WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DAVID JENNINGS
Grievant,

v. **Docket No. 2010-0801-WyoED**

WYOMING COUNTY BOARD OF EDUCATION,
Respondent.

D E C I S I O N

Grievant, David Jennings, is employed by Respondent, Wyoming County Board of Education ("WCBE"), as a bus operator. Grievant filed this grievance against Respondent protesting a five day suspension. The grievance statement was filed on December 17, 2009 and the statement provides:

> Grievant has been suspended for five days without pay on the grounds of insubordination and willful neglect of duty. Grievant alleges a violation of West Virginia Code 18A-2-6 and 18A-2-7.
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> Relief Sought: Grievant requests the reversal of the decision of the Wyoming County Board of Education, reimbursement of all lost wages, benefits, and seniority and the removal of any reference of this suspension from personnel records maintained by the Respondent. Grievant also requests an award of interest on all monetary sums.

A hearing was held at level one on December 11, 2009, and the grievance was denied at that level on December 15, 2009. Grievant filed an expedited appeal to level three on December 17, 2009. A level three hearing was held before the undersigned Administrative Law Judge on May 21, 2010 at the Grievance Board's Hearing Facilities in Beckley, West Virginia. Grievant was represented by counsel, John E. Roush, Esquire, West Virginia School Service Personnel Association. Respondent WCBE was represented by Gregory W. Bailey, Esquire of Bowles, Rice, McDavid, Graff & Love, LLP. 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 June 29, 2010. Both parties submitted fact/law proposals.

Synopsis

Grievant, a bus operator, contests the disciplinary action of Respondent. Grievant was suspended for five days without pay subsequent to his behavior failing to comply with a directive and alter a student bus loading location. Respondent established that Grievant knowingly governed his action in a manner which constitutes insubordination. Grievant failed to establish sufficient grounds of justification for his actions. Grievant evidenced a lack of appreciation of the need to follow directives. Respondent did not abuse its discretion in imposing disciplinary action with regard to Grievant's dubious behavior. This Grievance is DENIED.

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 employed by Respondent as a bus operator and has been so employed for approximately twenty-two years.

2. During the 2008-2009 school year, Grievant's duties included a bus route serving preschool students at Herndon Consolidated Elementary and Middle School (HCEM).

3. For a substantial period of time, Grievant and other bus operators parked their buses at the south end of HCEM School close to the area of the school where the preschool students they serve attend class.

4. On Friday, October 9, 2009, the Faculty Senate of Herndon Consolidated School met and considered the question of whether the loading point for preschool students should be moved in order to alleviate a safety hazard associated with the proximity of other students to the departing preschool buses. The Faculty Senate and Della Houck, Principal, who was in attendance, approved the relocation of the loading point for preschool students.

5. The change was to take effect on Monday, October 12, 2009.[1]

6. Grievant was informed by Preschool Teacher Ginger Michaels on October 12, 2009, that Principal Houck had directed that the preschool student loading location be changed.[2]

7. Grievant became agitated. In a demonstrative manner Grievant expressed concern as to why Principal Houck had not informed him of the change directly.

8. Grievant refused to move his bus to the new loading location upon being informed of Principal Houck's directive by Ms. Michaels.

9. The other 3 preschool bus operators complied with the Principal's directive to change the preschool student loading location beginning on Monday, October 12, 2009.

10. On Tuesday, October 13, 2009, Grievant again ignored the change in loading locations. Okey Mills, a senior teacher who was filling in for the Principal in her absence, communicated with Grievant regarding the loading location.

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[1] All of the preschool teachers agreed to walk their students to the new loading point and to inform the drivers of the 4 preschool buses of the new loading location. December 11, 2009, Board Hearing Transcript, at page 7.

[2] Grievant acknowledges this conversation transpired. Grievant does not contest that Ms. Michaels informed him of Principal Houck's directive.

11. Okey Mills is Principal Houck's designee in her absence. Mr. Mills is routinely the person who fills in at HCEM when Principal Houck is absent.

12. Grievant again became agitated and refused to load his preschool students at the new location.

13. Grievant's rationale for failing to comply with the directive to alter the bus loading location has not remained consistent throughout the course of events.[3]

14. Grievant complied with the Principal's directive for the first time on Wednesday, October 14, 2009.

15. Frank L. Blackwell, Superintendent of Wyoming County Schools by a letter dated October 21, 2009, recommended that Grievant be suspended for five (5) days without pay for conduct in the nature of insubordination. (R. Ex. 3).

16. Among other information the three page October 21, 2009, letter stated:

> On October 12, 2009, you were instructed to load Pre-K students at a location away from the playground. On October 13, 2009, in disregard of this direction, you positioned your bus to load students in the area of the playground. When approached by Pre-K teacher , Ginger Michael, on Monday, October 12, 2009; and the teacher in charge, Okey Mills, on Tuesday, October 13, 2009, and asked to move your bus, you reacted in a loud and disrespectful manner. You further responded by refusing to move your bus and loaded Pre-K students in the playground area during the time that 5th - 8th grade students were using the playground. You then maneuvered your bus through students who were using the playground.

(R. Ex. 3).

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[3] Grievant initially asserted a lack of clarity upon the authority of a school principal to direct the actions of a bus operator. Later, Grievant testified he was angry that he had not been provided with an explanation of the Principal's reasons for the change. December 11, 2009, Board Hearing Transcript, pgs. 71, 91, 94. It was also inferred that Grievant lacked proper notification.

17. Further, the October 21, 2009 letter noted the Employee Code of Conduct[4] and indicated that Grievant's behavior on October 12 and October 13, 2009, failed to meet those important standards. (R. Ex. 3).

18. Grievant, by counsel, requested a hearing.

19. On December 11, 2009, the Wyoming County Board of Education met and conducted a full evidentiary hearing upon the charges set forth in the Superintendent's October 21, 2009 letter.[5] Following the hearing the Board voted 5-0 to approve the suspension of the Grievant for 5 days without pay.

20. Grievant was officially informed of the Board action by a letter dated December 15, 2009, signed by Superintendent Blackwell.

21. Prior to the instant facts, Grievant was on notice that insubordinate conduct was not tolerated, and that any recurrence of such behavior would result in disciplinary action, (R. Ex. 2);

a. Grievant received an oral reprimand for insubordinate conduct in January 1998.

b. Grievant received a written reprimand dated October 9, 1998, regarding insubordinate conduct. The reprimand warned that similar misconduct would warrant more severe disciplinary action. *See Jennings v. Wyoming County Board of Education*, Docket No. 99-55-180 (February 10, 2000).

22. It was noted at the December 11, 2009, Board Hearing that Grievant was on notice regarding recurrence of insubordinate behavior.

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[4] West Virginia Board of Education Policy 5902, *Employee Code of Conduct*.

[5] A written transcript of the December 11, 2009, Hearing is of record and was available for review prior to the level three proceedings. The transcript and accompanying documents were incorporated into the instant record by the undersigned Administrative Law Judge.

23. Grievant's testimony at the L3 Hearing contradicted reliable fact, other witnesses' testimony and at times, his own prior statements. Grievant demonstrated a lack of reliability or veracity on key factual issues.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). *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 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.*

Grievant contends his actions do not warrant the charges. He argues, with the assistance of legal counsel, that he is not culpable of insubordination. In part, Grievant proposes his actions are explicable, misinterpreted, and excusable error. Grievant acknowledges the tenor of his conversations with Ms. Michaels and Mr. Miller reached a demonstrative level. Grievant highlights that he apologized to Ms. Michaels and corrected

his actions the day after Mr. Miller communicated with him. Grievant denies he failed to properly perform his assigned duties. Grievant alleges the Board's disciplinary action is inappropriate.

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 of 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).

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).

Grievant ignored the change in a student bus loading location. He did this despite being informed of the directive, no less than twice directly and an indiscernible number of times indirectly. Ms. Michaels and Mr. Miller explicitly informed Grievant via direct verbal communication.[6] There exist a tension between Grievant and Principal Houck regarding parking at HCEM School.[7] Further, it is hard to conceive that Grievant didn't notice the

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[6] There is ambiguous information of record that others may have also attempted to communicate the proposed change of the bus stop to Grievant. One such individual is identified as Principal Houck.

[7] Grievant and Principal Houck have had prior discussion(s) regarding the alleged inherent authority of School Bus Operator's use of the school parking lot. Grievant was not pleased with Principal Houck's execution of her authority. Citing L1 and L3 Hearing Testimony.

loading location of the three buses preceding him.[8] This is true for Tuesday, October 13, without a doubt and possibly Monday, October 12, as well.[9] Grievant intentionally parked on the south end of the building and not the new loading location.

Grievant's explanation for his failure to comply with the communicated change in the loading location has not remained constant. Grievant's communicated justification for his failure to conform has morphed with the passage of time and relevant proceedings. Grievant initially questioned the authority of a principal to alter his assigned loading location.[10] Later, Grievant made it quite clear that he expected and was entitled to an explanation for the change. It is also inferred that Grievant did not receive proper notice of the directive. The undersigned is not persuaded by these explanations and/or arguments. Grievant has failed to establish an acceptable excuse for his behavior.

The expectation set forth in West Virginia Board of Education Policy 5902, *Employee Code of Conduct*, provides in part, that:

> 4.2 All West Virginia school employees shall:

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[8] Grievant testified he did not inquire of any of the other three bus drivers as to why they parked at a different location. This information tends to be implausible, but not refuted by evidence of record.

[9] On Tuesday, October 13, 2009, Grievant ignored the change in loading locations. When approached by Okey Mills, a senior teacher who was filling in for the Principal in her absence, Grievant became agitated and refused to load his preschool students at the new location. Mr. Mills testified that Grievant stated that nobody was going to tell him where to park his bus. December 11, 2009, Board Hearing Transcript, pg 21.

[10] To the extent Grievant asserts a lack of clarity upon the authority of a school principal to direct the actions of a bus operator in the circumstances of these facts is moot. Citing Wyoming County Schools Transportation Handbook, G. Ex. 1. Such notion is inaccurate. A directive from Transportation Director Jimmy Graham was not necessary to properly instruct Grievant to alter the student loading location at HCEM after such a directive was issued by Principal Houck.

> 4.2.1 exhibit professional behavior by showing positive examples of preparedness, communication, fairness, punctuality, attendance, language, and appearance.
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> 4.2.2. contribute, cooperate, and participate in creating an environment in which all employees/students are accepted and are provided the opportunity to achieve at the highest levels in all areas of development.
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> 4.2.3. maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination.
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> 4.2.4. create a culture of caring through understanding and support.
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> 4.2.5. immediately intervene in any code of conduct violation, that has a negative impact on students, in a manner that preserves confidentiality and the dignity of each person.
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> 4.2.6. demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior.
>
> 4.2.7. comply with all Federal and West Virginia laws, policies, regulations and procedures.

Grievant is aware of proper employee conduct and has been advised regarding displays of disrespect toward supervisory personnel. *Jennings v. Wyoming County Board of Education*, Docket No. 99-55-180 (February 10, 2000), see Finding of Fact 21. As a measure to discourage recurrence of similar unacceptable behavior and as a punitive measure, Respondent did not abuse its discretion in imposing disciplinary action against the Grievant. Grievant demonstrated a lack of appreciation for the need to follow directives.

Further, when provided with an opportunity to acknowledge the shortcoming in his behavior and indicate a willingness to respond appropriately to directions, Grievant

persisted in claiming an entitlement to explanations as a requisite for compliance. While Grievant did express some regret for his agitated interaction with Ms. Michaels, Grievant exhibited little evidence that he acknowledges any inappropriateness with the conduct he exhibited on October 12 and 13, 2009. Grievant's conduct throughout the facts and circumstances of this matter is readily interpreted as insubordination.

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). In the circumstances of this case, the undersigned did not deem it necessary to delve into a full credibility assessment of Grievant's sworn testimony. Yet, it was readily evident that various statements of Grievant contradict reliable facts, other witnesses' testimony, and at times, his own prior testimony.[11] Grievant's recollection of information is not as accurate or consistent as this ALJ would expect in the circumstance.[12]

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[11] Eg., There is no doubt that a School Principal possesses the authority to communicate with a bus operator and establish or relocate the student loading location at the Principal's respective school building.

[12] 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*. Grievant has a vested interest in the instant subject matter; however, his statements are not consistent. Grievant's rendition of events change with what could be depicted as short term objectives. Grievant's recollection of facts is less than reliable with regard to time, place, and detail.

Grievant was aware of the directive and chose not to conform. Grievant neglected to properly perform his assigned duty.[13] His actions and interactions with others were inappropriate. Whether Grievant's conduct *per se* endangered student safety was not fully established.[14] Nevertheless, Respondent established by a preponderance of the evidence that Grievant's conduct warranted disciplinary action. Further, Respondent established that Grievant's actions constituted insubordination and willful neglect of duty.

Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute his judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997). Thus, under the circumstances presented, it has not been demonstrated that the disciplinary measure levied was disproportionate to the employee's offense nor that Respondent's actions constitutes an abuse of discretion.

The above-discussion will be supplemented by the following Conclusions of Law.

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[13] To prove willful neglect of duty, an 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. 95-29-151 (Aug. 24, 1995), *Hoover v. Lewis County Bd. of Educ.*, Docket No.93-21-427 (Feb. 24, 1994). Respondent demonstrated, by a preponderance of the evidence, that Grievant knowingly neglected to properly perform his assigned duty.

[14] This contention was noted in Level 3 testimony but not fully developed by Respondent. Among other points of contention, Respondent inferred that Grievant, after ignoring the change in loading locations, on October 13, in the process of leaving the schools premises Grievant's conduct endangered students. December 11, 2009, Board Hearing Transcript, pgs. 22-23.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). *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).

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). 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.

3. Insubordination involves 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). Insubordination may also be found when an employee shows a willful disregard for the implied directions of an employer. *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988), citing *Weber v. Buncombe County Bd. of Educ.*, 266 S.E.2d 42 (N.C. 1980).

4. In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995).

5. To prove willful neglect of duty, an 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. 95-29-151 (Aug. 24, 1995), *Hoover v. Lewis County Bd. of Educ.*, Docket No.93-21-427 (Feb. 24, 1994).

6. Respondent met its burden of proof and demonstrated, by a preponderance of the evidence, that Grievant was guilty of willful neglect of duty.

7. Respondent demonstrated that Grievant was insubordinate when he knowingly ignored a directive to change the student bus loading location at Herndon Consolidated Elementary and Middle School.

8. Respondent met its burden of proof and demonstrated, by a preponderance of the evidence, that the disciplinary action taken was consistent with Grievant's insubordinate behavior.

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: January 4, 2011

Landon R. Brown
Administrative Law Judge