SHARON STOVER, . .

Grievant, .

.

v. . Docket No. 95-26-078

.

MASON COUNTY BOARD OF EDUCATION, .

.

Respondent. .

D E C I S I O N

On February 21, 1995, Sharon Stover (Grievant) appealed her dismissal by the Mason County Board of Education (MCBE) directly to Level IV as authorized by W. Va. Code § 18A-2-8. Thereafter, evidentiary hearings were conducted in MCBE's office in Point Pleasant, West Virginia, and in this Board's office in Charleston, West Virginia, on April 24, 1995, and May 26, 1995, respectively. This matter became mature for decision on July 19, 1995, following timely receipt of post-hearing submissions from both parties. Consistent with W. Va. Code § 18A-2-8 and the practice of this Grievance Board, this disciplinary action has been advanced on the docket for an expedited decision.

Grievant was employed by MCBE as a school bus operator. By letter dated January 125, 1995, Grievant was notified by MCBESuperintendent Michael E. Whalen of his intent to recommend her dismissal as follows:

> This letter shall serve as formal notice of the intention to recommend your suspension, without pay, beginning Thursday, January 26, 1995, and termination of your contract to the Mason County Board of Education at their regular meeting to be held Tuesday, February 14, 1995. The reason for this recommendation is willful neglect of duty and insubordination, pursuant to West Virginia Code, 18A-2-8.
>
> On Monday, January 23, 1995, you failed to run your bus route and in so doing you would have been denying the students who ride your bus a day of instruction had someone else not run your route. It has been reported to me by Mr. Darrell Gandee, Transportation Supervisor, that you refused to make the run stating the reason for

> your refusal as determination on your part that the road on which your bus is parked was not safe for the bus to navigate. You were able, however, to report to the bus garage. Mr. Gandee further informs me that he took a substitute driver to your bus and the route was completed by that driver. You also told Mr. Gandee that you would not make your assigned bus run on Tuesday the twenty-fourth. Ms. Stover, you were the only driver who did not drive their route on the twenty-third.
>
> In our pre-termination conference, you did not satisfactorily defend your position or your reason for not performing your assigned duties. Mr. Gandee, on the other hand, provided me with information which proved your bus route was not unduly hazardous and you should have driven your regular route on January 23rd.
>
> If you wish a hearing before the board please notify me, in writing, by Monday, February 13, 1995.

R Ex 9.

Darrell Gandee, MCBE's Transportation Supervisor, testified that prior to assuming his current duties in October 1994, he was employed as a school bus operator for over twenty-three years. In his present position, Mr. Gandee serves as the immediate supervisor of all bus operators, including Grievant. One of his regularduties involves checking the roads in bad weather and making a recommendation to the Superintendent of Schools between 5:45 and 6:15 a.m. on operation of the buses.

Grievant's bus route originates at Hart's Farm on Ten Mile Road where her bus is parked overnight. Her morning run proceeds from Hart's Farm up Ten Mile across Thomas Ridge, then out Eagle Ridge to Bud Chattin Road onto West Virginia Route 2 (Route 2) and then West into Point Pleasant, delivering students to the schools in or near town. J Ex 1. Mr. Gandee's residence is on Bud Chattin Road near Santown. On January 22, 1995, Mr. Gandee left home about 11:00 p.m. to check various bus routes, returning home around 2:00 a.m. on January 23.

When Mr. Gandee left his residence, he drove across Eagle Ridge and Thomas Ridge, proceeding North on Ten Mile across Hall's Hill before midnight, noting that the road had been "plowed and sanded." He checked various other roads traveled by MCBE school buses, including Long Hollow Road. Mr. Gandee was operating a pickup truck equipped with four-wheel drive but it

was not necessary to engage the four-wheel drive that night.

Approximately three hours after returning, Mr. Gandee again left his residence at 5:00 a.m., noting that approximately one inch of additional snow had fallen overnight. This time, Mr. Gandee followed Eagle Ridge and Thomas Ridge to Grievant's bus at Hart's Farm on Ten Mile. There, he turned without going up Hall's Hill, and continued checking routes until 5:45 a.m. when he called the Superintendent of Schools to recommend that the schools remainopen. It was Mr. Gandee's opinion that Grievant's bus could safely be operated along her route with the use of chains.

Later that morning, Mr. Gandee overheard Grievant on the two-way radio advising another bus operator, Harold Ridenour, not to drive over Hall's Hill. Normally, Mr. Ridenour comes South from Route 2 on Ten Mile, across Hall's Hill, making his first stop before reaching Hart's Farm. Grievant told Mr. Ridenour that Hall's Hill was a "solid sheet of ice." Mr. Gandee got on the radio in his vehicle and told them that he had crossed Hall's Hill at midnight and that it had been plowed and sanded. At that point, Grievant's husband, who is also a bus operator employed by MCBE, came on the radio, stating that there was now snow and ice "everywhere" on Hall's Hill. Grievant told Mr. Gandee that she could not get to her bus and was not going to drive that morning. According to Mr. Gandee, she also stated that the roads were too hazardous, specifically referring to a hill between Hart's Farm and Thomas Ridge.

Mr. Gandee arranged for Russell Waugh, who is employed by MCBE as a mechanic at the bus garage and was thus readily available as a substitute bus operator, to drive Grievant's route that morning. Mr. Gandee drove his pickup truck from the bus garage out Thomas Ridge, taking Mr. Waugh to Grievant's bus at Hart's Farm. Mr. Gandee had no problem getting to Grievant's bus. Mr. Gandee and Mr. Waugh put chains on the bus and Mr. Gandee followed the bus as Mr. Waugh drove the route. Mr. Gandee did not observe any problemsas the bus covered Grievant's entire route. The bus ran approximately 30 minutes late.

Mr. Gandee testified that school was held and that all routes were run. He stated that no drivers, except Grievant, declined to drive due to road conditions. However, Mr. Gandee acknowledged on cross-examination that several MCBE bus operators curtailed their routes due to road conditions on January 23, 1995. In particular, Sharon Hargraves did not drive the Eddy Chapel Road portion of her bus route. Likewise, Raymond Zuspan ran only part of his route, before turning around and going home. Mr. Gandee credited Mr. Zuspan with making a "reasonable attempt" to drive his route. Les

Hansen drove all but the Long Hollow Road portion of his route. Lana Rayburn did not drive the Eighteen Mile Road and Gallipolis Ferry Road portions of her route. Finally, Rex Thorne did not operate his bus on the Ten Mile Creek portion of his route, as the parents brought the students out of that area due to hazardous road conditions.

Mr. Gandee further testified that Mr. Ridenour's bus was driven to Hart's Farm from the East over Ten Mile Road on the morning of January 23rd. This bus normally comes down Ten Mile Road from the North by crossing Hall's Hill. Mr. Gandee concluded that Grievant could have safely reached her bus by this alternate route.

Later that morning, Grievant was in the bus garage answering phones. Mr. Gandee did not ask Grievant to perform those duties. After Mr. Gandee concluded that Grievant was not going to make herafternoon run, another substitute bus operator, Tommy Reynolds, was called in to drive her route. Mr. Reynolds completed Grievant's afternoon bus run and Mr. Gandee picked him up at Hart's Farm.

During the evening of January 23 and early morning of January 24, another four inches of snow fell on the area. Grievant was one of several bus operators who did not drive their routes that day, although school remained open. Neither Grievant nor any other bus operator was disciplined for failing to drive on January 24. MCBE presented evidence that Grievant and another employee filed a grievance challenging the Board's policy regarding assigned parking places for their buses. R Ex 8. This grievance, Farley v. Mason County Bd. of Educ., Docket No. 94-26-639 (Feb. 28, 1995), was ultimately decided adverse to Grievant's position regarding the bus parking policy. In addition, Grievant was suspended without pay for three days for insubordination, due to her refusal to park her bus at Hart's Farm. The grievance appealing that action was denied by this Grievance Board, as Grievant was not justified in refusing to comply with an order with which she disagreed. Stover v. Mason County Bd. of Educ., Docket No. 94-26-640 (Feb. 23, 1995). From Mr. Whelan's testimony at Level IV, as well as the transcript of Grievant's pre-termination hearing (J Ex 2), it is apparent that MCBE believed Grievant's refusal to drive her bus on the morning of January 23rd was primarily motivated by her continuing displeasure over the assigned parking place for her bus.

MCBE policy regarding school closure due to inclement weather is set forth in a brochure entitled "Emergency Procedure for Closing Mason County Schools." G Ex 6. That document states:

> Since the decision to close/delay schools must be made very early (5:45 a.m.), the weather conditions can change drastically by the time the buses run. Bus drivers have the authority to make a second decision on their route if the road appears to be unsafe. The bus driver notifies the supervisor and the children served by that route.

Mr. Whelan, MCBE's Superintendent of Schools, testified that he was not satisfied with Grievant's explanation for refusing to drive her bus route because she never actually drove on any portion of her route on Thomas Ridge, stopping and turning around on Ten Mile Road after observing conditions on Hall's Hill. Mr. Whelan noted that Grievant could have reached her bus by an alternate route over West Virginia Route 87, proceeding West on Ten Mile Road, the same route driven by Mr. Ridenour in his bus, thereby avoiding Hall's Hill. Mr. Whelan believed Grievant's refusal to drive her bus was motivated by her continuing displeasure with MCBE's requirement that she park her bus at Hart's Farm instead of her residence.

Clifford Hart, who lives along Grievant's bus route approximately one and one-half miles from the point where Grievant's bus is parked on his uncle's farm, testified that his children rode the school bus on the 23rd. He recalled that the roads were snowy that day and that he used chains on his pickup, although he only travelled approximately one-eighth of a mile on Thomas Ridge. He also recalled that the state had cleared the roads on Sunday for afuneral. He noted the school bus was late that morning and the bus had chains on, but he would not have permitted his children to ride the bus if he felt the road conditions were unsafe. However, he agreed Thomas Ridge was snow-covered and "slick" on the 23rd.

Howard Waltermyer, who lives on Thomas Ridge near Route 2, recalled that on January 23rd, his now-deceased wife drove his granddaughter to school when the bus was late. Mrs. Waltermyer made no complaint to him regarding the road conditions. However, Mr. Waltermyer had no personal knowledge of the road conditions on Thomas Ridge that day.

Brenna Shobe, who lives on Eagle Ridge, recalled that her children rode the bus to school on the 23rd and the bus was approximately one hour late. She remembered following the bus to Bud Chattin with her husband driving a four-wheel drive pickup. She noted that their vehicle was not in four-wheel drive at the time and, although there was snow on the road, she did not believe the road conditions were unduly hazardous or she would not have allowed her children to ride the bus that day.

Bobby Cochran, a resident of Bud Chattin Road along Grievant's bus route, testified that he drives a dump truck which is equipped with air brakes, similar to Grievant's bus. He recalled that the main roads were clear on the 23rd. However, the back roads, such as Bud Chattin, were "fairly slick." He

considered the roads to be "dangerous" due to snow and ice, and stated he would not have driven his truck that day if he lived further from Route 2. (According to Mr. Gandee's testimony, Grievant's bus parking place is 4.8 miles from Route 2.)

Mr. Cochran's wife, Marlena Cochran, also testified that the roads were "dangerous" that morning. Mrs. Cochran did not go to work that day, due to the roads, but allowed her children to ride the bus so they would not get into trouble for absenteeism. She believed the "back roads" were in worse condition than Bud Chattin. Mrs. Cochran stated she does not usually drive when the roads are "slick."

Donald Miller, a resident of Thomas Ridge, left for work before 7:00 a.m. on January 23rd. He recalled that the road was "very icy and snow-covered on top of that." He considered the road to be "very dangerous." On that morning, Mr. Miller was operating a four-wheel drive truck, noting that "it slid a little" but he did not lose control. Mr. Miller drove his children to school, believing the bus would not run that day, given the road conditions. In his opinion, a school bus would not have been able to get off Ten Mile Road without chains. He also brought his children home that afternoon, noting that the main roads were clear, but the country roads, such as Thomas Ridge, were still as slick and dangerous as they had been that morning.

Deanna Stewart, a resident of Route 2 near Flatrock, drove her children to school on the morning of January 23rd. She took an alternate route to the schools that morning, due to the hazardous road conditions. Likewise, she did not let her 17-year-old daughter drive that morning. Mrs. Stewart further recalled thatthe adverse road conditions delayed the emergency squad in responding to her mother's fatal heart attack later that morning. In Mrs. Stewart's opinion, her children should not have been required to attend school that day.

Another MCBE bus operator, Harold Ridenour, testified that his regular morning route requires him to drive across Hall's Hill. However, on January 23rd he came down Route 87 and across Leon Baden Road to Ten Mile, avoiding Hall's Hill (and his first stop on his regular route) due to road conditions. In his opinion, it was too hazardous to drive a school bus over the Hall's Hill section of Ten Mile Road that morning. The secondary roads were all slippery. He opined that certain areas of his route were not safe to drive. Mr. Ridenour explained that he had previously agreed with his supervisor to run the other portions of his route on days that Hall's Hill was too slippery to cross.

Russell Waugh previously served as a bus operator for six years and still serves as a bus

operator on an "emergency" basis. He remembered the day Mr. Gandee had him drive Grievant's morning bus route, as a "snowy, slick morning." Mr. Waugh recalled that he and Mr. Gandee drove over Thomas Ridge to Grievant's bus, put chains on the bus, and he began driving the route. He testified that at one stop, the bus slid toward a waiting child, who had to move out of the way to avoid being struck by the bus. Mr. Waugh recalled that the bus slid several times during the run on Thomas Ridge. In addition, the rear wheels spun in several places,despite the chains. As best he could recall, the bus ran about one hour late and only 14 students rode the bus that morning.

In Mr. Waugh's opinion, it was too dangerous to drive and he would not have run the route if he had been assigned as the regular driver. Indeed, Mr. Waugh refused to drive the same route that afternoon because he believed the roads were too slick.

Thomas Reynolds, a substitute bus operator for MCBE during the past three years, recalled that he was called in by Mr. Gandee on the afternoon of January 23rd to drive Grievant's evening route. He had previously driven Grievant's route as a substitute. When Mr. Gandee called Mr. Reynolds, he advised him that the roads on Grievant's route were "clear." Mr. Reynolds agreed that Route 2 and Bud Chattin were clear but Eagle Ridge and Thomas Ridge were both "a glare of ice." Ten Mile had been cleared by the state but was still "patchy" with ice. In his opinion, Thomas Ridge and Eagle Ridge were too dangerous to drive that afternoon.

Grievant's husband, William Stover, has been employed by MCBE as a regular bus operator for nearly 10 years. He testified that once a decision is made by the Superintendent of Schools to keep the schools open in inclement weather, he understands that MCBE policy permits the individual bus operator to decide whether or not it is safe to drive their particular bus run. Mr. Waugh's testimony regarding MCBE's policy was similar to Mr. Stover's.

Mr. Stover recalled that he decided not to drive his route on at least three occasions prior to January 23, 1995, even though MCBE had determined that the schools would remain open. On twooccasions, the state plowed snow so that he could not get his bus out of its parking place. On the third occasion, he drove his bus along part of his route before deciding it was too dangerous.

Mr. Stover estimated that 2 inches of snow fell overnight between the evening of the 22nd and the morning of the 23rd. That morning, he left his residence driving a four-wheel drive Jeep Cherokee to take Grievant to her bus. They also had Grievant's daughter (Mr. Stover's stepdaughter) with them. Although Route 2 was partially covered with snow, they had no difficulty until they turned onto Ten

Mile Road (Secondary 22), where their vehicle went sideways in four-wheel drive. They proceeded South on Ten Mile Road. Mr. Stover contradicted Mr. Gandee's testimony that Ten Mile Road had been treated, indicating that there were over 2 inches of new snow on top of what had previously fallen. Mr. Stover decided it was not safe to proceed down Hall's Hill to Grievant's bus. At the point where they turned around beyond the crest of the hill, there were no tracks on the road, indicating that they were the first people to use that road that morning.

Grievant introduced photos (G Exs 7-16) illustrating the topography in the vicinity of Hall's Hill and the initial portion of her route on Thomas Ridge. According to Mr. Stover, Grievant made the decision not to drive her route at the point where they stopped and turned around on Hall's Hill. He concurred with that decision. Mr. Stover also recalled a radio conversation between Grievant and Mr. Gandee from his bus where Mr. Gandee told her that Hall's Hill had been "salted and sanded." Mr. Stover told Mr.Gandee over the radio that his information was incorrect as they had just been there.

Mr. Stover testified credibly that his route was over terrain that was not as steep as Grievant's route and that a greater portion of his route was fully paved, making it safer for him to drive his entire route. He noted that some of the roads, particularly the primary roads, were in better condition when he ran his afternoon route.

Although MCBE elected to leave the schools open on the 24th of January, 12 MCBE bus operators, including Grievant and Mr. Stover, did not drive any portion of their routes that day. According to Mr. Stover, Mr. Gandee came on the radio on the morning of the 24th and indicated that he would not drive, given the prevalent road conditions. No bus operators were disciplined for failing to drive on the 24th. Mr. Stover indicated that he decided not to drive on the 24th before learning of Mr. Gandee's comments.

Grievant testified as a witness in her own behalf at the Level IV hearing, waiving her right to silence under W. Va. Code § 18-29-6. Grievant has been employed by MCBE as a full-time bus operator since 1985 and was issued a continuing contract of employment in 1988. Grievant's description of her normal bus route was consistent with the route described by Mr. Gandee. She has been driving this route for the past six years. MCBE HT at 31. There are 58 students assigned to her 71-passenger bus.

Grievant indicated that she understood MCBE permitted drivers to make a "second decision" not to drive their route if theybelieved it was unsafe, despite any decision by the Superintendent that

schools would remain open. Grievant stated that she made such a decision 4 or 5 times during the 1993-94 school year without any adverse consequences, so long as she explained her reasons to her supervisor.

On Sunday evening, Grievant called a Mrs. Blessing who lives at the bottom of Hall's Hill to inquire about the road conditions in that area. Mrs. Blessing told her that the roads had been treated from Ten Mile Road to Leon Baden Road and over to Route 87, to accommodate a funeral. On the morning of January 23rd, Grievant left her house early with her husband and daughter because it was cold and snowy. They drove East on Route 2, passing the entrances to Bud Chattin Road and Thomas Ridge Road, both of which they observed to be snow-covered. Upon turning onto Ten Mile Road from Route 2, their vehicle slid sideways in the road. They also slid as they went past Bear Wallow Road on Ten Mile. Grievant wanted to turn around when they reached the Durst Farm, but they proceeded a little further down the far side of Hall's Hill, turning around about one mile short of where Grievant's bus was parked.

Grievant made her decision not to drive her route while she was on Hall's Hill, based on the conditions of that road, which was similar in topography to the first portion of her route on Thomas Ridge. Grievant testified similarly at her termination hearing before MCBE, stating, "I didn't feel it was safe for my own vehicle and I'm sure it wasn't safe down there for that bus." MCBE HT at 20-21. Under cross-examination, Grievant stated that even if herbus was parked at her home or at another location on Thomas Ridge, based upon her experience in driving her route, she would not have driven to the "back side" of Thomas Ridge.

After reaching her husband's bus, which was parked on Chestnut Ridge Road, Grievant called Mr. Ridenour on the two-way radio to let him know that it was not safe to travel down Hall's Hill. Mr. Gandee came on the radio and told her that the road had been "clear" at midnight. Grievant told him that the road was not clear at that point and it was not safe to drive. Mr. Gandee did not order Grievant to drive.

Grievant stated that her only reason for not driving on the 23rd was her judgment that the road was not safe to drive while transporting children. Grievant agreed that she could have reached her bus safely via Route 87 and Leon Baden Road, but, in her opinion, she would nonetheless be unable to operate her bus safely on Thomas Ridge.

That afternoon, Mr. Gandee asked Grievant if she intended to drive her afternoon run. Grievant

responded by asking Mr. Gandee if he would take her to her bus on Tuesday morning and he indicated that he was not operating a "taxi service." Thus, Grievant never stated if she was willing to drive her route that afternoon.

DISCUSSION

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. ofEduc., Docket No. 89-41-232 (Dec. 14, 1989). "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Kitzmiller v. Webster County Bd. of Educ., Docket No. 90-51-352 (Dec. 28, 1990), citing Dillon v. Bd. of Educ., 351 S.E.2d (W. Va. 1986); Albani v. Mineral County Bd. of Educ., Docket No. 90-28-016 (Nov. 30, 1990). Moreover, 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).

W. Va. Code § 18A-2-8 provides, in pertinent part:

> Notwithstanding any other provisions of law, a board may suspend any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea of nole contendre to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article.

The dismissal letter from Superintendent Whelan indicates that Grievant was terminated for insubordination and willful neglect of duty. Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Directors, So. W. Va. Community College, DocketNo. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). In order to establish insubordination, the employer must not only demonstrate that a policy or directive that applied to the employee was in existence at the

time of the violation, but that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). (Cf. Rogliano v. Fayette County Bd. of Educ., Docket No. 94-10-164 (Oct. 25, 1994), where it was determined that "Grievant was given ample opportunity and notice that disciplinary action would be taken against him . . . .") Likewise, to prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990).

In the context of this matter, Grievant was clearly on notice of the duties she was expected to perform as a school bus operator on January 23, 1995. Likewise, it is not contested that Grievant declined to drive her assigned route on that day. Although "employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions" (Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990), citing Meads v. Veterans Admin., 36 M.S.P.R. 574 (1988); Daniel v. U.S. Postal Serv., 16 M.S.P.R. 486 (1983); Davisv. Smithsonian Inst., 13 M.S.P.R. 77 (1983)), Grievant submits that her decision was a justifiable exercise of her discretion as a bus operator, based upon a good faith belief that operating her bus was not safe under the road conditions which she knew or reasonably believed to exist.

The "safety exception" is a well-established deviation from the "obey now - grieve later" doctrine in American employment law. See Frank Elkouri & Edna A. Elkouri, How Arbitration Works 671 (3rd Ed. 1973). Arbitrators treat this exception as an affirmative defense and this Grievance Board has previously determined that grievants have the burden of establishing such defenses by a preponderance of the evidence. Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1991), aff'd, 192 W. Va. 540, 453 S.E.2d 374 (1994); Young v. W. Va. Dept. of Health & Human Resources, Docket No. 90-H-541 (Mar. 29, 1991).

This Grievance Board has not previously sanctioned the safety exception. Likewise, the West Virginia Supreme Court of Appeals has not applied this particular exception to a dismissed public employee. However, in the context of a claim for unemployment compensation, our Supreme Court of Appeals authorized this defense as follows:

> A claimant for unemployment compensation benefits is not guilty of disqualifying

> "misconduct" when the claimant refuses to perform a job assignment because he or she reasonably and in good faith believes that performance of the job assignment would jeopardize the claimant's own health or safety or the health or safety of others.

Peery v. Rutledge, 355 S.E.2d 41, 44 (W. Va. 1987). This holding is consistent with the approach taken by arbitrators in the private sector:

> The principle applicable here is that an employee may refuse to carry out a particular work assignment, if at the time he is given the work assignment, he reasonably believes that by carrying out such work assignment he will endanger his safety or health. In such an instance the employee has the duty, not only of stating that he believes there is risk to his safety or health, and the reason for believing so, but he also has the burden, if called upon, of showing by appropriate evidence that he had a reasonable basis for his belief.

LaClede Gas Co. v. Oil, Chemical & Atomic Workers Int'l Union No. 5-6, 39 Lab. Arb. (BNA) 833, 839 (1962) (Bothwell, Arb.). Quoted in A. M. Castle & Co. v. United Steelworkers of America, Local Union 3247, 41 Lab. Arb. (BNA) 666, 670 (1963) (Sembower, Arb.). The United States Merit Systems Protection Board has recognized a similar "safety exception" defense for federal employees. See Parker v. Dept. of Interior, 4 M.S.P.B. 184 (1980).

Accordingly, a public school employee may not be disciplined for insubordination or willful neglect of duty under W. Va. Code § 18A-2-8 if the employee establishes that his or her refusal to comply with an order or to perform assigned duties was based upon a reasonable and good faith belief that such compliance would jeopardize the employee's health or safety or the health or safety of others. See Peery, supra. See also Bd. of Educ. v. Chaddock, 398 S.E.2d 120 (W. Va. 1990). Clearly, in order to meet this test, Grievant must establish that her refusal to drive her bus on the 23rd of January was both reasonable under the circumstances and made in good faith.

MCBE's evidence appeared to substantially anticipate this defense. Thus, the employer argued that Grievant's failure to reach her bus by an available alternate route and, consequently, at least attempt to drive her route evinced an unreasonable refusal on her part. Similarly, MCBE contended that her prior grievance and suspension for insubordination, both of which arose out of a dispute with the employer over the parking place for her bus, provide strong circumstantial evidence that her disagreement with this requirement was the motivating factor for her refusal to drive on the 23rd. For these reasons, MCBE contended Grievant did not meet the good faith requirement in refusing to perform her duties. In assessing the respective positions of the parties, it is apparent that

Grievant was on "thin ice" with her employer well before January's snow began falling in Mason County. Clearly, Grievant was unhappy with MCBE's earlier decision to change the overnight parking place for her bus and pursued both legal and extra-legal means to reverse that decision. Accordingly, when Grievant refused to drive her bus on January 23rd, she was acting at her peril, should she fail to establish that her refusal was founded upon an honest and good faith belief that her safety, or the safety of her student passengers, was reasonably in jeopardy. Nonetheless, based upon all of the evidence presented during two days of hearing, as well as the available records of Grievant's pre-termination meeting with MCBE's Superintendent and her pre-termination hearing with the Board, the undersigned is persuaded that Grievant has met her burden.

As noted by Arbitrator Bothwell, "the question to be decided is not whether he actually would have suffered injury but whether he had a reasonable basis for believing so." LaClede, supra, at 839. There, the arbitrator rejected the employer's argument that the employee should have at least tried the assigned work before concluding that it was hazardous to his health. "[I]f an employee has a reasonable basis for believing that the performance of a work assignment would cause injury to his health, he is not obligated to perform the work in order to see what would happen." LaClede, supra, at 841. The undersigned finds that Grievant was not necessarily obligated to reach her bus and attempt to drive her route before being entitled to invoke the safety exception to a charge of insubordination or willful neglect of duty. Indeed, on the following day, January 24, 1995, the evidence indicates that several MCBE bus operators, including Grievant and her husband, made no effort to drive their buses due to the prevalent road conditions, and suffered no adverse consequences.

The question of whether a given stretch of highway is unsafe to drive is a matter upon which reasonable people can, and in this case, did, hold differing opinions, all in good faith. The fact that Mr. Gandee, an employee with over 20 years of bus driving experience, could traverse Grievant's route in a pickup truck and conclude in good faith that it was not too hazardous, does not preclude Grievant, with eight years of experience, including six years driving that route, from reaching a different conclusion,based upon road conditions between her home and a point no more than one mile distant from her bus.

Significantly, Grievant's assessment, rather than that of Mr. Gandee, was more accurate, according to the credited testimony of Mr. Waugh and Mr. Reynolds, the substitutes who drove her

route on the morning and afternoon of January 23rd. While Mr. Gandee testified that he followed Mr. Waugh's bus and did not observe any problems, Mr. Waugh described a situation in which he nearly collided with one of his waiting student riders, due to the slippery road conditions. Mr. Waugh, having driven the route under the conditions prevailing that morning, stated he would not do it again under the same circumstances, substantially confirming Grievant's assessment of her route. Indeed, Mr. Waugh declined to return and drive that same route in the afternoon. Mr. Reynolds, after driving Grievant's route on the afternoon of the 23rd, similarly concluded that portions of the route were "too dangerous" to drive at that time.

The legitimacy of Grievant's concerns were further supported by the observations of Mr. Cochran, a professional truck driver, as well as Mr. Miller and Mrs. Stewart, whose children normally rode on Grievant's bus. While Mr. Hart and Mrs. Shobe did not find the roads unduly hazardous on the 23rd, their testimony nonetheless indicated that Grievant's route was indeed covered with snow and some ice. (The testimony of Mr. Waltermyer and Mrs. Cochran must be largely discounted since neither of them operated or travelledin a vehicle on the 23rd. Indeed, it is not clear from their testimony if they even ventured out of their homes that day.)

Moreover, the road condition assessments of Mr. Waugh and Mr. Reynolds were substantially corroborated by Mr. Gandee's acknowledgement that at least 5 other MCBE bus operators did not drive their complete routes on January 23rd, including a Mr. Zuspan who started his route, but turned around and went home, apparently without picking up any passengers. Their testimony was supported by Mr. Ridenour's election to drive an alternate, truncated route on the 23rd, avoiding the Hall's Hill portion of his regular route. While it was not clear from the record when Mr. Gandee learned about these route deviations, it is apparent that Superintendent Whelan did not receive complete information when he was advised that Grievant was the only MCBE bus operator who did not drive her route on the 23rd.

In finding that Grievant acted in good faith, the undersigned further notes that Mr. Gandee indicated the roads which he selected for inspection during the late evening of January 22nd and early morning of January 23rd were those stretches of highway most likely to create hazardous situations for MCBE bus operators. Thus, it is not surprising that Grievant's husband and other MCBE bus operators were able to operate their entire routes along more favorable terrain than Grievant's regular route. Moreover, Mr. Gandee's pronouncement that Grievant's route was not unduly

hazardous was further contradicted by the fact that another MCBE bus operatorelected not to run on Long Hollow Road, one of the locations covered by Mr. Gandee's late night inspection.

Finally, while school bus operators must be expected to drive their routes during inclement weather, including when certain amounts of snow and ice are prevalent on the roads, the initial portion of Grievant's bus route is located along some fairly difficult terrain. MCBE was certainly on notice of this situation. "During the winter of 1993, Grievant was temporarily allowed to park her bus at home due to inclement weather." Finding of Fact No. 4, Stover v. Mason County Bd. of Educ., Docket No. 94-26-640 (Feb 23. 1995). R Ex 7. MCBE's exercise of its lawful discretion to determine the designated overnight parking place for Grievant's bus requires Grievant to drive the most difficult portion of her route first, working her way back toward Route 2. The witnesses in this matter consistently pointed toward improved road conditions along the better-travelled roads. Accordingly, where the choice of parking place for Grievant's bus appears inextricably intertwined with her ability to operate her bus safely under hazardous road conditions, as verified through the observations of credible witnesses, the undersigned finds that Grievant's refusal to drive on January 23rd was not primarily motivated by her disagreement with her employer. Further, the undersigned finds that Grievant acted in good faith when invoking the safety of her passengers, as permitted under MCBE's Emergency School Closing Procedures" allowing bus drivers to "make a second decision on their route ifthe road appears to be unsafe" (G Ex 6), as well as the general "safety exception" noted in Peery, supra.

In view of these findings, it is not necessary to address Grievant's defenses relating to retaliation or failure to comply with West Virginia Board of Education Policy 5300. Likewise, since the charges are not sustained, there is no need to review the penalty selected.

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

FINDINGS OF FACT

1. Grievant had been employed by the Mason County Board of Education (MCBE) as a full-time school bus operator since 1985.

2. Grievant's regular morning bus route proceeded from the overnight parking place for her bus at Hart's Farm on Ten Mile Road down Ten Mile, across Thomas Ridge Road to Eagle Ridge Road,

over Eagle Ridge to Bud Chattin Road, over Bud Chattin to West Virginia Route 2 and West on Route 2 into Point Pleasant. Her afternoon bus route proceeded in reverse order back to Hart's Farm.

3. Grievant and another employee previously filed an unsuccessful grievance challenging MCBE's decision in designating overnight parking places, including the Hart's Farm location for Grievant's assigned bus. Farley v. Mason County Bd. of Educ., Docket No. 94-26-639 (Feb. 28, 1995).

4. Grievant was suspended without pay for three days in October 1994 due to her insubordinate conduct in failing to parkher bus overnight at Hart's Farm as directed by MCBE. Stover v. Mason County Bd. of Educ., Docket No. 94-26-640 (Feb. 23, 1995).

5. Darrell Gandee, MCBE's Transportation Supervisor and Grievant's immediate supervisor, is charged with checking the roads in bad weather and making a recommendation to the Superintendent of Schools not later than 6:15 a.m., regarding curtailing school bus operations.

6. On January 22, 1995, Mr. Gandee, who resides on Bud Chattin Road, departed his residence at 11:00 p.m. to inspect various county roads. Mr. Gandee drove over Eagle Ridge Road to Thomas Ridge Road, across Thomas Ridge to Ten Mile Road, over Ten Mile past Grievant's parked bus at Hart's Farm, and, before midnight, across Hall's Hill on Ten Mile to Route 2.

7. After checking various other roads, including Long Hollow Road, Mr. Gandee returned to his residence around 2:00 a.m. on January 23, 1995.

8. Mr. Gandee again left his residence around 5:00 a.m. on January 23, 1995, proceeding across Eagle Ridge and Thomas Ridge to Hart's Farm where he turned around without crossing Hall's Hill and continued checking other routes until 5:45 a.m.

9. Although at least one inch of additional snow fell after midnight, Mr. Gandee did not observe any roads during either of his inspection trips which he believed were unduly hazardous for school bus operations.

10. Mr. Gandee believed that Grievant's bus could be operated safely over her regular route, provided that chains were used.

11. On January 23, 1995, at approximately 5:45 a.m., Mr. Gandee spoke to Michael Whalen, MCBE's Superintendent of Schools, recommending the schools remain open. Mr. Whelan concurred.

12. During the evening of January 22, 1995, Grievant called a Mrs. Blessing who lives on Ten Mile Road at the bottom of Hall's Hill. Grievant learned that the state had treated Ten Mile Road to Leon Baden Road and over to West Virginia Route 87 to accommodate a funeral.

13. Shortly before 6:00 a.m. on January 23, 1995, Grievant and her husband, William Stover, who is also employed by MCBE as a regular bus operator, left their residence on Long Hollow Road. Mr. Stover was driving their four-wheel drive Jeep Cherokee.

14. Mr. Stover proceeded along Route 2, turning onto Ten Mile Road and driving over the crest of Hall's Hill.

15. While proceeding along Route 2 to Ten Mile, Grievant observed portions of Bud Chattin Road and Thomas Ridge Road to be covered with snow.

16. After crossing the crest of Hall's Hill, Grievant observed that there were no tracks leading down Hall's Hill toward her bus parking place at Hart's Farm, approximately one mile further ahead on Ten Mile.

17. Based on her past experience in driving her regular route over Ten Mile Road and Thomas Ridge Road under various road conditions, and the road conditions she had observed to that point, Grievant determined that her bus route would be too hazardous for safely transporting children that day.

18. Mr. Stover turned around and drove approximately three miles to the parking place for his assigned bus, about two miles off Route 2 on Chestnut Ridge Road.

19. Grievant did not drive over any part of her regular bus route, except for portions of Route 2, on January 23, 1995. 20. Grievant advised Mr. Gandee via two-way radio on her husband's bus that she would not run her route because it was too dangerous.

21. Mr. Gandee arranged for Russell Waugh, a full-time mechanic and former bus operator employed by MCBE, to drive Grievant's morning route. Mr. Gandee drove Mr. Waugh to Grievant's bus, assisted him in installing chains, and followed the bus along Grievant's route.

22. At one point on Grievant's route, the bus operated by Mr. Waugh slid toward a waiting student, who had to move out of the way to avoid being struck by the bus.

23. Despite being equipped with chains, the rear wheels on the bus operated by Mr. Waugh spun on several occasions.

24. Mr. Waugh observed Grievant's route to be snowy and slick. After completing the route, Mr. Waugh determined that the route was too dangerous to drive and declined to drive the route that afternoon.

25. Thomas Reynolds, a substitute bus operator employed by MCBE, drove Grievant's regular

afternoon bus run.

26. Mr. Reynolds observed that Grievant's route along Eagle Ridge Road and Thomas Ridge Road were both a "glare of ice" andthat Ten Mile Road had been cleared by the state but was still "patchy" with ice that afternoon.

27. After driving Grievant's route, Mr. Reynolds determined that portions of the route on Eagle Ridge and Thomas Ridge were too hazardous to drive.

28. At least six MCBE bus operators elected not to drive portions of their bus routes on January 23, 1995. One bus operator, Harold Zuspan, started his route but turned around and returned home due to the road conditions. Another, Les Hansen, did not drive the Long Hollow Road portion of his route, although Mr. Gandee had similarly inspected that road without determining it was too dangerous for bus operations.

29. After an additional four inches of snow fell overnight, 12 MCBE bus operators, including Grievant and her husband, declined to drive any portion of their assigned bus routes on January 24, 1995, without any adverse consequences. Other buses ran and school remained open on January 24th.

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. Insubordination and willful neglect of duty are among the causes listed in W. Va. Code § 18A-2-8 for which an education employee may be disciplined. Jones v. Mingo County Bd. of Educ.,Docket No. 95-29-151 (Aug. 24, 1995). See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

3. Insubordination includes "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Directors, So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989).

4. In order to establish insubordination, the employer must demonstrate that the employee's

failure to comply with a directive was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

5. To prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990).

6. Generally, an employee must obey a supervisor's order and take appropriate action to challenge the validity of the supervisor's order. Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions. Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990). However, an employee may not be disciplined for insubordination or willful neglect of duty under W. Va. Code § 18A-2-8, if the employee establishes that his or her refusal to comply with an order or to perform assigned duties wasbased upon a reasonable and good faith belief that such compliance would jeopardize the employee's health or safety, or the health or safety of others. See Peery v. Rutledge, 355 S.E.2d 41 (W. Va. 1987). See also Bd. of Educ. v. Chaddock, 398 S.E.2d 120 (W. Va. 1990).

7. The "safety exception" described in Conclusion of Law Number Six is an affirmative defense and grievants have the burden of establishing such a defense by a preponderance of the evidence. Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1991), aff'd, 192 W. Va. 540, 453 S.E.2d 374 (1994); Young v. W. Va. Dept. of Health & Human Resources, Docket No. 90-H-541 (Mar. 29, 1991).

8. Grievant established, by a preponderance of the evidence, that her refusal to drive her regular bus route on the morning and afternoon of January 23, 1995, was based upon a reasonable and good faith belief that the road conditions along her route posed an undue hazard to the safety of her student passengers.

Accordingly, this grievance is hereby **GRANTED** and MCBE is **ORDERED** to reinstate Grievant to her position as a regular bus operator, with appropriate backpay and benefits, and to expunge any record of this suspension and termination from her personnel records.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mason 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 nor 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.

LEWIS G. BREWER

Administrative Law Judge

Dated: September 25, 1995