

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DEBRA SHANTEE,

Grievant,

v.

Docket No. 2020-1468-PutED

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Debra Shantee, filed this expedited level three grievance against her employer, Putnam County Board of Education, dated May 18, 2020, stating as follows: “Ms. Shantee was terminated: (1) without just cause; (2) without an opportunity to correct her conduct; (3) in violation of the anti-discrimination/uniformity provisions of the WV Code; and, (4) in retaliation for her work as an employee representative. Her rights under WV Common law, PCS employee handbook, and WV Code Sections 6C-2-2(d) and (o); 18A-2-6, 7, and 8 were violated.” As relief sought, Grievant seeks, “[r]einstatement, back pay with interest.”¹

A level three hearing was conducted on October 26, 2021, November 9, 2021, and December 21, 2021, before the undersigned administrative law judge appearing at the Grievance Board’s Charleston, West Virginia, office.² Grievant appeared in person and

¹ Grievant did not address discrimination or reprisal in her proposed Findings of Fact and Conclusions of Law. As such, these claims, or defenses, are considered abandoned and will not be addressed further herein.

² This grievance was originally scheduled a level three hearing to be held on October 9, 2020. Upon the request of Grievant, by counsel, and for good cause shown, the hearing was continued. This matter was next scheduled for a level three hearing to be held on February 4, 2021. On January 28, 2021, counsel for Grievant requested a continuance of the same. For good cause shown, the hearing was continued and rescheduled to be held on August 5, 2021. On July 28, 2021, the parties jointly requested a continuance of

by her counsel, Andrew J. Katz, West Virginia Education Association. Respondent, Putnam County Board of Education, appeared by counsel, George B. Morrone, III, Esquire, Bowles Rice, LLP, and was represented by John G. Hudson, Superintendent. This matter became mature for consideration on February 17, 2022, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.³

Synopsis

Grievant was employed by Respondent as a Bus Operator. Respondent suspended Grievant then subsequently terminated her contract of employment for violating safety policies and the Employee Code of Conduct. Respondent alleges that Grievant's conduct constituted insubordination and willful neglect of duty. Grievant denies Respondent's allegations and asserts that her suspension and subsequent dismissal were the result of reprisal and discrimination. Grievant further argues that because her conduct was correctable, Respondent was required to give her an opportunity to improve before terminating her employment contract. Respondent failed to meet its burden of proving insubordination or willful neglect of duty by a preponderance of the evidence. The

the August 5, 2021, hearing. For good cause shown, the continuance was granted, and the matter was rescheduled for hearing on October 26, 2021. At the commencement of the October 26, 2021, hearing, counsel for Grievant moved for a continuance asserting that Grievant had not received notice of the hearing. Further, counsel for Grievant stated that he had been unable to review discovery produced by Respondent via a cloud storage link because the same had expired. Accordingly, counsel for Grievant advised he was unprepared to go forward on that date. For good cause shown, this ALJ granted the continuance. On that same date, the parties consulted and agreed on November 9, 2021, to be the date of the level three hearing. The parties appeared on November 9, 2021, and the hearing went forward as scheduled. The parties were unable to complete the level three hearing on that date. The grievance was continued to December 21, 2021. The parties appeared on December 21, 2021, and the hearing was completed that date.

³ The mailing date for the parties' post-hearing submissions was originally set as February 1, 2022. The parties requested that mailing date be extended to February 17, 2022, and this ALJ granted this request.

conduct for which Grievant was disciplined was correctable. As such, Respondent was required to grant Grievant an opportunity to improve before terminating her employment contract. Accordingly, the grievance is GRANTED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. At the times relevant herein, Grievant was employed by Respondent as a bus operator. Grievant had been employed by Respondent as a regular, full time bus operator since April 12, 2000. Before that, Grievant worked for Respondent as a substitute bus operator starting on May 19, 1997.

2. John Hudson is the Superintendent of Putnam County Schools. As of the date of the level three hearing, Superintendent Hudson had served in this capacity for six years.

3. Pat Clark is the Director of Transportation for Putnam County Schools. As of the date of the level three hearing, Mr. Clark had served in this capacity for three years. Accordingly, it would appear that Mr. Clark began working as the Director of Transportation in or about 2018. However, Mr. Clark has been employed by Putnam County Schools since 2008. Mr. Clark served as a substitute teacher, a regular, full-time teacher, and an athletic director before being hired as the Director of Transportation.

4. At the time Mr. Clark was hired as the Director of Transportation, he had no experience dealing with transportation matters or school bus operation. Further, Mr. Clark

does not have a commercial driver's license (CDL) which is required to operate a school bus.⁴

5. Mr. Wymer (first name unknown) was Grievant's immediate supervisor. Mr. Clark is Mr. Wymer's direct supervisor.

6. The job performance of service personnel employed at Putnam County Schools is evaluated each year using a standard set of factors and subfactors, such as, "maintains work habits that facilitate a positive work environment," "follows school and county rules and regulations," and "performs duties efficiently and productivity." In their evaluations, service personnel are rated as either "meets standards" or "does not meet standards."

7. Grievant's job performance was evaluated yearly by her employer.⁵ In each evaluation, including the evaluation Mr. Clark performed in or about May 2019, Grievant was rated "meets standards" in every factor and subfactor examined.⁶ On some of the evaluations presented, there are a few handwritten notations in the sections "Commendations" and "Suggestions," such as "work on being on time. [illegible]," "has improved as a driver this year—more cooperative and supports the transportation

⁴ See, testimony of Pat Clark, level three hearing.

⁵ In discovery, Grievant's counsel requested from Respondent copies of Grievant's performance evaluations and was provided the same. However, it is noted that Respondent did not provide copies of evaluations for every year Grievant was employed. There have been no allegations that Respondent failed to comply with Grievant's discovery request, or any motions to compel. Given such, while no explanation was offered, this ALJ presumes that some of the evaluation documents could not be found. Grievant's counsel noted during the level three hearing that he presented all the evaluations that were provided to him by Respondent. Counsel for Grievant did not raise any claims about the missing evaluation forms and did not allege any wrongdoing by Respondent or its counsel.

⁶ See, Grievant's Exhibits 1-10, completed Service Personnel Evaluation forms.

program,” “good driver,” “Suggestions: None.” However, the evaluator(s) have left these sections blank in most of the evaluations presented.⁷

8. On a “Substitute Employee/Extracurricular Duty Evaluation Summary” dated January 14, 2000, purportedly prepared by evaluator Cecil Dolan, it states as follows: “Service Substitute” “Employee’s Strengths: Debbie has excellent driving skills. She manages students on the bus well. Employee Weaknesses: Debbie has reported late to work on occasion. This presents a problem as a school bus operator. Suggestions for Improvement: Work on reporting to work on time.” This is the only form of its kind presented as evidence at the level three hearing. No other evaluation form presented asks the evaluator to identify an employee’s strengths and weaknesses.⁸

9. In the years 2017 and 2018, Grievant served as the President of the Putnam County Education Association (PCEA), the local affiliate of the West Virginia Education Association (WVEA). In this capacity, Grievant, at times, took positions opposing those of Respondent. Based upon the evidence presented, it appears that Mr. Clark may have been the Director of Transportation in 2018 while Grievant was the President of the PCEA. However, Grievant could not recall that with certainty, and, apparently, no one asked Mr. Clark.⁹

10. Sometime in January 2020, Mr. Clark met with Grievant concerning what he contended were inaccuracies in the time sheets she had prepared and submitted.

⁷ See, Grievant’s Exhibits 1, 3-10, completed Service Personnel Evaluation forms.

⁸ See, Grievant’s Exhibit 2, “Substitute Employee/Extracurricular Duty Evaluation Summary, March 24, 2000.

⁹ See, testimony of Debra Shantee.

During the meeting, Mr. Clark determined that Grievant had overreported her time worked and he corrected the time sheets with Grievant present.

11. All school buses in Putnam County are equipped with numerous video cameras. The cameras are installed at various locations inside the buses, including behind the bus operator. From this vantage point, one can view bus operators' actions while he or she is driving. The cameras are set to show the date, time, and the bus's rate of speed on the recordings.

12. School bus video recordings are not routinely pulled and reviewed by the Director of Transportation or other members of school administration.¹⁰ Instead, the recordings are typically reviewed only when there has been an incident or a complaint.

13. There had been no complaints about Grievant's driving at the times relevant to this grievance. Further, there had been no incidents on her bus.

14. Sometime in early March 2020, Mr. Clark pulled some of the video recordings from Grievant's bus and reviewed the same, citing the need to determine whether Grievant overreported her hours worked on some of her February time sheets. Mr. Clark asserted he took this action because Mr. Wymer refused to sign off on Grievant's time sheets because of inaccuracies.¹¹ Mr. Wymer was not called to testify at the level three hearing, and no written statements from him were presented as evidence in this matter.

15. At least some of the videos Mr. Clark pulled and reviewed were from the camera located behind the driver's seat. On these videos, a viewer can see the back of

¹⁰ See, testimony of Grievant; testimony of Pat Clark.

¹¹ See, testimony of Pat Clark; Respondent's Exhibit 1, Memo dated March 5, 2020.

Grievant's head and shoulders, sometimes her profile, and her arms and hands. From this camera, a viewer can also slightly see through the bus windshield and the glass of its front doorway. Given the camera's location, a viewer can see students boarding and exiting through the front doorway.

16. Mr. Clark reviewed recordings from Grievant's bus for at least some of her runs on the following dates, and Respondent presented seventeen video clips as evidence at the level three hearing: February 18, 2020 (two recordings); February 19, 2020 (four recordings); February 20, 2020 (one recording); February 25, 2020 (three recordings); February 27, 2020 (two recordings); February 28, 2020 (two recordings); March 2, 2020 (two recordings); and, March 3, 2020 (one recording). The total number of Grievant's recordings, as well as their dates, that Mr. Clark reviewed is unknown.¹²

17. Mr. Clark did not pull and review video recordings from other bus operators' buses during this time.¹³

18. Upon reviewing the recordings from Grievant's bus, Mr. Clark concluded that some of Grievant's actions he observed therein violated certain policies and procedures. Mr. Clark then prepared a memo consisting of four typewritten pages and forty-three pages of attachments (forty-seven pages in total), to Superintendent Hudson dated March 5, 2020, regarding Grievant with the following introduction:

After reviewing the records held at the Transportation office, I have found the following incidents requiring documentation during Ms. Shantie's employment with the Putnam County Schools. Debra was hired as a substitute driver on 5/19/1997 and became a fulltime bus operator on 4/12/2000. . . .

¹² It is noted that Mr. Clark went on to review Grievant's bus recordings for March 2 and March 3, 2020, which were outside the pay period at issue.

¹³ See, testimony of Pat Clark.

Later in this same memo, Mr. Clark proceeded to list what appears to be infractions Grievant committed during her entire tenure at Putnam County Schools beginning in 1997. There are fourteen in total, and are as follows:

Sept. 29, 1997—incident involving a pickup truck veering off highway by bus;

Jan. 26, 1999—Overslept;

Nov. 2, 1999—Not adhering to work directives;

Feb. 25, 2001—Late to work;

Feb. 17, 2005—Directive to be professional;

Sept. 14, 2005—Did not pick up students as directed;

May 5, 2006—Truck hit our bus;

Jan. 26, 2011—Hit trash can with bus;

Nov. 3, 2011—Overslept—Handwritten note;

Jan. 13, 2015—Hit guardrail with bus;

May 21, 2015—Handwritten Note—Driving slightly fast in Winfield 36-40mph and audio conversation on bus tape. Driver admitted she was having a conversation with her daughter with her phone laid down[.];

October 27, 2015—Hit a concrete barrier with bus;

May 31, 2017—Attendance letter; and,

Feb. 5, 2020—Did not show up for a Pre-K run.¹⁴

19. Mr. Clark attached documentation for each of the infractions to his memo.

Mr. Clark explained at level three that he did so to give Superintendent Hudson “the full picture” to make his decision.

¹⁴ See, Respondent’s Exhibit 1, Memo Dated March 5, 2020.

20. The parties agree that despite these infractions, Grievant's performance as a bus operator was always rated as "meets standards" on her yearly "Service Personnel Evaluations." The infractions listed in Mr. Clark's memo are not mentioned in any of Grievant's evaluations.

21. Further in his memo, Mr. Clark goes on to explain that, "[o]n 3/3/2020 the Winfield bus lounge coordinator, Mr. Wymer, brought time sheets and supplemental sheets to me for the week to review and sign. He informed me that he was not signing the timesheets or supplemental sheets for Debra Shantie¹⁵ due to inaccuracies. He showed me what he believed to be the time discrepancies and overlap on her times. In January 2020, I met with Debra Shantie for similar timesheet reasons. I corrected those inaccuracies in front of her[,] after conferring with her[,] I sent it over to payroll. . . ." Thereafter, Mr. Clark explains that he reviewed the recordings to check the times reported on Grievant's timesheet. In doing so, Mr. Clark asserts he found the policy violations set forth above.¹⁶

22. Mr. Clark also included in his memo quotations from the West Virginia School Bus Transportation Policy and Procedures Manual (4336) and the Putnam County Schools Employee Code of Conduct. Mr. Clark concludes his memo by stating that, "I am recommending Ms. Shantie be terminated as a result of the infractions listed above. If you have any questions, please contact me accordingly." Mr. Clark copied (cc) CD

¹⁵ This is a direct quotation. Grievant's name has been spelled "Shantee" and "Shantie" during this grievance. Neither Grievant nor her counsel has informed the Grievance Board of any misspellings. As such, this ALJ will continue to use "Shantee" as that is the spelling used on all documents from the Grievance Board.

¹⁶ See, Respondent's Exhibit 1, Memo Dated March 5, 2020.

Caldwell, Director of Administrative Services, and Dan Rinick, Assistant Superintendent of Personnel.¹⁷

23. No evidence was presented to suggest that Grievant was coached on the alleged violations or placed on any kind of improvement plan prior to Mr. Clark drafting and submitting his memo to Superintendent Hudson.

24. Mr. Clark did not meet with Grievant before drafting his memo recommending the termination of her employment contract, or before sending it to Superintendent Hudson.

25. While Mr. Wymer was not called to testify at the level three hearing, it does not appear from the documentary evidence presented that he met with Grievant before Mr. Clark's memo was sent to Superintendent Hudson either.

26. By letter dated March 10, 2020, Superintendent Hudson informed Grievant that she was being suspended indefinitely with pay,

pending the completion of an investigation into the matter described below. This suspension is effective immediately and is being imposed by reason of the following:

As investigation is being conducted into allegations that you have been engaging in the use of a cellular phone or other portable electronic device while operating a school bus; engaging in the use of a cellular phone while supervising the loading of students, all in violation of West Virginia Board of Education Policies 4336 and 5902, as well as Putnam County Board of Education Policies 9.15 and 4.9.

An investigation is being conducted into allegations that you have failed to accurately report starting and/or ending times for time worked and the total time worked, resulting in overpayment of wages to you, all in violation of Putnam County Board of Education Policies 4B.7 and 4.9.

¹⁷ See, *Id.*

I take no position whatsoever on your guilt or innocence in this matter at this time. This suspension is to facilitate a pending investigation only. When the investigation is completed, you will be notified. . . .¹⁸

27. At the time Superintendent Hudson was drafting this letter, he had already read Mr. Clark's memo, which not only advocates for Grievant's dismissal, but also lists the fourteen infractions dating back to 1997 right on the first page after the introductory paragraph, and the documentation attached thereto.

28. Mr. Clark did not include with his memo any of Grievant's performance evaluations for any of her years of employment which show that she was always rated as "meets standards." Mr. Clark himself evaluated Grievant in or about May 2019 and he rated her as "meets standards."

29. By letter dated April 8, 2020, Superintendent Hudson notified Grievant that at its board meeting held on April 6, 2020, the Respondent ratified her paid suspension "until the ongoing investigation is complete. The reason for the Board's action is the same as set forth in my letter to you on March 10, 2020." This letter also informed Grievant of her right to grieve this decision.¹⁹ Grievant did not grieve this action.

30. By letter dated April 13, 2020, Superintendent Hudson notified Grievant that he had scheduled a meeting with her to be held on April 16, 2020, "regarding the investigation of alleged cell phone usage while operating a school bus and failure to properly report your starting and ending times. The purpose of this meeting is to afford you an opportunity to provide information for my consideration with regards to the matters under investigation as outlined in my previous letter to you. Given that disciplinary action

¹⁸ See, Respondent's Exhibit 3, March 10, 2020, letter.

¹⁹ See, Respondent's Exhibit 5, April 8, 2020, letter.

may be discussed at this meeting you have the right to have a representative of your choosing present if you so desire.”²⁰

31. It is unclear from the evidence presented what was entailed in the investigation. It appears that Mr. Clark’s memo and the records he reviewed were the entire investigation, and that he took these actions of his own volition. It does not appear that Mr. Clark interviewed Grievant or any witnesses before drafting his March 5, 2020, memo, or before he presented the same to Superintendent Hudson. Nor does it appear that Mr. Clark investigated anything after March 10, 2020, the date Grievant was suspended. There is also no evidence that Superintendent Hudson directed Mr. Clark, or anyone else, to further investigate the matter after receiving Mr. Clark’s memo on March 5, 2020.

32. Grievant and her representative, Staci Wallace, met with Superintendent Hudson on April 16, 2020. Also attending was Respondent’s counsel, George “Trey” B. Morrone, III. During this meeting, Grievant and Ms. Wallace were shown the video clips that were pulled from her bus camera during the time in question and were provided an opportunity to respond to the allegations made against Grievant. Also addressed at this meeting were the allegations that Grievant overreported her time for the pay period corresponding with the recordings.²¹

33. By letter dated April 23, 2020, Superintendent Hudson informed Grievant that she was being suspended without pay immediately for failing to “accurately” report her starting and ending times, for using a cellphone or electronic device, failure to stop at

²⁰ See, Respondent’s Exhibit 6, April 13, 2020, letter.

²¹ See, testimony of Grievant; testimony of Superintendent John Hudson; Respondent’s Exhibit 7, April 23, 2020, Letter.

a stop sign, failure to follow the proper railroad crossing procedures, operating left of center, failing to abide by the speed limit, and removing her hands from the wheel to fix her hair, all in violation of West Virginia Board of Education (WVBE) Policy 4336, Putnam County Board of Education (PCBE) Policy 9.15, WVBE 5902, also known as the Employee Code of Conduct, and PCBE Policy 4.9.²²

34. On the final page of the April 23, 2020, letter, Superintendent Hudson informed Grievant that he would be recommending the termination of her employment contract at the Respondent's meeting May 11, 2020.²³

35. Despite Superintendent Hudson's testimony that he did not consider any of the alleged infractions listed on the front page of Mr. Clark's memo in making his decision to suspend Grievant without pay and to recommend her termination to the Board, six of those alleged infractions dating back from 2005 to 2015 are listed on the third page of his April 23, 2020, letter.²⁴

36. On that same day, April 23, 2020, Mr. Clark issued Grievant a separate written reprimand for inaccurately reporting her work time during the pay period February 16, 2020, to February 29, 2020. This written reprimand states, in part, as follows:

I reviewed your time entries for the individual dates and compared them to the video capturing your work time on the same dates. Based upon my investigation, I conclude that you:

²² See, testimony of Grievant; testimony of Superintendent John Hudson; Respondent's Exhibit 7, April 23, 2020, Letter.

²³ See, testimony of Grievant; testimony of Superintendent John Hudson; Respondent's Exhibit 7, April 23, 2020, Letter.

²⁴ Testimony of Superintendent John Hudson; See, testimony of Grievant; testimony of Superintendent John Hudson; Respondent's Exhibit 7, April 23, 2020, Letter.

inaccurately reported your starting and ending times to perform Supplemental Route 150 on February 17, 2020; February 18, 2020; February 19, 2020; February 20, 2020; February 24, 2020; February 25, 2020; and[,] February 26, 2020;

inaccurately reported your starting and ending times to perform Supplemental Route 135 on February 19, 2020[,] and February 26, 2020;

inaccurately reported your time on February 28, 2020, although the reason is unclear;

improperly requested additional \$20 of compensation to perform your vocational run on February 27, 2020.

I conclude that you over-reported your time for the work week ending February 22, 2020 by $\frac{1}{2}$ hour; that you over-reported time for the week of February 29, 2020, by $\frac{3}{4}$ hour; and that you improperly requested additional compensation of \$20 for performing your vocational run on February 27, 2020 . . .

Your failure to accurately report your starting and ending times for each work day violates Putnam County Board of Education Policy 4B.7. Your failure to accurately report your total time worked for the work weeks ending February 22, 2020 and February 29, 2020[,] also violates Policy 4B.7. Your request for additional pay of \$20 to perform your vocational run on February 27, 2020[,] misrepresents your time worked and also violates Policy 4B.7.

The *Employee Code of Conduct* set out in West Virginia Board of Education Policy 5902 and PCBE Policy 4.9, and these policies require employees to:

4.2.6. demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior.

4.2.7. comply with all Federal and West Virginia laws, policies, regulations[,] and procedures.

Your conduct of submitting inaccurate time and information on your time sheets which overstate the amount of time actually worked and/or the compensation you are entitled to receive does not reflect a high standard of conduct and moral /ethical

behavior and does not comply with the PCBE Policy 4B.7, as described above. . . .²⁵

37. By letter dated May 12, 2020, Superintendent Hudson informed Grievant that at its board meeting on May 11, 2020, Respondent unanimously voted to ratify her suspension, without pay, from April 23, 2020, to May 11, 2020, and to terminate her employment, “effective immediately.”

38. Grievant had received training on the West Virginia School Bus Transportation Policy and Procedures Manual. Grievant attended such requisite bus operator trainings and professional development sessions as required each year, including in August 2019 and October 2019, at which there was training on railroad crossings and cellphones.

39. Based upon the evidence presented, it does not appear that Grievant had ever been suspended for any reason before March 10, 2020. It also appears that the only discipline Grievant may have possibly received prior to March 10, 2020, was a written reprimand.

40. Grievant’s personnel records introduced by Respondent show that in her approximately 23 years of employment as a bus operator at Putnam County Schools, she had a list of minor infractions in her personnel file, less than one per year, none of which resulted in her receiving “does not meet standards” on her yearly performance evaluations. Many of the listed infractions occurred years apart. However, the last infraction in her file before Mr. Clark’s arrival was in 2017, and that was an “attendance letter.” That was three years before the incidents at issue in this grievance.

²⁵ This is a direct quote. The grammar and punctuation used is the same as in the original document. See, Respondent’s Exhibit 14, April 23, 2020, Written Reprimand Letter.

41. At times, Grievant intentionally drove her bus on the center line and left of center to avoid rough road, potholes, and the possibility of scraping guardrails on narrow roadways.

42. At times, Grievant unintentionally drove her bus left of center and on the center line because she did not have both hands on the wheel and her eyes facing forward.

43. During the times in question, Grievant used her cellphone as both a radio and clock while operating her bus. However, this resulted in Grievant repeatedly touching the phone's screen to reactivate the phone, or "wake it up," when its screen went dark.

44. On one of the dates in question, Grievant failed to follow the proper procedures for railroad crossings.

45. Even though Mr. Clark found what he deemed to be serious safety violations while reviewing Grievant's bus recordings, he did not review any other bus operators' recordings to see if they were doing any of the same things that Grievant was doing, nor did he schedule any meetings or additional trainings to address the same.

46. During the times at issue, Grievant's actions while operating her bus did not result in any injuries to anyone, traffic accidents, damage to the bus or to other vehicles, any citations, or any damage to property.

Discussion

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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Respondent asserts that its decision to suspend Grievant, and subsequently terminate her employment contract, was proper because Grievant violated bus operator safety policies, procedures, and traffic laws. Respondent argues that Grievant’s conduct endangered the safety of the students and the public at large. Respondent did not specifically charge Grievant with any of the offenses listed in WEST VIRGINIA CODE § 18A-2-8(a) in its April 23, 2020, disciplinary letter. However, in its post-hearing submissions, Respondent argues that Grievant’s conduct while driving her bus constitutes insubordination and willful neglect of duty because Grievant had received training on how to properly operate her bus. Grievant denies Respondent’s allegations. Grievant admits that she failed to comply with the policy on railroad crossings and that she took both hands off the steering wheel as shown on the video, but argues that she did not knowingly violate the other policies and procedures as alleged by Respondent. Grievant also denies endangering the safety of others while operating her bus.

WEST VIRGINIA CODE § 18A-2-8 states, in part, as follows:

- (a) Notwithstanding any other provisions of law, 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, a finding of abuse by the Department of Health and Human Resources in accordance §49-1-1 et seq. of this code, the conviction of a misdemeanor or a guilty plea or a plea of nolo contendere to a misdemeanor charge that has a rational nexus between the conduct and performance of the employee’s job, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge. . .

(b) A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to § 18A-2-12 of this code. The charges shall be stated in writing served upon the employee within two days of presentation of the charges to the board. . . .

W. VA. CODE § 18A-2-8(a)-(b). “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). However, “[i]t 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).

Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. See *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *Id.* (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).

Further, the “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. See *Adkins v. W. Va. Dep’t of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). “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 & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

Insubordination “at least includes, and perhaps requires, a willful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued by the school board or by an administrative superior. . . This, in effect, indicates that for 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 willful; and (c) the order (or rule or regulation) must be reasonable and valid.” *Butts v. Higher Educ. Interim Governing Bd./Shepherd Coll.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). [F]or a refusal to obey to be “willful,” the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order.” *Id.*, 212 W. Va. at

213, 569 S.E.2d at 460. This Grievance Board has previously recognized that insubordination “encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer.” *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988), *aff’d*, *Sexton v. Marshall Univ.*, 182 W. Va. 294, 387 S.E.2d 529 (1989).

“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 provide 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).

“The factor which distinguishes willful neglect of duty and insubordination from unsatisfactory performance is that the employee knows [his] responsibilities, and is competent to perform them, but elects not to complete them. When an employee’s performance is unacceptable because [he] does not know the standard to be met, or what

is required to meet the standards, and [his] behavior can be corrected, the behavior is unsatisfactory performance. *Bierer v. Jefferson County Bd. of Educ.*, Docket No. 01-19-595 (May 17, 2002).” *Waggoner v. Cabell County Bd. of Educ.*, Docket No. 2008-1570-CabED (Oct. 31, 2008).

PCBE Policy 9015, “Transportation Safety Program,” states that, “[t]he Board directs the Superintendent and staff to follow all safety provisions identified in the *West Virginia School Bus Transportation Policy and Procedures Manual*. WVBOE Policy 4336.” Policy 4336, otherwise known as W.VA. CODE ST. R. § 126-92-1 *et seq.*, states, in part, as follows:

10.25 Cellular Phones and Other Electronic Devices.

10.25.a. The use of ear pieces, ear buds, headsets, cellular phones, or other portable electronic devices, even those equipped with hands-free technology, is prohibited for operators while operating the bus and by aides while students are present. . .

10.25.b. The use of cellular phones while supervising the loading and unloading of students is prohibited.

10.25.c. If communication with the county’s board’s transportation department is necessary, the bus must be stopped in a location where the bus can safely remain stationary.

10.26. County Two-Way Radios.

10.26.a. County two-way radios shall be used to conduct transportation business only. Any use that could interfere with emergency communication shall be prohibited. . . .

W.VA. CODE ST. R. § 126-92-10 (2020).

Respondent alleges that Grievant used her cell phone while operating her bus, exceeded the speed limit, drove left of center, ran two stop signs, and failed to keep both

of her hands on the wheel at all times during the time period of February 18, 2020, to March 3, 2020. Respondent's case relies almost entirely on video recordings, or clips, from one of Grievant's bus cameras. At the outset, it is noted that these video clips are not high quality, and many of them are from the early mornings hours when it was still dark outside. Colors appear distorted in some of the videos. Also, at times, the images appear blurry and grainy which make it difficult to discern fine details. However, some of the video clips are better than others.

The video clips establish that Grievant repeatedly touched her cellphone's screen and handled the phone throughout her runs on the days in question. Grievant can be seen doing this in every video clip presented by Respondent. Respondent has not asserted that these clips are the only recordings from these days, or that they show Grievant's entire workday. These video clips are taken from longer recordings. In each clip, Grievant's cell phone can be seen sitting in the bus windowsill to her left. Grievant is not seen talking on her cell phone or using it to text. Respondent has asserted that in one clip Grievant appears to be texting while the bus is stopped and students are loading, but this viewer cannot discern that from the recording. It is undisputed that in some clips, Grievant can be observed with her cellphone in hand, apparently scrolling down on its screen, when the bus is stopped and/or students are loading. However, this ALJ cannot determine with certainty what Grievant is doing on her phone.

Grievant argues that she was using her phone as both a clock and a radio, but not using the telephone and texting applications. Grievant explained that she had to touch her cell phone's screen periodically because the screen will go dark when it is not in active use, and by touching it with her finger, the screen lights up allowing her to see the time.

Grievant asserts the same is true of the radio application. A review of the clips, all of which have audio, establishes that Grievant is not using her phone to call anyone or to have conversations via any handsfree technology. It is noted that in some of the videos, music can be heard playing in the background. Grievant contends that this is not cellphone “use” as prohibited by policy, and if it were, she did not know it.

The word “use” does not appear to be defined in the policies, regulations, or law that have been cited in this grievance. The evidence does not demonstrate that Mr. Clark addressed this particular topic in his trainings in 2019.²⁶ In Mr. Clark’s August 19, 2019, “Agenda Points” document, which he attached to his memo, he wrote the following:

Cell phones ARE NOT ALLOWED at any time on the bus or ear phones for cell phones. State Policy 4336 prohibits the use on the bus at any time. Also, State Policy states if a driver is caught using their cell phone they shall be terminated. (emphasis in original)²⁷

Nowhere in WVBE Policy 4336 is it written that cell phones are prohibited on buses, even when not in use. Additionally, Policy 4336 does not state that “if a driver is caught using their cell phone they shall be terminated.” This appears to be Mr. Clark’s mistaken interpretation. Policy 4336, Section 10.25.c., which is under the section heading, “10.25 Cellular Phone and Other Electronic Devices,” states that “if communication with the county board’s transportation department is necessary, the bus must be stopped in a location where the bus can safely remain stationary.” *Id.* The next section of the policy is titled, “10.26 County Two-Way Radios.” Given this, Policy 4336, Section 10.25.c is

²⁶ See, Respondent’s Exhibit 1, Clark Memo, pg. 14-17 of 97; testimony of Pat Clark.

²⁷ See, Respondent’s Exhibit 1, Clark Memo, pg. 15 of 97; testimony of Pat Clark. This document is purported to be from a bus operator training session; however, it is not clear if this document was a hand-out during the training or whether it was Mr. Clark’s outline for his presentation.

referring to permitted cellphone use and not radio usage. Further, Putnam County Schools assigns at least some bus aides a “bus [cell] phone” to have during their runs while students are being transported. It is not unusual for students’ parents call that phone during the runs.²⁸ Further, nowhere in Policy 4336 does it state that a violation of any of its provisions results in an automatic termination of employment, and Mr. Clark admitted so during cross examination at the level three hearing. See W.VA. CODE ST. R. § 126-92-21; W.VA. CODE ST. R. § 126-92-10., *et seq.*²⁹ Accordingly, Grievant’s mere possession of her cellphone while driving her bus does not violate policy.

Neither party has offered any authority for their respective positions as to whether using a cellphone as a clock or as a radio is prohibited use as contemplated by Policy 4336. The evidence presented established that the training Mr. Clark provided in August 2019 about cellphone use included misstatements of WVBE policy; however, nothing in the “agenda points” document indicates that the use of a cell phone as a radio, clock, or anything else, was discussed at the training. Further, there is no evidence that Mr. Clark, or anyone else, trained Grievant or other bus operators to understand that cellphone “use” was not limited to telephone calls and texting. Neither party called any other bus operators to testify at the level three hearing.

The policies at issue are somewhat vague as to what constitutes cellphone “use.” The fact that cellphones have evolved into so much more than a telephone does not help matters. In addition to “cellular phones,” Policy 4336 prohibits operators from using “other portable electronic devices” while operating their buses. Using a cellphone as a radio

²⁸ See, testimony of Phillip Watson, Bus Aide.

²⁹ See, testimony of Pat Clark.

would seem to fit that description, but even if it did not, Grievant's actions as captured by the bus camera, should be the main concern. From a review of the video clips, it is obvious that Grievant could not keep her hands off her phone while she was operating the bus. Grievant repeatedly touched the phone while driving, and when the bus stopped, she would pick it up and use it with both hands. Grievant can also be seen grabbing at her phone when it appears poised to fall from the windowsill, and in that clip, Grievant goes left of center as a result.³⁰ This ALJ does not doubt that Grievant was using the phone as a radio because music can be heard on the recordings. Nor does this ALJ doubt that Grievant was using it as a clock because the time is prominently displayed on almost all smartphone home screens. However, no matter what Grievant was using her cellphone to do, it distracted her, and it affected her driving.

Grievant denies speeding while operating her bus. She asserts that the time stamps and the rate speed displayed on the videos are inaccurate. While the bus speedometer can be seen from a distance in the clips, the images are too blurry and distorted to see what speed it is registering. Grievant points to several video clips on which the time stamps were incorrect given the activity shown on the recording. Grievant is correct. For example, one video time stamped 2:49 p.m. shows Grievant picking up students when she would only be dropping them off if the time were 2:49 p.m. If the camera settings are inaccurate as to the time, the accuracy of the other data displayed is certainly questionable. Respondent presented no evidence to refute or to explain any such inaccuracies. Further, Respondent presented no additional evidence to support its claim that Grievant was speeding. Respondent's allegation that Grievant was speeding

³⁰ See, Respondent's Exhibit 2A, video clip.

is based solely on the rate of speed displayed on the video recordings. Grievant has not been cited for speeding and Respondent received no eyewitness reports of her speeding.

Grievant admits that she did not use the proper procedures for railroad crossings. Grievant asserts that each morning she and another bus operator, who was heading in the opposite direction, would meet at the railroad crossing. Grievant asserts that she did not follow the proper procedures, such as stopping and opening the door before crossing, only when the other driver had determined it safe to cross and waived Grievant through. Grievant also admits that, as shown in one of the clips, she took her hands off the steering wheel for a couple of seconds to fix her hair because it was falling out of her hair clip. She explained that she did it without thinking and that she recognizes she should not have done so.

Respondent charged Grievant with running two stop signs based solely upon the video recordings. Mr. Clark testified that Grievant ran the stop signs. Grievant denies the same. In one of the instances at issue, Grievant asserts that there was a traffic light, not a stop sign, and that she had a green light; therefore, she did not have to come to a complete stop. Upon reviewing the recordings, no stop signs or traffic lights can be seen. The position of the camera allows only a limited view through the windshield and through the door. From this vantage point, a pole near the side of the road can be seen in one of the clips, but not what is on top of the pole. It could be a stop sign, some other kind of sign, or just a pole. Respondent called no eyewitnesses or introduced any additional evidence to attempt to prove this claim. Without more evidence, it is only Grievant's word against Mr. Clark's; therefore, Respondent has failed to meet its burden on this charge.

Grievant does not deny driving left of center at times. Grievant contends that she only did this to avoid potholes and rough roads, or to prevent damage to the bus on narrow roads.³¹ In some of the video clips, it appears like Grievant is deliberately driving left of center, which is consistent with her testimony; however, there were times when she crossed the center line because she did not have both hands on the steering wheel and her eyes forward. In Respondent's Exhibit 2-E, Grievant can be observed taking both her hands off the steering wheel for a couple of seconds to fix her hair. At that time, Grievant's bus does not cross the center line. The video clip then shows the bus hitting a rough patch even though it is in the proper lane. The sound of the bus hitting the rough patch can be heard on the recording, as well as Grievant using expletives to describe the road conditions. However, upon hitting the rough patch, Grievant's phone fell from the windowsill. The video clip shows Grievant reaching to catch it and returning it to its spot. When Grievant is reaching to catch her phone, the bus can be seen drifting toward the center line and Grievant did not do that intentionally. The video freezes for a second at this point, perhaps the result of hitting the rough road, so it is unclear if the bus crossed the center line. A few seconds later, the recording shows Grievant seemingly cross the center line deliberately. The sound of the bus hitting rough road is not heard again in this recording. It is noted that there were no students on the bus at this time.

During the level three hearing, Mr. Clark testified that there is never a time when it would be appropriate to cross the center line.³² A bright-line rule, such as this, is not realistic or reasonable. Hitting potholes has the potential to cause damage to vehicles,

³¹ It appears from the documents attached to Mr. Clark's memo that Grievant once hit a guardrail while driving her bus.

³² See, testimony of Pat Clark.

tires blow-outs, a driver to lose control of a vehicle, and accidents. Crossing the center line for a moment, when there is no oncoming traffic, to avoid hitting a rough patch of road, a pothole, debris, a person, or anything else that could result in harm, injuries, or damage could be viewed as reasonable. However, crossing the center line due to distraction is an entirely different situation.

In the clips, Grievant can be observed crossing the center line unintentionally while she is eating, when she is touching her phone, and when she is trying to keep her phone from falling. It appears unintentional because once Grievant has taken her hand off the steering wheel to eat or drink, the bus begins to drift toward the center line, at which time Grievant quickly grabs the steering wheel with a jerk, then steers the bus back to an appropriate place in her lane. However, at no time in the various recordings does Grievant appear to veer wildly across the center line well into the other lane, lose control of the bus, or cross the center line into the path of oncoming traffic.

In Respondent's Exhibit 2-F, Grievant can be seen driving on the center line or left of center intentionally during most of the video. Grievant testified that she would drive in this manner on narrow roads to avoid scraping the bus against guardrails, as well as to avoid rough patches and potholes.³³ Grievant cannot be seen jerking the wheel to steer the bus back into its lane, or making any sudden, or erratic, moves to bring the bus back into its proper lane. In this recording, at times, vehicles can be seen in the other lane while Grievant is driving on the center line. The clips show no evidence of any near-miss accidents, erratic driving, or reckless driving. Grievant's actions did not result in any

³³ On page one of Mr. Clark's memo, he lists every infraction, or incident noted in Grievant's personnel file going back to 1997. One such incident is dated January 13, 2015, and states, "hit guardrail with bus."

injuries, traffic accidents, damage to the bus or to other vehicles, citations, or damage to property. While it is true that Grievant violated many safety policies and procedures as demonstrated by the seventeen video recordings, it does not appear that she violated all of them willfully or negligently. Nor does it appear that Grievant defiantly or flagrantly engaged in any prohibited conduct. Further, in most of the video clips presented, no students were present on the bus.

The West Virginia Supreme Court of Appeals has held that “where the underlying complaints regarding a public school employee’s conduct relate to his or her performance . . . the effect of West Virginia Board of Education Policy is to require an initial inquiry into whether that conduct is correctable.” *Maxey v. McDowell County Bd. of Educ.*, 212 W. Va. 668, 575 S.E.2d 278 (2002). The provisions of Policy 5300 referred to by the Court have since been codified in WEST VIRGINIA CODE § 18A-2-12a and state the following:

(6) All school personnel are entitled to know how well they are fulfilling their responsibilities and should be offered the opportunity of open and honest evaluations of their performance on a regular basis and in accordance with the provisions of section twelve [§ 18A-2-12] of this article. All school personnel are entitled to opportunities to improve their job performance prior to termination or transfer of their services. Decisions concerning the promotion, demotion, transfer, or termination of employment of school personnel, other than those for lack of need or governed by specific statutory provisions unrelated to performance, should be based upon the evaluations, and not upon factors extraneous thereto. All school personnel are entitled to due process in matters affecting their employment, transfer, demotion or promotion

Id.

The Court discussed this provision of Policy 5300 in detail in the case of *Mason County Bd. of Educ. v. State Superintendent of Sch.*, 165 W. Va. 732, 274 S.E.2d 435 (1980) where it wrote:

Our holding in *Trimboli, supra*, requires that a dismissal of school personnel be based on a § 5300(6)(a) evaluation after the employee is afforded an improvement period. It states that a board must follow the § 5300(6)(a) procedures if the circumstances forming the basis for suspension or discharge are “correctable.” The factor triggering the application of the evaluation procedure and correction period is “correctable” conduct. What is “correctable” conduct does not lend itself to an exact definition but must, in view of the nature of the conduct examined in *Trimboli, supra*, and in *Rogers, supra*, be understood to mean an offense of conduct which affects professional competency.

Id at 739. Concerning what constitutes “correctable” conduct, the Court noted that “it is not the label given to conduct which determines whether § 5300(6)(a) procedures must be followed but whether the conduct complained of involves professional incompetency and whether it directly and substantially affects the morals, safety, and health of the system in a permanent, non-correctable manner.” *Id.* “A board must follow the § 5300(6)(a) procedures if the circumstances forming the basis for suspension or discharge are ‘correctable.’” *Mason County Bd. of Educ., supra.*

Every infraction and policy violation Mr. Clark has accused Grievant of committing is directly related to her performance and competency as a bus operator and is correctable. Respondent did not consider whether Grievant’s conduct was correctable, as required by law, before making the decision to suspend her or to terminate her employment contract. In fact, the evidence establishes that right from the start, Mr. Clark advocated for the termination of Grievant’s employment contract. Mr. Clark documented

this in his March 5, 2020, memo on page four.³⁴ Mr. Clark drafted his memo and began advocating for Grievant's termination without talking to Grievant or bringing any deficiencies to her attention. A review of the evidence establishes that Grievant did nothing so wrong that it could not be corrected. Grievant was entitled to an opportunity to learn of her mistakes and to improve before the termination of her employment contract. *Mason County Bd. of Educ., supra*. See also *Mullins v. McDowell County Bd. of Educ.*, Docket Number 2012-0671-McDED (Mar. 14, 2013); *Holton v. Lincoln County Bd. of Educ.*, Docket No. 2018-1301-LinED (Jan. 14, 2019), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 19-AA-6 (Aug. 11, 2021); *Thomas v. Kanawha County Bd. of Educ.*, Docket No. 2018-1419-KanED (Dec. 19, 2018); *Chapman v. Jefferson County Bd. of Educ.*, 2018-1321-JefED (Jan. 3, 2019), *aff'd* Kanawha Cnty. Cir. Ct. Civil Action No. 19-AA-7 (May 10, 2019), *amend.*, (June 5, 2019).

At the time Grievant was suspended and her employment contract terminated, she had been driving a bus for Putnam County Schools for approximately twenty-three years. Grievant had no significant disciplinary history, if any. It does not appear that Grievant was disciplined for any of the years-old infractions Mr. Clark found in her personnel file, nor does it appear that Grievant was ever placed on an improvement plan. If Grievant received any discipline in the past, it was never mentioned in her yearly performance evaluations.³⁵ Grievant's performance was evaluated each year and she was given the highest rating possible, "meets standards." The same is true of Grievant's last evaluation which was performed by Mr. Clark in May 2019.

³⁴ See, Respondent's Exhibit 1, pg. 4 of 97.

³⁵ See, Grievant's Exhibit 1, Grievant's Performance Evaluations.

Mr. Clark has asserted that Mr. Wymer brought Grievant's time sheets to him on March 3, 2020, and that he pulled Grievant's bus camera recordings later that morning to compare the times Grievant reported on some of her February time sheets with the timestamps on the video recordings for those dates.³⁶ The total number of Grievant's recordings Mr. Clark pulled and reviewed are unknown, but in his memo, he stated that he found infractions on February 18, February 19, February 20, February 25, February 27, February 28, March 2, and March 3. Mr. Clark claims that based upon the February recordings that he watched to "verify" Grievant's time, he decided to review Grievant's bus recordings for March 2 and March 3 *on* March 3, 2020.³⁷

It is clear from Respondent's exhibits 2-M, 2-N, and 2-O that Grievant drove at least some of her bus runs on Monday, March 2, 2020, and Tuesday, March 3, 2020. However, Grievant's full schedule for those two days, the number of runs made each day, and the duration of each is unknown. The video clips Respondent presented at the level three hearing are only small snippets from Grievant's workdays. Grievant's actual daily work schedule from Monday, March 2, 2020, through Friday, March 6, 2020, and from Monday, March 9, 2020, through Tuesday, March 10, 2020, are unknown. Grievant had a regular daily morning run transporting students to school and a regular daily evening run transporting them home. Grievant also had several "supplemental runs" each day. In Mr. Clark's memo, he noted at the bottom of page one that Grievant's supplemental runs were "SR 135 Gifted Wednesdays 7:50am-11:30am, SR 150 Pre-K 4 days a week 2pm-3pm, SR 70 After School Tutoring T-W-TH 5pm-7pm, [and] SR 25 Votec PM 5 days

³⁶ See, Respondents Exhibit 1, pp. 1-2; testimony of Pat Clark.

³⁷ See, Respondents Exhibit 1, pp. 1-3; testimony of Pat Clark.

per week No time listed.” Despite the timestamp that says otherwise, Respondent’s Exhibit 2-O is a clip of Grievant’s regular morning run on March 3, 2020. Looking at the time sheets attached to Mr. Clark’s memo only as an estimate, it appears that Grievant would have returned from that run sometime between 7:30 a.m. and 8:00 a.m.³⁸ Given that, Mr. Clark would have been able to pull the recordings from Grievant’s bus and watch them, including the run she made that very morning, March 3, 2020, as he testified.

According to Mr. Clark, after reviewing these recordings, he began drafting his memo to Superintendent Hudson, wherein he advocated for Grievant’s immediate dismissal for safety and Employee Code of Conduct violations. After viewing the recordings on March 3, 2020, Mr. Clark did not speak to Grievant about any safety concerns. This is when Grievant’s actual work hours for March 3, 2020, become significant. If Grievant completed any more of her regular or supplemental runs on March 3, 2020, such would have been done after Mr. Clark watched her recordings. If that were true, Mr. Clark would have allowed Grievant to make her bus runs as usual despite his stated concerns about the safety of the students and the public at large. However, during Grievant’s cross examination at level three, she stated that Mr. Clark pulled her recordings while she was in Florida. Grievant was not in Florida on the morning of March 3, 2020, because the video recording shows that she made her morning bus run on that date. Mr. Clark stated in his memo, as well as during his testimony at level three, that he pulled Grievant’s bus recordings and reviewed them on March 3, 2020. The record is silent as to Grievant’s work schedule following her morning run on March 3, 2020, through

³⁸ See, Respondent’s Exhibit 1, p. 5, p.7.

March 10, 2020, when she was notified that she was being suspended with pay. It is also unknown when Grievant traveled to Florida and returned.

Mr. Clark and Superintendent Hudson's allegations that Grievant's driving was dangerous and placed the safety of students, as well as the general public, at risk seem to ring somewhat hollow. If Grievant's conduct were so extreme and dangerous that only the termination of Grievant's employment contract would suffice to secure the safety of the students and the public, it would seem that Mr. Clark and/or Superintendent Hudson would have suspended Grievant on March 3, 2020, when Mr. Clark first reviewed the video recordings, or at least, called Grievant in for a meeting on that date.

Moreover, Mr. Clark did not stop at successfully advocating for the termination of Grievant's employment contract. By letter dated April 23, 2020, the very same day as Superintendent Hudson's letter informing Grievant that she was being suspended without pay and that he would be asking the board to terminate her employment contract, Mr. Clark issued Grievant a written reprimand for inaccurately reporting her work time on her February time sheets in violation of the Employee Code of Conduct. In his letter, Mr. Clark states that Grievant "over-reported" her "time for the work week ending February 22, 2020[,] by ½ hour; that [Grievant] over-reported time for the week of February 29, 2020, by ¾ hour; and that [Grievant] improperly requested additional compensation of \$20 for performing [Grievant's] vocational run on February 27, 2020."³⁹ This amounts to a total of 1.25 hours and \$20.00. To be clear, Respondent did not pay Grievant for the 1.25 hours or the extra \$20.00. Mr. Clark "corrected" Grievant's time sheet before it was submitted to payroll. Grievant did not grieve this written reprimand. When asked about

³⁹ See, Respondent's Exhibit 14, April 23, 2020, letter.

the same during the level three hearing, Grievant did not seem to have any recollection of it.

While Respondent's decision to terminate Grievant's employment contract, as stated in its April 23, 2020, suspension-without-pay letter, was for alleged safety violations, Superintendent Hudson referred to Mr. Clark's allegations of overreporting work time on page one of the same. For this reason, this issue should be addressed. As stated previously herein, Grievant argues that any error in her time sheets was unintentional. At the level three hearing, Mr. Clark appeared to suggest that because he met with Grievant in January about a similar type of error on her time sheet, Grievant was purposefully trying to defraud Respondent in to paying her for an additional 1.25 work hours, plus \$20.00, that she did not earn. Mr. Clark testified this was the reason he pulled and reviewed Grievant's bus recordings on March 3, 2020, in the first place. Aside from the fact that Mr. Clark met with Grievant over a similar issue in January, Respondent presented no evidence whatsoever to prove that Grievant's errors were intentional. Accordingly, to the extent Superintendent Hudson charged Grievant with deliberately overreporting her work time in his April 23, 2020, letter, Respondent has failed to prove the same by a preponderance of the evidence.

Based upon the evidence presented, Respondent failed to prove by a preponderance of the evidence that Grievant's actions as described herein constitute insubordination and willful neglect of duty. As such, Respondent's decision to terminate Grievant's employment contract was not justified. Respondent proved that Grievant violated Policy 4336 by taking her hands off the steering wheel while operating her bus, driving left of center, failing to follow the proper procedures for railroad crossings, and for

using a portable electronic device while operating her bus, all of which are related to Grievant's performance as a bus operator and are correctable conduct. Grievant was entitled to an opportunity to improve her performance before her employment contract was terminated. Respondent failed to prove by a preponderance of the evidence that Grievant exceeded the speed limit while operating her bus, that she failed to stop at two stop signs, and that Grievant was texting while operating her bus. Accordingly, this grievance is GRANTED.

The following Conclusions of Law support the decision reached:

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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. WEST VIRGINIA CODE §18A-2-8 states, in part, as follows:

(a) Notwithstanding any other provisions of law, 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, a finding of abuse by the Department of Health and Human Resources in accordance §49-1-1 et seq. of this code, the conviction of a misdemeanor or a guilty plea or a plea of nolo contendere to a misdemeanor charge that has a rational nexus between the conduct and performance of the employee's job, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge. . .

- (b) A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to § 18A-2-12 of this code. The charges shall be stated in writing served upon the employee within two days of presentation of the charges to the board. . . .

W. VA. CODE § 18A-2-8(a)-(b).

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 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).

4. “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).

5. Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. See *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *Id.* (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).

6. The “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. See *Adkins v. W. Va. Dep’t of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). “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 & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

7. Insubordination “at least includes, and perhaps requires, a willful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued by the school board or by an administrative superior. . . This, in effect, indicates that for 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 willful; and (c) the order (or rule or regulation) must be reasonable and valid.” *Butts v. Higher Educ. Interim Governing Bd./Shepherd Coll.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). [F]or a refusal to obey to be “willful,” the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate

disagreement over the legal propriety or reasonableness of an order.” *Id.*, 212 W. Va. at 213, 569 S.E.2d at 460.

8. Insubordination “encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer.” *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988), *aff’d*, *Sexton v. Marshall Univ.*, 182 W. Va. 294, 387 S.E.2d 529 (1989).

9. “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 provide 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).

10. “The factor which distinguishes willful neglect of duty and insubordination from unsatisfactory performance is that the employee knows [his] responsibilities, and is competent to perform them, but elects not to complete them. When an employee’s

performance is unacceptable because [he] does not know the standard to be met, or what is required to meet the standards, and [his] behavior can be corrected, the behavior is unsatisfactory performance. *Bierer v. Jefferson County Bd. of Educ.*, Docket No. 01-19-595 (May 17, 2002).” *Waggoner v. Cabell County Bd. of Educ.*, Docket No. 2008-1570-CabED (Oct. 31, 2008).³.

11. Respondent failed to prove by a preponderance of the evidence that Grievant’s conduct constituted insubordination and/or willful neglect of duty. As such, its decision to suspend, and subsequently terminate Grievant’s employment contract was not justified.

12. Respondent failed to prove by a preponderance of the evidence that Grievant exceeded the speed limit while operating her bus.

13. Respondent failed to prove by a preponderance of the evidence that Grievant was texting while operating her bus.

14. Respondent failed to prove by a preponderance of the evidence that Grievant failed to stop at two stop signs.

15. Respondent proved by a preponderance of the evidence that Grievant violated Policy 4336 by taking her hands off the steering wheel while operating her bus, driving left of center, failing to follow the proper procedures for railroad crossings, and for using a portable electronic device while operating her bus, all of which are related to Grievant’s performance as a bus operator and are correctable conduct. As such, Grievant was entitled to an opportunity to improve her performance before her employment contract was terminated.

Accordingly, the grievance is **GRANTED**.

Respondent is **ORDERED** to reinstate Grievant to her position as bus operator and to pay Grievant back pay from the date of her unpaid suspension to the date she is reinstated, plus statutory interest, and to restore all benefits lost as a result of the suspension and the termination of her employment contract, including seniority. Further, Respondent is **ORDERED** to remove all references to Grievant's suspension and the termination of Grievant's employment contract from Grievant's personnel file and any and all personnel records maintained by Respondent, or its agents.

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 (eff. July 7, 2018).

DATE: May 16, 2021.

Carrie H. LeFevre
Administrative Law Judge