PAUL EDWARDS,

Grievant,

v. **DOCKET NO. 97-08-273**

CLAY COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

This grievance was filed at Level IV by Grievant Paul Edwards against the Clay County Board of Education ("CBOE") on June 7, 1997, after his extracurricular contract was terminated on June 2, 1997, following his suspension without pay (from his extracurricular bus run only) on April 15, 1997. Grievant continues to be employed by CBOE as a regular bus operator. He requested as relief reinstatement to his extracurricular assignment, and back pay, benefits and interest, to April 15, 1997, and removal of the suspension from his personnel files. A Level IV hearing was held on August 6, 1997, and this matter became mature for decision on September 3, 1997, with receipt of Grievant's written argument.

The burden of proof in disciplinary matters, such as this, is on the employer to substantiate the charges against the employee by a preponderance of the evidence. W. Va. Code § 18A-2-8; Perkins v. Greenbrier County Bd. of Educ., Docket No. 94-13-019 (Aug. 12, 1994). The charges must be one or more of those listed in Code § 18A-2-8. Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995). A county board of education must act reasonably, notarbitrarily or capriciously. Rovello v. Lewis County Bd. of Educ., 381 S.E.2d 237 (W. Va. 1989). Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991).

Once an employee attains continuing contract status (after three years of acceptable employment), his contract may be terminated only pursuant to W. Va. Code § 18A-2-6 or 18A-2-8. The parties agreed that this principle is applicable to Grievant's extracurricular contract, and that Grievant's contract termination was pursuant to W. Va. Code § 18A-2-8. That Code Section provides that an employee may be suspended or dismissed at any time for:

> Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article. The charges shall be stated in writing served upon the employee within two days of presentation of said charges to the board.

CBOE's stated reason for terminating Grievant's contract was willful neglect of duty on two occasions. An employer asserting willful neglect of duty "must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act." Jones v. Mingo County Bd. of Educ., Docket No. 95-29-151 (Aug. 24, 1995). "It encompasses something more serious than `incompetence.'" Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120, 122 (1990). Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996).

Grievant drove one of three buses for what is called the "after school" program, as his extracurricular run. He had driven this run eight years. Larry Gillespie, Principal of Clay County Middle School, related that he is in charge of the after school program at the school. Tr. p. 6. (See footnote 1) Heexplained that children who stay after school for any reason, including detention and athletics, can ride a late bus to a point closer to their homes. Tr. p. 12. He stated he decides what days each week the buses need to run. Tr. p. 7. Grievant testified that the after school routes take the children to the closest point to their homes along scheduled routes, and "the parents are supposed to pick them up from there." Tr. p. 31. Children may be dropped at their doorsteps or several miles from their house, depending on where their house is in relation to the scheduled route. The bus runs do not begin until 5:30 p.m., and do not end until between 6:45 and 7:10 p.m. Respondent's Level IV Exhibit 2.

The first incident upon which CBOE rested its decision to terminate Grievant's extracurricular contract occurred on February 6, 1997. Grievant was assigned to arrive at certain locations along his extracurricular run at particular times, and these times were posted in the newspaper so that parents would know what time they needed to pick up their children. Tr. p. 65. Respondent's Level IV Exhibit 2. On February 6, 1997, because there were not many students on the bus, Grievant was running one half hour ahead of schedule. As a result, the parents of a third grade male student were not at the stop to pick him up when the bus arrived. It was dark, and the student lived more than one-half mile from the drop point. Grievant said the boy told him he could go to a house right by the road and call his parents. The parents said the boy did not know the people who lived in the house, and Grievant was the one who suggested the boy go there. Regardless of which version of events is true,

Grievant let the boy off the bus and immediately left. The boy did not go to the house next to the road, but ran about one-half mile in the dark on a cold night to the home of someone he knew. Tr. pp. 63-69. Grievant admitted this was poor judgment on his part. Russ Harper, Director of Student Services for CBOE, testified that Grievant was not disciplined after this incident, except that he made note of the incident, spoke to Grievant, the routing was changed to try to make sure Grievant arrived at the designated spots at the appropriate times, and Grievant agreed to wait until the scheduled time when he arrived early and the parents had not yet arrived. Mr. Harper further testified that Grievant had not previously been instructed as to what he should do if he arrived at a drop point early, but drivers had been instructed to use their best judgment when parents were not there to pick up children. Superintendent Jerry Linkinoggor stated he was not sure what CBOE would have done had a second incident on March 27, 1997 not occurred, but some action would have been taken, although possibly not as serious as dismissal.

Principal Gillespie stated that occasionally he receives a special request from a parent regarding where to let his child off the bus, and he talks to the driver to determine whether the parent can be accommodated, but he has no standard procedure which he utilizes each time to communicate a special request to a driver. Tr. pp. 7-8; L IV, T1. In the Fall of 1996, a Mrs. Boggs called Principal Gillespie and asked if her two daughters could be taken to their house instead of dropped at a point along the scheduled route, because the girls had been chased by some dogs between the route and their home. Tr. p. 13. Principal Gillespie talked to Grievant about this, and he believed Grievant had taken the children to their house. Tr. pp. 14-15.

Principal Gillespie stated he considers himself Grievant's supervisor in the after school program. Tr. p. 18. He testified that on March 25, 1997, he saw Grievant outside and stated to him that the two Boggs girls would have to stay in after school, and "[w]e need to take these girls home," or "on home." Tr. pp. 8, 15. He stated the girls were not in school that day, so he "mentioned that it wouldn't be in effect for that day since they weren't there. But they probably would be backThursday [March 27], and if they were, could we take them home?" Tr. pp. 8-9. Principal Gillespie at first could not remember whether he had told Grievant about the problem with the dogs, although he said he would normally tell him the reason for the deviation. Tr. pp. 9, 14. However, he stated on cross-examination that he had told Grievant, "[w]e need to take them home just because of the problems we've had with the dogs." Tr. p. 16.

Principal Gillespie felt Grievant needed to be reminded on March 27 about the Boggs girls, but he could not stay that day, so he asked the school Librarian, Karen Meyer, to remind Grievant. Ms. Meyer stated that Principal Gillespie asked her to "mention to the driver that the children were to be taken to their home instead of their regular stop." Tr. pp. 15-16, 19-20. She stated Principal Gillespie had told her the reason for this was because of a problem with dogs chasing the children. Tr. p. 20. Ms. Meyer wrote herself a note so she would remember, which stated, "Nellie and Leah Ann to the house - to house." She testified that on March 27 she followed the Boggs girls onto the bus, stepped up on the bus, and stated to Grievant, "[t]he girls are to be taken home." She recalled Grievant had responded, "[o]h, these are the ones," and she had said, "[y]es." Tr. pp. 22-23. Ms. Meyer could not recall if she had mentioned the dog problem to Grievant, but felt his simple response indicated a complete awareness of the situation. Tr. pp. 23-25.

Grievant's recollection of his March 25, 1997 conversation with Principal Gillespie was that he was talking with the Principal and Mr. Harper (See footnote 2) for a minute or less while the children were getting on the buses. Although he did not recall the complete conversation, Grievant related:

> I remember him saying the kids ought to be taken home all the time. Whether he meant just those kids, or all - I took it that he meant all the kids. And I knowed thatwasn't true; that we do not take all - you know, any of the kids all the way to the house, unless they live on the routes that's already pre-scheduled. . . . Then he mentioned something about the Boggs girls weren't there that day. And that they would be there on Thursday. But still, he didn't come right out and say, "Paul, I need you to take these girls all the way to the house," or I would have. He may have said "home." But home to us, when we come up here, that's what we come to do, is take the kids home. Tr. pp. 28-29.

Grievant did not know why Principal Gillespie mentioned the Boggs children, "[o]ther than that they were going to be in the after-school again." Tr. p. 30. Grievant further stated that Principal Gillespie, "did not say to me, `Paul, I need you to take these kids all the way to the house.' Because if he had, if it had been made clear to me, I would have done that. I've done it before. And I have no reason, you know, not to do it again." Tr. p. 32.

Grievant stated that in the fall of 1996 he had transported one of the Boggs children off the scheduled route to a point closer to her house on two successive occasions, after Principal Gillespie called him to his office and asked whether, "as a favor to him, a one time deal, he wanted to prove to the parents that they had to pull their time in the after-school. And if it would be any problem for me to take them all the way home. And I told him, `[n]o, as long as it was okay with Mr. Harper.'" Tr. pp. 47-49. Although Grievant stated he had taken the child "all the way to [her] house," the undersigned

concludes from his testimony that he never transported her to her doorstep, but only to the point where the daily bus route driver turns, which is some distance, perhaps half a mile, from her house. Tr. pp. 47-49.

Grievant's recollection of his brief conversation with Ms. Meyer was essentially the same as hers, except that he recalled he had said to her that these two girls were "the ones that go to Porter's Creek." He noted that it is not unusual for teachers to come to the bus with children and ask where the bus is going to make sure the children board the right bus. Tr. pp. 37-39. Grievant did not,however, indicate that Principal Gillespie usually told him that particular children would be riding the bus.

Finally, Grievant related that when he arrived at the Boggs girls' stop along the scheduled route, they told him they had understood he was supposed to take them to their house. He stated he told the girls, "that was not what I was told, you know, it wasn't made clear to me. I thought they were just telling me that to try and get me to take them down there so they wouldn't have to walk." He stated he believed the girls were lying to him. Tr. pp. 40-41. He noted that the transportation regulations prohibit him from dropping a child off at a location other than the designated stop without a bus pass or written permission from the parents, although he was not sure these rules applied to the extracurricular run. Tr. p. 51; L IV, T 2.

Grievant noted that he dropped the girls at the point on his scheduled route closest to their house. Tr. pp. 40-41. He stated he had never been made aware of a problem with dogs chasing the girls. Tr. pp. 42, 52. He stated it was 6:00 p.m., and would be daylight for another hour when he dropped the girls at the stop. He stated, "[a]nd I didn't see, you know, that their safety would be impaired in any way, more than any other kid that had to walk anywhere to home, any distance." Tr. p. 42. Grievant acknowledged he could have taken the girls to their house, and checked the next day to see whether they were lying, and that this probably would have been the safer course. Tr. p. 44. He further stated, however, that had he done this, it would have added fifteen minutes to his route, and he would have been fifteen minutes late getting the other children home. L IV, T 2. Earlier, however, he had stated that he was running about fifteen minutes ahead of schedule that day. L IV, T 1. Mr. Linkinoggor stated Grievant was allowed to retain his regular day run because that run is quite different from the extracurricular run; in that, the same children ride on the regular run each day, whereas, on the extracurricular run, different children ride each day. He stated the extracurricular run requires that the

driver exercise good judgment, which Grievant had not done on two occasions, placing children at risk on both occasions. The undersigned agrees.

It is clear from the transcript of the suspension hearing, and the Level IV hearing, that Grievant does not always understand what he is being asked, and that both Grievant and Principal Gillespie could stand to improve their communication skills. Although the setting in which Principal Gillespie attempted to communicate to Grievant that the Boggs children should be taken to their house was not ideal, Grievant should have understood at some point what was being communicated to him, given that he had gone off the scheduled route and taken one of the girls closer to her house on two other occasions, which he remembered. Principal Gillespie certainly could have given clearer instruction and cannot be held blameless. However, Grievant's actions again demonstrated a lack of good judgment, and a decision-making problem. A responsible action would have been to inquire whether he was to deviate from the scheduled route to take the girls closer to their house as he had done previously, particularly when, 1) Principal Gillespie specifically stated the girls needed to be taken home; 2) Grievant did not indicate Principal Gillespie normally told him when students were to ride his bus; 3) Principal Gillespie was previously talking about taking children to their houses, and Grievant did not think this made sense; and 4) the children finally made it clear to Grievant. Whether he misunderstood Principal Gillespie at first or not, it was incumbent upon Grievant to be able to take the information he had been provided, sort through it, and make a good decision. Grievant was not able to do this on two occasions. CBOE has proven the charge of willful neglect of duty.

While certain basic principles can be taught, CBOE cannot anticipate every situation which will be encountered in driving this run, which by its nature, presents unique circumstances. In order to safely drive this run, the employee must be able to make good decisions. It should have been clear without instruction that a third grader could not be left under the circumstances presented here, regardless of what the child said. The reasonable choices were to wait with the child, accompany the child to the house to place the call to his parents and make sure his parents agreed to let him wait at the house, or at the least, to wait until the child returned from placing the call to make sure he had reached his parents. Grievant's course of conduct falls short of reasonable. The second incident only serves to confirm Grievant's lack of good judgment.

Finally, in assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past

work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995) (citations omitted).

The penalty imposed was suspension without pay from Grievant's extra-curricular contract only, and termination of his extra-curricular contract. Grievant was allowed to retain his regular employment contract. Grievant's extra-curricular route presents unique hazards. Grievant demonstrated a lack of good judgment, which placed small children in dangerous situations. Respondent was justified in determining that Grievant should not be driving this particular type of run. The following facts pertinent to the resolution of this matter have been made from the evidence presented at Level IV.

Findings of Fact

1. Grievant is employed by CBOE as a bus operator. He has been driving a bus for CBOE for many years, and has driven the extra-curricular late run at issue eight years.

2. The extra-curricular run leaves Clay Middle School at 5:30 p.m., and runs along a scheduled route at a scheduled time. The last location listed on the schedule is "Top of Independence" at 7:00 p.m. Three buses serve the entire county, thus the children riding the buses may be dropped off far from their homes, and their parents are to make arrangements for them to travel safely from the route to their homes. The bus schedules are published.

3. On February 6, 1997, Grievant was one-half hour ahead of schedule, and when he arrived at the stop where he dropped a third grade male student, the boy's parents were not there to meet him. He knew the boy's parents picked him up at the stop. He let the boy off the bus in the cold and dark with no flashlight. There is no bus house at the stop, and the boy lived more than one half mile from the stop.

4. In the Fall of 1996, Grievant was called to Principal Gillespie's office and asked to deviate from his scheduled route and take a Boggs child to her house. Mr. Harper agreed this was fine. Grievant then took the child closer to her house on two occasions that Fall.

5. On March 25, 1997, Principal Gillespie told Grievant, during a brief conversation in the evening near the buses, that the two Boggs children would be riding the bus on the extracurricular run on March 27, 1997, and they needed to be taken home. Principal Gillespie said they needed to

be taken all the way to their house, but Grievant did not clearly hear Mr. Gillespie andthought he meant all the children should be taken to their houses. He did not understand why Mr. Gillespie would say this, as this was not possible with only three buses performing these late runs.

6. Grievant did not ask Principal Gillespie or Mr. Harper whether he was to deviate from his scheduled route again to take the Boggs children to a point closer to their house.

7. Ms. Meyer told Grievant on March 27, 1997, that the Boggs girls were to be taken home.

8. The Boggs girls told Grievant when he stopped at the point closest to their home along his scheduled route, that it was their understanding he was to take them to their house. Grievant did not take the Boggs girls to their house or to the place where he had taken the one Boggs child in the Fall of 1996. Grievant was running fifteen minutes ahead of schedule on March 27, 1997, and it would have taken him fifteen minutes to take the Boggs children to their house.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters is on the employer to substantiate the charges against the employee by a preponderance of the evidence. W. Va. Code § 18A-2-8; Perkins v. Greenbrier County Bd. of Educ., Docket No. 94-13-019 (Aug. 12, 1994). The charges must be one or more of those listed in Code § 18A-2-8. Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995). A county board of education must act reasonably, not arbitrarily or capriciously. Rovello v. Lewis County Bd. of Educ., 381 S.E.2d 237 (W. Va. 1989). Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991).

2. An employer asserting willful neglect of duty "must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act." Jones v. Mingo County Bd. of Educ., Docket No. 95-29-151 (Aug. 24, 1995).

3. Respondent proved the charge of willful neglect of duty.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Clay County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any

of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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BRENDA L. GOULD

Administrative Law Judge

Dated: November 5, 1997

Footnote: 1

References to the June 2, 1997 termination hearing transcript, which was made a part of the record at Level IV as Respondent's Exhibit 1, are made as follows: "Tr., p. __", with the page number appearing in the blank. References to the Level IV hearing tapes are made as follows: "L IV, T __",with the Tape number appearing in the blank.

Footnote: 2

Mr. Harper heard only bits and pieces of the conversation between Grievant and Principal Gillespie, and could relate only that he heard the Principal mention something about the Boggs girls.