THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

REBECCA HALE,
Grievant,

v. **DOCKET NO. 2012-1238-LewED**

LEWIS COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed by Grievant, Rebecca Hale, at level three of the grievance procedure, on May 2, 2012, contesting the termination of her employment by the Lewis County Board of Education. The statement of grievance reads:

> Respondent terminated Grievant. Grievant asserts that (a) termination was to[o] severe penalty, (b) Grievant is the victim of disparate treatment, and (c) Grievant was not evaluated and given the opportunity to improve prior to termination. Grievant asserts that Respondent's action was arbitrary and capricious and violated W. Va. Code § § 18A-2-8, 18A-2-12a, & 6C-2-2.

The relief sought by Grievant is, "reinstatement with compensation for all lost wages and all lost benefits, pecuniary and nonpecuniary. Grievant also seeks removal of references to her termination [from] her file."

A level three hearing was held before the undersigned Administrative Law Judge on September 14, 2012, 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 Denise M. Spatafore, Esquire, Dinsmore

& Shohl, LLP. This matter became mature for decision on receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on October 25, 2012.

Synopsis

Grievant was terminated from her employment as a Bus Operator after she exited her bus to use the restroom, leaving her bus running and unattended while kindergarten and grade school children were boarding the bus at an elementary school. Respondent demonstrated that Grievant willfully neglected her duty.

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

Findings of Fact

1. Grievant was employed by the Lewis County Board of Education ("LBOE") as a Bus Operator. Prior to her dismissal, she had been employed by LBOE since 2004 as a full-time Bus Operator, and was employed as a substitute for three years before that.

2. By letter dated April 18, 2012, Grievant was notified by LBOE Superintendent Dr. Joseph L. Mace, that he would be recommending to the Board of Education that she be dismissed from her employment. The letter stated that this recommendation was the result of an incident on April 10, 2012, "when you left your bus, loaded with unsupervised elementary students and with the engine running, to enter Jane Lew Elementary School to use the restroom. We also discussed [on April 16] the allegation that you made an obscene gesture to a teacher in the building that same day. This behavior constitutes serious violations of both State Transportation Policy 4336 and the Employee Code of Conduct. Additionally, there have been complaints, both recently and in the past,

regarding your unsafe driving, both on school grounds and on public roads." LBOE accepted the Superintendent's recommendation, terminating Grievant's employment in April 2012.

3. On the afternoon of April 10, 2012, Grievant drove her bus onto the school grounds at Jane Lew Elementary School and stopped her bus to allow students to board at the first boarding location at the school. Most of the students boarding the bus were in the third or fourth grade. After these students finished boarding the bus, Grievant drove her bus to the next boarding location at the school, stopped, and exited the bus to use the restroom. Grievant left the students on the bus unattended by an adult, and left the key in the ignition with the bus running, while students mainly ranging in age from kindergarten through second grade boarded the bus. A fourth grade student was asked by Grievant to monitor the other students while Grievant was gone. Teresa Childers, Principal at Jane Lew Elementary School, became aware that Grievant had left her bus and it was running while students were boarding, and she walked to the bus and boarded it to monitor the students until Grievant returned.

4. Grievant told Kimberly Turner, a kindergarten Aide who was on bus duty at the time and was standing at the door as Grievant went inside, that she was going to the restroom. Grievant did not ask any adult to watch the students on the bus while she was gone, nor did she attempt to contact anyone for assistance.[1]

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[1] Grievant testified at the level three hearing that she asked Ms. Turner to watch the children on the bus, but stated on cross-examination that she guessed it was Ms. Turner that she asked, and that maybe Ms. Turner did not hear her. Ms. Turner testified that Grievant did not ask her to watch the children on the bus. Grievant told Superintendent Mace at her pre-termination meeting that she did not ask anyone to watch the bus. When Grievant testified at the hearing before the Board of Education, after Ms. Turner's

5. Grievant has diabetes and must frequently use the restroom. On April 10, 2012, her need to use the restroom when she arrived at the school was urgent. In order to turn the bus engine off, she would have needed to go to the back of the bus and pushed a button before exiting the bus. Grievant did walk from the bus into the school to the restroom.

6. Grievant knew she should not exit the bus, and leave it unattended and running with children on board, but in her own words, "common sense went out the window that day" because of her need to use the restroom immediately.

7. State Department of Education Policy 4336 provides at Section 13.7 that, "[t]he school bus operator shall not leave the bus when it is running unless the bus is equipped with a lift . . . and the driver is assisting the loading or unloading of a student with the lift." State Department of Education Policy 4336 provides at Section 13.8: "[w]hen the school bus operator leaves the bus, the keys shall be in possession of the operator and the emergency brake engaged. . .."

8. Grievant passed Stephanie Stout, a teacher at Jane Lew Elementary School, on her way to the restroom on April 10, 2012. Ms. Stout observed Grievant place her hand along the side of her face and extend her middle finger as she passed her in the hall.

9. During the 2011-2012 school year Principal Childers spoke with Grievant and Grievant's supervisor about Grievant easing her bus toward the crosswalk at Jane Lew Elementary School while children and staff were still in the crosswalk, rather than

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testimony, she said she had asked someone named Ashley to watch the children on the bus while she went to the restroom. Grievant testified at level three that she thought Ms. Turner's name was Ashley.

remaining at the stop sign until the crosswalk was cleared. This behavior was a concern for several teachers and staff at the school.[2]

10. In May 2007, Grievant was suspended for 10 days without pay for two acts of moving the bus with a parent in the stairwell, and attempting to close the door of the bus on a parent.

11. In May 2006, Grievant was suspended for 10 days without pay after she was issued a warning ticket by the Lewis County Sheriff's Office for speeding while driving the school bus.

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 on one or more of the causes listed in WEST VIRGINIA CODE § 18A-2-8, and must be

[2] Grievant testified that she approached her supervisor about the personnel at Jane Lew Elementary School letting the children go across the crosswalk when she had already started moving her bus toward the crosswalk, but had not yet reached the stop sign, and that the children were going to be waiting for a while, so there was no rush to get them across. Grievant's attitude in this regard is somewhat alarming.

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 contendere to a felony charge." In the instant case, Respondent dismissed Grievant for willful neglect of duty.

"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,

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[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).

1996)." *Geho v. Marshall County Bd. of Educ.*, Docket No. 2008-1395-MarED (Oct. 30, 2008).

Grievant argued this situation did not constitute willful neglect of duty, rather she was entitled to an opportunity to improve her performance. Respondent argued that this was not a situation where an improvement plan was called for in that, Grievant knew what was required of her, but chose not to do what was required of her.

WEST VIRGINIA CODE section 18A-2-8(b) provides that "[a] charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article. The charges shall be stated in writing served upon the employee within two days of presentation of the charges to the board." W. VA. CODE § 18A-2-8(b). "[T]he factor which distinguishes willful neglect of duty and insubordination from unsatisfactory performance is that the employee knows [his] responsibilities, and is competent to perform them, but elects not to complete them. When an employee's performance is unacceptable because [he] does not know the standard to be met, or what is required to meet the standards, and [his] behavior can be corrected, the behavior is unsatisfactory performance. *Bierer v. Jefferson County Bd. of Educ.*, Docket No. 01-19-595 (May 17, 2002)." *Waggoner v. Cabell County Bd. of Educ.,* Docket No. 2008-1570-CabED (Oct. 31, 2008).

Grievant had been employed by LBOE for many years as a Bus Operator. While Grievant denied that she was aware of the provisions of State Department of Education Policy 4336 which specifically prohibit leaving the school bus unattended and running, she testified that she would not normally leave the bus running with children on it, and that she knew it was a safety issue to do so, but that her need to use the restroom was urgent, and

"common sense went out the window that day." It is clear from Grievant's own testimony that she knew what was required of her, but made a conscious choice to disregard the safety of the children so as to avoid the possibility of personal embarassment. Grievant's behavior in this instance is not correctable. Respondent demonstrated that Grievant engaged in the conduct with which she was charged, and that the conduct constituted wilful neglect of duty. Grievant knew her actions were wrong, but showed complete disregard for the safety of the students in her charge.

As to the allegation that Grievant made an obscene gesture toward Ms. Stout, Ms. Stout credibly testified that she had seen the gesture, while Grievant denied any such intent. The undersigned cannot conclude with any degree of certainty from this that Grievant intended by her action to make an obscene gesture toward Ms. Stout. This charge, however, is minor, and does not affect the more serious finding of wilful neglect of duty.

Grievant also argued that the punishment imposed was clearly excessive. "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[4] 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.*[5]

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[4] Grievant's counsel objected during the hearing to any evidence being placed in the record about Grievant's past work record on the grounds that the dismissal letter did not reference specific incidents of past misconduct. These objections were overruled. It is quite clear that when a Grievant is seeking mitigation, the Grievant's past indiscretions are relevant to this determination. Grievant's counsel cited no case law to the contrary in his proposed findings of fact and conclusions of law.

[5] Grievant also seemed to argue that one other bus operator was not punished for leaving his bus running when he went into the school. While Grievant testified that this had occurred, other witnesses testified that the bus operator in question had not left his bus running, and that there were no students on board at the time. Further, there is no indication that this allegation was ever brought to the attention of Grievant's supervisor or any other person in authority at LBOE. Accordingly, this allegation will not be further considered.

Grievant had two prior 10-day suspensions for improper behavior which were considered by Respondent in making the decision to terminate Grievant. Grievant's conduct in this instance was inexcusable. Though Grievant argued that special circumstances existed here, the undersigned does not find that Grievant's medical condition excuses her behavior. Grievant knew of her condition and what effects to expect, yet seemed unprepared to deal with the situation at hand. While it may have been embarrassing to ask for assistance, this did not outweigh the safety of the students. It was Grievant's duty to make sure the children were not left unsupervised on her bus while it was running, regardless of the personal embarrassment to her. Grievant did not demonstrate that the punishment imposed was clearly excessive.[6]

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in WEST VIRGINIA CODE § 18A-2-8, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd.*

[6] Respondent presented evidence to support a finding that Grievant had a history of unsafe driving, but was unable to demonstrate that all the alleged incidents were brought to Grievant's attention. The undersigned finds that the incident which is the subject of this grievance is so serious that these other allegations need not be addressed.

of Educ., Docket No. 91-20-005 (Apr. 16, 1991). *See Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975).

3. WEST VIRGINIA CODE § 18A-2-8 provides that "[A] board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge."

4. "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. *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)(footnote omitted).

5. Respondent demonstrated that Grievant willfully neglected her duty.

6. "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).

7. Grievant did not demonstrate that the penalty imposed was clearly excessive.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Acting Deputy Chief
Administrative Law Judge

Date: December 5, 2012