KAREN S. CONNER, .

.

Grievant, .

.

v. . Docket No. 94-01-394

.

BARBOUR COUNTY BOARD OF EDUCATION, .

.

Respondent. .

D E C I S I O N

On August 9, 1994, Karen S. Conner (Grievant), in accordance with W. Va. Code § 18A-2-8, submitted this grievance directly to Level IV, challenging her thirty-day suspension without pay by the Respondent Barbour County Board of Education (BCBE). An evidentiary hearing in this matter was held in this Board's office in Elkins, West Virginia, on November 4, 1994. Thereafter, this matter became mature for decision on December 21, 1994, following timely receipt of post-hearing submissions from both parties. (See footnote 1) **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 is employed by BCBE as a school bus driver. This disciplinary matter concerns various events involving Grievant on June 8, 1994, alleged by BCBE as constituting insubordination under W. Va. Code § 18A-2-8. While most pertinent facts are not in dispute, some matters necessary to resolution of this grievance are controverted, thus requiring that credibility determinations be made in regard to conflicting testimony.

Charles Zinn testified that he is now in his second year as BCBE's Transportation Director. During the 1993-94 school year Mr. Zinn received complaints from parents, and the drivers themselves, concerning the actions of Grievant and another bus operator, Pamela Bartley. These complaints generally involved claims that the two drivers were "playing games" along

their bus route, including one or the other holding the other one back and refusing to let the other's bus pass.

Mr. Zinn indicated that on October 18, 1993, Grievant brought an audio tape recording to the BCBE Central Office on which she had recorded the events of her morning bus run on that particular day. Subsequently, on October 21, 1993, after two students crossed the road in front of her bus to board, Grievant pulled away from the bus stop leaving the younger of the two students, a first grader, standing along the road. The student managed to return safely home, crossing the road unaccompanied, and his parents reported the incident to the school principal.

As a result of the first set of events described above, Mr. Zinn sent Grievant a memo dated October 29, 1993, entitled "Distraction From Duties" and stating the following:

> **On Monday, October 18, 1993, you brought a tape to the Board of Education Office that you had made during your morning run which detailed how foggy it was, and that you missed your turn off. This also went on to detail your run and to say that another bus did not stop at a stop sign and how fast you were traveling along with the bus in front of you.**
>
> **As foggy as it was according to you on your tape, I don't see how you could of had your mind on driving in a safe manner while holding the tape recorder in one hand and watching the speed you were traveling along with what the other bus driver was doing.**
>
> **Since the beginning of the school year, you and another bus operator have been arguing and playing games with each other which has to cause distractions.**
>
> **I believe the conflict with the other driver has created such a diversion that it is questionable whether you can concentrate on driving in a safe manner.**
>
> **This situation with the other bus driver must be stopped and put out of your mind so you can concentrate on your job which is driving children to and from school in a safe manner.**

> **This will be included in your evaluation for the 1993-94 school year. I will need a plan from you as soon as possible as to how you expect to correct this problem. I need to be assured that students come first and are transported in a safe and timely manner.**

BCBE Ex 1.

On the same day, October 29, 1993, Mr. Zinn sent Grievant a second memo, this one entitled "Failing To Pick Up Student" and relating the following:

> **On Thursday, October 21, 1993, I was contacted by Mr. Kittle, Principal at Mount Vernon Elementary School, and by Mr. and Mrs. Croston, parents of Lucinda, about you closing the door on Lucinda and leaving her at her bus stop.**
>
> **Mrs. Croston said she walked Lucinda, who is a first grader, and Earl, who is a fourth grader, to the edge of the highway. When the bus approached and stopped, both children crossed the road in front of the school bus. The mother thought both of her children got on the bus. She saw you and thought you were talking to someone behind you. When the bus started, she returned home. She then heard some noise in the leaves and turned to look and saw her daughter. Mr. and Mrs. Croston contacted Mount Vernon Elementary school when they found out that the bus door was closed in their daughter's face. They were extremely upset to think she was not seen and could have been run over. I know this was not done intentionally, but this could have caused a very serious accident. It is a miracle that Lucinda was not run over by the bus or a car when she ran back across the road in front of traffic to get home.**
>
> **When I asked you what happened on Thursday evening at Philip Barbour, you told me you saw both children crossing the road and thought both got on the bus. This shows your attention was someplace else. You also said the children told you when you were about one-half mile down the road that you had left Lucinda at the stop.**
>
> **You did not report this to the principal or make any effort to see what had happened to Lucinda.**

BCBE Ex 2.

Grievant responded to the former memo relating to "Distraction From Duties" with a memo

of her own dated November 2, 1993, which stated the following:

> **Paragraph one is accurate as far as you went but the fact that the bus in front of me was deliberately driving slow in order to make me late and the fact that this bus would not pull over to let me pass and that I was late getting to Philip Barbour because of this was not mentioned.**
>
> **Paragraph two refers to a time one half hour down the road, after it was daylight and the fog was lifted. As I am sure you are aware, a good driver constantly looks at his speedometer, his gauges, his mirrors and his students as well as the traffic situation constantly. The holding of a hand held tape recorder is nothing more than holding a CB microphone or a two way radio microphone. The recorder requires only one button operation and can even be switched to voice activated and eliminatethe button. Many of the buses also have a microphone on them for a PA system for talking to the students. I would only assume that to be completely fair that they are also getting a memo similar to the one you gave me. Also, most of the recording that I did was actually done when I was stopped behind the other bus when it was making the stops on Rt. 76 and was documenting what I had observed while making scans of the mirrors, gauges and traffic before I forgot the data and while it was fresh on my mind.**
>
> **Paragraph three implies continual arguing which is just not the case. My husband told you about one argument in which the other driver cussed me out. I have avoided contact with the other driver other than what is necessary in the normal operations of our duties involving student behavior and transfers. The other driver, I feel sure, will confirm this also. I am not playing any game, I am merely protecting myself by documenting what happens on my bus route so that when I am late on a particular date and I am questioned about it I will be able to confirm why. A recorder or black box is on all airplanes so that if a plane goes down what happened in the last few minutes will aid in finding out the cause of the crash. Who was responsible for the game that involved giving a driver two video cameras?**
>
> **Paragraph four, five and six. I don't have a conflict with the other driver. I don't know where you got this. Since when is it considered a conflict to report why you were late? The other driver does have a video camera on her bus. I haven't told you anything that other students or parents hadn't already told you before and these could have been discovered by you if you would have viewed AND listened to these video tapes. If the other driver is doing things and saying things then that is between you and her. How many of the tapes have you listened to? What the other driver does does not concern me unless it causes me to be late and my concern over being late was initiated by your memo that set up my time schedule.**
>
> **I am and always have been a safe driver. I have an excellent driving record and I am doing my best to get the students to school on a time schedule that I**

did not set up.

BCBE Ex 3.

Subsequent to the above correspondence, Grievant complied with Mr. Zinn's request and submitted an improvement plan dated November 15, 1993, which provided as follows:

> **(1) As per your request on Wednesday November 10, 1993, I will not use my tape recorder while students are on board the bus (I will abide by your request until I have had an opportunity to check out the legality of such a request.)**
>
> **(2) I will refrain from looking at my watch to see what time it is except as required to reasonably keep on schedule.**
>
> **(3) I have talked with Mrs. Croston and she will have her daughter go in front of her son while boarding the bus. This will be an extra precaution in seeing that the little girl gets on the bus first.**
>
> **(4) I would like to request that a white exterior light be mounted outside my entrance door to light up the outside area near the door when the door is opened to load and unload students. When it is rainy, foggy and dark or a combination of these you can't see outside. There is a light on the step well but it doesn't light up so you can see outside the bus.**
>
> **Howard saw such a light on a Harrison County bus last week and he says that is what I need. He also thinks it is a good idea for all buses. This area outside the door is a dark area on a bus when you have to pick up or drop off students in the dark.**
>
> **I can assure you that no one is more concerned with the safety of our children than I am. If you require additional information, please let me know.**

BCBE Ex 4.

Despite noting at the Level IV hearing that he considered his guidance regarding the tape

recorder as a directive rather than a request, Mr. Zinn accepted the improvement plan as written by Grievant. Mr. Zinn also indicated that Grievant's husband, who is also a BCBE bus operator, was video taping other school buses atthe Career Center. There was no evidence that Mr. Conner was ever ordered to cease and desist from taping.

Mr. Zinn testified that State Policy 4336 states that drivers can only pick up students at their designated stops. He further indicated that state and supplemental county policies prohibited some one other than an authorized student being on the bus unless they had the approval of the Superintendent, Principal or Transportation Director. Mr. Zinn indicated that Principals gave written approval to students going home on a different bus than the one they rode to school, if the student had written approval from a parent. BCBE did not offer any written policies into evidence. Additionally, Mr. Zinn acknowledged on cross-examination that the updated county policies he referred to were first discussed with the bus operators in an inservice meeting at the beginning of the 1994-95 school year.

Pamela Bartley, another BCBE Bus Operator, testified that she saw a camcorder on a tripod in the seat behind the bus operator on Grievant's bus during her morning run on June 8, 1994. Ms. Bartley indicated that the camera was being operated by someone sitting in the seat behind the camera (the second seat from the driver). She reported this incident to Mr. Zinn following her morning run.

Mr. Zinn described a subsequent conversation with Grievant at the Bus Garage on June 8, 1994, as she got off her bus following the last day of school for the 1993-94 school year. He first told her that he had approved her attendance at the State Bus Rodeo, but she would have to "fax" her application from the Board Office tothe appropriate state official that same day. Grievant agreed to submit the necessary application. Then, Mr. Zinn handed Grievant her written performance evaluation for the 1993-94 school year.

According to Mr. Zinn, Grievant looked at the performance evaluation and started saying "liar, liar." At about that same time, Mr. Zinn informed Grievant of a report he had received earlier that day regarding her use of a video camera on her bus. Grievant responded by saying that Mr. Zinn always accused her of things without asking her what had really happened. Mr. Zinn told Grievant that he was now asking for her side of the story. She proceeded to call Mr. Zinn a "dirty bastard." There was no substantive discussion regarding the evaluation. Mr. Zinn

asked Grievant to sign her evaluation to acknowledge receipt. Grievant refused to sign and Mr. Zinn asked her to return the evaluation so he could place it in her file without signature. However, when Mr. Zinn reached for the evaluation, Grievant jerked it back. When she again held the document in front of her, Mr. Zinn reached for it a second time. This time, Grievant held the document behind her back.

At about that time, Mr. Zinn called another bus driver over to witness the confrontation. Carl Bolton, a fellow bus operator employed by BCBE, testified that he was in the process of taking his personal belongings off his bus in the parking area at the BCBE Bus Garage. He observed Grievant take some papers and stick them behind her back as Mr. Zinn reached for them. Mr. Zinn then calledMr. Bolton over to where he and Grievant were standing to "witness a situation."

Mr. Zinn informed Mr. Bolton that he had given Grievant her evaluation papers and Grievant was refusing to give them back. Mr. Zinn then told Grievant, in Mr. Bolton's presence, that she was being reassigned to the Belington route of a bus operator who was retiring, in accordance with a written transfer notice she had previously been issued. Mr. Bolton stated that he then saw Grievant step closer to Mr. Zinn's face and call Mr. Zinn a "dirty bastard." Mr. Bolton stated that this took place on Board of Education property at the end of the BCBE Bus Garage "just off the street" adjacent to the Building Maintenance area.

After Grievant's comment Mr. Bolton and Mr. Zinn walked away from Grievant. Mr. Zinn testified that he walked away out of fear that Grievant might shove or push him. However, there was no physical misconduct alleged or threatened. On cross-examination, Mr. Bolton acknowledged that "salty language" was commonly employed around the Bus Garage, but denied that such language was directed at individuals. Mr. Zinn also acknowledged that he anticipated that Grievant would be unhappy learning that she had been transferred. (Earlier that day, Mr. Zinn had notified three other drivers of their transfer.) Approximately 15 minutes after the confrontation ended, Grievant's husband, Howard Conner, returned Grievant's evaluation forms to Mr. Zinn. See BCBE Ex 9.

As a result of the incidents described above, Mr. Zinn subsequently directed two letters to Grievant, both dated June 17,1994. One dealt with the video camera on her bus in the following terms:

It was reported to me, and you verified it at your (sic) meeting, that on June 8, 1994, during your morning run in Galloway, you had a camcorder set up on your bus and were taping during your run. You also had your daughter on the bus using the camcorder.

These two events are very close to insubordination. You were told not to transport students that are not on your route without prior approval by the school principal or myself, transportation director.

These two events that you took upon yourself caused a very serious safety situation. This could have caused an accident not only on your bus but on buses you were taping. Your attention was not on your driving.

This type of action will not be tolerated. I am still investigating these incidents and will possibly recommend further action once completed.

A copy of this letter will be placed in your file.

BCBE Ex 8.

The foregoing letter generated a written response from

Grievant dated June 20, 1994, and stating the following:

Are you disabled? Do you have a hearing problem? I distinctly recall telling you emphatically that:

1) I was NOT taping ANYONE on my bus run

2) I was NOT taping ANY BUSES on my bus run

3) I was NOT TAPING PAM as you accused me

4) I DID NOT have the camcorder on my bus, MY

DAUGHTER DID

5) My daughter is extremely upset with your letter and you will be hearing from her in the future.

6) It is my daughter's right to ride any school bus in the county that she chooses as long as she has a note from her parents, which she did.

7) Jimmy Runion's daughter rode his bus the very same day. Did you send Mr. Runion a "nasty" letter also? I can give you a list of several other drivers whose children have rode with them throughout the school year without a "peep" out of you. That is to say nothing of the many students who go from one bus to the other staying over with friends.

8) As I distinctly recall, you jumped on me, without knowing what you were talking about and made false accusations. Then you didn't want to listen to the truth. I did take the time to tell you items 1 thru 4 above and you still didn't listen.

9) There is no State or County Board policy in existence as of this date that forbids tape recorders, camcorders, or the like on a school bus by the driver or the students. In fact, as you are well aware, camcorders are mounted on several buses and if you forbid this on one then you must on ALL or face charges of discrimination, harassment, etc. As I told you, I was not taping any other buses. My daughter can tape whatever she wants. As you are probably aware, even the school yearbook can now be purchased on video tape. Since when and how on earth can what my daughter or what any other student on my bus does affect the safety of the students on my bus or other bus drivers or students as you stated in your letter?

Speaking of safety, I have never received a reply, and I know you never

contacted any of the witnesses regarding the bus who cut me off and deliberately drove in front of me at Philippi Elementary School and endangered my life and the lives of the students on my bus. This actually happened and was not the figment of someone's imagination. If you really cared about safety you would not ignore actual safety hazards.

Please remove your letter from my file. A written apology is expected by return mail.

BCBE Ex 5.

Mr. Zinn also sent a letter to Grievant on June 17, 1994 regarding her use of inappropriate language as follows:

During our meeting at the bus garage on June 8, 1994, you got very defensive and started using inappropriate language. I called a bus driver over to verify what was said and you continued to use inappropriate language.

This type of language will not be tolerated by a school employee on school property. I am still considering further action.

A copy of this letter will be placed in your file.

BCBE Ex 7.

As with the companion letter from Mr. Zinn previously discussed, the foregoing correspondence generated a response from Grievant dated June 20, 1994 in the following terms:

How long do you intend to continue to harass me? First of all, no bad language was used on Board property. I was not in the Bus Garage and I was not on my bus and unless the Board of Education now owns the streets of Philippi you owe me an apology for your total ignorance. You certainly like to dish it out, but you don't have the guts to stand up and take it!

> **Unless you have knowledge that the Constitution of the United States and the Bill of Rights has been abandoned, I believe that we still have freedom of speech in West Virginia and you cannot deny me my freedom unless of course you want to deal with the ACLU.**
>
> **Furthermore, you sit on your "laurels" and listen to all sorts of "cuss" words out of the men in the bus garage and I will bet that you never sent any of them a letter like you did me. What I said to you was not a cuss word and I am entitled to my opinion. The dictionary definition of the word I called you is "a vicious, despicable, or thoroughly disliked person." The harassment and the reprisals that you have continually dished out on me all year long would certainly be described as vicious and despicable.**
>
> **I expect a written apology and your letter to me to be destroyed.**

BCBE Ex 6.

On July 13, 1994, Mr. Zinn wrote to the Superintendent of Schools, William E. Phillips, recommending that Grievant be suspended for thirty days. G Ex 2. Mr. Zinn testified that he had not received Grievant's letters dated June 20, 1994, prior to the time when he recommended her suspension. This was primarily due to the fact that he was at home recovering from an operation and was conducting business by telephone through a secretary at the Board Office. Grievant's first formal notification of a proposedsuspension was contained in a letter from Mr. Phillips dated July 15, 1994, and stating the following:

> **This is to inform you that Charles Zinn, Director of Transportation, has informed me of a series of insubordinate actions which occurred or culminated on June 8, 1994. I have researched the information he presented and have verified it to be true.**
>
> **I am, therefore, pursuant to West Virginia Code 18A-2-7, suspending you, without pay, for a period of thirty (30) days beginning August 25, 1994 and extending through October 5, 1994.**
>
> **A hearing on these charges will be scheduled for the August 2, 1994 Board Meeting which will be held at 7:00 p.m. at the Board of Education Office, 105 South Railroad Street, Philippi, West Virginia. You and/or your counsel may be**

heard or present evidence in your behalf at this meeting.

BCBE Ex 12.

Mr. Phillips followed the above-quoted correspondence with a letter dated July 28, 1994, outlining the specific charges against Grievant as follows:

This is to advise you that the following charges of insubordination will be presented to the School Board at its next regularly scheduled meeting.

1. On June 8, 1994 you violated established transportation procedures by allowing your daughter, Amy Sue Conner, to ride your bus without administrative permission.

2. On June 8, 1994 you allowed your daughter, Amy Sue Conner, to operate a recording apparatus on your bus without administrative permission and in disobedience to the direction given to you by your supervisor regarding the use of taping devices on your bus.

3. On June 8, 1994 at the Philippi Bus Garage you were noncompliant and refused to return your evaluation form to your immediate supervisor.

4. On June 8, 1994 at the Philippi Bus Garage you were unruly and, in the presence of others, made derogatory statements to your immediate supervisor.

BCBE Ex 10.

Mr. Zinn noted that Grievant had filed 12 to 14 grievances under the statutory grievance procedure for education employees during the 1993-94 school year. He further remarked that this was a smaller number of grievances than she had filed in the previous school year against his predecessor as Director of Transportation. Mr. Zinn stated that he considered these grievances to be a form of "harassment." Nonetheless, Mr. Zinn denied that these grievances influenced the penalty he recommended for Grievant's incidents of

insubordination.

Mr. Zinn also indicated, during cross-examination, that no action would have been taken for Grievant's daughter being on her bus had Grievant not been insubordinate in her language that same day. He further stated at one point, "just because she had her daughter [on the bus] probably would not have merited a suspension or anything." Likewise, he stated that "the taping on the bus didn't cause me a problem, it was a concern for the other driver. It shook her up enough that it caused her problems or she wouldn't have called in to the county office." Mr. Zinn agreed that Grievant's alleged offensive language was the prime impetus behind the suspension.

BCBE's Superintendent of Schools, William Phillips, testified that he investigated the charges, including discussing the matter with counsel, at the same time Mr. Zinn was conducting his own inquiry. Moreover, he talked with Mr. Zinn by phone and personally interviewed Mr. Bolton and Ms. Bartley regarding what they had witnessed, before he recommended Grievant's suspension to the Board. Mr. Phillips indicated that he considered lesser penalties, to include a reprimand or an improvement plan, before electing to recommend a thirty-day suspension. He further indicated that he considered termination of Grievant but considered that Grievant "has been a good employee" and hoped "that this action . . . would be corrective enough that we could go on and have an employee performing her duties."

In arriving at his recommendation of a thirty-day suspension, Mr. Phillips further testified that he considered two prior disciplinary actions against Grievant while selecting the appropriate penalty for the offenses charged. Grievant was previously suspended for two days in 1980 for fighting. Subsequently, Grievant was suspended for four days in 1985 for striking her immediate supervisor. Mr. Phillips indicated he was not familiar with the specifics of incidents which resulted in reprimands being issued to other service personnel in 1994 for "insubordination" and "inappropriate language." He also indicated that professional personnel who had been reprimanded for separate "profanity with student" incidents in 1984 and 1985 had been overheard using language "less extreme" than that involved here. **(See footnote 2)** **Mr. Phillips recalled that Grievant's prior suspensions were discussed before the Board during her pre-suspension hearing.**

Grievant testified in her own behalf indicating that she has been a regular bus operator for BCBE for sixteen years and previously worked as a substitute bus operator for two years. She further testified that she was aware of the state transportation regulations governing bus operators but had never seen a county policy governing bus operations as testified to by Mr. Zinn. Grievant indicated that a previous Director of Transportation had directed the bus operators to pick up children at a designated bus stop, even if that was not the student's assigned stop, while conducting their morning run transporting students to school. However, when taking students home on their afternoon run, the bus operator needed a note signed by the school principal if the student were to ride a bus different from the one they normally rode or if the student was to get off at a stop other than his assigned stop. She denied any knowledge of a policy such as Mr. Zinn described limiting who rode on the bus going to school.

Grievant acknowledged that she had her daughter on her bus during her morning run. In particular, she was using her daughter to operate a video camera to document certain aspects of her bus route for evidentiary purposes in regard to another pending grievance she had against BCBE. Grievant had her daughter operate the camera since she recognized that she could not "tape and drive too." Grievant had the video camera on a tripod in the seat behind her with her daughter seated beside the camera and holding the camera in place. Grievant understood that she was not to use a tape recorder because it required her to do two things at once,affecting the safety of her driving. She did not believe that having her daughter operate a video camera went against Mr. Zinn's directive. Grievant did not have a video camera on her bus during her afternoon run.

When Grievant returned to the Bus Garage following her afternoon run, she was waiting for an opportunity to wash her bus. Grievant indicated that she was standing at the corner of the Maintenance Building on what she contends is an unpaved city street. Grievant's version of the conversation with Mr. Zinn which ensued at that point is consistent in regard to the initial discussion relating to the Bus Rodeo, but diverges at that point. While agreeing that Mr. Zinn then discussed the issue of video taping during Grievant's morning run, Grievant recalled Mr. Zinn's approach as more accusatory than simply inquiring into her side of the story. However, she did recall that Mr. Zinn said "that's what I'm doing right now" in response to her

protestations that "every body jumps to conclusions without looking into the matter and finding out exactly what was going on."

Grievant further testified that Mr. Zinn subsequently handed her two evaluation forms (BCBE Ex 9 & G Ex 3L). Grievant glanced over them and noted that "needs work" was noted in certain places on both documents and "needs improvement" was marked on one form, as well as certain narrative comments such as "work on developing a better rapport with other drivers & students." Grievant felt that these comments were unfairly critical.

Grievant asked if one of the documents was her copy and Mr. Zinn told her that they were two separate documents. Grievant then told Mr. Zinn that she wouldn't sign the forms because "I feel that they are nothing but a bunch of lies." According to Grievant, Mr. Zinn told her that she did not have to sign them if she did not want to sign them. Mr. Zinn told her he needed them back and Grievant told him that she needed to first make a copy for her records. Mr. Zinn again stated that he needed them back and that he would make copies for her. Grievant told him that she would give them back after she went down to the Board Office and made her own copies. At this time, Mr. Zinn reached for the documents and Grievant "instinctively pulled them away." This process was repeated a second time and then Mr. Zinn informed Grievant that she was being transferred to a different bus run at Belington for the following year. Grievant subsequently testified that she would not voluntarily return the forms to Mr. Zinn because she "did not trust him."

According to Grievant, Mr. Zinn walked over and called to Carl Bolton to come over and "be a witness to this." When Mr. Bolton came over, Mr. Zinn told him that he wanted him to be a witness that he was transferring Grievant "to Lejeune Cross's bus run next year." At that point, Mr. Zinn and Mr. Bolton started walking away while Grievant was still holding the evaluation forms. Grievant walked past Mr. Zinn and Mr. Bolton on her way to call her attorney with regard to what she should do with the evaluation forms. As she walked past Mr. Zinn, she said "you bastard."

After talking with an attorney, Grievant made some notes from the evaluation forms and had her husband return the forms to Mr. Zinn less than fifteen minutes later. Grievant admitted that she was angry and upset about her transfer when she called Mr. Zinn a "bastard." She further noted that she had not called Mr. Zinn a "liar" but had simply stated that certain entries

in her evaluations were "lies." Grievant further noted that she had never threatened to strike Mr. Zinn as she was very careful not to give physical expression to her frustrations because of her past disciplinary record.

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. of Educ., 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).

This grievance involves four specific charges of alleged misconduct by Grievant, all of which were characterized by BCBE as insubordination, one of the explicit causes for dismissal or suspension of a school employee in W. Va. Code § 18A-2-8. As each charge of insubordination alleged here involves a different set of facts and circumstances, each charge will be analyzed separately in accordance with the notice of suspension issued by Superintendent Phillips.

> **A. On June 8, 1994 [Grievant] violated established transportation procedures by allowing [her] daughter, Amy Sue Conner, to ride [her] bus without administrative permission.**

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, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket

No. 26-89-004 (May 1, 1989). Mr. Zinn described the event alleged in charge A as being "very close to insubordination" in his letter to Grievant dated June 17, 1994. BCBE Ex 8. This is a valid assessment of the charge and nothing that happened after June 17th brought this event any closer to constituting insubordination. 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 thatthe employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. (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 . . . .") In the context of this matter, both Grievant and her husband, Howard Conner, gave unrebutted testimony that the rules in effect at the time of this incident required a permission slip from the school principal before a student could ride a different bus home from school in the afternoon. (See footnote 3) **However, the standing procedure for picking up students in the morning was to pick up all students who were authorized to ride the bus. Under state policy, bus operators were not authorized to pick up students standing along the road at a point other than an authorized bus stop.**

BCBE's failure to introduce any written policies, or to establish conclusively when such policies were promulgated and conveyed to employees such as Grievant, constitutes a fatal defect in any effort to prove that Grievant, by permitting her daughter, a 9th grade student at Philip Barbour High School (PBHS), to ride to school on her bus during her morning bus run, committed an act of insubordination. Indeed, there was evidence that other bus operators had allowed their children on their own buses undersimilar circumstances on or before June 8, 1994, without any adverse consequences. Moreover, Grievant's letter to Mr. Zinn dated June 20, 1994, (BCBE Ex 5) should have placed BCBE on clear notice of Grievant's position on this issue. Accordingly, this charge of insubordination is not sustained.

> **B. On June 8, 1994 [Grievant] allowed [her] daughter, Amy Sue Conner, to operate a recording apparatus on [her] bus without administrative permission and in disobedience to the direction given to [Grievant] by [her] supervisor regarding the use of taping devices on [her] bus.**

As with the charge previously discussed, this matter was covered by Mr. Zinn's June 17th

characterization as an event that comes "very close to insubordination." The undersigned finds that this charge is similarly flawed. The allegation refers to a "recording device" while Grievant's written improvement plan (BCBE Ex 4) only contains an agreement not to use a "tape recorder." Moreover, the charge specifies that Grievant did not have "administrative permission" to operate a video camera while there was no evidence presented to suggest how such permission could possibly be obtained. Mr. Zinn even admitted that he considered his telling Grievant not to use a tape recorder as being a "directive" rather than a "request" although he did not clarify this issue with Grievant in the course of accepting her improvement plan. Moreover, the undersigned could not find any point in Mr. Zinn's testimony where he instructed Grievant not to use "recording devices" in general on her bus. Thus, Grievant's belief that she could have someone else operate a video camera under circumstances such that it would not necessarily distract her from her drivingwas not so unreasonable that her act constituted insubordination. See Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988).

It should be indicated, however, that while this act did not constitute insubordination under § 18A-2-8, it was certainly a proper matter for Mr. Zinn's concern. As noted in his letter of June 17, 1994, having a student operating a video camera on a tripod immediately behind the driver created "a very serious safety situation." Even though Grievant may not have been distracted by the camera's operation, a sudden application of the brakes and this camera could have become a projectile headed who knows where. Grievant's testimony that the video camera being operated by her daughter was comparable to cameras installed on school buses by the board of education is simply ludicrous. Such authorized cameras are permanently mounted so as not to become unguided missiles and do not require any directions from the driver to start operating, other than starting the bus motor. (See footnote 4) **The undersigned is particularly concerned that in Grievant's over-zealous effort to gather evidence for use in a pending grievance, she failed to recognize the inherent safety implications of her conduct. Accordingly, although the charge of insubordination in relation to the incident of a video camera on Grievant's bus during her morning run on June 8, 1994, is not sustained, this result has no bearing on Mr. Zinn'sletter of June 17, 1994, which may remain in Grievant's personnel file in accordance with standard BCBE policies and be considered in regard to her**

performance evaluation for 1993-94. (See footnote 5)

C. On June 8, 1994 at the Philippi Bus Garage you were noncompliant and refused to return your evaluation form to your immediate supervisor.

This charge is substantially controlled by the general axiom of employment law that "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), 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); Davis v. Smithsonian Inst., 13 M.S.P.R. 77 (1983). These general principles have been found to apply to an employee's refusal to turn over a document upon request. McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992).

The evidence on this charge was clear and unequivocal. Grievant's immediate supervisor asked her to hand back a document he had handed to her for her review, and she refused. This refusal was observed by another bus operator, Carl Bolton, and acknowledged in Grievant's testimony at Level IV. While Grievant attempted tomitigate the seriousness of the offense by noting that she returned the documents, through her husband, within fifteen minutes, the underlying conduct was nonetheless insubordinate. Indeed, Grievant's testimony that she had refused to return the documents to her supervisor because she "did not trust him" typifies the defiance of authority which is an inherent element of insubordinate conduct. See Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988). Accordingly, this charge of insubordination is sustained.

D. On June 8, 1994 at the Philippi Bus Garage you were unruly and, in the presence of others, made derogatory statements to your immediate supervisor.

This Grievance Board has previously noted that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out." Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988), citing Weber v. Buncombe County Bd. of Educ., 266 S.E.2d 42

(N.C. 1980). Thus, this Board has found that uttering abusive language to a supervisor may constitute insubordination. Payne v. W. Va. Dept. of Transp., Docket No. 93-DOH-454 (Apr. 29, 1994). See Burton Mfg. Co. v. Boilermakers Local 590, 82 Lab. Arb. (BNA) 1228 (1994) (Holley, Arb.).

Whenever an employee alleges an affirmative defense to a disciplinary charge, the employee has the burden of establishing that defense by a preponderance of the evidence. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991); Young v. W. Va. Dept. of Health & Human Res., Docket No. 90-H-541 (Mar. 29, 1991). Grievant's defense that her comments are somehow beyond theauthority of the employer because they took place on a public street is without merit. In the first place, despite the photographic evidence introduced, it is in no way clear to the undersigned that the location of this incident would be readily recognized as a "public street." Moreover, even if Grievant's discussion with Mr. Zinn took place on property that is technically part of the City of Philippi and not owned by or dedicated to the use of BCBE, there is obviously a sufficient nexus between Grievant's conduct and her employment status to sustain the charge at issue. See Rogliano v. Fayette County Bd. of Educ., 347 S.E.2d 220 (W. Va. 1986); Woo v. Putnam County Bd. of Educ., Docket No. 93-40-420 (June 2, 1994).

Grievant here does not deny that she called her immediate supervisor a "bastard" in front of another employee who is likewise supervised by Mr. Zinn. Instead, Grievant quibbles over whether she called her supervisor a "dirty" bastard. Although it is not essential to prove insubordination as charged, the undersigned finds more credible the testimony of Mr. Zinn and Mr. Bolton that Grievant used the phrase "dirty bastard" on at least one occasion. Grievant admitted to being emotionally distraught by her confrontation with Mr. Zinn and did not appear to be particularly candid when discussing this episode. As for Mr. Bolton and Mr. Zinn, their testimony on this issue was consistent and appeared generally candid and unrehearsed. Moreover, Grievant's written responses to Mr. Zinn's correspondence weeks after the incident at issue evincea tone of disrespect and contempt for her immediate supervisor that belies her subsequent exculpatory testimony. See BCBE Ex 5 & 6.

Inasmuch as the charge alleges that Grievant made "derogatory statements" in the plural, the undersigned finds that a preponderance of the evidence supports that Grievant used the

word "bastard" more than once, as testified to by Mr. Zinn. However, the undersigned further finds that Grievant most likely used the terms "lies" and "all lies" when discussing her evaluations and that Mr. Zinn simply recalls Grievant as saying "liar" because he was the author of the so-called "lies" at issue. In any event, in the context of the discussion described by Mr. Zinn, whether Grievant used the term "lies" or "liar" in addressing the comments in her evaluation form, Grievant's employment of such terms in expressing her disagreement with her evaluation did not rise to the level of actionable insubordination. Thus, the fourth charge regarding derogatory comments is sustained, based upon the previously-stated finding that Grievant used the term "bastard" more than once in addressing her immediate supervisor.

This Board has authority to mitigate a penalty imposed on an employee for multiple charges when one or more of those charges is not supported by a preponderance of the evidence. Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 9, 1991). This mitigation authority is consistent with the Grievance Board's power to fashion relief which is "fair and equitable" in the circumstances of a particular case in accordancewith W. Va. Code § 18-29-5(b). Phillips, supra. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips, supra, at 6, citing Parham v. Raleigh County Bd. Of Educ., Docket No. 91-41-131 (Nov. 7, 1991).

In regard to these pertinent factors, the undersigned notes that Grievant's prior evaluations covering her employment from 1993-94 back to 1980-81 were generally satisfactory. Moreover, Superintendent Phillips characterized Grievant as a "good" employee in his testimony, suggesting that the thirty-day suspension was intended to get Grievant's attention and salvage her career as a productive employee. While Grievant attempted to prove that the penalty imposed upon Grievant was inconsistent with penalties imposed upon other employees, Grievant's burden of proof on this issue was not met in that there was no persuasive showing that other incidents involving either insubordination or profanity were sufficiently similar to the instant offenses as to warrant a meaningful comparison. The "clarity

with which the employee was advised of prohibitions against the conduct involved" is not directly relevant to the charges sustained here since these charges involve face-to-face defiance of authority. Moreover, this factorhas already been applied in determining that Respondent failed to prove two of the four insubordination charges directed at Grievant.

Finally, an allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was "clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the offense and the personnel action." Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989). Given the misconduct proven here, as well as the two prior suspensions imposed upon Grievant during her employment by BCBE, Grievant failed to demonstrate that a thirty-day suspension is a clearly disproportionate penalty. Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1991), aff'd, No. 22252 (W. Va. Sup. Ct. Dec. 16, 1994). The undersigned concludes that Grievants' relatively prompt return, through her husband, of the documents previously withheld from her supervisor, was mitigating conduct. However, Grievant's derogatory statements to her supervisor represent a serious and unjustified defiance of authority. Even considering that this incident arose in an unusual setting, given that Mr. Zinn elected to discuss confidential personnel matters in the Philippi Bus Garage parking area, Grievant's actions were nonetheless totally unwarranted and can only be considered detrimental to an effective employee-employer relationship.

At least two other issues need to be addressed. Although an employee's prior disciplinary record is normally a factor to beweighed in assessing an appropriate penalty (See Douglas v. Veterans Admin., 5 M.S.P.B. 313 (1981)), Grievant's counsel objected to Superintendent Phillips' testimony in this regard as improper since there was no reference to prior misconduct in the notice of charges (BCBE Ex 10, quoted supra.). Grievant's counsel essentially complained that it was unfair to require Grievant to address these previous disciplinary actions since Grievant was not put on notice that these prior actions had been considered in arriving at the decision to impose a thirty-day suspension.

The undersigned, over objection, admitted this evidence of prior disciplinary actions for the sole purpose of determining whether a thirty-day suspension was an appropriate penalty

for the sustained charges. While the preferred practice would be to include any prior disciplinary actions relied upon to enhance the penalty, Grievant's counsel did not cite any applicable rules or regulations, nor any case law on procedural due process, which makes such notice mandatory. Indeed, this argument was not renewed in Grievant's post-hearing brief. Thus, the undersigned finds that BCBE acted properly in considering two prior disciplinary actions involving fighting and striking her supervisor in arriving at an appropriate penalty for the original charges of insubordination.

Grievant also argued that the two-day suspension imposed for "fighting" in 1980 was too far removed in time to be considered in assessing a penalty for insubordination that occurred in 1994. Again, while the undersigned is aware that certain agencies have administrative policies which limit the amount of time a disciplinary action may be retained in an employee's personnel records, or the circumstances under which prior disciplinary actions can be employed in assessing a penalty for a current infraction, Grievant's counsel has not cited any law, rule or regulation containing any such restriction applicable to employees of BCBE. Accordingly, BCBE acted properly in considering Grievant's two-day suspension for fighting in 1980 and her four-day suspension for striking her supervisor in 1985, in selecting an appropriate penalty for her acts of insubordination in 1994. Moreover, the undersigned concludes that a thirty-day suspension would be an appropriate penalty for the two charges sustained, even if Grievant's prior record as an employee was totally unblemished. 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).

Finally, Grievant alleged that this disciplinary action was an act of reprisal taken in retaliation for previous grievances she had filed against BCBE and Mr. Zinn. In that regard, it is clear that Grievant made out a prima facie case of reprisal under W. Va. Code § 18-29-2(p) by showing that she had previously engaged in protected activity by filing a number of grievances during the past two years, that she was subsequently treated in an adverse manner, that BCBE or its agent had direct knowledge of Grievant's protected activity, and that an inference of a causal connection exists based upon the timing of the protected activity and the adverse treatment. See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d

251 (W. Va. 1986); Fareydoon-Nezhad v. W. Va. Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-088 (Sept. 29, 1989); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). However, by proving the two sustained charges of insubordination, BCBE has provided a legitimate, nonretaliatory reason for its actions sufficient to rebut the presumption of retaliation. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Mace v. Pizza Hut, Inc., 377 S.E.2d 461 (W. Va. 1988); Sheperdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 309 S.E.2d 342 (W. Va. 1983); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). Indeed, BCBE established by a preponderance of the evidence that similar disciplinary action would have been initiated against any employee who engaged in comparable misconduct.

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 has been employed by the Barbour County Board of Education (BCBE) for sixteen years as a regular bus operator.

2. As a result of certain events where Grievant brought a tape recording to BCBE's Central Office on October 18, 1993, and left a student standing along the road during her morning bus run on October 21, 1993, BCBE's Director of Transportation and Grievant's immediate supervisor, Charles Zinn, expressed concernover Grievant's being distracted from her duties and requested in a memo dated October 29, 1993, that Grievant prepare an improvement plan. BCBE Ex 1.

3. Thereafter, Grievant submitted an improvement plan dated November 15, 1993, which included the following statement: "As per your request . . . I will not use my tape recorder while students are on board the bus . . . ." BCBE Ex 4.

4. Mr. Zinn accepted the improvement plan as written without noting that his guidance on using a tape recorder was a directive rather than a request or noting that the prohibition extended to other recording devices.

5. As of the 1993-94 school year, BCBE and state policies prohibited bus operators from picking up students at some point other than an authorized bus stop, and students could ride

home only on their regular bus, and be let off only at their assigned bus stop, unless they had written approval from their school principal based on parental request. There was no clear policy in effect at that time restricting bus operators from bringing students to school on a bus other than their regular bus.

6. On June 8, 1994, Grievant's daughter, Amy Sue Conner, then a ninth grade student at PBHS, rode to school on Grievant's bus. Ms. Amy Conner normally rode to school on a different bus.

7. On June 8, 1994, Grievant's daughter, at Grievant's request, operated a video camera mounted on a tripod and located on the seat immediately behind the driver (Grievant). See BCBE Ex 5. Grievant was recording her morning bus route for evidentiarypurposes in regard to her individual grievance then pending before BCBE.

8. On the morning of June 8, 1994, another bus operator, Pamela Bartley, reported to Mr. Zinn that Grievant had a video camera on her bus during her morning run. Ms. Bartley and Grievant had a continuing disagreement during the past year over various work-related matters.

9. Mr. Zinn spoke with Grievant on June 8, 1994, in the parking lot of the Philippi Bus Garage standing in the open on what may be an unpaved public street. After discussing Grievant's attendance at a State Bus Rodeo and the complaint regarding use of a video camera on her bus run, Mr. Zinn handed Grievant her performance evaluations for the 1993-94 school year.

10. Grievant glanced through the evaluations, noting certain adverse comments and telling Mr. Zinn that the comments were "lies, all lies."

11. Mr. Zinn requested Grievant to sign her evaluation. Grievant refused and Mr. Zinn then requested that Grievant return the documents, offering to make copies for Grievant. Grievant refused to return the documents, insisting that she would make her own copies and physically holding the documents out of Mr. Zinn's reach.

12. Mr. Zinn informed Grievant that she was being transferred to a Belington bus route for the 1994-95 school year, replacing a retiring bus operator. Grievant called Mr. Zinn a "dirty bastard."

13. Mr. Zinn called another bus operator, Carl Bolton, over from his bus to "witness a

situation." After informing Mr. Bolton, in Grievant's presence, that Grievant was refusing to return her evaluation forms and that he was transferring Grievant to the Belington route for next year, Mr. Zinn and Mr. Bolton started to walk away from the area. At this point, Grievant called Mr. Zinn a "dirty bastard" in Mr. Bolton's presence.

14. Howard Conner, Grievant's husband, returned the evaluation forms to Mr. Zinn approximately fifteen minutes after the events described in Findings of Fact Numbered 9 through 13, above.

15. During the 1993-94 school year. Grievant filed twelve to fourteen individual grievances against BCBE and at least that number during the previous school year.

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 is one of the causes listed in W. Va. Code § 18A-2-8 for which an education employee may be disciplined. 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, DocketNo. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989).

4. By failing to demonstrate the existence of a clear written policy or verbal directives covering such matters, BCBE was unable to establish by a preponderance of the evidence that Grievant engaged in insubordinate conduct by allowing her daughter to ride to school on her bus during her morning route or by directing the same daughter to operate a video camera on the bus during her morning bus route on June 8, 1994.

5. BCBE established by a preponderance of the evidence that Grievant engaged in insubordination prohibited by § 18A-2-8 by refusing to return her 1993-94 performance evaluations as requested by her immediate supervisor, Mr. Zinn, on June 8, 1994. See McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug 3, 1992).

6. By uttering derogatory statements to her immediate supervisor on June 8, 1994, including calling him a "dirty bastard" in the presence of another subordinate, Grievant engaged in an act of insubordination prohibited by § 18A-2-8. See Payne v. W. Va. Dept. of Transp., Docket No. 93-DOH-454 (Apr 29, 1994).

7. An allegation that a particular disciplinary measure is disproportionate to the offense proven or otherwise arbitrary and capricious is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was "clearly excessive or reflects an abuse of agency discretion or an inherent disproportionbetween the offense and the personnel action." Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

8. Given Grievant's previous performance evaluations and work history including two prior disciplinary suspensions, penalties imposed in other cases involving BCBE employees, and the nature of the two charges of insubordination actually proven, the undersigned finds that a thirty-day suspension is not a disproportionate penalty. Phillips, supra; Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1991), aff'd, No. 22252 (W. Va. Sup. Ct. Dec. 16, 1994).

9. Although Grievant established a prima facie case of reprisal under W. Va. Code § 18-29-2(p), by proving the merits of two of the four charges, and noting Grievant's prior disciplinary record, BCBE established legitimate, nonretaliatory reasons for taking disciplinary action extending to a thirty-day suspension. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Mace v. Pizza Hut, Inc., 377 S.E.2d 461 (W. Va. 1988); Sheperdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 309 S.E.2d 342 (W. Va. 1983); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

Accordingly, the grievance is GRANTED to the extent that the Barbour County Board of Education is hereby ORDERED to remove any and all references in Grievant's suspension regarding the charges of insubordination relating to allowing her daughter to ride on her bus and the operation of a recording device on her bus on June 8,1994. No other relief is provided herein and the grievance is otherwise DENIED.

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

Circuit Court of Barbour 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: January 31, 1995

Footnote: 1By stipulation of the parties at the Level IV hearing, the record in this matter includes audio cassettes of Grievant's pre-termination hearing before the Board of Education. However, since neither party pointed to any evidence from that hearing which had any relevance to the issues raised at Level IV, the undersigned did not review that hearing in rendering the instant decision.

Footnote: 2Mr. Phillips was not as familiar with the factual background behind reprimands previously issued to other employees inasmuch as reprimands do not have to go to the board of education through the Superintendent of Schools. See BCBE Ex 11.

Footnote: 3In particular, Mr. Conner's testimony on this issue appeared candid and unrehearsed. Although he obviously had an interest in the outcome of this grievance, the undersigned found his testimony to be credible and not contradicted by any other evidence of record.

Footnote: 4Mr. Zinn testified that the video cameras authorized on school buses were permanently mounted and came on automatically with the ignition. Thus, drivers would not be distracted by the cameras in any way since they were not required to "operate" the cameras.

Footnote: 5As should be clear from these comments, this decision is limited to finding that BCBE failed to prove that Grievant was given clear and unequivocal directions regarding use of recording devices on her bus. This decision does not find merit in any of Grievant's patently spurious reasons why such an order would not be proper.