THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

SCOTT WALLS,
Grievant,

v. **DOCKET NO. 2013-1682-MonED**

MONONGALIA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed at level three of the grievance procedure by Grievant, Scott Walls, on April 4, 2013, against his employer, the Monongalia County Board of Education, contesting a two-day suspension without pay. The relief sought by Grievant is "(a) compensation for lost wages and benefits, including but not limited to restoration of seniority, & (b) removal of all references to the suspension from any file maintained by Respondent or its agents."

A hearing was held at level three before the undersigned Administrative Law Judge, on October 4, 2013, 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 November 6, 2013.

Synopsis

Grievant was suspended for two days without pay when he exited the bus to speak with a school principal about a disciplinary issue, and left the bus running with

unsupervised students on board. Grievant was aware he was not to leave the bus running with students on board who were not supervised if he exited the bus. Grievant's reasons for not turning the bus off before exiting were that it was cold outside and he needed to continue on his evening route as quickly as possible. Grievant's actions constitute wilful neglect of duty. Grievant did not demonstrate that the discipline imposed was clearly excessive or disproportionate to the offense.

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

Findings of Fact

1. Grievant has been employed by the Monongalia County Board of Education ("MBOE") for two years full time as a Bus Operator.

2. Sometime in late January 2013, Grievant was driving his evening bus route taking students home from Cheat Lake Elementary School, when a student on the bus presented a disciplinary issue. This same student had been a disciplinary problem for quite some time on the bus.

3. After attempting to correct the student's behavior without success, Grievant turned the bus around and returned to Cheat Lake Elementary School, where Principal Dennis Gallon met the bus. Grievant exited the bus to speak with Principal Gallon about the student, leaving the bus running while students were on the bus, with no supervision. Grievant stood on the sidewalk beside the bus talking to Principal Gallon for about a minute and a half.

4. 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."[1] 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. . .."

5. Grievant was aware that it was a violation of state policy for him to leave the bus running with students on board if he exited the bus. Grievant left the bus running because he was in a hurry to get back on his evening schedule, and because it was cold outside and he did not want the students to get cold.

6. By letter dated April 8, 2013, Grievant was notified that, at its March 26, 2013 meeting, MBOE had approved the Superintendent's recommendation that Grievant be suspended for two days without pay.

7. Other MBOE Bus Operators, including Bus Supervisor Darryl White, have left their buses running while they went into a convenience store, with no students on board, and were not disciplined for this. Other MBOE Bus Operators have exited their buses, leaving them running, while students were boarding, and have not been disciplined for this. The record does not reflect that those responsible for administering discipline were made aware of these instances.

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.*,

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[1] Grievant pointed to the fact that bus operators leave the bus running with students on board to operate a lift. Clearly, this is not something that is a policy violation.

Docket No. 89-41-232 (Dec. 14, 1989). A preponderance of the evidence is evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proven is more probable than not. *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in WEST VIRGINIA CODE § 18A-2-8, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991). *See Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975). WEST VIRGINIA CODE § 18A-2-8 provides that "[A] board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge."

Respondent argued that Grievant's conduct constituted 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.[2] *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).

Grievant admitted that he had been trained not to exit the bus while it was running with students unattended on the bus. Respondent demonstrated that Grievant's action was a serious safety violation. Respondent proved that Grievant knew what was required of him, but intentionally left the bus running with the goal of keeping the bus warm and ready to quickly depart. Grievant willfully neglected his duty. The only real issue in this case is whether the punishment imposed was clearly excessive or clearly disproportionate to the offense.

"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*

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[2] "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).

Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995)(citations omitted). The Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). "Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall not substitute her judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997)." *Meadows, supra.*

Grievant argues that the punishment imposed was clearly excessive because other MBOE Bus Operators, one of whom is now a supervisor, have on several occasions exited the bus to go into a convenience store, leaving the bus running and unattended in the parking lot, and have exited the bus to talk to other Bus Operators while students were

boarding, leaving the bus running, all with no consequence. While it would appear that these situations are indeed violations of state policy, and appear to present serious safety concerns, there was no evidence presented that those responsible for imposing discipline were made aware of these instances. Just because other Bus Operators do the same thing Grievant did, it does not make it right. Grievant has not demonstrated that a two-day suspension was clearly disproportionate to the offense or clearly excessive.

The following Conclusions of Law support the decision reached.

Conclusions of Law

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

2. WEST VIRGINIA CODE § 18A-2-8 provides that "[A] board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge." "Although reprimands are not specifically addressed in W. VA. CODE § 18A-2-8, the Grievance Board has previously recognized that lesser penalties can be imposed for the offenses listed in this statute. *See Wahl v. Mineral County Bd. of Educ.*, Docket No. 98-28-175 (Sept. 14, 1998); *See also Blankenship v. Mingo County Bd. of Educ.*, Docket No. 97-29-486 (Apr. 17, 1998)." *Showalter v. Marshall County Bd. of Educ.*, Docket No. 07-25-165 (May 28, 2008).

3. The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in WEST VIRGINIA CODE § 18A-2-8, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991). *See Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975).

4. "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 proved the charges against Grievant, and that Grievant's actions constituted willful neglect of 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. 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).

8. Grievant did not demonstrate that the penalty imposed was clearly excessive or disproportionate to the offense.

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).

BRENDA L. GOULD
Administrative Law Judge

Date: November 22, 2013