THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

WYATT L. GRAHAM,
Grievant,

v. **Docket No. 2013-0014-WetED**

WETZEL COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Wyatt L. Graham, filed this grievance directly to level three on July 9, 2012, against his employer, Wetzel County Board of Education. He challenges a suspension of three days without pay. For relief, he requests "back pay for the three days of wages taken from me. Also, I would ask that matter within my personel [sic] file regarding this matter be stricken from my file. I would like a letter of apology issued from the WCS board and County Office published in the local paper. Also, I would like to be paid for three additional days to offset the imposed punishment." A level three hearing was conducted before the undersigned Administrative Law Judge on December 11, 2012, at the Grievance Board's Westover office location. Grievant appeared in person and by his representative, Owens Brown, West Virginia Education Association. Respondent appeared by its counsel, Richard S. Boothby, Bowles Rice, LLP. The matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on January 16, 2013.

Synopsis

Grievant is a bus operator employed by the Wetzel County Board of Education. He

was suspended for failing to complete a required check-in procedure implemented by Respondent. Grievant had previously been admonished for failing to complete this same bus check-in process. Respondent met its burden of proof in establishing that Grievant was insubordinate due to his failure to comply with a reasonable directive. Grievant failed to establish that mitigation of the punishment was appropriate. This grievance is denied.

The following findings of fact are based upon the record established at level three.

Findings of Fact

1. Grievant is employed as a bus operator by the Wetzel County Board of Education.

2. On April 19, 2012, Brian Jones, Director of Ancillary Services, issued a memo to all bus operators regarding the "End of Year Bus Check In" process. Mr. Jones is the Grievant's supervisor.

3. The end of year bus check in procedure was established to encourage the habit of bus operators to clean their buses at the end of the school year. In the event any bus operators neglected to turn in their buses after cleaning, mechanics would be responsible for cleaning the buses during the summer months.[1]

4. On May 1, 2012, Grievant's assigned bus, Bus #1, was taken out of service by order of Dave Moore, West Virginia Department of Education bus inspector, for multiple defects. Among those defects were repairs to the bus that were needed, in addition to the bus being presented for inspection without being cleaned.

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[1]West Virginia Department of Education Bus Transportation Policy requires bus operators clean their buses as part of their duties. 126 C.S.R. 92.

5. Bus #1 was returned to service by the bus inspector on the same day as the defects noted were corrected after necessary repairs were completed.

6. Grievant began driving Bus #21 at some point after May 1, 2012.

7. Mr. Jones made an appointment with Grievant to review the May 1, 2012, Bus #1 inspection report and to have Grievant correct the cleanliness issue noted on the report.

8. The appointment was scheduled for May 4, 2012, at 11:15 a.m. Grievant cancelled the meeting by leaving a message for Mr. Jones at 8:46 a.m. on the morning of May 4, 2012. The meeting was not rescheduled and Grievant continued to operate Bus #21 for a period of time up to the end of the school year.

9. Grievant drove Bus #21 into the bus garage on June 1, 2012, for the end-of-year check-in with Mr. Jones. Mr. Jones asked Grievant why he was not operating Bus #1 and bringing that bus in for the check-in process. Grievant responded by saying "I'll see you later," exited Bus #21 and walked out of the garage.

10. Mr. Jones inspected Bus #21 and found a number of problems that Grievant needed to correct before Bus #21 could be checked-in. Grievant did not check-in any bus for the 2012-2013 school year.

11. Mr. Jones reported Grievant's conduct to Superintendent Diane Watt.

12. On June 8, 2012, Superintendent Watt contacted Grievant to ask him why he had not completed the bus check-in procedure required of all drivers. Grievant responded that Mr. Jones had somehow refused to accept Bus #21. Superintendent Watt explained to Grievant that he would be permitted to check-in Bus #21, rather than Bus #1, but he still needed to complete this check-in. Grievant refused to check-in Bus #21.

13. On June 11, 2012, Superintendent Watt instructed Assistant Superintendent Jay Yeager to hand-deliver a suspension letter to Grievant.

14. On that same day, Mr. Yeager offered that, if Grievant would simply follow the written check-in procedure for Bus #21, the matter would be dropped. Grievant responded that his 200-day contract had ended on June 8, 2012, and that he would not be checking-in any buses after that date.

15. Grievant has previously been warned about his failure to comply with the bus check-in procedure. Several letters of reprimand have been issued to Grievant concerning the same type of misconduct.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant 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 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. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying determines the weight of the testimony." *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, the employer has not met its burden. *Id*.

The grounds upon which a Board may discipline any person in its employment are immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance substantiated by an employee performance evaluation or conviction on a felony charge. W. VA. CODE § 18A-2-8. The authority of the Board to discipline an employee must be based upon one or more of the causes listed in W. VA. CODE § 18A-2-8, and must be exercised reasonably, not arbitrarily and capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991).

Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002) (*per curiam*). *See Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts, supra*.

The record of this case demonstrates that Grievant was fully aware of the bus check-in requirement at the end of the school year. He refused to comply with the

requirement even after having been extended two additional chances to do so.[2] The facts of this case make it clear that Grievant's actions fall within the statutory grounds for disciplining school service personnel. Grievant refused to speak with or acknowledge his supervisor about completing his job duty. Grievant admitted to Superintendent Watt that he neither completed the bus check-in process nor had spoken to his supervisor about doing so. Even more perplexing is the undisputed record of this case that Grievant was twice offered the opportunity to correct the situation, but, again, refused to act. Respondent was able to prove by a preponderance of the evidence Grievant's conduct amounted to a willful refusal to comply with a direct written order. This is insubordination.

Grievant asserts that the punishment was unjust in his grievance form. The undersigned treats this assertion as a request for mitigation of the punishment. "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

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[2]"Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. *See Day v. Morgan Co. Health Dep't*, Docket No. 07-CHD-121 (Dec. 14, 2007).

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*.

The record of this case did establish that Grievant had not been suspended in the past; however, he received numerous counseling sessions and was clearly on notice that angry outbursts and questioning of work assignments would not be tolerated. The facts of this grievance did not demonstrate that the disciplinary measure was clearly disproportionate to the undisputed insubordination of the Grievant.

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. Insubordination is defined as the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors/So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). In order to establish insubordination, the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid. *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). *See Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Riddle v. Bd. of Directors/So. W. Va.Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989).

3. Respondent met its burden of proving Grievant's actions were insubordinate.

4. "[M]itigation 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).

5. Nothing in the record of this grievance established that the three-day suspension was so clearly disproportionate to the offense that it indicates an abuse of discretion.

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: February 15, 2013

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Ronald L. Reece
Administrative Law Judge