THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

MARTIN ZIRKLE,
Grievant,

v. **Docket No. 2009-1525-MasED**

MASON COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant Martin Zirkle filed this grievance directly to Level Three on May 7, 2009, alleging that he was improperly terminated from his position as a regularly employed school bus operator. Grievant alleges a violation of WEST VIRGINIA CODE § 18A-2-8. Grievant seeks to be reinstated in his former position and to be compensated for all lost wages and benefits, with interest, seniority, and to have the record of the termination expunged from his personnel file.

Following a pre-termination hearing held on April 30, 2009, Respondent voted to uphold the recommendation by Mason County Superintendent of Schools Dr. Larry E. Parsons that Grievant's employment be terminated. At the Level Three hearing conducted before Administrative Law Judge Wendy Elswick on March 19, 2010, September 9, 2010, and January 31, 2011, at the Grievance Board's Charleston office, Grievant was represented by Dwight J. Staples, Esquire, and Respondent was represented by Gregory W. Bailey, Bowles Rice McDavid Graff & Love, LLP. The case was reassigned to the undersigned Administrative Law Judge due to administrative reasons on May 17, 2011. The matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on April 13, 2011.

Synopsis

Grievant argues that Respondent has failed to meet its burden of proof, and that his dismissal was unlawful because he was not given an improvement plan he claims is required in this case pursuant to Policy 5300. The history of discipline for similar misconduct related to the operation of his bus, and Grievant's prior evaluations related to his work performance was substantial compliance with Policy 5300. Respondent demonstrated that Grievant's actions were insubordinate and a willful neglect of duty. This grievance is denied.

The undersigned makes the following findings of fact based on the complete record of the grievance.

Findings of Fact

1. Grievant was employed as a full-time bus operator for Respondent beginning in 1993. During his sixteen years as a bus operator, Grievant received satisfactory performance evaluations; however, some deficiencies concerning adherence to county and state policies were noted.

2. By letter dated March 20, 2009, Respondent was notified of a list of charges that formed the basis for the Superintendent's recommendation that Grievant's employment be terminated.

3. As a result of an investigation of an incident involving student passengers on Grievant's bus, a recording made by a camera installed on Grievant's bus was initially reviewed by the principal of New Haven Elementary School. The principal observed

certain conduct by Grievant that prompted him to contact the Assistant Director of Transportation, Lawrence Wright.

6. Mr. Wright reviewed the recording with the principal and came to the conclusion that Grievant had engaged in misconduct. Respondent's Exhibit 2, Level Three.

7. A bus video showed that Grievant left his bus running while unattended on December 8, 2008. Leaving a bus running while unattended is a violation of state policy. Grievant received annual training with respect to this policy. Grievant admitted that he left his bus running while parked on his father's property, and that he went into his father's house to be warm.

8. A bus video showed that Grievant was smoking a cigarette while on the bus on December 8, 2008. State and county policy prohibit the use of tobacco while on a school bus. Grievant had previously signed an acknowledgment that he was aware of this prohibition.

9. Grievant was observed smoking a cigarette while operating his bus by the Director of Transportation, Gary Mitchell, in the spring of 2008. No students were on the bus. Mr. Mitchell had a conversation with Grievant about smoking on the bus, and he warned Grievant that future violations would have consequences. Grievant acknowledged that he had been cautioned regarding smoking on his bus by Mr. Wright and Mr. Mitchell.

10. A bus video showed students standing and moving about the Grievant's bus while it was moving on December 9, 2008. The recording also showed Grievant engaged in conversation with students while he was operating the bus. State policy indicates that students should remain seated while the bus is in motion. Grievant had been provided with

training concerning this requirement. Grievant admitted that he was aware of the requirement that students not be permitted to stand while his bus was in motion. Nevertheless, Grievant permitted students to stand on the bus while it was in motion.

11. A bus video showed Grievant operating his bus over a railroad crossing without observing the state policy requirements on December 18, 2008. Grievant received training with respect to these requirements on an annual basis.

12. Grievant indicated that he elected to not stop his bus before crossing the railroad tracks because his view was obstructed by a building. Mr. Wright inspected the railroad crossing in question to determine whether obstructions existed that would have prevented Grievant from having a clear view up and down the tracks. No obstructions restricted the view of the railroad tracks in either direction from the point a school bus would be required to stop before crossing. In addition, Grievant did not complete the required checklist for identifying position hazards as required by state policy.

13. A bus video showed that, on December 9, 2008, the Grievant failed to observe the unloading procedures contained in state policy. Grievant was provided with training concerning this requirement on an annual basis.

14. A bus video showed that Grievant covered the camera on his bus with a glove on December 18, 2008. This conduct was in violation of state policy that requires a school bus operator keep both hands on the steering wheel when operating a bus.

15. A recording made on December 15, 2008, showed Grievant engaged in a conversation with a student during which he remarked that he remembered when the student was “flat as a board.” Respondent’s Exhibit 2, Level Three. The student

responded, “Did you call me a whore?”, Grievant responded, “No, I said ‘flat as a board.’” Grievant went on to say, “Three boys at Wahama would [call you a whore].”

16. A student indicated that Grievant slapped her buttocks on multiple occasions when she was exiting the bus. This student also claimed that Grievant made her feel uncomfortable by stating she was getting bigger and bigger. This student testified at the pre-termination hearing and before the Grievance Board during which she continued to make her claim that Grievant had slapped her buttocks.

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). "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).

Pursuant to West Virginia Code, school personnel may be suspended or dismissed 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 *nolo contendere* to a felony charge. W. VA. CODE § 18A-2-8; *Kanawha County Bd. of Educ. v. Sloan*, 219 W. Va. 213, 632 S.E.2d 899 (2006).

Dismissal of an employee under W. VA. CODE § 18A-2-8 "must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously." Syl. Pt. 3, in part, *Beverlin v. Board of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975); Syl. Pt. 4, in part, *Maxey v. McDowell County Board of Education*, 212 W. Va. 668, 575 S.E.2d 278 (2002); Syl. Pt. 7, in part, *Alderman v. Pocahontas County Bd. of Educ.*, __ W.Va. __, 675 S.E.2d 907(2009).

Superintendent Parsons' letter dated March 20, 2009, characterized Grievant's conduct as amounting to insubordination and willful neglect of duty. 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*.

To prove a 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. 95029-151 (Aug. 24, 1995). 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). 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.

Grievant contends that Respondent failed to meet its burden of proof in the case. In addition, Grievant contends that since he was not placed on a plan of improvement he did not receive counseling concerning his work habits. He claims, at best, Grievant's conduct can be described as negligent.

The West Virginia Supreme Court of Appeals has found reversible error in the event an Administrative Law Judge does not assess whether Grievant's behavior was correctable pursuant to the State Board of Education Policy 5300.[1] *Maxey*, *supra*. In addition, "[f]ailure by any board of education to follow the evaluation procedure in West Virginia Board of Education Policy 5300 . . . prohibits such board from discharging, demoting or transferring an employee for reasons having to do with prior misconduct or incompetency that has not been called to the attention of the employee through evaluation, and which is correctable." *Id.* "A board must follow the West Virginia Board of Education Policy 5300 . . . procedures

[1]That policy is now referred to as Policy 5310, 126 C.S.R. 142. It is worth noting that the legislature codified the specific improvement plan language from Policy 5300 in W. VA. CODE § 18A-2-12a(b)(6).

if the circumstances forming the basis for suspension or discharge are correctable. The factor triggering the application of the evaluation procedure and correction period is correctable conduct. What is correctable conduct does not lend itself to an exact definition but must be understood to mean an offense or conduct which affects professional competency." *Id*.

Grievant's reading of Policy 5300 is misplaced as it relates to his work habits in the operation of his bus. It is sufficient that the employee received feedback informing him of the error of his ways, the harm misconduct causes, directions on how to improve, and the potential consequences of continued misconduct.[2] The record established that in addition to disregarding the published rule against smoking on a school bus, Grievant was expressly warned against such behavior by Gary Mitchell in the spring of 2008, after he observed Grievant smoking on his bus. Nevertheless, Grievant continued to smoke on his bus. The record also established numerous policy violations such as allowing students to stand while the bus was in motion; failure to come to a complete stop prior to crossing a railroad track; leaving his bus while it was running; failure to use both hands when steering his bus; and, failure to use his parking brake when unloading students. The record established that Grievant was counseled against smoking on the bus, and received annual training on policies related to the operation of his bus.[3] Grievant received the necessary

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[2]*See Hare v. Randolph County Bd. of Educ.*, 183 W. Va. 436, 396 S.E.2d 203 (1990); *Tolliver v. Monroe County Bd. of Educ.*, Docket No. 01-31-493 (Dec. 26, 2001).

[3]West Virginia Board of Education Policy 4336 provides, in pertinent part, the following:

4.2.14 Students shall not stand while bus is in motion, at any time a seat is available.

13.10 The school bus shall be brought to a complete stop, with or without

input from his employer, yet he continued to neglect his duties as a bus operator. The undersigned finds no violation or noncompliance on the part of Respondent with Policy 5300.

Finally, Superintendent Parsons references in his letter the investigation into allegations of inappropriate contact with students. While not specifically stated in the superintendent's letter, this allegation would appear to be a charge of immorality. The Supreme Court of Appeals of West Virginia has attempted to define "immorality" within the meaning of W. VA. CODE § 18A-2-8. The Court stated: "Immorality is an imprecise word which means different things to different people, but in essence it also connotes conduct 'not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior.' [Citations omitted.]" *Golden v. Bd. of Educ. of Harrison Co.*, 169 W. Va. 63, 285 S.E.2d 665, 668 (1981); *Harry v. Marion Co. Board of Educ.*, 203 W. Va. 64, 506 S.E.2d 319, 321 (1998).

The video evidence in this case demonstrates that Grievant on one occasion alluded to the bust size of a student by remarking that she used to be "flat as a board." The video evidence also established that Grievant had or attempted physical contact with students. The bus recordings demonstrate that Grievant reached toward female students when they had their backs to Grievant and were going down the steps to exit the bus. Grievant admitted that he frequently had physical contact with students. Grievant downplayed the

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passengers, not more than 50 feet, nor less than 15 feet, from the nearest rail of any railroad track.

13.7 The school bus operator shall not leave the bus when it is running.

contact by stating he loved the students riding on his bus and that his conduct was not improperly motivated. In any event, this conduct was not appropriate. The undersigned finds that such conduct is not in conformity with accepted principles of right and wrong behavior.

Upon a thorough review and consideration of the record and the parties' proposed findings of fact and conclusions of law, the undersigned concludes that the Respondent's decision to terminate the employment of Grievant was not arbitrary and capricious, or an abuse of its broad discretion.

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. Pursuant to West Virginia Code, school personnel may be suspended or dismissed 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 *nolo contendere* to a felony charge. W. VA. CODE § 18A-2-8; *Kanawha County Bd. of Educ. v. Sloan*, 219 W. Va. 213, 632 S.E.2d 899 (2006).

3. Dismissal of an employee under W. VA. CODE § 18A-2-8 "must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or

capriciously." Syl. Pt. 3, in part, *Beverlin v. Board of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975); Syl. Pt. 4, in part, *Maxey v. McDowell County Board of Education*, 212 W. Va. 668, 575 S.E.2d 278 (2002); Syl. Pt. 7, in part, *Alderman v. Pocahontas County Bd. of Educ.*, __ W.Va. __, 675 S.E.2d 907(2009).

4. 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*.

5. To prove a 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. 95029-151 (Aug. 24, 1995).

6. "Immorality is an imprecise word which means different things to different people, but in essence it also connotes conduct 'not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior.'

[Citations omitted.]" *Golden v. Bd. of Educ. of Harrison Co.*, 169 W. Va. 63, 285 S.E.2d 665, 668 (1981); *Harry v. Marion Co. Board of Educ.*, 203 W. Va. 64, 506 S.E.2d 319, 321 (1998).

7. Respondent has established that Grievant's conduct constituted insubordination, willful neglect of duty, and immorality.

8. "Failure by any board of education to follow the evaluation procedure in West Virginia Board of Education Policy 5300 . . . prohibits such board from discharging, demoting or transferring an employee for reasons having to do with prior misconduct or incompetency that has not been called to the attention of the employee through evaluation, and which is correctable." Syl. Pt. 4, in part, *Maxey v. McDowell County Board of Education*, 212 W. Va. 668, 575 S.E.2d 278 (2002).

9. West Virginia State Board of Education Policy 5300 is substantially complied with if an affected employee's misconduct is evaluated in writing, the employee is informed as to how to improve his conduct and is informed of the potential consequences of a failure to improve. *Hare v. Randolph County Bd. of Educ.*, 183 W. Va. 436, 396 S.E.2d 203 (1990); *Tolliver v. Monroe County Bd. of Educ.*, Docket No. 01-31-493 (Dec. 26, 2001).

10. Through disciplinary actions in the form of written reprimands, and prior evaluations, Respondent substantially complied with Policy 5300.

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 (2008).

Date: June 16, 2011

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Ronald L. Reece
Administrative Law Judge