WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

GEORGE HOWES,
Grievant,

v. **Docket No. 2011-0609-LogED**

LOGAN COUNTY BOARD
OF EDUCATION,
Respondent.

D E C I S I O N

Grievant, George Howes, filed this grievance against Logan County Board of Education ("LCBE"), Respondent, protesting a five-day suspension, which the Grievant served out in October 2010. The original grievance was filed on October 28, 2010, and the Grievance statement provides:

> Grievant, a regularly employed school bus operator, has been suspended for five days without pay for several infractions. Grievant alleges violations of West Virginia Code § 18A-2-8, Respondent's disciplinary policy & due process. Grievant also asserts that this suspension is arbitrary, capricious, and that the penalty imposed is too harsh. Grievant additionally asserts that the suspension imposed is harsher than suspensions imposed upon other employees due, in part, to the fact that he has filed several grievances pertaining to this employment.

Relief Sought:

> Grievant seeks the removal of any reference to this suspension from records maintained by the Respondent and reimbursement of lost wages, benefits, and seniority.

Grievant filed an expedited appeal of his suspension. WEST VIRGINIA CODE § 6C-2-4(a)(4). A level three hearing was held before the undersigned Administrative Law Judge on January 20, 2011, in the Grievance Board's Charleston office. Grievant appeared in person and with counsel Kimberly A. Levy, Esquire, West Virginia School Service Personnel Association. Respondent was represented by its counsel, Leslie Tyree, Esquire.

This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about February 21, 2011. Both parties submitted fact/law proposals.

Synopsis

Respondent has a recognized duty to protect and safeguard the children entrusted to its care. On the day in discussion, Grievant was entrenched in an ill-advised verbal exchange with a grandparent of two students scheduled to be on his bus. Logan County School Bus Operators are required to govern their actions in accordance with rules and regulations applicable to the transportation of students, e.g.,West Virginia School Bus Transportation Policy and Procedures Manual. Respondent determined Grievant violated 126 C.S.R. 92 §§ 13.7 and 13.8. Respondent sanctioned Grievant for exiting his bus containing students, without turning off the engine and removing the key.

Grievant was not provided written notice of the charge against him, an explanation of the evidence, and an opportunity to respond to the charge prior to Respondent's decision to impose discipline. Respondent failed to establish essential facts fundamental to the alleged violation of duty. Respondent failed to prove by a preponderance of the evidence that Grievant neglected to turn the bus engine off and take the keys with him upon leaving the bus. Accordingly, this grievance is Granted.

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

Findings of Fact

1. Grievant is a regular school service employee employed as a school bus operator by the Logan County Board of Education. Grievant has been so employed for approximately two years.

2. During the time period relevant to this matter, Grievant drove a route that included Route 44, Horsepen, and the Conley Branch areas of Logan County. Grievant transported students to Omar Grade School and Logan High School; the age of the students ranged from pre-K to high school age. The 2010-11 school year was the first year that Grievant drove this route.

3. Eli Williamson, the grandparent of two students who rode Grievant's bus telephoned Respondent's transportation office. Mr. Williamson had an issue with the bus stop where his grandchildren were being picked up.

4. Mr. Williamson requested a change or authorization for his grandchildren to be picked up at an alternate stop.

5. Linda Gibson, a transportation supervisor in the service of Respondent, approved a change in the assigned bus stop for the Williamson grandchildren. Ms. Gibson commenced performing the duties of a transportation supervisor on or about July 31, 2010.

6. Ms. Gibson and Grievant communicated regarding Mr. Williamson's wishes. Grievant was aware that the bus stop had been changed and he was to begin picking up the Williamson grandchildren at the new stop on October 21, 2010.

7. There was a verbal incident between Mr. Williamson and Grievant on Thursday, October 21, 2010. A portion of this argument was recorded on Grievant's on-board bus camera.

8. The recording equipment on Grievant's bus captures both audio and visual data.

9. The camera recorded a portion of the October 21, 2010 verbal exchange between Grievant and Mr. Williamson. Grievant repeatedly asked Mr. Williamson, "Are you threatening me?" Mr. Williamson acknowledges he is threatening Grievant. Grievant exits the bus.

10. Grievant exited the bus while engaged in the verbal altercation with guardian Williamson.[1] The recording of the incident makes it very clear that there was a verbal exchange ongoing and that during such, Grievant left the driver's seat to exit the bus. Children were on the bus.

11. It is unclear the amount of time the bus camera remains operational upon turning the bus off. It is intended that the camera functions for a period of time after disengagement of the bus engine but the length of this time period was not established.

12. Relevant West Virginia rules and regulations pertaining to transportation provides that a school bus operator shall not leave the bus when it is running unless the bus is equipped with a lift and safety interlock system and the driver is assisting with the loading or unloading of a student with the lift. WV School Bus Transportation Policy and Procedures 126 C.S.R. 92 § 13.7.

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[1] Grievant indicated to Jim Guy, Assistant Superintendent and Director of Transportation, that he had exited the bus in order to examine one of the bus's tires.

13. West Virginia School Bus Transportation Policy and Procedure 126 C.S.R. 92 § 13.8 states that when a school bus operator leaves the bus, the keys shall be in the possession of the operator and the emergency brake engaged.

14. The bus driven by Grievant on October 21, 2010 was not equipped with a lift or safety interlock system; nor were any students in need of loading or unloading assigned to Grievant's bus at that time.

15. Mr. Williamson communicated a complaint to agent(s) of Respondent regarding Grievant and the incident that transpired on Thursday, October 21, 2010.

16. On that same day, Jim Guy, Assistant Superintendent and Director of Transportation spoke with Grievant regarding the event.

17. The recording equipment on Grievant's bus was reviewed by agents of Respondent.

18. The recording of the incident does not provide visual confirmation as to whether Grievant turned off the ignition of his bus and took the keys with him when he exited the bus. Resp. Ex. 3. The ignition switch is not within camera range.

19. Grievant was sent a letter dated October 21, 2010 signed by Logan Superintendent of Schools, Wilma Zigmond and Assistant Superintendent, Jim Guy. The October 21, 2010 correspondence, in relevant part, states:

> On Thursday, October 21, 2010 it was reported to the supervisors at Logan Garage by a parent that you got off your bus and confronted him. You also lied to me about the reason as to why you stepped off your bus. Your video camera on your bus recorded that you did not step off your bus to check your tires. It showed that you stepped off your bus to have a confrontation with a parent. You left your student on the bus unattended with the key in the ignition and the bus running.

> According to WV School Bus Transportation Policy and Procedures Manual (4336) 13.7 and 13.8 bus operators shall not leave the bus when it is running unless the bus is equipped with a lift and with safety interlocks for FMVSS 403 and 404 lift equipment and the driver is assisting the loading or unloading of a student with the lift. When the bus operator leaves the bus, the keys shall in possession of the operator and the emergency brake engaged.

Resp. Ex. 2.

20. Pursuant to the October 21, 2010 correspondence, Grievant was suspended for five working days on the grounds that he had exited his bus without turning off and removing the key from the ignition and having a confrontation with "a parent".

21. Grievant served the five-day suspension from Friday, October 22, 2010 through Thursday, October 28, 2010.

22. Grievant was not offered nor did he request to speak to the Superintendent or the Logan County Board of Education.

23. From the angle of the camera and the field of vision that was captured by the bus recording of the October 21, 2010 incident, the location of the bus keys was not visible. The video recording did not provide visual confirmation as to the location of the bus keys when Grievant exits the bus. Resp. Ex. 3.

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 § 3 (2008); *Holly v. Logan County Bd. of Educ.,* Docket No. 96-23-174 (Apr. 30, 1997); *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). *Hanshaw v. McDowell County Bd. of Educ.,* Docket No. 33-88-130 (Aug. 19, 1988). "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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). 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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in WEST VIRGINIA 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). WEST VIRGINIA CODE § 18A-2-8 provides that "[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 contendre to a felony charge."

"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). This is a fairly heavy burden, given that Respondent

must not only prove that the acts it alleges did occur, but also that the reason for Grievant's neglect of duty was more than simple negligence." *Tolliver v. Monroe County Bd. of Educ.*, Docket No. 01-31-493 (Dec. 26, 2001). Willful neglect of duty "is 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). "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).

Respondent explicitly suspended Grievant for five days for violation of WV School Bus Transportation Policy and Procedure 126 C.S.R. 92 § 13.7 and 13.8. Respondent maintains it lawfully sanctioned Grievant for safety violations. Respondent's argument is that Grievant expressed 'poor judgement' "in leaving his bus and confronting an angry parent while elementary school children sat on the bus and observed the incident."

In review of the evidence, the undersigned is convinced that Grievant exited the bus, not to check a tire but to continue a verbal altercation he was having with a guardian of two students scheduled to be transported on the bus. Resp. Ex. 3, Audio-Visual Disk Recording. This was ill-advised conduct. Grievant was not sanctioned for the verbal conduct. Grievant was deemed culpable, and suspended for five days by Respondent for exiting his bus, containing students, without turning off the engine and removing the key.

The evidence presented did not establish facts sufficient to determine the elements of the offense alleged. It was not established by the visual evidence presented, nor testimony of record, that Grievant failed to disengage the engine and remove the keys before exiting the bus.

Respondent did not establish by a preponderance of the evidence the conduct it contends Grievant committed.

An allegation that an Employer failed to follow a specific procedural requirement in accomplishing a disciplinary action is an affirmative defense, and Grievant has the burden of establishing the facts to support such allegation by a preponderance of the evidence. *Bradley v. Cabell County Board of Education*, Docket No: 99-06-150 (September 9, 1999); *Hammer v. Greenbrier County Board of Education*, Docket No: 2008-0302-GreED (May 21, 2008).

Grievant's Counsel highlights that Grievant was determined guilty of violating applicable transportation rules and regulations without due process. Counsel directed the undersigned's attention to a relatively clear concept.[2] Due process as applicable to Grievant required written charges and some opportunity to respond before the imposition of a suspension which deprived him of wages or salary. *See Clarke v. W. Va. Bd. of Regents,* 166 W. Va. 702, 279 S.E.2d 169, 175 (1981); *Waite v. Civil Service Commission*,

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[2] An individual's due process rights derive from the United States Constitution. "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). See also West Virginia Supreme Court of Appeals case *Board of Education of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994).

161 W. Va. 154, 241 S.E.2d 164 (1977); *Beverlin v. Board of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554, 557 (1975); *see also* H*ammer v. Greenbrier County Board of Education*, Docket No: 2008-0302-GreED (May 21, 2008); *Starkey v. Jefferson County Board of Education,* Docket No. 02-19-010 (April 8, 2002). The conversation between Grievant and Jim Guy, Assistant Superintendent and Director of Transportation, prior to written notice of the allegations of wrongdoing, was not due process. Counsel contends Grievant was not provided adequate due process prior to being determined guilty and deprived of recognized property right or liberty interest in his employment. The undersigned is persuaded.

Although "due process is a flexible concept," *Clarke, supra,* it is not flexible enough to accommodate the absence of pre-disciplinary due process which occurred here. The record established that Grievant was not provided written notice of the charges, an explanation of the evidence in the case, and an opportunity to respond to the charge prior to discipline being imposed. "[S]chool employees have a property interest in continued uninterrupted employment and due process safeguards must be provided when a county board of education seeks to deprive employees of that interest." *Knauff v. Kanawha County Bd. of Educ.* , Docket No. 20-88-095 (Jan. 10, 1989).

Respondent did not, by a preponderance of the evidence, establish the actions it contends Grievant committed. Nor did Respondent adequately provide due process to Grievant prior to suspending him for five days. For the foregoing reasons, this grievance must be granted.

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 § 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. The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in WEST VIRGINIA 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. Respondent has not met its burden of proof by a preponderance of the evidence and proven the charges against Grievant that predicated a five-day suspension.

4. It is a well-settled principle of constitutional law, under both the State and Federal Constitutions, that an employee who possesses a recognized property right or liberty interest in his employment may not be deprived of that right without due process of law. *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); *Board of Education of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994); *Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, (1981). "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.' " *Cleveland Bd. of Educ.*

v. Loudermill, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494, (1985), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

5. It is not necessary for a pre-disciplinary hearing to be a full adversarial evidentiary hearing; however, an employee is entitled to written notice of the charges, an explanation of the evidence, and an opportunity to respond prior to a board of education's decision to discipline the employee. *Board of Education v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994).

6. The record of this grievance established that Grievant was not provided written notice of the charge against him, an explanation of the evidence, and an opportunity to respond to the charge prior to Respondent's decision to impose discipline.

For the foregoing reasons, this grievance is hereby **GRANTED** and Grievant's suspension is **VACATED**. Respondent is **DIRECTED** to reinstate the seniority, salary, and benefits attributable to Grievant's suspension, and to remove references to the suspension from the records which Respondent maintains on the Grievant.

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).

Date: August 11, 2011

Landon R. Brown
Administrative Law Judge