LEONARD SPAULDING, .

Grievant, .

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v. . Docket Number: 95-10-181

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FAYETTE COUNTY BOARD OF EDUCATION, .

Respondent. .

D E C I S I O N

Leonard Spaulding (hereinafter Grievant) was employed as a substitute bus operator by the Fayette County Board of Education (hereinafter Board) until his dismissal by the Board on May 1, 1995. He filed this grievance against the Board on May 5, 1995, pursuant to West Virginia Code §§18-29-1, et seq., contending that his dismissal was in violation of W. Va. Code §§18A-2-8 and 18A-4-15. He seeks reinstatement to employment as a substitute bus operator, back wages and seniority retroactive to May 1, 1995. This complaint was initiated at level four of the grievance procedure pursuant to Code §18A-2-8. An evidentiary hearing was held at this Grievance Board's Charleston, West Virginia office on June 19, 1995. The case became mature for decision on July 17,1995, the date the Undersigned received a copy of the transcript of the testimony presented to the Board at its meeting on May 1, 1995, concerning the charges against Grievant. (See footnote 1)

Grievant was employed by the Board on March 29, 1993. By letter of April 4, 1995, Grievant was suspended from his duties as a substitute bus operator for thirty days, April 5 through May 4, 1995, for alleged neglect of duty and insubordination. The Board contends that Grievant has had four

accidents while driving a school bus since September 14, 1994, and has failed to report all of them to the transportation director. More specifically, it contends that on both March 8, and 20, 1995, Grievant backed a bus into the wall at the Gauley Bridge High School bus garage; on March 6, 1995, he scraped the side of his bus on a cement wall while driving his route; and on September 14, 1994, he backed over a mailbox in the driveway of the regular bus operator for whom he was substituting. Previously, Grievant was issued a written reprimand on December 21, 1994, for having had five accidents over a period of fourteen and one-half days' substitute work, and also for having failed to file any accident reports for these incidents.

The Board of Education has the burden of proving the facts supporting the charges upon which Grievant's termination was based by a preponderance of the evidence. W. Va. Code §18-29-6. It contends that the testimony and exhibits presented at the hearingin this matter are sufficient to meet this burden. Grievant contended in his opening statement that the Board has failed to follow its own policies and also W. Va. Code §18A-2-8. He maintains that he has never received any performance evaluation, was not given an improvement plan prior to his termination and, was not allowed to transfer to other service personnel positions as requested. Finally, he denies that the Board has proven the charges supporting his termination by both competent and sufficient evidence.

At both hearings, the Board presented testimony of the various bus operators for whom Grievant had substituted, to establish that he caused the damage he is alleged to have caused. The Board contends that Grievant, over a period of approximately two years, substituted for regular drivers fourteen and one-half days and, within those limited days, experienced nine accidents while either on route or in and around the bus garage. According to the Board, Grievant also failed to report any of these accidents to its transportation director. The Board presented the testimony of the acting Transportation Director Galen Horrocks, to establish that all bus operators, pursuant to the State Department of Education's regulations, are required to report any and all accidents and, that Grievant had not reported any of his accidents. Finally, the Board's Superintendent testified as to the reasons supporting Grievant's termination.

Grievant did not testify at level four, although he did present testimony at the Board's hearing on May 1, 1995. Grievantadmitted that he did have one accident in the fall of 1994, when he backed into a fence across the street from the property where he was picking up a passenger. He then testified that he did report this accident to Transportation Director Horrocks. With regard to the other alleged

accidents, Grievant stated that he was never aware that he had hit anything with any of the buses he was driving; therefore, he did not know that he needed to report anything to Mr. Horrocks. Grievant also testified that he accidently struck a garage door at one of the bus garages but did no damage so there was no accident to report. In conclusion, Grievant denies that he has willfully neglected his duty or been insubordinate.

Grievant's suspension and termination were based upon four specifically alleged accidents which he had and did not report, three of which occurred at the Gauley Bridge bus garage and one on his assigned route from that garage. At both hearings in this matter, other alleged accidents and/or errors in judgment were attributed to Grievant; however, these incidents may not be relied upon in support of his termination as neither the suspension nor the dismissal letter make any reference to these incidents. In regard to Grievant's very general legal arguments, they can be summarily dismissed. Grievant has failed to establish by a preponderance of the evidence that the Board erred in not granting him a transfer, by not giving him an official performance evaluation, or by not creating and placing him upon an improvement plan prior to his discharge. Under Code §18A-2-8, an improvementplan is only a necessary precursor to a termination if that termination is based upon a charge of unsatisfactory performance. This was not the case herein.

This case boils down to an issue of the credibility of the witnesses. The Board relies upon both the direct and circumstantial evidence which it has presented to support its burden of proving that Grievant experienced the many accidents but did not report them. Grievant has denied that he experienced the accidents and contends that the Board has not met its burden of proof in the case. Given a thorough review of the evidence of record, it is determined that the Board's witnesses were more credible than Grievant, and that the Board has met its burden of proof.

Based upon the written reprimand Grievant received and did not challenge, it must be accepted that he experienced at least four accidents between the period of May 1993 and September 1994. These accidents were mostly related to his ability to judge distances while driving a school bus. Grievant's testimony that he was not aware that he had the four accidents in question is not convincing as it is deemed implausible. Given the nature of the accidents, it seems impossible that he would not have known he had hit four separate, stationary objects with a school bus, one of which was a wall, resulting in a twenty-foot scrape along the side of a forty-foot bus.

The Board presented as witnesses, bus drivers who testified that they witnessed Grievant strike

immovable objects at the GauleyBridge bus garage. Further, the circumstantial evidence supporting the conclusion that Grievant had an accident while driving his route on March 6, 1995, is sufficient to support such a finding. This evidence, coupled with testimony from the individual who trained Grievant and who testified that he experienced many problems with judging distances while driving, and also, testimony from an aide who rode on his bus more than once who stated that Grievant did not appear to be able to safely operate a smaller than normal, handicap-equipped school bus, supports the conclusion that Grievant's testimony was not credible. Since it is established that Grievant had the accidents attributed to him and, that he had to have been aware that they occurred, it must also be determined that he failed to report them to Transportation Director Horrocks.

The following findings of fact have been properly deduced from the evidentiary record developed in the case.

Findings of Fact

1. Grievant was employed by the Fayette County Board of Education as a substitute bus operator on March 29, 1993.

2. Between Grievant's hire date and September 22, 1994, he experienced five accidents and failed to properly report all five of them to his transportation director. As a result, Grievant was given a written reprimand and was warned that any further misconduct would lead to his immediate suspension and/or termination.

3. In the fall of 1994, Grievant ran over a mailbox in the yard of the regular driver for whom he was substituting. He failed to report this accident to the Board's transportation director.

4. On March 6, 1995, Grievant, while driving a school bus, hit an object, thereby causing approximately twenty feet of the paint and molding on the side of his bus to be damaged. Grievant failed to report this accident to the Board's transportation director.

5. On both March 8, and 20, 1995, Grievant backed his bus into the Gauley Bridge bus garage, causing damage to both the bus and the garage. Grievant did not report either of these accidents to the Board's transportation director.

6. Grievant was aware that both the State Department of Education and the Board require that all accidents involving school buses which result in damage, must be reported within twenty-four hours to the Board's transportation director.

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusions of law.

Conclusions of Law

1. Pursuant to W. Va. Code §18A-2-8, county board of education school personnel may only be suspended or dismissed for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge.

2. The Board has established by a preponderance of the evidence that Grievant willfully neglected his duty by failing to report four accidents to his transportation director while substitute driving a school bus for other regular drivers.

3. The Board has established by a preponderance of the evidence that Grievant was insubordinate by not reporting accidents which he had experienced, after being informed to do so by letter of written reprimand dated December 21, 1994.

4. Grievant has failed to prove by a preponderance of the evidence that the Board has violated, misapplied or misinterpreted any statute, regulation, policy, rule or written agreement, preventing it from terminating his employment based upon the charges of willful neglect of duty and insubordination.

Therefore, this grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Fayette 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.

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ALBERT C. DUNN, JR.

Administrative Law Judge

August 3, 1995

Footnote: 1The Board requested that the evidence taken at this Board hearing be considered as part of the record and Grievant did not object. This hearing was not one of the hearings required by the statutory Grievance Procedure for Education Employees.