

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**CLAUDE JEFF DYER,
Grievant,**

v.

Docket No. 2022-0039-LinED

**LINCOLN COUNTY BOARD OF EDUCATION,
Respondent.**

DECISION

Grievant, Claude “Jeff” Dyer, filed this grievance against his employer Respondent, Lincoln County Board of Education protesting a letter of reprimand received for a failure to perform a requisite amount of Preventative Maintenance inspections. The original grievance was filed on July 19, 2021, and the grievance statement, provides:

On July 7th, 2021, Mr. Dyer received a written reprimand stating that he failed to serve the functions of his job as Transportation Coordinator/ Chief Mechanic. John Roy, Transportation Director, states that grievant did not perform the required amount of PM’s (preventative maintenance) scheduled from September 2020 to February 2021. Respondent states that this fails to meet Policy 4336-26.2.f, regarding scheduling and performance of PM’s.

The grievant did not violate policy 4336-26.2.f. Grievant did in fact provide a schedule for bus operators to bring their bus in for PM. The grievant also asked the respondent numerous times for help performing the scheduled PM’s because of lack of staff. Along with the lack of staff, the grievant had been dealing with Covid 19 quarantine from the Board of Education, school closures from inclement weather, staff being quarantined due to Covid 19, and lack of available buses to perform PM’s on. With that being said, the Lincoln County Board of Education has also failed to meet Policy 4336-25.3 “Personnel/Staffing”. The policy states under 4336-25.3.a. “Maintenance center staff may vary with the number of vehicles to be maintained.” It also states under 4336-25.a.31. “One mechanic for nine buses.” Policy also states under 4336-25.3.a.2. “One mechanic and one assistant for a fleet of ten (1) to eighteen (18) buses. Policy 4336.25.3.a.3. then adds “one additional mechanic and one additional assistant for each additional sixteen (16) buses over eighteen (18) buses.

The grievant has been operating with two (2) mechanics for approximately sixty (60) buses for the entire school year of 2020-2021. The grievant has been severely understaffed and it is the respondent’s duty to provide the appropriate amount of personnel to assist in performing the job duties as mechanics and transportation coordinator.

With current policy in place and the Lincoln County Board of Education's lack of staffing, grievant believes that an unjust punishment has been given and is arbitrary and capricious.

Relief Sought:

Grievant Requests the Letter of Reprimand be removed from their file and any and all rights and benefits be reinstated as a result from the removal of the Letter of Reprimand. In the alternative, grievant seeks more extra ordinary relief requesting more proportional punishment.

A conference was held at level one on August 12, 2021. The grievance was denied at level one by a written decision on September 7, 2021. Grievant appealed to level two on September 15, 2021, and a mediation session was held on November 22, 2021. Grievant appealed to level three on December 3, 2021. A level three hearing was held before the undersigned Administrative Law Judge on March 18, 2022, in the Grievance Board's Charleston office. Grievant appeared in person and by counsel, Rebecca A. Roush, General Counsel, West Virginia School Service Personnel Association (WVSSPA). Respondent appeared by and through Josh Brumfield, Assistant Superintendent of Lincoln County Schools and was represented by its counsel Leslie Tyree, Attorney at Law. The following witnesses appeared and presented testimony:

For the Respondent:

- John Roy, *Former* Director of Transportation, Lincoln County Board of Education and Current Director of Food Services, Lincoln County Board of Education.
- Josh Brumfield, Assistant Superintendent of Lincoln County Schools and *Former* Director of Transportation, Boone County Board of Education.
- Jeff Huffman, Transportation and Finance Consultant for the Lincoln County Board of Education and *Former* Superintendent Boone County Board of Education.

For the Grievant:

- Tammy Owens, Secretary, Lincoln County Board of Education Transportation Department.
- Dave Owens, Mechanic, Lincoln County Department of Transportation.
- Brian Adkins, Mechanic, Lincoln County Department of Transportation.

- Jeff Dyer, Grievant and Chief Mechanic Lincoln County Schools.

At the conclusion of the level three hearing, the parties were invited to submit written proposed Findings of Fact and Conclusions of Law. Both parties submitted fact/law proposals and this matter became mature for decision on April 21, 2022, on receipt of the last of these proposals.

Synopsis

Grievant is employed by Lincoln County Board of Education as a transportation coordinator/chief mechanic. Grievant was given a Letter of Reprimand noting that there was a failure to perform the requisite amount of Preventative Maintenance Inspections on school buses during the time period of September 2020 through February 2021. Grievant is of the opinion that he is being erroneously blamed for the shortcoming of the Administration that have failed to meet the expectations of the West Virginia Department of Education resulting in a state of emergency and threatened takeover.

Grievant alleges that he was wrongfully reprimanded. The written reprimand expressed dissatisfaction and concern regarding Grievant's job performance and conduct. Respondent used a lesser corrective disciplinary action. Respondent's decision to issue a corrective letter of reprimand does not constitute an abuse of discretion. Grievant did not prove that the letter of reprimand was unreasonable, arbitrary, and/or capricious. Respondent established appropriate grounds for disciplinary action. Respondent's disciplinary action is not established to be a violation of any statute, policy, rule, or regulation. By a preponderance of the evidence, Respondent demonstrated justification for the issuance of a written reprimand to Grievant. Accordingly, this grievance is denied.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant, Claude Dyer, has been employed by the Lincoln County Board of Education, Respondent, for 32 years. He started work as a substitute bus driver where he worked for six years before working his way to a full-time bus driver position for twelve years. Thereafter, he worked as a mechanic in the Bus Garage for seven years before being promoted to Chief Mechanic. Grievant is currently employed by Respondent as a transportation coordinator/chief mechanic.

2. Respondent, Lincoln County School District employees three (3) mechanics to include Chief Mechanic Dyer.

3. Grievant as transportation coordinator/chief mechanic, he is responsible for those job responsibilities as listed in his job description for "Chief Mechanic". The job description for a Chief Mechanic is a part of the record as Respondent's Exhibit 2.

4. The job description for chief mechanic lists as the third job responsibility of the Chief Mechanic as: (3) Establishes an efficient and effective system of routine automotive maintenance and preventive care. Respondent's Exhibit 2

5. Preventative Maintenance Inspections, (PMs) are physical inspections of buses to make sure they are in working order for the safety of the children being transported and can include such things as checking wipers, turning signals, brakes, lights, tires as well as other safety systems.

6. It is a recognized responsibility of Grievant to schedule, document and make certain PMs are completed on Lincoln County buses. This should be done pursuant

to state law and policy. See L3 Testimony of John Roy and Josh Brumfield. Routine and timely completion of PMs has been represented to be critical to the safe operation of the bus fleet and the safety of the children riding the buses.

7. Transportation departments within West Virginia Boards of Education, among other regulatory constraints, are governed by West Virginia State Board of Education policy 4336, 126 C.S.R 92. Grievant's Exhibit 8 Said policy, among other obligations, requires PMs to be completed on every bus every 20 days not to exceed 40 days.

8. There is no identified or known revocation or relaxation of the mandate of policy 4336, 126 C.S.R 92 during the COVID 19 pandemic.

9. The majority of Lincoln County School buses are parked adjacent to the central office of the Lincoln County Board of Education, beside the bus garage when not being used for morning, afternoon, or extra runs. A small percentage of drivers take their buses home after their runs are complete in the afternoons.

10. Bus operators are not required to be present while PMs are completed by county bus mechanics although they may be present if PMs are occurring at a time the driver is at the bus garage. There has never been a requirement that bus operators be present during PMs. Preventative Maintenance Inspections generally take less than an hour per bus, usually 45 minutes, more or less, if no problems are discovered.

11. There are approximately 55 Lincoln County buses with three fulltime mechanics. Serious mechanical issues with buses are not repaired by Lincoln County bus mechanics but are rather outsourced to "WorldWide", a bus company, for repair.

12. In July of 2020, the West Virginia State Department of Education began a Special Circumstances audit of the Lincoln County School District pursuant to West Virginia Department of Education (WVDE) policy 2322. The special circumstances audit began in July of 2020 and reported out in November of 2020. Grievant's Exhibit 9

13. WVDE policy 2322 establishes 11 "Efficiency Indicators" necessary to provide an effective school system. WVBE policy 2322 efficiency indicator number 9 relates to county transportation departments and if their operations are up to standards.

14. The special circumstances audit report of the Lincoln County School District was dated November 2020. The special circumstances audit was reliant upon data from the 2019-2020 school year.

15. In accordance with West Virginia Code 18-2E-5, and based on the results of the special circumstances audit, the WVDE, voted unanimously during its November 2020 meeting to declare a state of emergency for Lincoln County Schools. Grievant's Exhibit 14

16. The Lincoln County transportation department was reviewed under efficiency indicator 9 as part of the special circumstances audit conducted by the West Virginia Department of Education and was determined to be deficient in three areas of non-compliance by the November 2020 report. Grievant's Exhibit 9, 11

17. The West Virginia State Department of Education's policy 4336, specifically sections 26.2.a, d, e, f, and g, require the following:

26.2. County Bus Maintenance

26.2.a. The county board shall establish a bus maintenance program. ***At no time shall any other vehicle maintenance take priority over bus maintenance.*** The maintenance program may be delivered by the county board or through a private contractor.

26.2.d. An inventory of the bus vehicle parts shall be completed annually and made available at the county maintenance center.

26.2.e. ***Maintenance records for buses shall be current and made available*** at the county maintenance center for review by the WVDE bus inspector upon request.

26.2.f. A preventive maintenance inspection ***shall be performed on all buses (including spares) every 20 days and not to exceed a maximum of 40 days***. A preventive maintenance schedule for each bus shall be posted in the county maintenance center, made available to the bus operator, and to the WVDE bus inspector upon request.

26.2.g. All county-owned facilities including bus maintenance centers are subject to inspection by the WVDE Office of School Facilities and Transportation staff per W. Va. Code §18-9D-16(c).

(Emphasis added) Respondent's Exhibit 3

18. Special Circumstances Audit Efficiency Indicator 9: Transportation, specified three areas of non-compliance within the Lincoln County transportation department:

a. Non-Compliance 9.1: The Maintenance records did not meet the minimum requirements as indicated in policy 4336. Maintenance records were missing key information regarding bus repairs, maintenance, and parts replacement as required by WVBE Policy 4336, chapter 26, section 2.e

b. Non-Compliance 9.2: The audit team determined a bus maintenance schedule existed, however there were several instances in which scheduled maintenance of school buses exceeded the 40 day maintenance window as required by WVBE Policy 4336, chapter 26, section 2.f.

c. Non-Compliance 9.3: The audit team determined an inventory of bus parts did not exist as required by WVBE Policy 4336, chapter 26, section 2.d., other than informal verbal conversations between mechanics and the honor system for the use of parts.

Respondent's Exhibit 4 Non-Compliance 9.1, 9.2 and 9.3

19. The special circumstances audit team, during their review, interviewed Grievant and “addressed practices and procedures outlined in WVDE Policies 4336, 4373, and 2525 with him which include regulations and guidelines for the transportation of students, operation of buses, route assignment and extra duty trips, driver certification and training and certification **and the inspection, repair and maintenance of school buses.**” *Emphasis added*, Respondent’s Exhibit 4, paragraph 2

20. Maintenance in the form of PM’s was required by WVDE policy 4336 on EVERY bus every 20 days never to exceed 40 days. The requirements of the policies were brought to the attention of Respondent during the special circumstances audit. The audit team specifically addressed with Grievant WVDE policy 4336. Respondent’s Exhibit 4

21. Having heard and considered the results of the special circumstances audit, the West Virginia State Department of Education directed State Superintendent Clayton Burch to appoint designees to coordinate improvement efforts for Lincoln County schools to include the transportation department, and as a result, consultants were hired. Grievant’s Exhibit 14

22. Pursuant to West Virginia Code § 18-2E-5 (m)(2), if progress in correcting the extraordinary circumstances/deficiencies is not made in 6 months from the time the county receives the recommendations of the special circumstances audit team, the WVDE shall intervene in the operation of the school system to cause improvements to be made.

23. Jeff Huffman, former Superintendent of Boone County schools was hired by Lincoln County Board of Education in February of 2021 to assist the county in addressing

the points of non-compliance as noted by the special circumstances audit team in an effort to correct the extraordinary circumstances to avoid the WVDE from intervening in the operations of the county.

24. Transportation and Finance Consultant Huffman evaluated and worked with the Lincoln County transportation department as part of assisting the county to address and correct the points of non-compliance in transportation, non-compliance 9.1, 9.2 and 9.3 as revealed during the special circumstances audit.

25. With respect to PMs, Consultant Huffman evaluated current data from September 8, 2020, through February 26, 2021 to determine whether the PMs were being performed in compliance with WVDE policy 4336.

26. Superintendent, Jeffrey Kelley assumed his position as Superintendent on July 1, 2020.

27. At the time in question, John Roy was the central office director of food service as well as transportation. He was Grievant's superior, and it is unclear the amount of responsibility Mr. Roy may be attributed for the timely completion of PMs. Respondent tends to recognize that while the transportation department was under Director Roy's umbrella, Grievant, as chief mechanic, was responsible for daily operations to include PMs and all the other duties in the job description for chief mechanic.¹

28. While the special circumstances audit was based on data from the 2019-2020 school year, which began July 1, 2019 and ended June 30, 2020, Mr. Huffman's review began with PM data from September 8, 2020 through February 26, 2021.

¹ It is not established as fact that Director Roy is blameless with regard to the priority of Lincoln County PMs. Former Director of Transportation, Roy, testified that he had no reason to suspect that after the special circumstances audit that Grievant had not begun completing PMs in accordance with policy 4336.

29. Consultant Huffman requested records from Grievant regarding all PM inspections that were performed during September 2020 through February 2021. On March 8, 2021, the PM inspection schedule for the 2020-2021 school year was provided to Mr. Huffman by Grievant.

30. The records then provided by Grievant revealed that 249 PM inspections were scheduled between September 8, 2020 and February 26, 2021; however during that six month time period only 33 PM inspections out of 249 were actually performed. Respondent's Exhibit 5

31. Specifically, Consultant Huffman's inquiry discovered the following:

- In September of 2020, there were 42 buses scheduled for PMs and 0 were completed.
- In October of 2020, there were 48 buses scheduled for PMs and 1 was completed.
- In November of 2020, there were 33 buses scheduled for PMs and 1 was completed.
- In December of 2020, there were 36 buses scheduled for PMs and 9 were completed.
- In January of 2021, there were 45 buses scheduled for PMs and 11 were completed.
- In February of 2021, there were 45 buses scheduled for PMs and 11 were completed.

32. Grievant was aware: that the lack of PMs was an audit finding of non-compliance in the November 2020 report by the special circumstances audit team; that PMs were an area to be reviewed going forward; and that WVDE policy 4336 required PMs to be completed every 20 days on every bus, not to exceed 40 days, because this policy was discussed and reviewed with Grievant by the audit team.

33. Consultant Huffman reviewed the official bus file kept in the transportation department and all records provided by Grievant and found little to no instances where PMs were performed as required by WVDE policy 4336.

34. Grievant was well aware when Mr. Huffman began to investigate the completion of PMs, and Grievant himself provided PM documentation to Mr. Huffman for review. As chief mechanic, PMs are one of Grievant's many responsibilities.

35. Grievant, during his testimony, acknowledged that PMs are his job, that PMs did not meet the requirements of policy 4336, that work orders do not take the place of PMs, and that an inspector from the WVDE would not accept a work order as a PM. Grievant had an opportunity to produce additional documentation regarding the completion of PMs to Mr. Huffman.²

36. After completing his review of PMs, Mr. Huffman worked to create a schedule which would insure that going forward all buses were inspected every 20 days not to exceed 40 days as required by policy 4336.

37. After Mr. Huffman submitted the new schedule for the completion of PMs, all scheduled PMs were completed. All PMs were completed with the same 3 mechanics that were unable to complete them during the September 2020 – February 26, 2021, time frame.

38. Josh Brumfield served as the director of transportation for Boone County Schools during the time frame in question during the COVID 19 pandemic. He was of the opinion that the pandemic should have had little to no influence on the completion of PMs under the direction of his Chief Mechanic.

² Grievant has indicated that although some PMs were not recorded separately and kept with the official bus file, that they were in fact completed and recorded on work orders. (Grievant's L3 testimony). These records were never provided to Mr. Huffman, as requested.

39. Superintendent Jeffrey Kelley and Transportation Director Roy met with Grievant shortly after March 24, 2021, to discuss a variety of transportation related items, during that meeting the Grievant acknowledged the following: Respondent's Exhibit 1

- Buses did not meet timelines for preventative maintenance as provided in policy 4336.
- There was a process in place if a PM was missed
- All records were current
- Somewhere between 18 and 20 buses might be outside policy requirements for PMs

40. During a subsequent meeting on June 11, 2021, Superintendent Kelley requested Grievant provide any additional documentation that might be needed to add to the records on file regarding PMs to be turned into him prior to June 15, 2021.

41. Grievant failed to provide Superintendent Kelley any further documentation to show that PMs had in fact been performed or to contest in any way the data gathered by Mr. Huffman. Additionally, Grievant had still not provided any additional documentation that PMs had been performed by July 7, 2021, the date of his corrective letter of reprimand from transportation director Roy.

42. Grievant's corrective letter from John Roy was based upon the lack of PMs performed and documented during a specific 6-month period, September 8, 2020 through February 26, 2021.

43. On April 1, 2022, two weeks post the level three hearing, Grievant through counsel, submitted for consideration 127 pages purporting to be documentation of PMs that were completed.

44. The 127 pages submitted post hearing include 41 pages dated outside the period of the corrective letter.

A. Specifically, 41 pages of the 127 pages submitted predate September 8, 2020 and include 36 Bus Repair order and 5 PMs. Thus these 41 pages are outside the time frame of the corrective letter.

B. Specifically, 3 of the documents post-date February 26, 2021 and include 1 bus repair order, 1 work order, and 1 PM. Thus, these three documents are outside the time frame of the corrective letter.

C. Only 67 of the 127 documents submitted post hearing fall within the time frame of review of September 8, 2020 through February 26, 2021.

1. Specifically there are 2 work orders issued 12-7-2020 and 2-25-2021, and an invoice without a date of issuance.

2. Of the remaining 64 documents, 12 were PMs and 52 were bus repair orders from Grievant as evidence of PMs.

45. Work orders and PMs are different and not interchangeable. Grievant is aware and acknowledged that they are different.

46. Grievant did not adequately perform some essential function(s) of his job and identified deficiencies did not meet the requirements of WVDE policy 4336, 126 C.S.R. 92.

47. The June 20, 2021 letter of reprimand was issued to be corrective in nature and to improve Grievant's work performance regarding school transportation safety issues. The inspection, repair, and maintenance of school buses along with the proper documentation cannot be taken lightly by Respondent. The issues in contention could have drastic county wide consequences.

Discussion

In disciplinary matters, the employer bears the burden to prove by a preponderance of the evidence that the disciplinary action taken was justified. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018).

. . . See [*Watkins v. McDowell County Bd. of Educ.*, 229 W.Va.500, 729 S.E.2d 822] at 833 (The applicable standard

of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education*, 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). See also *Hovermale v. Berkeley Springs Moose Lodge*, 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) (“Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence.”). . .

W. Va. Dep’t of Trans., Div. of Highways v. Litten, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision). 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 party bearing the burden has not met its burden. *Id*

Respondent issued a letter of reprimand to Grievant on July 7, 2021, which expressed dissatisfaction and concern regarding Grievant’s job performance and conduct. A written letter of reprimand is a form of corrective disciplinary action. It is not the most severe disciplinary action, but it is consequential and can bear some impact on further disciplinary action. Grievant alleged that he was wrongfully reprimanded. Grievant asserts that he has been given a reprimand in an effort to make him a scapegoat for much larger problems within the agency’s administration. Grievant submits that PMs were not completed due to the lack of enough mechanics, COVID 19 causing bus operators to be away from work, but then also indicated that although PMs were not recorded separately and kept with the official bus file, that they were in fact completed and recorded on work orders.

Respondent highlights that the letter of reprimand was intended to correct Grievant's job performance while advising him of future expectations. It is undisputed that Grievant was aware that PMs, and the lack thereof, was a finding of non-compliance in the November, 2020 report by the special circumstances audit team. Further, Grievant was aware of WVDE policy 4336 requiring PMs to be completed every 20 days on every bus not to exceed 40 days, because this policy was discussed and reviewed with Grievant. There is no identified or known revocation or relaxation of the mandate of policy 4336, 126 C.S.R 92, during the COVID 19 pandemic.

Respondent has discretion to take disciplinary actions, but those actions must be reasonable and not arbitrary and capricious. *McDaniel v. Div. of Highways*, Docket No. 2017-1404-CONS (June 30, 2017). A written reprimand is of significance, but it is a relatively minor form of discipline. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd*, Mercer Cnty. Cir. Ct. Docket

No. 97-CV-374-K (Oct. 16, 1998).³

The Lincoln County Board of Education, Respondent, found itself in jeopardy of intervention by the WVDE due to deficiencies defined in the November 2020 Special Circumstances Audit Report. Grievant's Exhibit 9 The audit team identified PMs as an area of concern and discussed and reviewed WVDE Policy 4336 during the special circumstances audit. Grievant was on notice that PMs in transportation had been determined to be in non-compliance. When the preventative maintenance inspections were reviewed again by Consultant Huffman, reviewing records from the time frame of September 8, 2020 to February 26, 2021, there was no improvement and, in fact, Grievant had only completed 33 of the 249 PMs expected to be completed. Respondent established that PMs were not being completed or documented properly in compliance with WVDE policy 4336. Respondent's Exhibit 5

The argument that Grievant did not have access to a significant number of the busses is disingenuous. Bus mechanics can complete PMs at any time by simply walking across the parking lot where a majority of the buses are parked during any time they are not being used to complete a bus run. The assigned driver to a particular bus is not necessary to perform preventative maintenance inspections.

³ “[T]he “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).” Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (per curiam). “While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer].” *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01- 20-470 (Oct. 29, 2001), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), appeal refused, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

Among other explanations for established deviancies, Grievant argued that PMs were not completed due to not having enough mechanics to perform them. This contention is a double-edged sword.⁴ The expectation that Grievant can make an entire bus garage operational without the appropriate resources being allocated is problematic. Grievant contends “[i]t is grossly unfair to create the circumstances to cause an employee to fail while also then blaming the employee for the failure.” This argument, if true, does mitigate some degree of Grievant’s responsibility. Not all of his culpability, but some, thus a written reprimand and not some higher degree of discipline. Respondent is under the threat of intervention. The failure to rectify highlighted and correctable deficiencies is inexcusable. Non-Compliance to the degree established by the evidence of record is not a minor oversight. The failure to properly document is also a component. Nevertheless, after Mr. Huffman submitted the new schedule for the completion of PMs, all scheduled PMs were completed. All PMs were completed with the same three mechanics that were unable to complete them during the September 2020 through February 26, 2021 time frame. Thus, it is established that with significant motivation and dedication, the three mechanics currently employed can perform the necessary PMs in a timely fashion.

Grievant also provides that COVID-9 caused PMs to not be completed due to bus drivers being quarantined or off work. Testimony was very clear that bus drivers do not

⁴It is recognized that applicable Policy 4336(25.3) “Personnel/Staffing” states under 4336(25.3.a), that ‘Maintenance center staff may vary with the number of vehicles maintained.’ It is also recommended under 4336-25.3.a.2. that ‘one mechanic and one assistant for a fleet of ten (10) to eighteen (18) buses. Policy 4336 (25.3.a.3) recommends ‘one additional mechanic and one additional assistant for each additional sixteen (16) buses over eighteen (18) buses.’ G Ex 8 The undersigned, further notes that the staffing quotas identified are not mandatory but are merely recommendations.

need to be present for mechanics to complete PM inspections, that the majority of buses were parked adjacent to the bus garage, and, in fact, the COVID-19 pandemic was a “golden opportunity” to complete PMs because students were not being transported to school or to extra-curricular activities, thus reducing other bus maintenance while increasing the amount of time buses were sitting at the bus garage unused.

Finally, Grievant seemed to argue that the maintenance department did actually complete PMs, but simply did not complete a PM form to document the PM for the file attached to each bus, but rather recorded such on workorders. Grievant testified that the documents were located in his desk drawer in the bus garage. This argument does not negate sufficient performance deficiencies identified by the written reprimand.⁵ Work orders do not take the place of PMs. Further, Consultant Huffman, as well as Superintendent Kelley, asked on more than one occasion for Grievant to produce any documents related to the completion of PMs and none were provided.

Grievant was on notice from the 2020 special circumstances audit that PMs were an area of deficiency as the audit determined that “maintenance records were missing key information regarding bus repairs, maintenance, and parts replacement as required by WVDE Policy 4336, chapter 26, section 2.e.” Still, Grievant did not take the necessary steps to make sure PMs were performed or that maintenance records reflected maintenance performed to meet the requirements of WVDE policy 4336, 126 C.S.R. 92,

⁵ See FOF 43-47. Assuming arguendo that Grievant Dyer had in fact submitted the identified 127 pages to Superintendent Kelley as requested and had Superintendent Kelley fully accepted all the documents as PMs that fell within the period of review of September 8, 2020 through February 26, 2021, even though they were not documentation of PMs, this would have theoretically lifted the PM completion rate to 37.75%. Leaving 62.25% of the PMS not completed and still in violation of WVDE policy 4336. In other words, had all the documents submitted post hearing within the time frame of the reprimand been accepted as PMs, the number still falls short of the requirements in WVDE policy 4336.

26.2.f. and to remedy efficiency indicator non-compliance 9.1 and 9.2. Respondent clearly established that PMs were a known responsibility of Grievant and that during the time frame of September 8, 2020 through February 26, 2021, PMs were not being completed as required by WVDE policy 4336, 26.2.f. In addition, maintenance records did not meet the minimum requirements.

An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94- 01-394 (Jan. 31, 1995). See *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

Respondent issued a letter of reprimand to Grievant on July 7, 2021, which expressed dissatisfaction and concern regarding Grievant's job performance and conduct. A letter of reprimand is a form of corrective disciplinary action. The letter of reprimand was issued as a less restrictive alternative to an employee plan of improvement and corrective action. Employee plans of improvement can be tedious, time consuming for the employee as well as very restrictive and imposing on an employee. In the alternative, a corrective letter of reprimand is simply a vehicle to bring an issue to the attention of the employee in an effort to correct the conduct and allow the employee the opportunity to improve without the restrictions of an official plan of improvement. The letter of reprimand was intended to correct Grievant's job performance. Grievant, with full knowledge of the serious nature of the special circumstances audit and the

deficiencies in his job performance defined by the special circumstances audit team, failed to perform and document PMs properly.

A written reprimand documenting relevant events and providing guidance regarding future conduct is not extreme. A key component to a successful corrective action is that an employee realizes that his or her work performance or behavior is unsatisfactory and what is expected in terms of improvement and to implement behavioral or attitudinal alterations which facilitates, eliminates or accomplishes a recognizable goal. Respondent met its burden and established persuasive evidence of record to justify the corrective action. A formal written reprimand in the instant circumstances is not an excessive disciplinary action.

It is undisputed that significant accommodations and adjustments were made in many jobs to navigate the COVID-19 pandemic. Nevertheless, Respondent's decision to issue a corrective letter of reprimand was not arbitrary and capricious or a violation of any statute, policy, rule or regulation. Respondent has met its burden of proving by a preponderance of the evidence that the corrective written reprimand issued to the Grievant is not an abuse of discretion. In establishing a legitimate basis for its letter of reprimand, Respondent demonstrated that it was not arbitrary or capricious action.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "The 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 party bearing the burden has not met its burden. *Id*

2. Respondent has discretion to take disciplinary actions, but those actions must be reasonable and not arbitrary and capricious. *McDaniel v. Div. of Highways*, Docket No. 2017-1404-CONS (June 30, 2017).

3. An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). “Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff’d*, Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

4. “An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer’s discretion, or an inherent disproportion between the offense and the personnel action.” *Miller, supra*, citing *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995).

5. Grievant failed to persuasively establish that a reprimand letter was an inappropriate disciplinary action and/or excessive action given the facts and/or circumstances in the instant matter.

6. The record of this grievance does not establish that a written reprimand is a clearly disproportionate disciplinary action for the proven conduct of Grievant. It is not established that Respondent's disciplinary action was an abuse of discretion or an arbitrary and capricious action.

7. Respondent established by a preponderance of the evidence that Grievant failed to perform recognized responsibilities of his position; accordingly, Respondent established sufficient evidence of record to meet its burden of establishing grounds for the issuance of a written reprimand.

8. Respondent met its burden of proving by a preponderance of the evidence that the written reprimand issued to Grievant is justified.

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: May 6, 2022

Landon R. Brown
Administrative Law Judge