THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JOANNA L. COSTELLO,
Grievant,

v. **DOCKET NO. 2012-0622-MonED**

MONONGALIA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed by Grievant, Joanna L. Costello, at level three of the grievance procedure, on December 14, 2011, contesting her suspension and the subsequent termination of her employment by the Monongalia County Board of Education. The statement of grievance reads:

> Respondent suspended Grievant without pay and terminated her for failure to properly supervise children on her bus. Grievant denies the allegation of failure to properly supervise students, asserts that termination is too harsh a penalty for a long time employee both in and of itself and in comparison to the treatment of similarly situated employee, i.e. disparate treatment. (W. Va. Code § 6C-2-2). Grievant also alleges that she was entitled to have her deficiencies called to her attention by an evaluation and to be given an opportunity to improve prior to termination. (W. Va. Code §§ 18A-2-12a and 18A-2-8)[.]

The relief sought by Grievant is, "reinstatement, compensation for all lost wages and benefits, with interest, and removal from her record of any references to her suspension without pay and termination."

A level three hearing was held before the undersigned Administrative Law Judge on May 23, 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 June 26, 2012.

Synopsis

Grievant was terminated from her employment as an Aide when she completely ignored two male students on the special education bus to which she was assigned, allowing those students to engage in sexual acts with each other while riding on the bus on two consecutive days. Respondent demonstrated that Grievant willfully neglected her duty.

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

Findings of Fact

1. Grievant was employed by the Monongalia County Board of Education ("MBOE") as an Aide on a special education bus. Prior to her dismissal, she had been employed by MBOE since 1979.

2. Grievant is assigned to morning, mid-day, and afternoon bus runs. The mid-day bus run is approximately 20 to 25 minutes each way, transporting special education students from University High School to the Monongalia County Technical Education Center ("MTEC") and back for a work program. Grievant is assigned to the special education bus to monitor and assist these students as needs arise. Six students were

assigned to ride the bus on Grievant's mid-day MTEC run. On August 31 and September 1, 2011, four students were on this bus.[1]

3. On August 31 and September 1, 2011, two male students on the MTEC run special education bus to which Grievant was assigned, performed sexual acts on one another over a period of 10 to 15 minutes each day. On August 31, the boys were sitting seven seats from the front of the bus on opposite sides of the aisle, and on September 1, they were sitting eight seats from the front of the bus on opposite sides of the aisle. On September 1, the boys had gone to the very back of the bus, but were told by the bus operator, Karen Dalton, that they were too far back and they needed to move forward. Grievant did not engage the boys with regard to where they were sitting on either day. During the bus trip on August 31, one of the boys moved to the edge of his seat leaning across the aisle with his head in the other boys lap for some period of time on several occasions. Then this boy began moving across the aisle while the bus was moving, to sit in the seat with the other boy. His head would disappear from view again and again over an extended period of time, and when he reappeared, he would wipe his mouth with his hand. Then the two boys would change positions. On September 1, one of the boys moved from his seat to sit with the other boy, and the head of one boy would disappear from view again and again, and then he would sit up in the seat and the head of the other boy would disappear from view. At one or more points during the trip on both days, one

[1] Grievant testified there were five students on the bus, but the videotape from the bus, admitted into evidence at level three as Respondent's Exhibit Number 2, shows only four students.

of the boys stood or sat up on the seat with his butt toward the other boy for short periods of time while the bus was moving.

4. On August 31, Grievant was sitting in the second seat of the bus, to the right of the bus driver, and on September 1, Grievant was sitting in the first seat. In addition to the two boys who were engaging in sexual acts with one another, one female student was seated across the aisle from Grievant on both days, and one boy was seated on the drivers side of the bus in the fifth seat back on both days. On both days, Grievant talked to the bus driver during almost the entire trip, and she talked to the female student across the aisle from her occasionally. Grievant sat facing forward, turning around to observe what the students behind her on the bus were doing only one time, on August 31, 2011. On September 1, 2011, twenty minutes into the bus ride, Ms. Dalton asked the boys what they were doing. Only then did Grievant turn around to observe the activity behind her. Grievant then went back to see what the boys were doing, began yelling at them, and separated them immediately, while the bus was moving.

5. Grievant had been told by a teacher at University High School, Mrs. Kennedy, that the two boys who were engaging in sexual acts were no trouble, but that she needed to keep one of the female students on the bus segregated from the boys because she was "boy crazy." There was also a female student on the bus who tended to fall asleep, and Grievant was concerned that she would hit her head while she was sleeping.[2] After this

[2] Grievant testified that she sat across the aisle from this student to make sure she did not hit her head, and in front of the female student who was said to be "boy crazy," and that she had to watch these two students. With rare exception, Grievant did not watch the student seated across from her, and there is no female student sitting directly behind Grievant, nor is there any sign on the video of any other female student.

incident Grievant discovered that the two boys who had engaged in sexual acts on the bus had been caught in the same activity together in the shower at the Shell building prior to August 31.[3]

6. During the mid-day run on September 1, 2011, Grievant's cell phone rang and she answered it. She then talked on her phone for about two minutes, conducting personal business.

7. MBOE has in place a written description of school bus aide duties and responsibilities. That document states that "[c]ell phone use is only acceptable to contact parents or the transportation center." It also states "[i]t is your duty to monitor students while in transit." Grievant was aware of these requirements.

8. When she arrived at the school on September 1, 2011, Grievant reported what had occurred between the two boys to William Hendershot, Manager of Transportation.

9. Grievant continued to ride the bus on the mid-day run, as well as her regular morning and afternoon runs, until she was suspended, without pay, on November 2, 2011, for this incident.

10. After a hearing before the MBOE, Grievant was dismissed from her employment on December 12, 2011, for wilful neglect of duty in her failure to monitor the students on the bus on August 31 and September 1, 2011.

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[3] Grievant testified at the level three hearing that she had been assigned to this bus to assist a student who had specific medical needs, but that he was not riding the bus at this time. Respondent's witnesses disputed this. Grievant did not pursue in her written argument the assertion that she had no responsibility for monitoring the other students on the bus, and this argument is deemed abandoned.

11. The Bus Operator on August 31 and September 1, 2011, Ms. Dalton, was suspended without pay for two days for her failure to monitor the students on her bus. The record does not reflect the length of Ms. Dalton's employment, or whether Ms. Dalton had been disciplined before. However, the record does reflect that Ms. Dalton's primary responsibility was to drive the bus, and it was Grievant who had primary responsibility for monitoring the students, which was why she was assigned to the bus.

12. On May 19, 2010, Grievant was suspended for 20 days without pay for leaving a special needs student on the bus on completion of the bus run.

13. On July 26, 2007, Grievant was suspended for 15 days without pay for using an MBOE school bus to transact personal business and filing a false police report.

14. On March 21, 2006, Grievant received a written warning for using school property for personal use.

15. On December 19, 2008, a Bus Operator employed by MBOE received a written warning for telling a student on his bus to put his knife away and not bring it on the bus again, rather than taking the knife from the student and reporting the incident, thereby putting his passengers and other staff in danger. The record does not reflect whether there were any mitigating factors, the length of this person's employment, or whether he had been disciplined before.

16. On January 8, 2010, an MBOE Bus Operator received a written reprimand for releasing two students on her bus to a fireman to deliver to their homes during an emergency situation. The record does not reflect any mitigating circumstances, other than that it was quite late in the day when this occurred, after a three hour delay caused by

downed power lines, the length of this person's employment, or whether she had been disciplined before.

17. On April 28, 2011, a substitute Bus Operator for MBOE received a written reprimand and a suspension from substituting for a period of about three weeks, for raising his voice to students on his bus and making inappropriate, threatening remarks to them. The record does not reflect whether there were any mitigating factors, the length of this person's employment, or whether he had been disciplined before.

18. On March 2, 2012, an MBOE Bus Operator received a written reprimand for talking on a cell phone while driving the bus. The record does not reflect whether there were any mitigating factors, the length of this person's employment, or whether he had been disciplined before.

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

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.[4] *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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[4] "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. Grievant also asserted that she had done what she had been told to do by the teacher who told her to keep an eye on the two girls, and that the two boys were no trouble. Respondent argued that this was not a situation where an improvement plan was called for in that, Grievant knew what was required of her, she just chose not to monitor the students.

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 MBOE since 1979. She knew how to perform her duties, and what was expected of her. However, she sat facing forward talking to the bus operator and on her cell phone for almost the entire bus trip for two days, looking back to

check on the three boys on the bus only one time. Further, there were not two girls on the bus that Grievant needed to watch as she stated in her testimony, there was only one girl sitting across from Grievant, and Grievant paid very little attention to her. The “boy crazy” girl was not, in fact, sitting behind Grievant on these two days as Grievant testified. Grievant basically spent the entire bus trip not working, but enjoying a conversation. This meets the definition of willful neglect of duty. Grievant was not entitled to a performance improvement period.

Grievant also argued that the punishment imposed was clearly excessive in comparison to that imposed on other employees. “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.*

In addition,

> 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).
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> *McVicker v. Kanawha County Bd. of Educ.*, Docket No. 95-20-339 (Feb. 9, 1996).
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> [T]he burden is on the employer to come forward with a reason why a difference in treatment exists once the grievant identifies a disparity in the result for the same offense. *Drummer v. General Services Administration*, 22 MSPR 432 (1984). Only when the established misconduct is sufficiently egregious is the disparate treatment doctrine immaterial. In other words, if an employee's punishment is appropriate to the seriousness of the offense, an allegation of disparate treatment presents no basis for reversal. *Quander v. Dept. of Justice,* SF07528311002 (1984). An agency may impose valid sanctions that are different if its decision is based upon management's full consideration of all relevant factors. *Gilmore v. Dept. of Army*, 7 MSPB 155 (1981).
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> *McVicker, supra*.

Olson v. Kanawha County Bd. of Educ., Docket No. 02-20-380 (May 30, 2003).

Grievant pointed to the punishment imposed on Ms. Dalton, as well as the punishment imposed on the four Bus Operators whose punishment is detailed in the Findings of Fact set forth above. First, Grievant is not a Bus Operator, and her responsibility for monitoring the students on a special education bus is not the same as that of a Bus Operator. Second, Grievant has a lengthy disciplinary record, while the disciplinary records of these other Bus Operators were not placed in the record, nor was their length of employment. Grievant has not proven any disparate treatment in the punishment imposed. Further, the undersigned concludes that Grievant did not demonstrate that the punishment imposed was clearly excessive under the circumstances, given Grievant's prior disciplinary record and the complete failure of a long-term employee to monitor the students on the bus at all.

The following Conclusions of Law support the decision reached.

Conclusions of Law

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

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

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

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

8. Grievant did not demonstrate that the penalty imposed was clearly excessive given her prior disciplinary record, nor did she demonstrate disparate treatment in the penalties imposed on other employees.

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).

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BRENDA L. GOULD
Acting Deputy Chief
Administrative Law Judge

Date: July 31, 2012