THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DEBORAH K. MCKINNEY,
Grievant,

v. **Docket No. 2021-2451-TayED**

TAYLOR COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant is employed by the Taylor County Board of Education as a bus operator. Grievant filed this action directly to level three challenging the termination of her employment following an incident involving unsafe behavior and a willful neglect of duty. Grievant seeks to be made whole, including back pay with interest and benefits restored and reversal of any and all disciplinary. A level three evidentiary hearing was conducted before the undersigned on August 31, 2021, at the Grievance Board's Westover office. Grievant appeared in person and by her representative, Gordon Simmons, West Virginia School Service Personnel Association. Respondent appeared by its counsel, Denise M. Spatafore, Dinsmore & Shohl LLP. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on October 5, 2021.

Synopsis

Grievant was dismissed for willful neglect of duty while operating her bus in a manner that endangered students' safety. Respondent proved that Grievant knowingly endangered students and engaged in willful neglect of duty. Grievant contends that she

was denied due process and that her dismissal was too severe a punishment. The record of this case did not support a finding that Grievant was denied her due process rights. In addition, the record did not support mitigation of the discipline imposed by the Board of Education. This grievance is denied.

The following Findings of Fact are based upon the record of this case.

Findings of Fact

1. Grievant has been employed by the Taylor County Board of Education as a bus operator for approximately eighteen years.

2. Respondent's bus operators are trained regarding proper loading and unloading procedures at schools, along with safety requirements for all school bus operators.

3. Taylor County Board of Education provides for buses to line up in a specific order when picking up students at schools at the end of the day. All drivers are expected to wait until all students are loaded before leaving the parking lot and to not deviate from the established order or go around parked buses out of concern for the safety of students and others present.

4. During the 2020-2021 school year, Grievant was assigned to operate Bus 76. In the afternoon, Grievant picked up students at Anna Jarvis Elementary School to transport them home at the end of the school day.

5. In the loading order on March 19, 2021, at Anna Jarvis Elementary School, Grievant's bus position was behind Bus 97, driven by Robin Sharp.

6. On that date, while students were still loading, Grievant attempted to leave the parking area by going around Bus 97. Ms. Sharp activated her red flashing lights,

she also advised Grievant over the radio not to continue trying to go around her bus because students were loading.

7. Ms. Sharp finished loading students and accelerated her bus to leave the parking lot. At the same time, Grievant accelerated her bus in an attempt to pass Ms. Sharp in the parking lot. Both buses accelerated through the parking lot side-by-side, until Grievant, who was in the lane of traffic going the opposite direction, had to brake in order to avoid a head on collision with a car, and nearly striking Ms. Sharp's bus.

8. Following a review of the video footage and after conducting an investigation, administration decided that both bus operators should be disciplined for the unsafe behavior. Both drivers were advised by letters dated April 12, 2021, to meet with the superintendent on April 20, 2021, to discuss the matter and provide their version of the events.

9. Prior to April 12, 2021, Grievant had identified an attorney who would be representing her in the matter. Counsel for Respondent contacted that attorney on April 9, 2021, advising him of the need to meet and discuss the incident, and review the evidence prior to a recommendation to the Board of Education of disciplinary action. Counsel for both parties agreed on the date of April 20, 2021, for this meeting.

10. Grievant's attorney did not appear at the meeting on April 20, 2021, due to what he claimed was a scheduling conflict. Grievant's attorney eventually admitted in an email to Respondent's counsel that he had simply forgotten about the April 20 meeting.

11. Grievant did appear at the April 20 meeting and advised the superintendent that she did not want to discuss the issues without her counsel present, and that she would like all the information sent to her attorney.

12. At that meeting, based upon her review of the information available to her, the superintendent informed Grievant that she was planning to recommend a thirty-day suspension, but she would have further discussion with Grievant's attorney.

13. On April 20, 2021, Superintendent Miller mailed all of the information and evidence regarding the March 19 incident to Grievant's attorney.

14. Respondent's counsel contacted Grievant's attorney by email not long after he had an opportunity to review the material. Respondent's counsel explained the disciplinary process and requested that a discussion occur regarding the incident, allowing him and his client to present their side of things in order to determine what discipline would be appropriate. Respondent's counsel attempted contact on numerous dates with no response.

15. Superintendent Miller ultimately decided to place the item on the Board of Education agenda for a meeting to be held on May 26, 2021. Superintendent had decided to recommend termination of the employment contract for both bus operators as a result of the drivers' misconduct.

16. Grievant was advised of this recommendation in a letter dated May 12, 2021, along with an explanation of the charges, her right to a hearing, and her right to representation at the Board of Education meeting.

17. Grievant did not attend the Board of Education meeting on May 26, 2021. The Board of Education unanimously voted to terminate Grievant's contract of employment.

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).

An employee of a county board of education may be suspended or dismissed only 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. W. VA. CODE § 18A-2-8. "The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. VA. CODE § 18A-2-8, as amended, 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)." *Graham v. Putnam County Bd. of Educ.*, Docket No. 99-40- 206 (Sep. 30, 1999).

Grievant was dismissed for willful neglect of duty in endangering students by racing another bus through a busy school parking lot. To prove a willful neglect of duty, the employer must establish that the employee's conduct constituted 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. 95029-151 (Aug. 24, 1995). Willful neglect of duty encompasses something more serious than incompetence. *Bd. of Educ. v. Chaddock*, 183 W. Va. 638, 398 S.Ed.2d 120 (1990), *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996).

The record established that all bus operators receive periodic training regarding safe procedures and practices, including directives to follow an assigned order at each school while loading students and leaving the property. A specific bus lineup, where each bus remains in an assigned position to load students, then requiring all drivers to wait until all buses are loaded, is a safe system. Grievant's attempt, without any notification or contact with the other driver, to move out of her position and go around other buses to leave out of turn, brought about Ms. Sharp immediately engaging her red flashing lights and telling Grievant that she should not try to go around her. This produced obvious safety concerns. The operation of bus red lights is found through out West Virginia Board of Education Policy. The purpose of these lights is to advise other vehicles not to move past or around the bus while students are being loaded, in order to protect their safety.

One of the most troubling undisputed elements of this case is the sight of two school buses accelerating, side-by-side through a school parking lot, ending with Grievant braking hard to avoid a head-on collision with an oncoming car. Disregard for the safety of students in one's charge, in contradiction of established policies, justifies termination

of an employment contract for willful neglect of duty. As in the case of *Hines v. Lewis County Bd. of Educ.*, Docket No. 2012-1238-LewED (Dec. 5, 2012) (*Affirmed*, Memorandum Decision, No. 13-0469, W. Va. 2014), Grievant knew her actions were wrong, but showed complete disregard for the safety of the students in her charge. This type of behavior constitutes willful neglect of duty.

Grievant contends that she was denied her right to representation prior to the superintendent's recommendation to terminate her employment. The record provided the undersigned with emails and letters in which Grievant identified her attorney and advised Respondent to communicate with him. After numerous attempts over a three-week period, after the attorney failed to appear for the meeting with Respondent's attorney, the superintendent proceeded with the disciplinary process. Grievant was notified of the superintendent's recommendation and her right to a hearing before the Board of Education, prior to disciplinary action, and chose not to attend the meeting. This contention is without merit.

Grievant also contends that she was deprived of a predetermination meeting and the resulting deprivation of due process. The employee's legal rights are triggered by the superintendent's decision to recommend discipline, at which point the employee must be provided with the opportunity for a hearing and the opportunity to address the charges against them, prior to the Board of Education's vote on the recommendation.

The Supreme Court of Appeals of West Virginia, in *Bd. of Edu. of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994), determined what due process is required to terminate a continuing contract of employment. "It has previously been held that a full-blown hearing is generally not required before an employee may be terminated,

but that employee has the minimum pre-deprivation right to at least have an opportunity to respond to the charges either orally or in writing. *Loudermilk*, 470 U.S. at 542. An employee is also entitled to written notice of the charges and an explanation of the evidence. *Wirt*, *supra*. In other words, notice of the charges, explanation of the evidence, and an opportunity to respond is all the due process that Respondent is required to provide. *Id*. At Syl. Pt. 3." In the instant case, Grievant was advised of the charges on several occasions before the Board of Education meeting, along with being informed of her opportunity for a hearing before the Board of Education. This argument is without merit.

Grievant contends that the disciplinary action of termination was excessive under the circumstances of her case. The undersigned disagrees. The argument that discipline is 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. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

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).

Grievant did not offer any evidence in support of this request for mitigation. Respondent's determination that Grievant's conduct was willful neglect of duty is reasonable applicable of that cause to terminate employment. Respondent also dismissed the other driver for engaging in the same conduct. Grievant knew her actions were wrong, but showed complete disregard for the safety of the students in her charge. Dismissal was appropriate given the severity of her actions.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. 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).

2. An employee of a county board of education may be suspended or dismissed only 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. W. VA. CODE § 18A-2-8. "The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. VA. CODE § 18A-2-8, as amended, 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)." *Graham v. Putnam County Bd. of Educ.*, Docket No. 99-40- 206 (Sep. 30, 1999).

3. The Supreme Court of Appeals of West Virginia, in *Bd. of Edu. of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994), determined what due process is required to terminate a continuing contract of employment. "it has previously been held that a full-blown hearing is generally not required before an employee may be terminated, but that employee has the minimum pre-deprivation right to at least have an opportunity to respond to the charges either orally or in writing. *Loudermilk*, 470 U.S. at 542. An employee is also entitled to written notice of the charges and an explanation of the evidence. *Wirt*, *supra*. In other words, notice of the charges, explanation of the evidence, and an opportunity to respond is all the due process that Respondent is required to provide. *Id*. At Syl. Pt. 3."

4. Respondent proved by a preponderance of evidence that Grievant's conduct was willful neglect of duty justifying dismissal.

5. Grievant did not prove by a preponderance of the evidence that she was denied due process or denied her right to representation.

6. 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).

7. Grievant did not prove by a preponderance of the evidence that mitigation is warranted.

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 (2018).

Date: November 16, 2021

Ronald L. Reece
Administrative Law Judge