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BIRCH HARE

v.

DOCKET NO. 42-88-132

RANDOLPH COUNTY BOARD OF EDUCATION

DECISION

Grievant, Birch Hare, was first employed as a regular bus operator by the Randolph County Board of Education in 1980. Mr. Hare filed a level four grievance on July 5, 1988 after the board of education had voted to dismiss him from employment on June 27. The parties agreed to submit the matter for decision based upon the transcript of the hearing conducted by the board with supplemental testimony offered on August 17 and proposed findings of fact and conclusions of law submitted by September 20.

During the grievant's term of employment with the board of education he has been involved in four accidents while operating a school bus. Accident reports filed with the Department of

Motor Vehicles indicate that on May 17, 1982 the grievant drove off the road onto the berm. For an "unknown reason" the grievant failed to realign the vehicle to the pavement and struck a utility pole.¹ The accident occurred during the daylight with clear weather and dry roads. His vision was not obscured. Approximate damage to the bus was estimated to be \$4,000.00 and an additional \$2,000.00 to replace the electric pole and fencing. The grievant indicated on the school bus accident report that the accident could have been avoided.²

Sixty-two students were passengers on October 10, 1983 when the grievant hit a pickup truck in the left rear section when it stopped "rather quickly" to allow a third vehicle to make a left turn. The accident occurred during the daylight in clear weather with dry road conditions and unobscured vision.³

¹At the June 20 hearing the grievant stated that he was forced off the road by a car while the accident report states only that he had passed another vehicle traveling in the opposite direction and that the wheels were on the berm due to the narrowness of the road. (Exhibit 5d)

²This report offers two alternatives for the operator, "I could have avoided the accident" or "I could not have avoided the accident" with the appropriate choice to be indicated by an "X".

³The grievant's statement attached to the accident report indicates he saw the truck "sitting" there but did not know if it was stopped as the brake lights were not on.

Damage was estimated to be \$1,000.00 to the truck and \$350.00 to the bus. The grievant again indicated the accident could have been avoided. By letter dated October 20, 1983 Superintendent Charles Basil reprimanded the grievant for the two accidents both which were determined to have been his fault. The grievant was advised that another accident would possibly result in the suspension or termination of his employment as a bus operator. (Exhibit No. 6i)

On December 11, 1986 the grievant was cited for reckless driving when he ran a red light and collided with an automobile causing combined estimated damages of \$3,100.00. The seventeen students on board were unharmed; however, a lawsuit brought by the passengers of the car resulted in a \$25,000.00 settlement. (T.93) The grievant states that the last time he saw the light it was green. (T.91) A witness who would have allegedly corroborated the grievant's statement regarding the color of the light failed to appear at either the hearing before the board of education or at the level four hearing. On the school bus report the grievant indicated the accident could have been avoided and suggested a longer caution signal might prevent future accidents of this nature. As a result of this accident the grievant was suspended from his duties for five days, without

pay, and was warned that another avoidable accident would result in a recommendation that he be dismissed from employment. (Exhibit 6h)

On May 3, 1988 the grievant incurred approximately \$150.00 in damages to his bus when the windshield and a mirror were broken as a result of his driving into two extension ladders which were protruding over the roadway from a parked truck. The ladders and the rack upon which they were mounted were damaged at an estimated cost of \$460.00. Despite his acknowledged familiarity with the applicable regulations (T.111) the grievant did not stop for an accident investigation but proceeded to the bus garage where he secured another vehicle to complete his evening run. The grievant did not complete the accident report until May 6 when directed to do so by the Transportation Director.

Superintendent Billy Ray Dunn notified the grievant by letter dated May 24, 1988 of his intention to recommend dismissal on the basis of incompetency as established by his record of four preventable accidents. Following an evidentiary hearing held on June 20, the board of education approved the recommendation for dismissal on June 27.

The grievant argues that his evaluations have rated his performance as acceptable throughout his period of employment

and he has never been given a plan of improvement to indicate any deficiency as required by State Board of Education Policy 5300 (6)(a). The grievant contends that evaluation is of utmost importance in the dismissal of an employee for incompetence and that informal, verbal warnings do not meet the requirements of Policy 5300. Second, the grievant asserts that county policies relating to progressive discipline for accidents and moving violations while operating a school bus were not implemented until 1986-87 and cannot be applied to accidents occurring before that time.⁴

The controlling issue in this matter is whether or not the unsatisfactory actions of the grievant were correctable. If correctable, the actions should have been cited as unsatisfactory performance on the grievant's evaluations and he should

⁴The policy provides for suspension for one to three days without pay or termination after the first citation with the discipline to be applied according to the severity of the incident. A second citation results in suspension for three to five days without pay or termination and the third citation merits termination upon approval by the board. An addendum to the policy issued in January 1987 indicates that only serious citations, i.e., those involving other vehicles, pedestrians or students, would affect the bus operator's record. Examples of serious violations are hit and run accidents, failure to heed traffic control devices, excessive speeding and driving under the influence. Minor violations such as backing accidents in bad weather, breaking mirrors or marker lights or ditching a bus to avoid an accident, even if preventable, would have no effect on the employee's driving record.

have been given a period of improvement. If the actions were not correctable then the procedures set forth in Policy 5300 would not apply and the dismissal may stand.

The grievant argues that the actions were correctable by merely preventing preventable accidents. The evidence indicates to the contrary. In his testimony before the board the grievant stated that he was unaware or confused as to the causes of each accident. He testified that on May 3, 1988 he did not see the ladders and thought that a rock hit the window. After looking in his rear view mirror he detected that the ladders were extending into the roadway.⁵ He admitted that he did not stop as he had been directed in a memo of November 1986 and did not consider the event to be serious. Although he claimed he was not trying to hide the accident he did not file a report until directed to do so by the Transportation Director some three days later. (T.80)

Regarding the December 1986 accident, the grievant maintained that the light was green but after a discussion with the Transportation Director apparently agreed that the light had changed.

⁵The grievant stated that the ladders and the gray sky "...kind of blend together". (T.79)

(T. 85 and Exhibit 5b) Karen Green, a student who was a passenger on the bus, testified at the level four hearing that she had been seated on the fourth row that day and had observed the light turn red prior to the grievant's entering the intersection.

The grievant recalled the October 1983 accident to have occurred because he saw no brake lights from the pickup truck. The grievant indicated that he was certainly aware of what was taking place at this time as he observed the driver of the truck pull out into the roadway and decelerate to allow a third vehicle to make a left turn. (T.100)

The grievant characterized the May 1982 accident to be self-explanatory. When passing a car from the opposite direction he ran off the roadway and could not get back onto the pavement. A wheel became entangled in a guy wire and pulled the bus into a utility pole. (T.104-105) No specific cause was given for his inability to get the bus back onto the road.

The grievant's physical examination reports indicate that he has no health problems. He has been certified as possessing the skills required to operate a school bus. The cause of the accidents was apparently due to inattentiveness, failure to react responsibly in a hazardous situation or acting in a

less than cautious manner. The operation of any motor vehicle entails a tremendous responsibility and the operator of a school bus is charged with an even higher standard of care by virtue of the passengers he transports and the size of the vehicle.

While the accidents were not brought to the grievant's attention on his annual evaluations he did receive a written reprimand in October 1983 and a five day suspension in 1987.⁶ Unquestionably these actions by the board put the grievant on notice that further preventable accidents would not be tolerated. As the written warnings had no effect on the grievant's performance there is no reason to expect that a plan of improvement would correct the situation. Had the accidents been precipitated by a factor that was physical in nature or by a lack of skills, the problem may have been correctable. The exercise of care and responsibility are self-initiated and cannot be controlled or corrected by an employer.

In addition to the foregoing factual recitation it is appropriate to make the following specific findings of fact and conclusions of law.

⁶Accidents and other citations should be included on an employee's evaluation as such information is a part of his driving record and reflects on his overall performance.

Findings of Fact

1. The grievant has been employed as a full-time bus operator by the Randolph County Board of Education since 1980.

2. The grievant has been involved in four accidents as a bus operator, all of which were designated as "preventable" on the school bus accident report forms.

3. In May 1982 the grievant ran off the road and struck a utility pole resulting in an approximate total of \$6,000.00 in damages.

4. In October 1983 the grievant hit a stopped pickup truck in the back end resulting in damages of approximately \$1,400.00.

5. Following the 1983 accident the grievant was issued a written reprimand and a warning that another accident could result in suspension or termination of his employment.

6. In December 1986 the grievant ran a red light and collided with a car resulting in damages to the vehicles of \$3,100.00 and a personal injury settlement of \$25,000.00.

7. As a result of the 1986 accident the grievant was suspended for five days and was again warned that another preventable accident could result in the termination of his employment.

8. In May 1988 the grievant hit ladders which were extending from a parked truck incurring approximately \$500.00 in damages.

9. The grievant did not stop at the scene of the accident as he had been directed but proceeded on to the bus garage where he exchanged the bus and made his evening run. He did not file an accident report until specifically directed to do so some three days later.

10. The grievant was dismissed for incompetency from employment as a bus operator on June 27, 1988.

11. The accidents were never included on the grievant's evaluations nor was he ever given a plan of improvement.

Conclusions of Law

1. State Board of Education Policy 5300 (6)(a) prohibits a board of education from discharging an employee for reasons having to do with prior misconduct or incompetency that has not been called to the attention of the employee in an evaluation and which is correctable. Carrell v. Kanawha County Board of Education, Docket No. 20-87-073-1 and Williams v. Roane County Board of Education, Docket No. 44-86-160-1.

2. A county board of education is not required to follow the procedures of State Board of Education Policy 5300 prior

to dismissal in those circumstances where the behavior is not correctable. Rovello v. Lewis County Board of Education, Docket No. 21-86-087.

3. The failure to act cautiously or responsibly while operating a school bus as evidenced by four preventable accidents in six years is not correctable by a plan of improvement.

4. The dismissal of the grievant from employment as a bus operator was valid and is hereby upheld.

Accordingly, the grievance is DENIED.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Randolph County and such appeal must be filed within thirty (30) days of receipt of this decision. (W. Va. Code, 18-29-7). Please advise this office of your intent to do so in order that the record can be prepared and transmitted to the Court.

DATED

October 25, 1988

Sue Keller

SUE KELLER
HEARING EXAMINER