HESSIE GUNNELLS,

Grievant,

v.

DOCKET NO. 97-23-055

LOGAN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Hessie Gunnells, filed this grievance on January 30, 1997, protesting a 20-day suspension imposed by the Logan County Board of Education ("Board") for failure to observe a railroad crossing warning. Hearing was held in this Board's Charleston, West Virginia, office on February 19, 1997, and the record was held open pending the submission of additional evidence. Subsequently, following several continuances, the parties agreed to close the record with the existing evidence, and this case became mature for decision on September 30, 1997, the deadline for the parties' submission of proposed findings of fact and conclusions of law.

SUMMARY OF EVIDENCE

The evidence of record consists of Respondent's Exhibit 1, a "Near Miss Report", and the testimony of Grievant, David Workman, and Jerry Vance.

ISSUE

The issue is whether the Board has proven by a preponderance of the evidence that Grievant failed to observe a railroad crossing warning light on December 19, 1996, justifying a 20-day

suspension from employment, without pay.

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; Nicholson v. Logan County Bd. of Educ., Docket No. 95-23-129 (Oct. 18, 1995). Moreover, the authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

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

> Nothwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendre to a felony charge.

Respondent did not specifically assign a W. Va. Code § 18A-2-8 cause which led to Grievant's suspension, however, it is assumed that Grievant's conduct constitutes “willful neglect of duty.” To prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. Williams v. Cabell County Bd. of Educ., Docket No. 95-06-325 (Oct. 31, 1996); Hoover v. Lewis County Bd. of Educ., Docket No.93-21-427 (Feb. 24, 1994). See Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990). “'Willful neglect of duty' may bedefined as an employee's intentional and unexcusable failure to perform a work-related responsibility.” Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990).

Grievant is employed as a bus operator by the Board. On December 19, 1996, Transportation Director David Workman received a telephone call from a representative of CSX Corporation, informing him that a school bus, number 8804, had gone through a railroad crossing. The CSX representative telefaxed a copy of a “Near Miss Report” to Mr. Workman, filled out by Engineer J.P. Hopkins, confirming that a public school bus number 8804, had stopped at a railroad crossing with flashers operating, then proceeded through the crossing when a train was approaching. The “Near

Miss Report" indicates the train was approximately 500 feet from the crossing. R. Ex. 1. Mr. Workman never spoke with Engineer Hopkins regarding this incident. Mr. Workman identified the driver of bus number 8804 as Grievant.

That same day, Grievant reported to Pat Tabor, her supervisor, that as she was crossing the Water Street railroad tracks, the warning lights came on. She denies crossing against the flashers. She says the flashers were not on when she stopped, looked and listened, but as she proceeded across the tracks, the flashers came on. At that point, she heard the whistle, but she never saw the train. She reported the incident to Ms. Tabor because it scared her and she was afraid she would get in trouble. She also told Jerry Vance, another bus operator, who was also her WVEA representative. There were approximately 25 children on the bus that day.

After the Christmas holidays, Mr. Workman met with Grievant, Jerry Vance, and Pat Tabor, to discuss this incident. At or shortly after this meeting, Mr. Vance told Mr.Workman and Ms. Tabor that he had observed Grievant crossing the railroad tracks while the warning lights were in activation.

Mr. Vance testified that he was sitting at the end of the Water Street Bridge at a stop light getting ready to make a left turn. Grievant's bus was at the railroad tracks at the Water Street crossing. It was about 7:12 a.m. and still dark. Bus numbers are printed on the back of the buses. He saw the bus number while she was sitting at the tracks, and knew that bus was Grievant's bus. He estimates he was about 75 feet from Grievant's bus. Mr. Vance testified that the warning lights were flashing before Grievant started across the tracks. He said it was very unusual for a bus to cross the railroad crossing while the lights were flashing.

Grievant's representative objected to the introduction of the Near Miss Report from the CSX engineer on the grounds of hearsay. The engineer was not called to testify in this matter. However, the objection to the introduction of hearsay evidence is misplaced. Under W. Va. Code § 18-29-6, the formal rules of evidence are not applicable in grievance proceedings, except for the rules of privilege recognized by law. Hearsay evidence is generally admissible in grievance proceedings. The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings. Seddon v. W. Va. Dept. of Health, Docket No. 90-H-115 (June 8, 1990). Nonetheless, an administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding.

See Miller v. W. Va. Dept. of Health and HumanRes., Docket No. 96-HHR-501 (Sept. 30, 1997); Harry v. Marion County Bd. of Educ., Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996); Seddon, supra.

There are several factors to consider in determining the weight to be allocated to hearsay evidence, including: the availability of persons with first-hand knowledge to testify at the hearing; whether the declarant's out-of-court statements were in writing, were signed, or were in affidavit form; the employer's explanation for failing to obtain signed or sworn statements; whether the declarants were disinterested witnesses to the events and whether the statements were routinely made; the consistency of the declarants' accounts with other information in the case, their internal consistency, and their consistency with each other; whether corroboration for the statements can otherwise be found in the employer's records; the absence of contradictory evidence; and the credibility of the declarants when they made the statements attributed to them. See Borninkhof v. Dept. of Justice, 5 M.S.P.B. 150 (1981).

Further, where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dept. of Health & Human Resources, Docket No. 95-HHR- 066 (May 12, 1995). See Harper v. Dept. of the Navy, 33 M.S.P.R. 490 (1987).

In the instant case, the CSX engineer who filled out the Near Miss Report was not called to testify, although the record was left open for a considerable period of time in an effort to procure his testimony. The Near Miss Report, prepared in the ordinary course of business of CSX Corporation, identifies the location of the alleged incident involving Grievant as the Water Street crossing; gives the date and time of the incident as December19, 1996 at 7:10 a.m.; identifies the bus number as 8804, Grievant's bus; and indicates the bus “stopped and then proceeded” through the railroad crossing while the warning flashers were activated. R. Ex. 1.

Mr. Vance testified that he observed Grievant at the Water Street crossing, although he did not remember the date, at approximately 7:12 a.m. He also identified her bus number as 8804, and testifies she stopped and then proceeded through the railroad crossing while the flashers were activated.

Grievant herself does not deny she was at the Water Street crossing on December 19, 1996, at

approximately 7:10 a.m., and stopped and proceeded through the railroad crossing, although Grievant contends the flashers did not become activated until she had already proceeded through the crossing.

Thus, while the Near Miss Report, by itself, would not be sufficient to outweigh Grievant's testimony that the flashers became activated after she proceeded through the crossing, the corroborative testimony of Mr. Vance lends enough additional weight to the Near Miss Report evidence to outweigh slightly Grievant's version of events.

Respondent has the burden of proving the disciplinary action by a preponderance of the evidence. A preponderance of the evidence is evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of witnesses, but by the greater weight of all evidence, which does not necessarily mean the greater number of witnesses, but opportunity for knowledge, information possessed, and manner of testifying determinesthe weight of testimony. Black's Law Dictionary, 1064 (5th Ed. 1979); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1.

Grievant is employed as a bus operator by the Board.

2.

On December 19, 1996, Grievant, driving bus number 8804, with approximately 25 students on board, stopped at the Water Street railroad crossing, and then proceeded through the crossing while the warning flashers were activated.

CONCLUSIONS OF LAW

1.

In disciplinary matters, W. Va. Code § 18-29-6 places the burden of proof on the employer.

2.

Respondent demonstrated by a preponderance of the evidence that Grievant crossed a railroad crossing against the warning flashers while transporting students, warranting suspension.

3.

Respondent has proven by a preponderance of the evidence that Grievant's conduct of crossing the railroad tracks against the warning flashers constitutes 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 Logan County and such appeal must be filed within thirty (30) days ofreceipt 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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MARY JO SWARTZ

Administrative Law Judge

Dated: December 9, 1997