

**WILLIAM JOHNSON**

**v. Docket No. 95-54-471**

**WOOD COUNTY BOARD OF EDUCATION**

**DECISION**

Grievant William Johnson, a bus operator for Respondent Wood County Board of Education (WCBE) for approximately twenty years, was suspended, then terminated, for allegedly violating policies relative to the use of tobacco in or on school property. The charge was triggered upon a motorist's report that Grievant had been smoking while driving a school bus with students present. Grievant appealed the termination. A level four hearing was conducted on December 5, 1995. At the hearing, the parties supplemented the record compiled at a pre-termination hearing held October 24, 1995. The case became mature for decision on January 10, 1996, upon receipt of the last of the parties' post-hearing, responsive fact/law proposals. [\(See footnote 1\)](#)

**Background**

West Virginia Board of Education (BOE) Policy 2422.5A prohibits the use of tobacco products by the students and staff of any board of education in any building or in or upon any other property owned by the school system. Ex. 5 (10/29/95). [\(See footnote 2\)](#) WCBE adopted its "Tobacco Control Policy," WCBE Policy 5114.10, on December 10, 1991. Ex. 4 (10/29/95). Specifically, WCBE's policy prohibits the use of "all tobacco and tobacco products in all school buildings, on school grounds, or any motorized vehicle used for school activities." Policy 5114.10 further states that employees who violate the policy "shall be subject to discipline as circumstances warrant, including written/oral reprimands, notation upon evaluation, suspension, or dismissal."

As documented on a September 25, 1992 evaluation, acknowledged and signed by Grievant on November 5, 1992, Grievant was overall rated "Does Not Meet Performance Standards" as a bus operator because he had smoked on the school bus with students present and had permitted students also to smoke on the bus. Ex. 2A (10/24/95). At that time, Grievant was placed on an improvement plan. The plan offered the assistance of a twelve-week smoking cessation counseling program with a doctor. The stated time line for the plan was: "Perpetual. This act should not reoccur." Ex. 2B (10/24/95). WCBE hired a new superintendent for the 1995-96 school year, Dr. Daniel

Curry. Before the new superintendent's arrival, and prior to the beginning of the new school year, Assistant Transportation Director Blaine Auvil conducted an in-service session for bus operators to reaffirm WCBE's no-smoking policy. Essentially, Mr. Auvil was aware that many bus operators were smokers who carried cigarettes in their pockets, and he did not want any of them to get into trouble because of their smoking habit. At the in-service, participants, including Grievant, were given copies of BOE Policy 2422.5A and WCBE Policy 5114.10.

When the 1995-96 school year commenced, Grievant began his bus driving chores at 6:30 a.m. each morning in Vienna, where he lives, and picked up and delivered students to various schools, a high school, a junior high school and some elementary schools. The final leg of his morning run started at about 8:00 a.m., when he left the Vienna area to transport approximately four children to a parochial elementary school in Parkersburg. Grievant then returned to Vienna with the bus. On Wednesday morning, October 11, 1995, Grievant was driving his regularly assigned bus, No. 18. However, Grievant was scheduled to have his bus serviced after he completed the morning run and to use an alternate bus for his mid-morning, early-afternoon extra driving and his regular evening run. At approximately 8:15 or 8:20 a.m. on October 11, 1995, Mr. Auvil received a telephone complaint about Grievant from Ms. X. [\(See footnote 3\)](#) When Mr. Auvil was specifically asked at Grievant's pre-termination hearing what Ms. X's complaint was, he responded that, "[s]he said he was smoking on the bus. He had a cigarette to his lip, and she saw the smoke rolling." T.23. Because Grievant's bus was due in for servicing that morning, Mr. Auvil was able to examine the bus shortly after the complaint was received. When Mr. Auvil inspected the bus, he found cigarette ashes on top of and down the side of a heater located on the floor between the driver's window and the driver's seat.

At some point that day, Mr. Auvil and Transportation Director Michael Falck confronted Grievant with both Ms. X's complaint and the fact that cigarette ashes were found on the bus. Grievant denied smoking on the bus with children present, and stated the person who reported him may have seen him place his pen in his mouth, which he was inclined to do while driving. Grievant, however, admitted he had smoked aboard the bus the night before at his home when he was cleaning it for the next day's servicing, and reasoned that he probably dropped ashes in the bus at that time. The administrators were not satisfied with Grievant's explanation.

By letter dated October 13, 1995, Dr. Curry notified Grievant he was suspended, effective the

middle of that day, until such time as WCBE's members could meet and hear his recommendation that Grievant be terminated. The letter continued, in pertinent part, as follows:

On Wednesday, October 11, 1995, you were in direct violation of . . . [WCBE and BOE policies] by smoking on a school bus and continuing to smoke on a school bus while students were present on the bus.

Following a pre-termination hearing on October 24, 1995, at which both Grievant and WCBE were represented by counsel, WCBE's members, by a two to one vote, upheld Dr. Curry's recommendation to terminate Grievant.

### Applicable Legal Standard

In disciplinary matters, the employer has the burden of proving its case by a preponderance of the evidence. Webb v. Mason County Bd. of Educ., Docket No. 26-88-206 (Jan. 5, 1989). When the standard of proof is a preponderance of the evidence, it is not necessary for the employer to prove the facts to the exclusion of all reasonable doubt, but rather, the decision must be made in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth. Siler v. W.Va. Dept. of Health and Human Resources, Docket No. 94-HHR-278 (Nov. 16, 1994), citing Simmons v. Insurance Co., 8 W.Va. 474, \_\_\_ S.E. \_\_\_ (W.Va. 1875), and Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994).

Each disciplinary case must be determined upon the facts and circumstances which are peculiar to that case. See Blake v. Civil Service Comm., 310 S.E.2d 472 (W.Va. 1983). When evidence which prompts an employee's dismissal is disputed, and the weight of the evidence very close, the employee's "credibility tips the scale, at least to the degree that the evidence is not found weighted" in the employer's favor. See Knapper v. Kanawha County Bd. of Educ., Docket No. 91-20-037 (Apr. 29, 1991). Finally, when the evidence does not establish with sufficient certainty that the wrongdoing charged against an employee actually occurred, "that uncertainty must be resolved in the grievant's favor." Wirt v. Mercer County Bd. of Educ., Docket No. 92-27-431 (Apr. 28, 1993).

### Evidence and Discussion

Although other pertinent evidence was considered, this case turns on the credibility and reliability

of the accused and the accuser, Grievant and Ms. X, the eye-witness to the alleged smoking incident. After a painstaking review of all of the evidence, the undersigned must conclude that, although the question about whether Grievant smoked on the bus with children present is very close, the weight of the evidence ultimately tips in Grievant's favor, not WCBE's. Under the circumstances, WCBE failed to prove by a preponderance of the evidence the stated charges upon which Grievant's termination was based.

It is evident that Ms. X truly believes she saw Grievant smoking a cigarette in the presence of children on the school bus on the day in question. However, the reliability of Ms. X's evidence cannot be established merely because she fervently believes that she saw Grievant smoking on October 11, 1995, especially given Ms. X's various descriptions of her sighting and other important factors. On balance, given Grievant's steadfast and seemingly sincere denial, his revelation that he frequently placed a pen to his mouth while driving and his explanation of how ashes could be present on the bus on the day in question, [\(See footnote 4\)](#) together with the testimony of two young passengers on the bus who testified at level four that they neither saw Grievant smoke nor noticed the odor of cigarette smoke, the correctness of what Ms. X thought she saw on October 11, 1995 is subject to question. Specifically, the reliability of Ms. X's evidence must be examined closely.

Ms. X's direct testimony at the termination hearing was not very detailed. Ms. X also lives in the Vienna section of Wood County, and both of her children, a seven year old daughter in elementary school and a thirteen year old son in junior high school, are assigned to ride Grievant's bus. Ms. X discussed what amounted to three separate instances when she saw Grievant's bus on a four-lane highway on the morning of October 11, 1995, from her own vehicle, a Ford Explorer. According to her, she saw Grievant's bus initially while she was stopped on an off-road to the right of Grand Central Avenue, Vienna's main street, and he passed her on her left; a bit later while they were both traveling in the same direction in adjoining lanes where she eventually passed him (he in the right-hand lane and she in the left-hand lane); and a final time when she stopped in a third, left-hand turning lane and he passed her to her right. In her direct examination, Ms. X reported only one instance of actually seeing Grievant smoking. She explained that, on the morning of October 11, she drove her daughter to Neale Elementary School in Vienna. While depositing her daughter at the drop-off in front of Neale at about 8:10 a.m., she noticed Grievant's bus pass by her, to her left, on Grand Central. Ms. X then pulled into Grand Central, in the direction the bus was going, so she could

return to her home. While driving down Grand Central in the left-hand lane, she said she again spotted the bus, to her right in the right-hand lane, and looked up and recognized Grievant. The testimony continued:

Q: Did you have a clear view of [Grievant]?

A: Right.

Q: Was it raining out or foggy that day?

A: No.

Q: It was a clear day?

A: Yes.

Q: Did you see him do something at that point in time?

A: I saw him smoking.

Q: Could you tell us what you saw exactly that made you think that it was a cigarette that he had?

A: 'Cause he put it up to his mouth and there was smoke coming from it.

Q: What was your reaction at that point?

A: I couldn't believe that he was smoking. Well, I couldn't believe he was smoking on the bus[.] [A]nd then as the bus went on down[,], passed because I had to stop at 12th Street[,], at the stop where I turn onto 12th Street to go home[,], I noticed there was two little kids in the back, very back seat on the right- hand side.

Q: What did you do then?

A: Other than being shocked that there was kids on the bus[,], I went home and told my husband what happened and I called the bus garage.

T.12-13. Near the end of Ms. X's direct testimony, she agreed there was no doubt in her mind that she saw Grievant smoking. However, while she remembered driving her daughter to school on the day in question, she could not remember whether her son rode the school bus that morning (she was

unsure whether he had a football meeting before school began that day).

Ms. X's recall was also a bit faulty during her cross-examination at the pre-termination hearing. In fact, a persistent examination of Ms. X regarding her critical sighting of Grievant allegedly smoking in the school bus revealed little more specifics about exactly what she saw. She did agree that, when she caught sight of Grievant smoking, both her vehicle and Grievant's bus were moving, with Grievant's bus in the lane immediately to her right. T.14-15. However, Ms. X did not directly respond when Grievant's counsel asked her on two occasions to specify how long she had been able to actually observe Grievant when their vehicles were side-by-side. At this point, Ms. X expanded upon her direct testimony and stated that she had looked directly at Grievant two times, the second time to confirm that he was smoking. Rather than pinpoint the length of time she had been able to see Grievant, Ms. X explained by stating, in essence, that she passed Grievant on her way to entering the (third) turning lane (to her left) on 12th Street and looked at him, that she stopped at the turning lane due to oncoming traffic, and that Grievant passed her while she was waiting and she looked at Grievant again. T.18, 19. Never during the pre-termination hearing did Ms. X state that both vehicles were ever stopped at the same time and that she was thus able to see Grievant or Grievant's bus while both of their vehicles were stopped.

Grievant's attorney pressed for more details about what Ms. X observed while the two vehicles were in adjoining lanes. Ms. X stated she could see Grievant clearly in his bus from his chest to the top of his head. However, when asked if he had been wearing a ball cap, she said she believed so, but could not "swear to it." She remarked, "You don't look at people to see what they have on when you pass them in a car." T.17. Details about the clothing Grievant wore on the day in question could understandably escape Ms. X's attention. However, Ms. X's testimony was that she had a clear view of Grievant's upper torso, and whether Grievant wore an item such as a ball cap is significant. It is troubling that Ms. X could speak with such assurance that she saw an object as small as a cigarette in the proximity of Grievant's face/head but could not confirm or recall whether she saw something as large and distinguishable as a ball cap in the very same area. [\(See footnote 5\)](#) T.17.

The probe for more details was not successful:Q: Where was your attention directed the first time while you were moving? In front of you as you were driving or on him?

A: I was looking for driving, but at the time I saw it was him and I glance[d] up. He is my children's bus driver and I just looked at him.

Q: Do you know how long the glance was? I am not trying to aggravate you. This is real important here.

A: I understand. I just don't clock myself looking at somebody. I looked up and I saw him smoke and then he went on and I looked again.

T.18-19.

At the level four hearing, WCBE's counsel questioned Ms. X, a smoker herself, about her motivation for making the report to transportation officials about the alleged smoking incident on October 11. Her response was,

A: Because I know it's a state law that you don't smoke on school property. I can't smoke when we go to my son's football games, we have to go out into the road, you know, have to get completely off of school property and I knew you weren't to do it and I was concerned for the safety of the kids because if you're smoking a cigarette, I don't care who you are, if you drop that cigarette, your first instinct is going to go down and pick that up. And I worry about the safety of my kids, he their bus driver. They ride every day home with him.

Q: Did you think that your actions would cause Mr. Johnson to be fired?

A: No, I had, to tell you the truth, I had no idea it would come to this, no earthly, you know, at all, no.

Q: Was it your intent to get him fired?

A: No, I just, you know.

Q: What was your intent?

A: Just, I thought he would just be reprimanded, say you don't smoke on the bus, you don't, with kids, without kids, you don't smoke on the bus.

T4.31-32. It can be inferred from Ms. X's testimony that she is not just concerned or "shocked" about a bus operator smoking while children are on the school bus for safety's sake, but that she is also inclined to be disconcerted about a school employee smoking on school property, with or without children present, while she may not. [\(See footnote 6\)](#) This attitude may have had some bearing on her

perceptions on the morning in question.

When WCBE's counsel questioned Ms. X about exactly what she saw on October 11, 1995, Ms. X again stated that she left Neale School for home and came to pass by Grievant's bus. She then suggested that she had an opportunity to see Grievant smoking, or with a cigarette in his hand, on three occasions (instead of the two instances she described in earlier testimony), as follows:

A: I looked up, just because he's the kid's bus driver, the kid's bus, it's, I don't know, a mother thing I guess, and looked up and he was smoking and I thought I, I thought that's what it was, I turned to make sure and he was smoking.

Q: Was there a time when you came to a stop so that you could look over at him for more than just a glance?

A: Yes, because there's, to turn off, there's a third, there's a turn off lane there at 12th Street because of, there's a Sam's Club and there's businesses around there, so, there's a special lane that you can, that's set up to turn and I was there and then he went past me again.

Q: And did he still have a cigarette?

A: Yes.

Q: Did you see smoke?

A: Yes.

T4.30. Notably, on December 5, 1995, nearly two months after the alleged smoking incident occurred, Ms. X's recall about the events on October 11, 1995 appeared much sharper in some respects than was the case at the October 24, 1995, pre-termination hearing, a mere two weeks following October 11. She never testified at the previous hearing that she had seen Grievant smoking or with a cigarette in his hand on three occasions.

Additionally, when pressed for details during cross-examination about precisely what she saw and when she saw it, Ms. X seemingly contradicted her earlier testimony that her only sightings of Grievant occurred when either both vehicles were in motion or when her vehicle was stopped and Grievant's was in motion. Grievant's counsel again asked Ms. X to explain how long, as well as how well, she had been able to initially observe Grievant on the day in question. Ms. X did not seem



certain about details:

A: I mean, it wasn't like, I just looked up and looked back and that was the end of it. I did look up, I don't know, maybe, I'm not good estimating time or distances, it wasn't a minute but it wasn't like a second or two either.

Q: Could you maybe demonstrate for us, just show your pulling up and look and then tell us how long it is before you looked away?

A: Well, I know I looked at him twice to make sure I saw what I saw. I probably looked up, went to look at the light again and then looked back again, saw that he was smoking, make sure he was smoking, went back and watched for the light for me to turn. [Emphasis added.]

T4.39. At that point in her level four testimony, Ms. X clearly became speculative about her sightings, and hinted that she had seen Grievant smoking twice while she waited at the Grand Avenue and 12th Street intersection to turn. However, she never previously stated that her initial and second view of Grievant smoking occurred while she was stopped at the intersection. Rather, she testified previously at the pre-termination hearing that she initially saw Grievant smoking while both of their vehicles were moving. She also stated under direct examination at that proceeding that she had to stop and wait in the left- hand turning lane on 12th Street due to oncoming traffic and that Grievant passed her by at that point. At that time, Ms. X never stated that she actually saw Grievant as well as the bus again, for a second or confirming look. She merely stated she was "shocked" to see two children seated in the back of Grievant's bus.

During further cross-examination at the level four hearing, Ms. X was asked about the windows in her vehicle. Ms. X emphat ically stated she saw Grievant through the windshield of her vehicle, not through the sunroof (or through her side window). She did not explain how she could have "looked back" through the windshield after she passed Grievant and be able see him again. This entire subject of window glass raises concerns about how well Ms. X could have seen Grievant. Window glass on a passing vehicle might have a curve or slant, a tint or even a glare under certain circumstances, all affecting how well a person in another vehicle might see the driver inside, especially when both vehicles are not seated equally as high off the ground. ([See footnote 7](#))

In summary, it is clear that Ms. X had no animosity toward cigarette smokers because she admitted that both she and her husband were smokers and that she smoked in her own automobile

when she was alone. T4.31, 39. However, based on her testimony, while Ms. X genuinely may be concerned about the safety of her children on the school bus, there is reason to believe that she also would be resentful if school employees smoked on school property, regardless of the circumstances, while she is prohibited from smoking at a football game. This attitude may have colored Ms. X's perception on the morning in question and affected what she thought she saw. In short, Ms. X could have understandably mistaken a white pen in Grievant's mouth for a cigarette, then have concluded she saw smoke "on less visual data than would normally be required," as Grievant's counsel suggests in his brief. Gr. Brief at 3.

In addition, Ms. X's ability to catch any more than a passing glimpse of Grievant was definitely hampered because either both her vehicle and Grievant's were in motion or her vehicle was stopped while Grievant's was in motion. [\(See footnote 8\)](#) It is troubling that Ms. X made no mention under direct examination in the pre-termination hearing that she observed Grievant as well as his bus while she waited in the turning lane, but that, under cross-examination at the hearing, she added the detail that she observed Grievant himself while she was sitting in the turning lane waiting to turn, testimony she repeated at level four.

It is also important that Ms. X never stated at either hearing that Grievant moved from Grand Central's far right lane to the left lane in which she had been traveling before she entered the left-hand turning lane and stopped for the oncoming traffic. Thus, even if Ms. X saw Grievant as well as his bus when she sat in the turning lane at the Grand Central and 12th Street intersection, Grievant must have been two lanes away from her, to her right, at that point. Had Ms. X truly observed Grievant himself from her position in the driver's seat at the far left of her vehicle, it is doubtful that, from that vantage point, she readily could have seen a detail such as smoke rising from a cigarette. [\(See footnote 9\)](#)

Based on the totality of Ms. X's testimony, the undersigned concludes that Ms. X probably had no more than one or two fleeting glimpses of Grievant on October 11, 1995, at which time she strongly, but perhaps mistakenly, came to the impression that Grievant was smoking. As noted above, Ms. X related at various times that she had either two or three sightings of Grievant actually smoking or holding a cigarette in his hand. The initial sighting, described by Ms. X at both hearings, occurred when Ms. X's and Grievant's vehicles, both in motion, were side-by-side in adjoining lanes and she looked up through her windshield and got the impression that Grievant was smoking. Following that

initial glance, Ms. X's vehicle passed Grievant's bus. As Ms. X stated at one point in her level four testimony, she may have looked back, with both vehicles still in motion, for a second look, to confirm what she thought she saw. However, it is not believable that Ms. X could have had enough time, while both vehicles were still moving, to look back for a second view and to affirm, with any degree of certainty, that Grievant was smoking. If the second look, or perhaps a third look, occurred after Ms. X had stopped at the 12th Street turning lane, her ability to clearly see whether Grievant was smoking or holding a cigarette in his hand was even more compromised than before, because at that point his bus was still in motion two lanes away from her.

The undersigned's nagging doubt about the reliability of Ms. X's evidence is resolved in Grievant's favor due to Grievant's seemingly sincere and unequivocal denial that he had smoked on the bus while students were present on October 11, 1995. He emphatically stated he had never smoked on the bus with children present following his reprimand for the offense in 1992. His explanation that Ms. X may have seen him raise a white pen to his lips on October 11, 1995 is very plausible, both from the perspective that he kept a pen on his person or on the bus to log certain bus-driving activities while on duty and because he was inclined to place that pen in his mouth at times while driving. A long-time smoker who at times cannot smoke might resort to other forms of behavior such as chewing gum, eating candies or other food or placing objects to the mouth or lips.

The level four testimony of the two young parochial school children who rode Grievant's bus from Vienna to Parkersburg each day also bolstered Grievant's testimony that he never smoked on the bus when children were present, including the day in question. [\(See footnote 10\)](#) These children were on the school bus on October 11, 1995 at the precise time when Ms. X said she saw Grievant smoking. [\(See footnote 11\)](#)

The nine year old girl on that run testified that she only knew Grievant from riding on the bus. She stated she usually sat in the middle or the back part of the bus on the trip from Parkersburg to Vienna, but that she could see over the top of the seats in front of her to the front of the bus. She said she had never seen Grievant smoke on the bus. Her eight year old brother stated he could see the bus driver from where he usually sat in the back of the bus. He testified that he had never seen Grievant smoke on the bus and had never smelled cigarette smoke on the bus. [\(See footnote 12\)](#)

These children were bright, forthright witnesses whose testimony credibly established they understood the nature of cigarette smoking and could discern the "smoky" odor of a person who is a

smoker as opposed to the actual smell of cigarette smoke. Although both children replied "yes" when asked by WCBE's counsel if they liked their former bus driver, such responses do not establish that they would not tell the truth or that they had any real interest in the outcome of the case. See, T4.8-25.

Without question, WCBE's school officials must be commended for requiring their bus operators to refrain from smoking while on duty and in the presence of children. Safety concerns aside, it could be said that a compelling goal of a non-tobacco use policy and practice in the schools is to curtail children's exposure to smokers and other users of tobacco products so as to not encourage children to smoke and/or use tobacco in any manner in the first place. In this case, Grievant's testimony that he never smoked on the bus while children were present on the day in question is accepted. Had WCBE established by a preponderance of the evidence that Grievant smoked on the bus with children aboard on the morning of October 11, 1995, its termination action would not be disturbed. The undersigned is mindful that Grievant admitted he had smoked on the bus the night before when the bus was parked in his own yard. Grievant's admitted smoking on the bus on October 10, 1995, is a second-offense violation of WCBE's tobacco control policy for which he is subject to discipline. [\(See footnote 13\)](#) However, this offense was not covered in the suspension and termination charges brought against Grievant, and is not at issue here. [\(See footnote 14\)](#)

In addition to the foregoing discussion, the following formal findings of fact and conclusions of law are made.

#### Findings of Fact

1. Prior to his termination, Grievant, a cigarette smoker since his teens, had been employed as a bus operator by WCBE for approximately twenty years.
2. As part of his recordkeeping duties as a bus operator, Grievant had to log gas consumption or other information and he kept a white pen aboard the bus for this purpose. Grievant raised the pen to his lips on occasion while driving the bus.
3. In 1992, Grievant was reprimanded for smoking aboard his bus with students present, in violation of WCBE's policy prohibiting the use of tobacco products in or upon school property.
4. On the morning of October 11, 1995, Ms. X, the mother of two of Grievant's daily bus passengers, was traveling in her Ford Explorer on a four-lane street along Grievant's route when she saw Grievant driving his bus. At the time Ms. X saw Grievant, both vehicles were moving in the same

direction in adjoining lanes with Grievant to her right, and at one point the vehicles were side-by-side. A bit later, Ms. X's vehicle was stopped in a left-hand turning lane while Grievant's bus was still in motion, two lanes away to her right.

5. When Ms. X returned home shortly after seeing Grievant the morning of October 11, she called WCBE's transportation department and reported what she believed to be a smoking incident on Grievant's part. She said that she saw Grievant raise a cigarette to his mouth, that she saw cigarette smoke and that children were aboard the bus.

6. In part, Ms. X was motivated to report Grievant due to safety concerns for her own children. However, Ms. X appeared resentful that she and her husband were not permitted to smoke on school property at any time, even during her son's football games, and expressed the opinion that bus drivers should also not be permitted to smoke on a school bus, with or without children present.

7. Two students who were aboard the bus on the time and day in question could see Grievant from their seats. They never saw Grievant smoke on the bus at any time, and they never smelled cigarette smoke on the bus that day, or at any other time.

8. Grievant's bus was inspected by school officials shortly after Ms. X's report was taken, and cigarette ashes were found on a heater between the window and the driver's seat. When confronted by the school officials about these matters, Grievant denied smoking on the bus with children aboard at the time in question.

9. By his own admission, Grievant boarded the bus, parked at his home for cleaning, on the evening of October 10, 1995, with a lit cigarette. He inspected the bus for orderliness and filled out a report while smoking the cigarette on the bus.

10. Based on Ms. X's report, and the fact that the cigarette ashes found aboard the bus seemingly corroborated Ms. X's account that Grievant had smoked on the bus in the presence of children, WCBE first suspended Grievant and then terminated his employment following a pre-termination hearing.

#### Conclusions of Law

1. Each disciplinary case must be determined upon the facts and circumstances which are peculiar to that case. See Blake v. Civil Service Comm., 310 S.E.2d 472 (W.Va. 1983). 2. A fellow motorist's account that she could actually see Grievant smoking while children were aboard his bus on October 11, 1995, was not entirely reliable; therefore, Grievant's "credibility tips the scale, at

least to the degree that the evidence is not found weighted" in WCBE's favor. See Knapper v. Kanawha County Bd. of Educ., Docket No. 91-20-037 (Apr. 29, 1991).

3. Respondent failed to demonstrate by a preponderance of the evidence that Grievant smoked on his school bus on the morning of October 11, 1995, as alleged in a notice of suspension and impending dismissal dated October 13, 1995.

Accordingly, the grievance is **GRANTED**, insofar that the suspension and termination based upon Grievant's smoking on the bus on October 11, 1995, when children were present was not established and cannot be upheld, and the Wood County Board of Education is Ordered to reinstate Grievant to his former position and to restore all lost wages, benefits and seniority. Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wood 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 appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

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**NEDRA KOVAL**

**Administrative Law Judge**

**Date: March 28, 1996**

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[Footnote: 1](#)

*In addition to the evidence adduced at the level four hearing, the record contains the pleadings, the transcript and exhibits of the October 1995 pre-termination hearing, and the level four fact/law proposals from the parties, received December 29, 1995, January 2, and January 10, 1996, respectively.*

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[Footnote: 2](#)

*References to the transcript from the pre-termination hearing will be cited T.\_, while references to the level four transcript will be cited T4.\_. Documentary evidence will be identified with the date it was admitted into the record.*

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[Footnote: 3](#)

*Ms. X is a private citizen and not a school employee, and there is no need for the purposes of this decision to identify her.*

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[Footnote: 4](#)

*Grievant's admission that he smoked on the bus while it was parked at his home was decidedly against his own interests. Grievant instead could have denied any knowledge of how the ashes appeared in his bus.*

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[Footnote: 5](#)

*It is also worth mentioning that, during her direct and cross-examination at the pre-termination hearing, Ms. x never said she saw smoke come out of Grievant's mouth, nor did she say she saw a "puff" of smoke flow from Grievant's mouth, only that she saw smoke coming from "it," it meaning the cigarette. T.13. In fact, Grievant's attorney used the phrase, "puff of smoke," at some point during the cross-examination of Ms. X. See, T.18.*

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[Footnote: 6](#)

*Ms. X said she could not "back down from it" now, despite the fact that her report led to Grievant's termination. T4.33.*

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[Footnote: 7](#)

*Ms. X agreed that her Ford Explorer, a four-wheel drive vehicle, was not classified a truck and did not sit up off the ground as high as a pick-up truck, although it was higher than a normal automobile.*

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[Footnote: 8](#)

*Interestingly, there were never any questions posed of any witness about how fast either Grievant or Ms. X were driving on the day in question, or even about the speed limit on Grand Central Avenue.*

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[Footnote: 9](#)

*In response to the undersigned's questions to Ms. X about her "second" look to confirm that Grievant was smoking, Ms. X stated she observed a hand to mouth action on Grievant's part only once, but during the next view of Grievant, saw only what appeared to be a cigarette in Grievant's hand.*

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[Footnote: 10](#)

*Of some importance in this entire matter is the fact that Ms. X never stated that her two children, ages seven and thirteen, ever complained or reported to her that Grievant had smoked on the bus in their presence.*

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[Footnote: 11](#)

*Other than when Grievant is alone on the bus, his best opportunity to smoke a cigarette aboard the bus, if so inclined while children are present, is when he transports only the four to five parochial school children, the last of his morning passengers, to their school in Parkersburg.*

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[Footnote: 12](#)

*The children did admit to WCBE's counsel that, while they watched the bus driver at times, at other times they talked to their friends or looked out of the bus's windows.*

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[Footnote: 13](#)

*It is noted that in WCBE's level four, post-hearing proposed conclusions of law, it for the first time characterized Grievant's alleged conduct, perhaps correctly so, as "insubordination" and "willful neglect of duty," noting also for the first time that a board of education could terminate an employee for these offenses under W.Va. Code §18A-2-8.*

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[Footnote: 14](#)

*Notably, at Grievant's pre-termination hearing, Dr. Curry opined essentially that smoking on the bus at any time violated WCBE's tobacco control policy, but smoking while children were present was "more serious" because it affected the welfare of the children. T.79-80. A transportation department administrator stated he would not be inclined to recommend dismissal for a smoking offense on the bus if children had not been present. Accordingly, if WCBE decides to discipline Grievant for the admitted smoking offense of October 10, 1995, given Grievant's twenty-year history as a WCBE employee, it would not be improper for WCBE to impose some lesser form of discipline than termination under the circumstances.*

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