WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BRADLEY STEPHENS,
Grievant,

v. **Docket No. 2012-0339-WayED**

WAYNE COUNTY BOARD OF EDUCATION,
Respondent.

D E C I S I O N

Grievant, Bradley Stephens, a regularly employed bus operator, filed this grievance against his employer, the Wayne County Board of Education ("WCBE"), Respondent, on September 27, 2011, protesting suspended without pay, for a school bus driving incident that occurred the first day of school 2011 and his ultimate termination from employment. Grievant alleges he was the victim of discrimination in that he was harassed, reprimanded and ultimately terminated for actions that are tolerated when performed by other bus operators. Grievant seeks reinstatement to his position with compensation for all loss wages and benefits with interest.

A personnel hearing was held on September 19, 2011, before the WCBE. Subsequent to the hearing, Respondent approved the County Superintendent's recommendation for Grievant's termination. On September 25, 2011, Grievant exercised his right pursuant to W. VA. CODE § 6C-2-4(a)(4) to file directly to level three. A level three hearing was held before the undersigned Administrative Law Judge on February 22, 2012, in the Grievance Board's Charleston office. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association. Respondent was represented by David A. Lycan, Esquire, General Counsel.

This case became mature for decision on March 27, 2012, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals.

Synopsis

Grievant, a regular school bus operator, admittedly violated municipal and state road laws while operating a school bus with elementary children on board. Respondent unanimously voted to terminate Grievant's employment as a result of Grievant's current misconduct coupled with his past school bus operator's work history.

Respondent established misconduct. Respondent cites the instant event and the cumulative effect of past improper actions with respective opportunity to correct as proper justification for the severity of disciplinary action. It is within Respondent's discretionary authority to terminate Grievant's employment. Grievant did not establish, by a preponderance of the evidence, that Respondent has acted in an unreasonable or discriminatory manner. Respondent's actions are lawful. Accordingly, 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 was employed by Respondent as a bus operator. Grievant was initially hired by Respondent as a substitute bus operator in 2003 and became a regularly employed bus operator with Respondent in October of 2005.

2. August 11, 2011 was the first day of school for children in Wayne County for the 2011-2012 school year.

3. On August 11, 2011, Grievant was scheduled to make the assigned regular bus run of a fellow bus operator, who was at the time on medical leave. Grievant had been making this run in place of this co-worker throughout the prior school year. The afternoon portion of the bus run began with Grievant picking up students at Kellogg Elementary and then proceeding from there to Vinson Middle School to pick up middle school students.

4. The Kellogg Elementary is located in the west end of the city of Huntington, West Virginia. School lets out in the afternoon at Kellogg Elementary at 2:35 p.m. Each school day there are school buses parked and waiting on the paved loading area located on school property in front of said school, for the purpose of transporting elementary students.

5. On August 11, 2011, the first day of school, buses were parked in line and parallel with Piedmont Road, a two way city street bordering on the front side of Kellogg Elementary. The buses, in their order in line, were driven by bus operators Dreama Thompson; Grievant, Brad Stephens; and Terry Wolford, respectively.

6. Parents were also lined up on the road around the school to pick up their children.

7. Elementary students were loaded onto the buses. The buses were lined up in the order in which each was to pull out and merge into traffic in the eastbound lane of Piedmont Road. The buses were then to proceed eastward approximately one-tenth of a mile to the traffic light at the point where Piedmont Road intersects with Spring Valley Road. Bus Operator Thompson's afternoon bus route required her to turn left, while

Grievant's bus route required him to proceed straight through the traffic light and continue on Piedmont Road directly to Vinson Middle School, where he was to turn his bus into the loading zone in front of that school and pick up a number of middle school students. The approximate distance between Kellogg Elementary and Vinson Middle School is four-tenths of a mile.

8. Reportedly, under normal driving conditions, the driving time between the two schools is about three minutes, including any waiting time if such a driver in normal traffic is stopped by a red traffic light at the only traffic light situated between the above two schools. *See* Thompson Testimony.

9. There is an access road for parents' vehicles leading off Piedmont Road onto Kellogg Elementary property located approximately 300 feet from the Kellogg Elementary bus loading zone in front of the school. The portion of Piedmont Road from Kellogg Elementary to the above-referenced intersection traffic light has a continuous double yellow line in its center.

10. Vinson Middle School lets out at 2:40 p.m., five minutes after Kellogg Elementary concludes its school day at 2:35 p.m. Vinson Middle school students waiting for their buses are placed in groups and positioned in places where their buses are supposed to pull in and pick them up each school day.

11. A transportation department supervisor, Mark Queen, received a telephoned complaint from a Huntington TTA (Tri-State Transit Association) bus operator. It was provided that while waiting in the westbound lane of Piedmont Road near Kellogg Elementary on the afternoon of August 11, 2011, the TTA bus operator observed a Wayne County school bus pull out and around a waiting line of traffic in the eastbound lane, cross

over a double yellow line, and proceed in the oncoming westbound traffic lane past traffic waiting in line in the eastbound lane until the bus was able to finally merge back into the correct line of eastbound traffic.[1] Testimony of Transportation Director, Patrick Fluty.

12. The school bus being operated by Dreama Thompson on August 11, 2011, was equipped with four different camera heads, taking digital footage of four different areas as follows: the first camera focused directly on the students inside the bus; the second camera provided a view of Ms. Thompson's driver's side of the bus from the outside near her seat all the way back behind this side to traffic and pedestrians behind that side of the bus; the third camera focused on the front view of the bus aimed basically straight ahead; the fourth camera provided a view of the stair well and entry door of the bus. The cameras also picked up audio from sounds upon the bus, as well as incoming sounds from the bus's two-way radio system which allowed bus operators to communicate with each other, as well as with the Transportation Department in Wayne, WV.

13. David Thompson, Transportation Supervisor/Chief Mechanic, testified at the Level III Hearing. After the Department received the telephoned complaint about Grievant's driving at Kellogg Elementary on August 11, 2011, Supervisor Thompson obtained the hard drive from the camera system on the bus being operated by Dreama Thompson. Supervisor Thompson viewed the August 11, 2011, digital footage on said system that related to Grievant's operation of his school bus at Kellogg Elementary.

14. Respondent's Transportation Director, Patrick Fluty, contacted Grievant and met with him at the Transportation Department's offices on the morning of August 12,

[1] Grievant's school bus was at the light in the wrong lane of traffic facing him with no place to go. Level 1 Testimony of Transportation Director, Patrick Fluty.

2011. At said meeting Grievant admitted that he had indeed crossed the double yellow line and driven his school bus for, in his estimation, about half a city block, on the wrong side of the above city street known as Piedmont Road, before he merged the bus back into the correct lane of traffic.

15. Later in the same day, August 12, 2011, Director Fluty arranged for Grievant and himself to meet with County Superintendent Gary Adkins. Grievant again acknowledged that he had committed the cited driving violations and at the conclusion of this conference, Superintendent Adkins suspended Grievant, without pay, until the next regular meeting of the School Board, Respondent.

16. Footage from the hard drive from the camera system on the bus being operated by Dreama Thompson, was introduced by Respondent's counsel into evidence as Respondent's Exhibit No.11. During the Level III hearing, the ALJ and the parties viewed the digital footage from the hard drive of the camera system of Dreama Thompson's bus as recorded on August 11, 2011.[2]

17. The digital footage establishes that Dreama Thompson loaded her elementary students at Kellogg Elementary and began pulling out and merging into eastbound traffic on Piedmont Road at 2:43 p.m and that her bus continued in the eastbound lane of traffic until she turned her school bus left at the traffic light at the intersection of Piedmont Road and Spring Valley Drive at 2:46 p.m., indicating that she remained in the eastbound lane of traffic on Piedmont for approximately three minutes

[2] Supervisor Thompson testified that the single camera located on Grievant's bus on August 11, 2011, was a camera that provided only a backward view from the front of the bus of the passenger seats in the interior of Grievant's bus.

from the time she pulled her bus out of Kellogg Elementary to the moment she reached the above traffic light.

18. The digital footage from Ms. Thompson's bus clearly establishes that Grievant's bus was located behind Ms. Thompson's bus in the waiting line of eastbound traffic and that Grievant pulled his bus out and around Ms. Thompson's bus, crossed over the double yellow line in the middle of Piedmont Road and proceeded about one-half a city block on the wrong side of the street before merging back into the correct eastbound lane of traffic not far from the above referenced intersection's traffic light. The digital footage also revealed that at the time Grievant was attempting to pull his bus out around Ms. Thompson's bus, vehicles were traveling through in the westbound lane of Piedmont Road.

19. The audio portion of the footage from Ms. Thompson's school bus revealed that on August 11, 2011, Grievant attempted to persuade school bus operator Thompson to pull her bus out across the double yellow line and go around the waiting eastbound line of traffic, but Ms. Thompson refused to do so.

20. Immediately thereafter, Grievant informed Ms. Thompson that he was taking his bus around. Ms. Thompson cautioned him as follows: "I wouldn't do that Brad." Grievant ignored bus operator Thompson's advice and went around her bus and across the double yellow line.

21. Grievant's bus was loaded with elementary age students.

22. Prior to the instant 2011-2012 school year incident described in the foregoing paragraphs, Grievant had been disciplined for several other incidents in preceding years. On one instance Grievant struck a sign while passing another bus. Grievant was suspended when a student fell on his bus because the student stood up while Grievant

was putting his bus in motion. Grievant has also been reprimanded for speeding, talking on a cell phone and eating while driving. Grievant did not challenge any of these incidents and testified that he was not aware of his options.

23. Transportation Director Fluty's predecessor, set up a plan of assistance for Grievant. Director Patrick Fluty, upon his arrival in 2009, elected not to enforce and carry out the corrective action providing Grievant with a fresh start and an opportunity to prove himself with a new Director. Thereafter, Grievant committed a number of school bus driving violations. Director Fluty has issued Grievant two separate letters of reprimand. Respondent has suspended Grievant's employment without pay for three days and Director Fluty did eventually place Grievant on a plan of improvement.

24. The first letter of reprimand that Director Fluty issued Grievant was issued in September of 2009, when the Grievant, while waiting the afternoon school bus line with elementary and middle school students aboard, at the loading area at Vinson Middle School, attempted to jump the waiting school bus line and go around the buses in front of his bus by pulling his bus onto the sidewalk and grass, but instead, the Grievant was foiled in his attempt to do so, when his school bus struck and scraped the school's traffic sign. Grievant admitted to Director Fluty (and also during his Level III testimony concerning the present grievance) that he had erased the portion of his bus's camera's footage of the incident at Vinson Middle School. *See* R. Ex. 5. Grievant was warned by Director Fluty that failure to conform to safe operating procedures and policies could lead to Grievant being placed on a plan of improvement or termination of employment.

25. Grievant received a three-day suspension, without pay, from Respondent on May 24, 2010, for pulling his bus out before a student passenger was properly seated,

causing the student to fall and strike his head against a bus window, breaking the glass and causing the student to incur bodily injury. R. Ex. 6.

26. Transportation Director Fluty has received several complaints about Grievant as a bus operator, from various school principals, assistant principals, parents and students, as well as persons who have no direct association with the county school system. Director Fluty receives more complaints regarding Grievant than any other bus operator under his supervision. *See* Director Fluty testimony.

27. Grievant acknowledged at the Level III hearing that no emergency existed on August 11, 2011, when he pulled his school bus out and across the double yellow line on Piedmont Road.

28. Grievant provided surveillance tape of his former fellow bus drivers that Grievant and his wife and children had taken after the Grievant's suspension imposed by Respondent's Superintendent on August 12, 2012. The parties and the ALJ viewed a copy of the material during the Level III hearing. The various surveillance sequences revealed minor infractions of bus drivers such as smoking near or on empty school buses, eating on an empty school bus, possibly exceeding the speed limit by five miles per hour, and other alleged infraction of W. Va. Department of Education safety policy.

29. Grievant called upon Bonnie Newsome, a bus operator employed by Respondent, to testify. Ms. Newsome testified via telephone at the Level III hearing. Bus operator Newsome stated that Transportation Supervisor Mark Queen had never told her that she could not play gospel music on her bus; he had at one time told her that if any of the students on her bus complained about her playing gospel music, that she should

discontinue playing the music. Ms. Newsome provided that none of her students ever complained about gospel music.

30. Edmond Stephens, a regularly employed bus operator for Respondent, and Grievant's brother was called as a witness at the Level III hearing. Edmond Stephens acknowledged that he had witnessed some minor bus operator violations concerning his fellow bus operators, such as seeing some of them smoking and eating on empty buses, etc. However, he further acknowledged he had never reported these violations. Edmond Stephens did not witness any serious driving violations committed by fellow bus operators. Bus operator Stephens provided he would certainly have reported the same to the Transportation Department's administrators.

31. Respondent cited that a number of facts and events factored into the ultimate decision to terminate Grievant from employment. Specifically, School Superintendent Akins communicated to Grievant that:

> . . . I will base my recommendation to the Board of your termination as an employee upon what I perceived to be your violations of W. Va. Code § 18A-2-8 with regard to your actions as an employee. I will specifically base my recommendation to the Wayne County Board of Education of your termination as an employee of the Wayne County Board of Education, upon the following:
>
> 1) Eyewitness and video and audio recordings, as well as your own admissions to me, that on August 11, 2011, after picking up your student passengers from Kellogg Elementary after the dismissal of school, and while waiting in a departing line of traffic at said school, you improperly and illegally pulled your bus out of the waiting line of traffic and eventually into the opposing lane of the public road and traveled in this matter past all waiting vehicles until you were forced to stop your bus at a red traffic light where you had no choice but to remain in this oncoming wrong lane until the operators of other vehicles allowed you to enter a proper lane on the road. You made this improper and highly dangerous move even after you were cautioned and

warned not to do so by a fellow school bus operator in the bus just in front of you in the original waiting line of traffic. Your actions and the conversation with your fellow bus driver were taped and recorded. There is no question that your actions during the above incident were extremely reckless and seriously endangered the health and possibly even the lives of the passengers on your bus as well as others.

2) The fact that you received a letter of reprimand for a quite similar incident to the above incident, that occurred on September 14, 2009, after the conclusion of the school day at Vinson Middle School, when you attempted to improperly move your school bus (containing student passengers) across the grass and over the sidewalk to attempt to get ahead of two school buses waiting in line ahead of your school bus. In this attempt, you scraped a school traffic sign and then had to wait on the grass and sidewalk until the two buses ahead of you could move out. Your actions on that day were also in reckless disregard of the welfare and safety of the students on your bus and other students and drivers in the area. The fact that you repeated this kind of action on August 11, 2011, indicates that you learned nothing from your prior improper actions.

3) The fact that you were suspended without pay for five days, for pulling out before a student could be seated on your bus in an incident that occurred on your bus on May 24, 2010, causing the student to fall and strike his head against a window and suffer substantial injury.

4) The fact that you received a letter of reprimand from the Wayne County Board of Education's Transportation Department under date of March 22, 2011, for several violations of W. Va. Department of Education's state policy 4336, such as various occasions where you were exceeding speed limits, eating food and talking on a cell phone, while operating your school bus.

5) The fact that you have been the subject of various complaints from administrators at various schools for your failure to follow rules and procedures, such as notifying administrators of any changes in your regular bus schedule, properly dropping students at the correct stops, and allowing students upon your bus who are entitled to be transported, etc.

6) The fact that you have been the subject of various complaints from parents and students alike with regard to incidents involving these students and parents.

> 7) The fact that you have already been the subject of one plan of assistance that was implemented on August 27, 2010, for not following State Policy 4336 safety rules and not following the instruction of your supervisors.
>
> It is my opinion that your improper actions on August 11, 2011 is enough to substantiate my recommendation for termination of your employment. The fact that you have committed serious errors in the part with regard to your employment as a bus operator and have been given opportunity to correct those errors, only to continue your pattern of recklessness on the first day of school of the present school year, leaves me with no alternative but to recommend termination of your employment. The safety of students and staff and parents and other citizens of the county is of utmost importance to me as Superintendent and your actions of August 11, 2011 are inexcusable, given the fact that you have been given various opportunities to correct and learn from previous acts of recklessness and safety violations.

September 6, 2011 letter, R. Ex. 2.

32. A special meeting was called by Respondent on September 19, 2011, and a full hearing was held by Respondent, resulting in the Respondent's Board members voting unanimously to terminate Grievant's employment.

Discussion

As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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.*

WEST VIRGINIA CODE §18A-2-8 states, in part as follows:

> (a) Notwithstanding any other provisions of law, 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 contendere to a felony charge. . . .

W. VA. CODE § 18A-2-8(a). Dismissal of an employee under WEST VIRGINIA CODE section 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. Bd. 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.,* 223 W. Va. 431, 675 S.E.2d 907 (2009).

It is not necessarily clear which of the listed statutory causes Respondent believed most readily applied to Grievant's behavior. Statutory causes which readily seem applicable are willful neglect of duty, unsatisfactory performance and insubordination. "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).

"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.[3] *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). 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).

Insubordination "includes, and perhaps requires, a willful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . .[by] an administrative superior." *Butts v. Higher Educ. Interim Governing Bd.*, 569 S.E.2d 456 (W. Va. 2002) (per curiam). *Williamson v. Lincoln Co. Bd. of Educ.*, Docket No. 05-22-089 (June 30, 2005). Insubordination involves the "willful failure or refusal to obey reasonable orders of a

[3]"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).

superior entitled to give such order." *Riddle, supra; Williamson, supra.* In order to establish insubordination, an employer must demonstrate 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 Co. Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995); *Williamson, supra*.

Relevant bus camera footage and even Grievant's own testimony establish that Grievant knowingly and intentionally committed the described road violations. Grievant does not dispute that he committed the acts of misconduct alleged. Grievant violated clear and unambiguous municipal and state law, as well as W. Va. Department of Education safety policy. Grievant endangered the safety of his passengers and the general public. Grievant performed a critical element of his duties in an unsatisfactory manner. Grievant relies heavily on the contention that other bus operators violate laws all the time. The undersigned is aware that Grievant avers selective enforcement.[4] In review of the instant facts and circumstances of events, the undersigned will be mindful of this purported contention/defense.

Respondent put forth that the instant event was the tipping point in a series of driving violations committed by Grievant. Respondent denies the allegation of discrimination, grounded in religious beliefs or any other impermissible rationale. Respondent highlights Grievant's history of disciplinary actions.

[4] Grievant believes that he is singled out for comparatively harsher treatment than co-workers, who violate applicable codes of employee conduct. Grievant purports, as a by-product of his strong opinions and religious views, he has been harassed, reprimanded and ultimately terminated for actions that he claims have also been committed by his former fellow bus operators, without punishment.

Grievant maintains that Respondent has been overly critical of any infraction of the rules by Grievant, no matter how trivial.[5] Grievant alleged he was singled out and not treated the same as other employees, which amounts to a claim of discrimination and favoritism. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). Favoritism is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). In order to establish a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

[5] For an employee to prevail on a claim of disparate treatment [in discipline], he must establish that there is no rational basis for distinguishing specific penalties for the same or substantially similar misconduct. The misconduct brought into question must be similar or more serious than that with which the grievant is charged. *Clark v. Dept. of Navy,* 6 MSPB 24 (1981). The grievant must also show that the other employee's disciplinary record is similar to his own. *Clancy v. Dept. of Navy*, 6 MSPB 173 (1981). Finally, the grievant must establish that his position is similar to that of the other employee to whom he is compared with respect to the trust and responsibility expected of his position. *Rohn v. Dept. of Army*, 30 MSPR 157 (1986); *McVicker v. Kanawha County Bd. of Educ.*, Docket No. 95-20-339 (Feb. 9, 1996); *Olson v. Kanawha County Bd. of Educ.*, Docket No. 02-20-380 (May 30, 2003).

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant testified that he believes that his disparative treatment was fueled by his supervisor's disapproval of his religious fervor.[6] Grievant contends that the seminal act that led to the genesis of his alleged discrimination was a conflict that occurred between Grievant and Transportation Department Supervisor Mark Queen in 2009. Grievant avers that Supervisor Queen informed Grievant that he could not play gospel music[7] on his school bus and that in response, Grievant informed Supervisor Queen that Supervisor Queen did not understand the difference between church and state activities and that it was none of his business if Grievant played gospel music on his bus and that Supervisor Queen should mind his own business and, "keep his mouth shut."

Grievant stated repeatedly that other bus operators, in past school years, had crossed the double yellow line on the two way street in front of Kellogg Elementary in the afternoons after school and traveled on the wrong side of the street.[8] However, Grievant

---

[6] Grievant highlights that he clashed with his supervisors over listening to gospel music and his quotations from the Bible. Further, Respondent was aware that Grievant was a trustee of a predominantly African-American Christian church in the area.

[7] In an attempt to corroborate this claim, Grievant called his fellow bus driver, Bonnie Newsome, as a witness. However, in her testimony, Bonnie Newsome testified that she too sometimes played gospel music on her bus, but that at no time did Supervisor Mark Queen order her to stop playing such music on her bus. Instead, she stated that Supervisor Queen merely told her that if any of her students complained about gospel music being played on her bus, then she should not continue playing such music. Ms. Newsome said that she never received any such complaints, but that she did not regularly play much gospel music anyway, because she wanted to concentrate on driving the narrow two lane road of her bus route.

[8] Grievant testified that other bus operators had crossed this same double line at this same location on a routine basis under these same circumstances.

produced no witnesses or evidence to corroborate such a claim. Grievant did offer a video tape that he and his wife and children had made of some of Grievant's fellow bus operators, after the Grievant had been suspended on August 12, 2011. This tape revealed minor violations by some of his fellow bus operators, such as eating or drinking or smoking on a bus while each were empty of students. Grievant attempted to show that some bus operators were exceeding speed limits by five miles per hour, the surveillance tape was not conclusive. Grievant's allegation that a bus operators had failed to fully stop his empty bus at a railroad crossing was incorrect when viewed at the Level III hearing by the parties and the ALJ. Respondent has a duty to educate bus drivers regarding rules of the road and to responsibly govern its employees' conduct. Further, Respondent has a duty to reasonably enforce applicable rules and regulations applicable to employee codes of conduct. However, nothing on Grievant's surveillance tape, or testimony provided, established that Respondent was aware of a serious driving error by a school bus operator.

The various surveillance sequences revealed minor infractions of bus drivers such as; smoking near or on empty school buses, eating on an empty school bus, possibly exceeding the speed limit by five miles per hour, etc. What Grievant's footage does not demonstrate is that Respondent was aware of the events. Further, what is not of record is proof that Respondent failed to take appropriate corrective action after being made aware of misconduct by bus operators.[9] The disciplinary authority of Respondent is not a weapon of convenience for Grievant to wield about as a sword against his former co-workers or a shield for Grievant to harbor his inappropriate conduct.

[9] Reportedly a viewable copy of this surveillance tape was not provided to Respondent's counsel until the day before the Level III hearing.

Nothing on Grievant's surveillance tape indicated that any of those drivers had committed as serious a driving error as Grievant committed on August 11, 2011. Nor did he establish the driving or disciplinary history of the depicted bus operators. Grievant has not established that similarly-situated employees are treated more favorably than he in like situations. The undersigned is not persuaded Grievant has been singled out for trivial infractions of applicable employee codes of conduct, e.g., W. Va. Department of Education Safety Policies. Grievant provided no persuasive testimony, or other evidence, other than his belief, that Supervisor personnel conspired to sanction him for mundane behavior. Respondent established just cause for administering disciplinary actions with regard to Grievant. Grievant has not established unlawful discrimination or favoritism.

Grievant had a history of committing school bus driving violations and had been given opportunity to correct his behavior. Transportation Director Pat Fluty testified that he has received numerous complaints from school principals, assistant principals, parents, students and even persons not directly associated with the county school system regarding driving violations committed by Grievant. Director Fluty stated that during the period of time that he has served as Transportation Director, he has received far more complaints regarding Grievant than any other of the 85 regularly employed bus operators. Grievant received a letter of reprimand for an incident that occurred at Vinson Middle School on September 9, 2009, when Grievant, with students aboard his bus, attempted to jump the waiting school bus line, and drive his school bus on the sidewalk and grass by the bus loading area and pass the waiting school buses in front of his bus, but ultimately scraped his bus into one of the school's traffic signs. Grievant erased his school bus camera's video coverage of this incident. Grievant has also been the recipient of a three-day

suspension by the Wayne County Board of Education in May of 2010, for pulling his bus out before one of his students could be seated, resulting in the student falling, and breaking a bus window with his head. These are not trivial events.

Several discrepancies exist in Grievant's testimony at Level III; however, it is noted with interest that Grievant claimed that he did not object or file grievances on any of the enumerated disciplinary actions or the implementation of the improvement plan because he was not familiar with the grievance system and did not know he could file a grievance over any of these actions. On cross-examination, Grievant admitted that he had filed a grievance back in 2009 on another matter, well before he had received any of the above disciplinary actions. He also acknowledged that he had legal counsel at the time he received the above-referenced three-day suspension. Further, Superintendent, Gary L. Adkins, May 25, 2010, letter R. Ex. 6, clearly informed Grievant that he had the opportunity, within five days of receiving his suspension letter, to appeal. It is improper for Grievant to now attack the merits of the previous disciplinary actions.[10]

Grievant acknowledged at the Level III hearing that no emergency existed on August 11, 2011, when he pulled his school bus out and across the double yellow line on Piedmont Road with what he described as "80 to 85 screaming kids at my back" inside his

[10] As most recently noted in *Taylor v. Doddridge County Board of Education*, Docket No. 06-09-451 (Mar. 26, 2007), when an employee does not grieve prior discipline, the merits of that action cannot be challenged in a later, unrelated grievance, and the substance of the allegations must be presumed to be true. *See Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT- 256 (Oct. 27, 1997); *Jones v. W. Va. Dept. of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Stamper v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-144 (Mar. 20, 1996); *Womack v. Dept. of Admin.*, Docket No. 93-ADMN-430 (Mar. 30, 1994); *Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994).

bus. Grievant stated that the reason he pulled out was because it was the first day of school and the eastbound lane of traffic ahead of him was stalled because these vehicles ahead of his bus were waiting to turn into the parents' access road to Kellogg Elementary to pick up their children. Grievant claimed that he was running behind on his bus schedule and that by crossing the double yellow line and driving a half a block in the lane for oncoming westbound traffic, he was able to save "five to eight minutes of time." However the digital footage from the camera heads on the bus of Dreama Thompson's school bus indicate that the students had boarded her bus in normal amount of time and that traffic moved along normally in the eastbound lane and that none of the vehicles waiting ahead of her bus in the eastbound lane turned into the parents' access road to Kellogg Elementary. Ms Thompson's bus in fact went from the point where her bus merged into the eastbound lane of Piedmont Road from the Kellogg loading area, on down and then left at the traffic light at the intersection of Piedmont Road and Spring Valley Road in three minutes and had the Grievant's bus remained behind Ms. Thompson's bus, Grievant's bus would have only been in this same line of traffic for three minutes and then would have proceeded on down to nearby Vinson Middle School in less than a minute. Grievant did not demonstrate persuasive justification for his misconduct to members of the Wayne County School Board or to the undersigned Administrative Law Judge.

Respondents had discretionary options in the circumstances of this case. Nevertheless, Respondent elected to terminate Grievant's employment. Grievant promulgates that the penalty imposed is too harsh for an action routinely performed by other bus operators. "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). It is not established that other bus operators routinely perform the illegal maneuver executed by Grievant. Further, Respondent highlights cumulative effect of multiple disciplinary actions, Grievant’s failure to correct his conduct and the overall safety of students and the general public.

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).

Given the considerable deference afforded to employers in disciplinary situations, the undersigned does not find sufficient justification to rule that the discipline imposed was excessive. 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); *Meadows, supra.* Grievant has not demonstrated that the penalty imposed was clearly excessive.

In summary, Grievant has a documented disciplinary history. Grievant's past work record and the circumstances certainly do not favor mitigation. Grievant chose to drive his school bus loaded with elementary school children across the double yellow line of a busy city street and drive a half block in the oncoming traffic lane, in conflict with municipal and state law, as well as W. Va. Department of Education safety policy. In defense of his actions, Grievant relies heavily on the contention that other bus operators violate laws all the time. This fact, true or not, does not negate the malfeasance of Grievant. In accordance with the evidence presented, the undersigned ALJ, as the trier of fact, is not persuaded that Respondent was unlawfully discriminatory with regard to Grievant. Respondent reasonably determined Grievant's latest act of misconduct was the tipping point, last straw, and chose to terminate Grievant's employment. It is not established that Respondent's disciplinary action was motivated by unlawful factors. Nor is it established that Grievant is being arbitrarily or capriciously punished more stringently than a similarly situated employee. Respondent proved the reason for the termination of Grievant's employment by a preponderance of the evidence.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. 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).

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 contendere* to a felony charge." 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.*, 223 W.Va. 431, 675 S.E.2d 907(2009).

3. Respondent established by a preponderance of the evidence that, in the circumstances of this case, Grievant's misconduct constituted a disciplinary offense.

4. In order to establish a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

5. Grievant did not prove he was the victim of discrimination or favoritism. Respondent terminated Grievant's employment for established deeds of misconduct.

6. Respondent had discretionary options in the circumstances of this case. Considerable deference is afforded to employers in disciplinary situations. An 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).

7. Respondent demonstrated Grievant willfully neglected and repeatedly failed to perform the responsibilities of his position satisfactorily.

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: August 10, 2012

Landon R. Brown
Administrative Law Judge