**JAMES O. HOOVER, .**

**.**

**Grievant, .**

**.**

**v. . DOCKET NO. 93-21-427**

**.**

**LEWIS COUNTY BOARD OF EDUCATION, .**

**.**

**Respondent. .**

## D E C I S I O N

This is a grievance by James O. Hoover (hereinafter Grievant) submitted directly to Level IV in accordance with W. Va. Code §18A-2-8, on October 14, 1993, challenging his suspension without pay by the Lewis County Board of Education (hereinafter LCBE) commencing on October 5, 1993. An evidentiary hearing in this matter was held in the Board's office in Charleston, West Virginia, on December 10, 1993. (See footnote 1)

Grievant is employed by LCBE as a school bus driver. While on duty during the afternoon of September 17, 1993, Grievant became involved in an altercation with another LCBE bus driver. That incident resulted in the disciplinary actions which Grievant challenges in this appeal. Although some details of the incidentare in controversy, many of the facts are undisputed. The narrative which follows is based upon the credited testimony and evidence presented at the Level IV hearing.

On September 16, 1993, Grievant had a discussion with Ms. Mildred Paxson, Director of Transportation for LCBE, regarding whether he or another driver, Mr. Joe Peters, was responsible for transporting two particular students to and from school. Ms. Paxson decided that the students should be transported by Mr. Peters. On the afternoon of September 17, 1993, the two students in question reported to Grievant's bus to be transported home. Grievant questioned them as to why they were riding his bus and was told that they had been directed to his bus by the other driver, Mr. Peters. Appropriately, Grievant transported the students to their bus stop.

Later that afternoon, at approximately 3:15 p.m., Grievant arrived at a scheduled passenger transfer point in Jane Lew, West Virginia. Mr. Peters' bus arrived shortly thereafter. The two drivers parked their respective buses parallel to each other, facing in opposite directions with their doors virtually adjacent, allowing passengers to step almost directly off one bus to another. After the regular passenger transfer was completed, Grievant stepped aboard Mr. Peters' bus.

Grievant was standing in the aisle at the top of the entrance steps next to the door opener with his back to the windshield, facing toward the driver, Mr. Peters, who was seated. Grievant asked Mr. Peters if Ms. Paxson had told him that the two studentswere to ride on Peters' bus rather than Grievant's. Mr. Peters replied that she had not. Grievant then turned and stepped down into the stepwell as if to leave the bus. However, he turned back and leaned toward Mr. Peters, shook his finger in Mr. Peters' face and said, "those are not my students and I'm not going to haul them or one of us is going to take a thrashing." (See footnote 2) Grievant acknowledged that shaking his finger at Mr. Peters while using the term "thrashing" was confrontational.

A brief altercation immediately ensued with Grievant and Mr. Peters shoving and pushing each other. Mr. Peters threw off his seat belt and ordered Grievant off his bus. Grievant put his hand on Mr. Peters' shoulders and pushed Mr. Peters back into his seat and got off the bus. The students on Mr. Peters' bus reacted by "screaming and hollering," according to the Grievant. A student, Tina Dillon, was sitting in the seat immediately behind the driver, Mr. Peters. Mr. Peters accidentally struck Ms. Dillon at some point during the altercation.

Mr. Peters promptly brought this incident to the attention of Ms. Paxson, calling her over the two-way radio system in his bus and asking her to come to Jane Lew where he had been "attacked by Mr. Hoover." She went to the scene of the incident where the students (on Mr. Peters' bus) were waiting. The student who had been injured was present and she was still crying and visibly shaken with a red spot over her eye. She told Ms. Paxson that Mr.Peters had hit her accidentally while he was trying to push Grievant away from him. She also told Ms. Paxson that Grievant had his finger in Mr. Peters' face and shoved him against the window of his bus.

Although Grievant heard the radio conversation between Mr. Peters and Ms. Paxson after driving away, he completed his assigned route without returning to Jane Lew. Ms. Paxson confronted Grievant in the bus parking lot when he returned with his bus. She asked him what had happened and he replied, "Nothing."

The Superintendent of Schools for LCBE, Dr. Joseph L. Mace, was advised of the incident on the evening of September 17, 1993, by Mr. Hinkle, principal of the school at Jane Lew. In addition, Mr. Peters called Dr. Mace at home that same evening and stated that he had accidentally struck the student passenger while attempting to defend himself against Grievant. Both drivers were suspended with pay effective the next work day (Monday), pending outcome of an investigation into the incident. (See footnote 3)

At a meeting the following Monday morning between Dr. Mace, Ms. Paxson, and Grievant, the Grievant indicated that he did not know that a child had been struck and that he had not hit Mr. Peters. Grievant admitted getting on Mr. Peters' bus and confronting him about who was to pick up two students. Grievant claimed that he was attacked by Mr. Peters. However, Grievant admitted losing his temper and putting his finger in Mr. Peters' face while stating, "I am not going to haul any more of your kids or one of uswill take a licking." Grievant denied striking Mr. Peters with his fist but acknowledged that there was "some pushing and shoving." After his meeting with the Grievant, Dr. Mace also met with and questioned the other driver, Mr. Peters. Mr. Peters alleged that Grievant came on his bus and attacked him and that he (Peters) was able to get his seat belt off and to force Grievant off his bus. Mr. Peters admitted that he accidentally struck the student passenger while attempting to fend off the Grievant.

Dr. Mace also questioned the student who had been injured on Mr. Peters' bus. Both the student and her mother agreed that the student's injury was not intentional. Dr. Mace further investigated the incident by interviewing three additional students who were passengers on Mr. Peters' bus. None of these students nor Mr. Peters appeared to testify at the Level IV hearing. (See footnote 4)

After giving proper notice to the Grievant and an opportunity to appear before LCBE, Dr. Mace recommended that the Grievant's suspension be converted to a suspension without pay, effective October 5th, 1993. LCBE voted to approve such suspension, pending outcome of a criminal investigation by the Lewis County Sheriff's Department. Upon learning that Grievant had been indicted by thegrand jury, Dr. Mace advised Grievant on November 12th, 1993, that he was recommending to LCBE that the suspension without pay be continued, pending outcome of the criminal charges. R Ex 7. LCBE subsequently adopted this decision. (See footnote 5) These two separate, but related, suspensions are now at issue.

Grievant has been regularly employed by LCBE since June 1985, having worked the previous

four years as a substitute driver. Prior to the present incident, Grievant had not been the subject of any prior disciplinary action by LCBE. (See footnote 6) Mr. Peters had previously been suspended by LCBE for three days based upon breaking school regulations and not following orders. Dr. Mace indicated that the two drivers were engaged in ongoing disputes that preceded the disagreement over who was responsible for transporting the two students on September 17, 1993.

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Froats v. Hancock County Bd. of Educ., Docket No. 91-15-159 (Aug. 15, 1991); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). Since there were twosuspensions, LCBE must meet this burden with regard to both disciplinary actions.

Grievant's initial suspension without pay, commencing on October 5, 1993, was for "misconduct and willful neglect of duty as it relates to your involvement in a dispute with Joseph Peters, bus driver which resulted in a physical confrontation on or about September 17th Friday." R Ex 1. The undersigned finds that the Respondent established by a preponderance of the evidence, particularly Grievant's admissions against interest to Dr. Mace at the September 20th meeting, and Grievant's testimony at the Level IV hearing, that Grievant engaged in confrontational gestures and language which Grievant should reasonably have expected to provoke a physical altercation with another driver, Mr. Peters. This altercation resulted in a disruption of the normal decorum on the school bus, as well as injury to a student passenger seated behind Mr. Peters. (See footnote 7)

Respondent based its charge of "willful neglect of duty" on the fact that Grievant got off his bus, leaving students unattended. To prove willful neglect of duty, the employer must establish that Grievant's conduct constituted a knowing and intentional act, rather than a negligent act. See Board of Educ. of County of Gilmer v. Chaddock, 398 S.E.2d 120 (W. Va. 1990). The facts in this case do not indicate that Grievant's stepping off hisbus and onto an adjacent school bus for no more than two minutes resulted in any lack of provision for the care and safety of his passengers. Further, LCBE did not establish by a preponderance of the evidence that Grievant left his bus with the intention of instigating an argument or physical altercation with another bus driver. Thus, the undersigned finds that this charge has not been sustained. Therefore, Grievant's suspension for misconduct and willful neglect of duty is sustained, only so far as it relates to the misconduct which occurred on Mr. Peters' bus.

A board of education may conditionally suspend an employee based upon an indictment alone, provided there is a rational nexus between the indictment and the employee's ability to perform his assigned duties. Lemery v. Monongalia County Bd. of Educ., Docket No. 91-30-477 (Apr. 30, 1992); Kitzmiller v. Harrison County Bd. of Educ., Docket No. 13-88-189 (Mar. 31, 1989). See Brown v. Dept. of Justice, 715 F.2d 662 (D.C. Cir. 1983).

Given that the incident which led to Grievant's indictment transpired on the employer's school bus while Grievant was on duty, it is clear that the requisite nexus exists in this case. (See footnote 8) Indeed, the Grievant does not appear to contest this issue. What the Grievant does challenge is the fact that LCBE suspended him without pay based on indictment for a misdemeanor, rather than afelony. Grievant argues that this Board's decision in Newhouse v. Roane County Board of Education, (See footnote 9) wherein a suspension with pay was upheld on the basis of a grand jury misdemeanor indictment, represents the maximum extension of a school board's authority to suspend an employee based upon an indictment alone.

While it is true that Kitzmiller and Lemery involved felony indictments, (See footnote 10) the rule adopted therein is primarily founded upon avoiding the potential conflict that could arise from a government employer prosecuting its case in an evidentiary hearing while a state or federal prosecution is pending trial. Kitzmiller, supra, at 7-8. See Brown v. Dept. of Justice, 715 F.2d 662 (D.C. Cir. 1983). (See footnote 11) This interest in avoiding conflict is not eliminated by the fact that misdemeanor charges are at stake, rather than felony charges. Thus, LCBE did not exceed its authority by suspending Grievant without pay based upon his indictment for a misdemeanor battery. See Newhouse v. Roane County Bd. of Educ., Docket No. 93-44-060 (May 28, 1993).

In any event, LCBE's selection of an indefinite suspension as the appropriate penalty in this matter is not sanctioned by our decisions in Kitzmiller, Lemery and Newhouse. Conviction on thefelony drug and murder charges in Lemery and Kitzmiller, respectively, as well as the battery charges in Newhouse, which involved unlawful touching of female students by a teacher, all reasonably support the penalty of dismissal from employment. On the other hand, the battery charges against Grievant, which arose from a workplace altercation, notwithstanding the injury to a student passenger that arose therefrom, do not warrant Grievant's dismissal from employment. See Blake v. Civil Service Comm'n, 310 S.E.2d 472 (W. Va. 1993) In other words, in addition to the fact that a criminal indictment has been rendered against an employee, the school board must also

determine the maximum penalty that should be assessed for the underlying offense. While an indefinite suspension is appropriate when conviction of the criminal charges could reasonably lead to dismissal, a suspension of some limited duration should be assessed when the underlying offense is not so serious as to warrant such a severe penalty. (See footnote 12) Dr. Mace indicated in his testimony at Level IV that a two-month suspension without pay, and placing Grievant on an improvement plan, would be a sufficient penalty, assuming Grievant is found guilty of the pending criminal charges.

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. of Lewis County, 158 W. Va. 1067, 216 S.E.2d 554 (1975). This Board has authority to reduce or rescind an imposition of discipline upon an employee that is so clearly excessive as to be arbitrary and capricious. Best v. Univ. of W. Va. Bd. of Trustees/W. Va. Univ., Docket No. 91-BOT-216 (Oct. 11, 1991); Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). See Bd. of Educ. of the County of Gilmer v. Chaddock, 398 S.E.2d 120, 123 (W. Va. 1990); Rovello v. Lewis County Bd. of Educ., 381 S.E.2d 237, 241 (W. Va. 1989). See also Douglas v. Veterans Admin., 5 M.S.P.B. 313 (1981).

In the instant case, Grievant has been suspended without pay since October 5, 1993. Thus, Grievant's suspension now exceeds 120 days. In arriving at an appropriate penalty less than dismissal, the undersigned has considered that Grievant's misconduct provoked an altercation in the presence of students and that a student passenger was injured. (See footnote 13) On the other hand, Grievant is a long-term employee with no prior disciplinary infractions serious enoughto result in a prior suspension. Consistent with these factors, and considering the testimony of Dr. Mace, the undersigned finds that a 60-day suspension without pay is adequate to correct and punish Grievant's offense.

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate in this matter.

## FINDINGS OF FACT

1. On September 16, 1993, Grievant obtained agreement from Ms. Mildred Paxson, Director of

Transportation for LCBE, to have two students reassigned from Grievant's bus to another bus operated by Mr. Joe Peters.

2. On September 17, 1993, the two students boarded Grievant's bus, telling Grievant they had been directed to do so by Mr. Peters.

3. Later that day, Grievant's bus and Mr. Peters' bus were parked parallel to each other, facing in opposite directions, to facilitate a routine transfer of passengers from one bus to the other.

4. Grievant took this opportunity to step over onto Mr. Peters' bus, ostensibly with the purpose of verifying if Mr. Peters had received Ms. Paxson's directions regarding the two students.

5. Mr. Peters was seated in the driver's seat and Grievant was standing in the bus stepwell. Following a brief conversation wherein Mr. Peters indicated that Ms. Paxson had not told him that he was responsible for transporting the two students, Grievantshook his finger at Mr. Peters while stating that "one of us is going to take a thrashing," or words to that effect.

6. An altercation ensued between Mr. Peters and the Grievant, in the course of which Amy Dillon, a student passenger seated immediately behind the driver, was accidentally struck on the face by Mr. Peters.

7. The students on the bus reacted to the altercation by making a great deal of noise.

8. Following a brief scuffle, Grievant returned to his bus and continued his run, unaware that a child had been injured.

9. Grievant was indicted for misdemeanor battery as a result of his participation in the altercation.

**CONCLUSIONS OF LAW**

1. The employer must establish the charges in a disciplinary matter by a preponderance of the evidence. W. Va. Code §18-29-6; Froats v. Hancock County Bd. of Educ., Docket No. 91-15-159 (Aug. 15, 1991); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

2. LCBE established by a preponderance of the evidence that Grievant engaged in misconduct on September 17, 1993, through his confrontational speech and gestures, provoking an altercation with another bus driver.

3. A Board of Education may conditionally suspend an employee based upon an indictment alone, provided there is a rational nexus between the indictment and the employee's ability to perform his assigned duties. Lemery v. Monongalia County Bd. of Educ., DocketNo. 91-30-477 (Apr. 30, 1992);

Kitzmiller v. Harrison County Bd. of Educ., Docket No. 13-88-189 (Mar. 31, 1989).

4. Grievant provoked an altercation with another bus driver on a school bus, resulting in accidental injury to a student passenger and disrupting the normal decorum of the students, thereby providing sufficient nexus for a suspension without pay based on Grievant's subsequent indictment, notwithstanding that Grievant was indicted for a misdemeanor rather than a felony. See Newhouse v. Roane County Bd. of Educ., Docket No. 93-44-060 (May 28, 1993).

5. The West Virginia Education and State Employees Grievance Board has authority to reduce or rescind an imposition of discipline upon an employee that is so clearly excessive as to be arbitrary or capricious. Best v. Univ. of W. Va. Bd. of Trustees/W. Va. Univ., Docket No. 91-BOT-216 (Oct. 11, 1991); Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). See Bd. of Educ. of the County of Gilmer v. Chaddock, 398 S.E.2d 120, 123 (W. Va. 1990); Rovello v. Lewis County Bd. of Educ., 381 S.E.2d 237, 241 (W. Va. 1989).

6. The maximum reasonable penalty for Grievant's misconduct is a suspension without pay for 60 days.

Accordingly, this Grievance is hereby **DENIED** in part and **GRANTED** in part. The Respondent is **ORDERED** to reinstate Grievant, converting the present indefinite suspension to a suspension without pay for 60 days. Further, Respondent will pay any back payto which Grievant is entitled and appropriately adjust his seniority.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lewis County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board not any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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**LEWIS G. BREWER**

**Administrative Law Judge**

**Dated: February 24, 1994**

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Footnote: 1 *This case became mature for decision on January 21, 1993 following receipt of post-hearing submissions which included Respondent's reply brief.*

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Footnote: 2 *Grievant admitted, upon cross-examination by Respondent's counsel, that he had a "bad habit" of making such comments.*

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Footnote: 3 *Grievant does not challenge this suspension with pay.*

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Footnote: 4 *Grievant's contention that Mr. Peters somehow coached these students in preparing their statements is rejected. No evidence was introduced to support this speculative allegation. Moreover, the statements contain inconsistencies and reflect the different perspectives normally encountered when multiple individuals "witness" an event sufficient to negate any argument that they were orchestrated by Mr. Peters or anyone else. In any event, these unsworn hearsay statements have not been considered by the undersigned except to the extent that they corroborate Grievant's admissions to Dr. Mace or Grievant's testimony at the Level IV hearing.*

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Footnote: 5 *During the Level IV hearing, this suspension was incorporated in Grievant's Level IV appeal which had been initiated earlier on October 14, 1993.*

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Footnote: 6 *Dr. Mace testified that Grievant had previously been reprimanded for "losing his temper." However, no documentation to support this was introduced by LCBE. Moreover, this was inconsistent with the testimony of Ms. Paxson, Grievant's immediate supervisor. The undersigned finds that Respondent did not demonstrate the imposition of prior discipline by a preponderance of the evidence.*

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Footnote: 7 *The other driver, Mr. Peters, took sick leave for several days following the incident, complaining of a sore back. Mr. Peters also filed a claim for workers' compensation, citing the same injury.*

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Footnote: 8 *Respondent's counsel attempted to establish the "notoriety" of this incident by attaching two newspaper clippings as exhibits with its post-hearing submission. Grievant's counsel objected, noting that these exhibits were not introduced at the Level IV hearing. The undersigned concurs with Grievant's recollection of the evidence introduced at Level IV. These exhibits were not considered in this decision.*

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Footnote: 9 *Docket No. 93-44-060 (May 28, 1993).*

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Footnote: 10 *The charges in Kitzmiller involved conspiracy to commit murder. Kitzmiller, supra, at 2. The Lemerys were charged with conspiracy to manufacture marijuana, manufacturing marijuana, and possession of marijuana with intent to distribute. Lemery, supra, at 3.*

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Footnote: 11 *This dilemma apparently impacted the Respondent's conduct at the Level IV hearing in that neither Mr. Peters nor any of the students on his bus were called as witnesses.*

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*Footnote: 12Grievant argues that his penalty is disproportionate to the suspension assessed against the other participant in the altercation, Mr. Peters, citing Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991) and Best v. W. Va. Univ. Bd. of Trustees/W. Va. Univ., Docket No. 91-BOT-216 (Oct. 11, 1991). However, contrary to Grievant's contention, these holdings regarding comparable penalties are not relevant in that LCBE did not find Mr. Peters at fault and impose any disciplinary action on him. Inasmuch as the evidence does not support a finding that Mr. Peters applied excessive force in reacting to Grievant's provoking conduct, the undersigned concurs with LCBE's determination.*

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*Footnote: 13In Blake v. Cabell County Bd. of Educ., Docket No. 92-06-150 (Dec. 10, 1992), a bus operator was given a five-day suspension for striking another bus operator. The aggravating factors noted here were not present in that case. (The suspension in Blake was overturned at Level IV based on a factual determination that the disciplined employee acted in self-defense.)*