceptable. Grievant had many administrators on sight with whom she could have easily made the request that they respond to the actions of the students which she found objectionable. Instead, Grievant exited her bus and grabbed the student by the arm without first making reasonable inquiry of the student concerning her activity. Nothing in the record of this grievance supports or justifies this behavior.

Monongalia County Policy 5-08 “Transportation Services Management” clearly states under the list of general guidelines for bus operators in relation to student management that they should not use physical force and to observe the policy of “HANDS OFF.” Respondent’s Exhibit One, Level Three. In addition, the policy emphasizes that the bus operator should always control their temper. There is no dispute in the record that Grievant was aware of this policy and its mandates.

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*.

The record of this grievance demonstrates that Grievant, knowingly and intentionally, exited her bus and grabbed a student in clear violation of Respondent’s policy. Grievant was aware of this policy, and nothing offered by Grievant would operate as a justification to violate the policy.[2] This is insubordination in the purest sense of the

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[2]Grievant did explain what led up to her actions at the hearing conducted before the Board of Education by testifying that “after John had told me all the problems that he was having on his bus, I was - sort of became the watchdog for him, because I know being the young driver people seem to strive on that. It’s just like the hunt, you know, the wolves, you know, they get in a pack and they want to tear up the little dog. So I was sort of watching out for John because I was a senior driver.” September 8, 2009, Hearing

word, and a willful neglect of duty. Respondent has met its burden of proving Grievant engaged in insubordination and willful neglect of duty. In addition, Superintendent Devono's recommendation to the Board of Education was reasonable in light of the circumstances, and cannot be said to be arbitrary or capricious.

Turning to Grievant's claim of reprisal, WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative 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 the Grievant must establish by a preponderance of the evidence the following elements:

> (1) that he engaged in protected activity (i.e., filing a grievance);
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> (2) that he was subsequently treated in an adverse manner by the employer or an agent;
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> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
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> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Vance v. Jefferson County Bd. of Educ. Docket No. 02-19-272 (Oct. 31, 2002); *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).

Transcript, Page 128.

Grievant also explained at the level three hearing that her CPI training and massage therapy training gives her the right to touch students when they are harming themselves or others. Nothing in the record established that the student was harming herself or others and this finding defeats that assertion without questioning its validity. In addition, nothing in the record supports Grievant's contention that a weapon of some sort may have been passed among the students.

The only evidence in the record of this grievance related to this claim is Grievant's testimony at level three that she felt she was the victim of reprisal due to her union involvement. Grievant noted a reduction in hours and the failure to be chosen for assignments of new bus runs. This alone is insufficient to establish a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment. The record of this grievance establishes that Respondent's actions were the legitimate result of Grievant's conduct on May 21, 2009, and were non-retaliatory. A two-day suspension without pay due to the undisputed fact that Grievant grabbed a student in violation of Respondent's policy is reasonable and does not provide any inference of a retaliatory motive. The suspension is supported by the facts of this grievance and the necessary elements of reprisal have not been demonstrated by Grievant.

The following conclusions of law support the decision reached.

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. The grounds upon which a Board may discipline any person in its employment are immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance substantiated by an employee performance evaluation or conviction on a felony charge. W. VA. CODE § 18A-2-8.

3. The authority of the Board 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 and capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991).

4. Respondent has met its burden of proof and established the allegation of willful neglect of duty and insubordination on the part of Grievant. Its decision to impose a two-day unpaid suspension was not unreasonable and cannot be viewed as arbitrary and capricious.

6. To demonstrate a prima facie case of reprisal the Grievant must establish by a preponderance of the evidence the following elements:

> (1) that he engaged in protected activity (i.e., filing a grievance);
>
> (2) that he 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; and
>
> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Vance v. Jefferson County Bd. of Educ. Docket No. 02-19-272 (Oct. 31, 2002); *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).

7. Grievant failed to demonstrate that she has suffered any retaliation or reprisal.

Accordingly, this 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 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 (eff. July 7, 2008).

Date: June 16, 2010

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Ronald L. Reece
Administrative Law Judge