THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JOHN R. BOORE,
Grievant,

v. **DOCKET NO. 2011-1306-MrnED**

MARION COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed at level three of the grievance procedure by Grievant, John R. Boore, on March 15, 2011, against his employer, the Marion County Board of Education ("MBOE"), contesting a three-day suspension without pay. The relief sought by Grievant is "compensation for lost wages, restoration of seniority and any other benefit lost as a result of his suspension without pay, expungement of his record of all references to his suspension without pay, and interest on all sums of money to which he is entitled."

A level three hearing was held before the undersigned Administrative Law Judge on September 12, 2011, in the Grievance Board's Westover office. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by Stephen R. Brooks, Esquire, Flaherty, Sensabaugh and Bonasso, PLLC. This matter became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on October 13, 2011.

Synopsis

Grievant is a bus operator, and was suspended for three days without pay after he was involved in an "at-fault" accident in traffic. Grievant ran into the rear of the vehicle in front of him with his bus, when the cars in front of that car slammed on their brakes in response to the driver of the lead vehicle suddenly changing his mind about pulling out into traffic. This was a minor accident. Respondent did not take into consideration the circumstances of the accident or Grievant's work record. Grievant demonstrated that the penalty imposed was too severe under the circumstances.

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 Marion County Board of Education ("MBOE") as a full-time bus operator since 1999. Grievant has always received good evaluations. The Transportation Supervisor, Ronald Schmuck, described Grievant as a "very good driver, very conscientious driver." Respondent's Exhibit 1, page 24.

2. On February 15, 2011, Grievant was involved in an accident in traffic while driving a school bus. Grievant was slowing down as he was coming to a stop sign at an intersection. There were three cars waiting at the intersection. The driver of the first car started to pull out into traffic, and then slammed on his brakes, causing the drivers of the other two cars in line to slam on their brakes. Grievant was unable to stop in time and hit the third car from behind with the bus, causing $887.29 in damage to the car. Damage to the school bus was minimal, requiring no parts, and about a half hour of labor performed

by school board mechanics. Grievant was deemed to be "at-fault." This "was a very minor accident." Respondent's Exhibit 1, page 30, Testimony of Ronald Schmuck. There were no students on the bus at the time. This was the first "at-fault" accident in which Grievant had been involved.

3. By letter dated February 16, 2011, Superintendent Thomas K. Deadrick suspended Grievant for three days without pay for being involved in an "at-fault" accident with a school bus, in traffic. This punishment was the same as that imposed by MBOE on other full-time bus operators during the 2010-2011 school year, who were involved in their first "at-fault" accident with a school bus, in traffic. Mr. Deadrick did not take into consideration the circumstances which resulted in the accident, the amount of damage to either vehicle, or Grievant's performance evaluations.

4. Gary Price, Assistant Superintendent for MBOE, made the decision that all bus operators who are involved in their first "at-fault" accident should receive a three-day suspension without pay, regardless of the circumstances. Mr. Price made this decision after meeting with Mr. Schmuck, Joe Toothman, and Chuck Sconish, bus operator representative. The meeting took place because of the number of accidents that had occurred at the beginning of the 2010-2011 school year. MBOE felt it needed to address the issue of bus operator accidents for safety reasons, and asked for input from these three gentlemen. This new practice of imposing an automatic three-day suspension for an "at-fault" accident involving an MBOE vehicle, in traffic, was not reduced to writing, was not approved by MBOE, and the bus operators were not advised of the practice.

5. During the 2010-2011 school year, other MBOE bus operators who were involved in minor one-vehicle accidents with minor damage to the school bus, which were

the result of a miscalculation by the bus operator of distances, received either no discipline or written reprimands.

6. Prior to this incident, Grievant had received only one written reprimand, more than a year before, for letting a kindergarten student depart from the bus when the parent was not at the bus stop to meet the child.

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).

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."

MBOE did not identify which of the statutory causes it believed applied to Grievant's behavior. "It is not necessary for a board of education to identify an employee's offenses by the exact terms utilized in W. VA. CODE § 18A-2-8, as long as the required written notice of charges specifically identifies the alleged acts of which the employee is accused. *Jordan v. Mason County Bd. of Educ.*, Docket No. 99-26-080 (July 6, 1999)." *Scott v. Wetzel County Bd. of Educ.*, Docket No. 06-52-289 (Jan. 3, 2007). However, the failure to do so results in speculation by the undersigned as to how to apply the law to this situation. The only statutory causes which seem remotely applicable are willful neglect of duty, incompetency, and unsatisfactory performance.

"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.[1] *Williams v. Cabell County Bd. of Educ.*, Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd.*

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[1]"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).

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). 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); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996)." *Geho v. Marshall County Bd. of Educ.*, Docket No. 2008-1395-MarED (Oct. 30, 2008).

"'Incompetency'" is defined to include 'lack of ability, legal qualification, or fitness to discharge the required duty.'" *Black's Law Dictionary* 526 (Abridged Sixth Ed. 1991) (Emphasis added).

Grievant made three arguments. Grievant first argued that the practice of requiring an automatic three-day suspension without pay for a first-offense at-fault accident in traffic is not enforceable, because MBOE did not put this practice in writing, citing W. VA. CODE § 18A-2-12a(b)(7). Certainly a Board of Education need not reduce to writing the penalty for every offense. Likewise, MBOE was certainly not required to accept Assistant Superintendent Price's decision that an automatic three-day suspension without pay be imposed in these circumstances. This argument by Grievant apparently was made to counter Respondent's continuing objection to Grievant's efforts to show that the punishment imposed was too severe. Respondent argued that once Grievant acknowledged he was involved in an at-fault accident in traffic in a school bus, no other facts were relevant; Respondent had met its burden of proof, and apparently Respondent asserts that the undersigned cannot mitigate the punishment. The undersigned does not accept either Grievant's argument or Respondent's. Respondent is not required to adopt

a written policy setting forth the discipline it will impose in any given situation, and Grievant is not precluded from challenging the discipline imposed just because Assistant Superintendent Price decided that a particular level of discipline would be imposed on all bus operators for a particular infraction.

Grievant's second argument was that this accident did not rise to the level of willful neglect of duty because Grievant's inability to bring the bus to a stop, despite his efforts to do so, was not an intentional act. As noted above, willful neglect of duty is an action that is knowing and intentional, as opposed to negligent. Certainly, there is no evidence to suggest that Grievant intended to hit the car in front of him with the bus. Rather, the accident was the result of Grievant's inaccurate assessment of the situation. However, no one is contending that Grievant is not a capable driver, so neither incompetency or unsatisfactory performance seem applicable either. Nonetheless, the undersigned is hesitant to say that an employee cannot face discipline for an accident which was at least arguably avoidable, causing damage to Respondent's property.

Finally, Grievant argued that the penalty imposed for this little fender bender was too harsh. "The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was 'clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995)(citations omitted). The Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). "Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall not substitute her 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)." *Meadows, supra.*

Grievant's past work record and the circumstances certainly favor mitigation. Grievant was a good employee and was seen as a good driver. This was a minor accident, which would likely have been difficult to avoid with the drivers in front of Grievant slamming on their brakes. Respondent did not even consider the circumstances or Grievant's work record or driving ability overall. Respondent's sole consideration was consistency.

The undersigned must also consider that in other instances when bus operators miscalculated distances and hit something with the bus resulting in minor damage, which was most certainly the case here, and there were no other vehicles involved, the bus operators received a written reprimand. The only distinction here is that another vehicle was involved. Grievant has demonstrated that a three-day suspension without pay was too severe under these circumstances. This accident was not worthy of anything more than a written reprimand.[2]

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. 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." "Although reprimands are not specifically addressed in W. VA. CODE § 18A-2-8, the Grievance Board has previously recognized that lesser penalties can be imposed for the

[2] Grievant pointed to *Starsick v. Marion County Board of Education,* Docket No. 91-24-487 (October 26, 1992), for the proposition that a two-day suspension without pay is too harsh a punishment for an accident. The undersigned reads *Starsick* as standing for the proposition that a school board cannot impose disparate penalties in similar situations.

offenses listed in this statute. *See Wahl v. Mineral County Bd. of Educ.*, Docket No. 98-28-175 (Sept. 14, 1998); *See also Blankenship v. Mingo County Bd. of Educ.*, Docket No. 97-29-486 (Apr. 17, 1998)." *Showalter v. Marshall County Bd. of Educ.*, Docket No. 07-25-165 (May 28, 2008).

3. 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).

4. "The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was 'clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

5. In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995)(citations omitted).

6. The Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). "Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall not substitute her 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)." *Meadows, supra.*

7. Grievant demonstrated that the penalty imposed was clearly excessive under the circumstances.

Accordingly, this grievance is **GRANTED.** The three-day suspension without pay is **ORDERED** reduced to a written reprimand. Respondent is **ORDERED** to remove all references to the three-day suspension from Grievant's personnel file and from any other files maintained by Respondent, to restore all benefits lost as a result of the three-day suspension, including seniority, and to pay him backpay for the three days, plus interest.

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: November 4, 2011