THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

RONALD LESKY,
Grievant,

v. **DOCKET NO. 2011-0896-HanED**

HANCOCK COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed by Grievant, Ronald Lesky, at level three of the grievance procedure, on December 14, 2010, contesting a three-day suspension without pay imposed by his employer, the Hancock County Board of Education. The statement of grievance reads, "[m]y 3-day suspension was in violation of 18A-2-7 and 18A-2-8." The relief sought by Grievant is "to receive the compensation I lost by this suspension, plus the three days returned to my retirement, and any reference to the suspension removed from my personnel file."

A level three hearing was held before the undersigned Administrative Law Judge on April 6, 2011, in the Grievance Board's Westover office. Grievant was represented by Owens L. Brown, West Virginia Education Association, and Respondent was represented by William T. Fahey, Esquire, Hancock County Assistant Prosecuting Attorney. This matter became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on May 9, 2011.

Synopsis

Grievant, a bus operator, was suspended for three days without pay for using his cell phone while the school bus was in motion. Grievant denied that he had done so. The only evidence against Grievant was hearsay testimony, and the testimony of one student on Grievant's bus who stated that he heard Grievant say, "going to be late," and he thought Grievant was talking on the telephone. This testimony is insufficient to prove the charges against Grievant.

The following Findings of Fact are made based upon the record developed at level three.

Findings of Fact

1. Grievant has been employed by the Hancock County Board of Education ("HBOE"), as a bus operator for 11 years.

2. On October 26, 2010, Grievant was making his evening bus run from Broadview School taking elementary students to their bus stops. The bus he was driving was a spare he was using while his assigned bus was under repair. When he came to the bus stop for one of his students who was in second grade, no one was waiting for the student at the bus stop to take her home.

3. Rather than leaving the student alone at the bus stop, Grievant took the student back to Broadview School so that she would not be left unsupervised. This extra trip made Grievant approximately 15 minutes late in completing the remainder of his bus run, which consisted of picking up students at Weir High School, St. Paul Parochial School, and Weir Middle School, and transporting them to their bus stops.

4. Grievant used the radio on his bus to contact the HBOE transportation secretary, informing her that he would be late getting to Weir High School, and asking her to contact the High School to let the personnel there know. Grievant did not ask the secretary to contact anyone at St. Paul Parochial School or Weir Middle School regarding the anticipated delay in his arrival at those destinations.

5. When Grievant arrived at Weir High School he attempted to use the radio on his bus to again contact the secretary to ask her to call St. Paul Parochial School and Weir Middle School to inform them of the delay, but the radio was not working. Grievant was caught off guard. Grievant used his personal cell phone to call St. Paul Parochial School from the Weir High School parking lot to inform personnel there that he would be 15 minutes late. When he got to St. Paul Parochial School he used his personal cell phone to call Weir Middle School, while parked on the street, to inform personnel at the school that he would be 15 minutes late. He did not exit the bus to place these two calls because there were students on the bus.

6. Grievant was aware of the HBOE policy, Policy EEAJ, that precludes the use of any electronic device, including cell phones, while an employee is on a school bus. This policy, however, allows the employee to use the cell phone if the bus is pulled off the road and not in motion.[1]

7. A student riding Grievant's bus on October 26, 2010, took a picture, using her cell phone, of Grievant with his cell phone in his hand, looking at the screen, while sitting in the driver's seat. At the time this picture was taken, the bus was sitting at a stoplight on

---

[1] This policy was not placed into evidence. This finding regarding the policy was gleaned from the testimony of the witnesses.

Main Street in Weirton. This student also told Andrea Dulaney, Assistant Principal at Weir High School, that Grievant had been texting while driving the school bus, and gave her the names of other students to contact. Ms. Dulaney did so. Two female students told Ms. Dulaney that Grievant was talking on his cell phone while the bus was moving, and one of the two told her Grievant had been texting while on the bus. None of these three students provided testimony under oath, nor did they provide written statements.

8. A male student who rides Grievant's bus, and who attends Weir High School, was also interviewed by Ms. Dulaney, and was the only witness called to testify regarding Grievant's actions on October 26, 2010. This student, C.O.,[2] was in the second or third seat behind Grievant on the side of the bus opposite the driver's seat. C.O. saw Grievant playing with his cell phone while the bus was stopped at the stop light on Main Street at Krogers. He did not observe Grievant texting. As the school bus was traveling up Marland Heights hill in Weirton, C.O. heard Grievant say, "going to be late." C.O. did not see Grievant place a call or receive a call on the cell phone. C.O. testified that he "thought" Grievant called someone.

9. Superintendent Susan Smith testified that holding the cell phone and looking at it meets the definition of using it. She did not explain the origin of this definition. Grievant was not aware that HBOE policy precluded him from looking at his cell phone while stopped at a stop light.

---

[2] Consistent with Grievance Board practice, this student will be identified only by his initials.

10. Grievant was looking at his cell phone while at a stoplight. He was calling up the telephone number for Weir Middle School so that it would be on his screen when he reached St. Paul's Parochial School.

11. Grievant's cell phone bills do not show that Grievant sent or received any text messages on October 26, 2010.[3]

11. Grievant did not use his cell phone to send or receive any text messages while driving the school bus on October 26, 2010.

12. Superintendent Smith recommended that Grievant be suspended for three days without pay, and HBOE approved the recommendation. By letter dated November 8, 2010, Grievant was advised that he was being suspended for three days without pay for "using a communication device during your bus run while students were on the bus, This is in direct violation of . . . Policy EEAJ."

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). A preponderance of the evidence is evidence which is 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 proven is more probable than not. *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

---

[3] Respondent's counsel advised at the level three hearing that Grievant was not punished for texting, but rather for placing a phone call while the bus was moving.

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." Respondent did not ever identify which of these categories it believed was applicable. Thus, the undersigned must guess, and will only apply the law as it relates to insubordination.

Insubordination has been defined as the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *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). In order to establish 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 v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). *See Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *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).

"Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. *See Day v. Morgan Co. Health Dep't*, Docket No. 07-CHD-121 (Dec. 14, 2007). "An employee's belief that management's decisions are incorrect or the result of incompetence, absent a threat to the employee's health and safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. *Vickers v. Bd. of Directors/W. Va. State College,* Docket No. 97-BOD-122B (Aug. 7, 1998). *See Parker v. W. Va. Dep't of Health and Human Resources*, Docket No. 97-HHR-042B (Sept. 30, 1997)." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003).

The allegations against Grievant arose from a student reporting to Ms. Dulaney that Grievant had been using his cell phone to send a text message while he was driving the bus. Three female students told Ms. Dulaney this, and one of them produced a picture she had taken using her cell phone. Two of the students told Ms. Dulaney Grievant was also talking on the cell phone while the bus was moving. None of these students provided testimony under oath, nor were they subject to cross-examination. No written statement from any of these students was placed into evidence.

The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit

form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements.[4] *Gunnells v. Logan County Bd. of Educ.,* Docket No. 97-23-055 (1997); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-8-115 (June 8, 1990).

The only explanation offered for the failure to call these three witnesses was that the female student who took the picture and reported that Grievant was texting did not feel comfortable participating in a hearing, and the other two female witnesses had moved out of the school district at the time of the level three hearing. None of these students gave a signed, written statement, sworn or otherwise, which was presented into evidence, and no explanation was given for the failure to obtain signed, written statements. Ms. Dulaney's summary of her conversations with the students is unreliable hearsay, which cannot be considered by the undersigned in this proceeding. *Warner v. Dep't of Health and Human Res.*, Docket No. 07-HHR-409 (Nov. 18, 2008). The statements made by these three female students, as related by Ms. Dulaney, will be given no weight.

---

[4] The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing hearsay. *See Borninkhof v. Department of Justice*, 5 MSBP 150 (1981).

The only evidence that Grievant was talking on his cell phone while the bus was in motion is C.O.'s testimony that he heard Grievant say, "going to be late," while the bus was in motion. C.O. said he "thought" Grievant was talking to someone on the cell phone. He did not, however, see him place a call, and he did not testify that Grievant had his phone to his ear. Grievant denied that he had been using the cell phone while the bus was in motion, admitting that he did use the phone while on the bus, but he placed both calls while parked at schools.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's

information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

The undersigned personally observed Grievant as he provided his testimony, and found him to be a credible witness. He readily admitted that he should have asked the secretary to contact all three schools when he first called her on the radio, and that he could have made other choices, but he was somewhat rattled by the radio not working, and did not take the time to think through all of the choices. He was concerned about letting the schools know that he was running late so that the students would not be standing outside waiting for him. Grievant was trying to be responsible. The one student witness who testified did not provide information that he actually saw Grievant call anyone on his cell phone, nor did he state that he observed Grievant with the cell phone to his ear. He did not testify that he heard Grievant say anything other than, "going to be late," such as, "hello," or "this is Ron Lesky," or "bye." He qualified his statement given during the suspension hearing before HBOE by stating he "thought" Grievant called someone. It appears to the undersigned that the students on Grievant's bus saw Grievant with his cell phone out and drew conclusions from this, rather than from personal observation that he was actually using his cell phone. The fact that the student heard Grievant say, "going to be late," is persuasive, but it is odd that that is the only thing he heard Grievant say. Grievant could just as easily have been mumbling to himself as talking to someone on his phone.

Finally, the undersigned cannot conclude from the testimony presented that Grievant violated any policy by having his cell phone out and calling up a phone number for later use while he was stopped at a stoplight, as Superintendent Smith suggested.

Certainly, Grievant was not aware that he was violating a policy, did not possess the intent necessary to support a charge of insubordination. Respondent did not prove the charges against 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. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

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. 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."

4. In order to establish 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 v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). *See*

Santer v. Kanawha County Bd. of Educ., Docket No. 03-20-092 (June 30, 2003); *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).

5. Respondent did not prove that Grievant was talking on his cell phone while the school bus was in motion, or that he was otherwise insubordinate.

Accordingly, this grievance is **GRANTED.** Respondent is **ORDERED** to remove the three-day suspension without pay imposed upon Grievant from Grievant's record, to pay him back pay for the three days,[5] and credit him with any benefits he lost due to the three days of suspension.

[5] As Grievant did not request interest in the relief sought, none will be awarded.

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).

BRENDA L. GOULD
Administrative Law Judge

Date: June 27, 2011