EDWARD C. JONES,

Grievant,

v. DOCKET NO. 96-01-471

BARBOUR COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Edward C. Jones, Grievant, submitted this grievance directly to Level IV, in accordance with W. Va. Code §18A-2-8, challenging his termination by Respondent, the Barbour County Board of Education. He alleges:

> My suspension from my position as [a] bus driver is unwarranted and not supported by the facts. I have not received the proper employee performance evaluation as required by [W. Va. Code §§] 18A-2-8 and 18A-2-12.

As relief, Grievant seeks "[i]mmediate reinstatement with back pay and all benefits."

On December 22, 1996, an evidentiary hearing was held in this matter at the Grievance Board's office in Elkins, West Virginia. On February 3, 1997, this case became mature upon receipt of the parties' reply proposals.

BACKGROUND

At the beginning of 1996, Respondent's Drug And Alcohol Testing For Transportation Department personnel policy ("DAT Policy") became effective. BH Exh. #1. (See footnote 1) Prior to the DAT Policybecoming effective, the policy was reviewed with covered employees, including the Grievant, and the employees, including Grievant, were provided training about the policy. The DAT Policy places Respondent in compliance with the federal Omnibus Transportation Employee Testing Act of 1991 in that bus drivers in Barbour County, as well as throughout the State of West Virginia, are required to have a commercial driver's license (see W. Va. Code §17E-1-7). As the regulations implementing the Omnibus Transportation Employee Testing Act of 1991 were being promulgated, safety concerns about drivers of commercial vehicles and the effects of alcohol were also the subject

of Federal Register discussion. That public discussion included general agreement among the commentators that an alcohol concentration level of 0.04 represents the point at or above which impairment for most individuals rises dramatically. (See footnote 2) Level IV Respondent's Exh. #5.

Both the federal act and the DAT Policy are based on a zero tolerance philosophy towards alcohol and seek to promote and maintain a safe and healthy work environment free from the negative influence of drugs and alcohol. The DAT Policy is based on the federal act and incorporates alcohol concentration levels below those typically established by state legislatures for criminal sanctions involving driving under the influence. Indeed, the DAT Policy establishes an alcohol concentration level of anything above 0.02 as "positive" and that information is clearly spelled out in the policy along with other related information prohibiting certain conduct, including a driver operating his bus (a safety sensitive function) within four hours after using alcohol or while having an alcohol concentration of 0.04 or greater. The DAT Policy also mandates certain types of drug and alcohol testing for compliance, including random alcohol testing.

Respondent's DAT Policy is designed to prevent accidents, injuries, and losses. The DAT Policy covers Respondent's bus drivers, and its first paragraph states that employees and students are the Board's most valuable resources, and their health and safety is a serious concern.

The following Findings of Fact were derived from the record.

FINDINGS OF FACT

1. Grievant, Mr. Edward C. Jones, was employed by Respondent as a bus operator for approximately twelve (12) years until the termination of his employment. 2. Grievant has an excellent employment record.

3. As a bus operator, Grievant performs safety-sensitive duties.

4. Grievant was given a copy of Respondent's DAT Policy. BH Exh. #2 and #3, and BH Tr. 101-2.

5. Grievant understood the consequences of testing above a 0.04 level on the breath alcohol test. BH Tr. 101-2.

6. Grievant started his morning bus run at 6:40 a.m. on October 3, 1996. He did not know the level of alcohol in his system. BH Tr. 105.

7. A certified breath alcohol technician ("BAT"), (See footnote 3) Mrs. Gladys Antulov, from Medbrook Medical Center (Medbrook) administered an initial, or screening, breath alcohol test to

Grievant at 9:39 a.m. on October 3, 1996, using an Intoximeters, Inc. Alco Sensor IV/RBT IV ("AS/RBT IV") evidential breath testing device. BH Exh. #8.

8. The result of the alcohol screening test for Grievant was an alcohol level of 0.053, which required Mrs. Antulov to conduct a confirmation test on Grievant.

9. At 9:57 a.m. on October 3, 1996, Mrs. Antulov conducted a confirmation breath alcohol test on Grievant again using the AS/RBT IV equipment, and the test result was an alcohol level of 0.048 (BH Exh. #8), thus establishing a positive alcohol test result for Grievant. 10. In conducting the alcohol screening test and the alcohol confirmation test on Grievant on October 3, 1996, Mrs. Antulov followed the manufacturer's procedures, which comply with 49 C.F.R. Part 40, Subpart C. Mrs. Antulov performed the following steps:

a. Grievant entered a confidential testing area and produced identification, including a photo ID, to Mrs. Antulov;

b. Grievant's name and social security number were recorded on the "Breath Alcohol Testing Form" (BH Exh. #8, sometimes referred to as "Testing Form"). Grievant verified the accuracy of that information (BH Tr. 54);

c. Mrs. Antulov explained to Grievant that if his alcohol concentration on the test was 0.02 or above that there would be a fifteen minute wait and then a confirmation test would be performed. She further explained to Grievant that if the confirmation test results also showed an alcohol concentration of 0.02 or greater, then Mr. Zinn, Respondent's Director of Transportation, would be contacted. BH Tr. 54);

d. Mrs. Antulov recorded Grievant's screening test result, 0.053, and test number, 679, on the front of the Testing Form. The test number and alcohol concentration results match the evidence tape printout automatically generated from the testing equipment and taped to the back of the Testing Form. BH Tr. 55, BH Exh. #8);

e. Given the alcohol concentration level of 0.053 obtained on Grievant's screening test, Mrs. Antulov advised Grievant that after a fifteen minute wait, she would conduct aconfirmation test. The AS/RBT IV is manufactured so that following a screening test result of 0.02 or greater, an internal timer in the equipment will not allow a technician to perform another test until at least fifteen minutes have passed (BH Tr. 55 and 70, and testimony of M.R. Forrester at the Level IV hearing);

f. During the fifteen minute period following the screening test, Mrs. Antulov recorded on

the Testing Form in the "Remarks" section that Grievant advised her that he had used Listerine mouthwash at about 6:30 a.m. on October 3, 1996. During the fifteen minute period, Grievant remained in the testing room with Mrs. Antulov, did not consume any food or beverage, and was cooperative concerning her instructions about burping or belching (BH Tr. 58);

g. Following the fifteen minute waiting period, at 9:57 a.m. on October 3, 1996, Mrs. Antulov conducted the confirmation breath alcohol test on Grievant, and the test result was an alcohol concentration of 0.048. Mrs. Antulov recorded the test number, 680, and result on the Testing Form, printed her name, signed her name, and asked the Grievant to sign his name, which he did (BH Tr. 55, BH Exh. #8);

h. Grievant selected a sealed mouthpiece prior to the screening test. He also selected a sealed mouthpiece for a "blank" test following the screening test (which "blank" check was performed, as further described below, and yielded a result of .000 as shown on the confirmation test tape on the back of BH Exh. #8).

Grievant also selected a sealed mouthpiece for the confirmation test (BH Tr. 56-60);

i. Between the screening test and the confirmation test, Mrs. Antulov conducted a blank test using a sealed mouthpiece selected by Grievant. The blank test draws a breath through the mouthpiece, which is attached to the AS/RBT IV and in this case the .000 reading and recording of that result confirms there was no residual alcohol in the equipment prior to the confirmation test conducted on Grievant (BH Tr. 58-59, and BH Exh. #8); and

j. Following the confirmation test, Mrs. Antulov conducted a calibration check on the equipment by allowing Grievant to select another sealed mouthpiece which was then connected to a tank of a known standard of gas and then connected to the AS/RBT IV. Mrs. Antulov recorded the known standard of alcohol from the tank, which is digitally displayed on the tank into the AS/RBT IV in Grievant's presence and then activated the AS/RBT IV to draw a "breath" from the tank. On October 3, 1996 the calibration check, following the confirmation test on the Grievant, indicated that the equipment was operating within its normal range of tolerance (0.005), and the tape printout produced automatically by the AS/RBT IV shows that with the designation "CAL CHECK OK" (BH Tr. 61-63, BH Exh. #8). Mrs. Antulov attached the automatically generated evidence tapes from the AS/RBT IV to the back of the Testing Form (BH Exh. #8).

11. The AS/RBT IV used for the breath alcohol testing of Grievant was calibration checked on

October 1, 1996, and found to be operating accurately and not in need of calibration. BH Tr. 65- 69, BH Exh. #9.

12. The AS/RBT IV equipment used to test Grievant on October 3, 1996, has never been out of calibration, and therefore has not needed to be calibrated, since it was acquired by Medbrook, approximately eighteen months prior to the testing of Grievant. See, BH Exh. #9, and testimony of Mr. Miles Runner, Calibration Technician, at the Level IV hearing.

13. The AS/RBT IV equipment did not malfunction and was operating properly and accurately on October 3, 1996, both prior to and following the testing of Grievant. (See footnote 4)

14. Respondent has contracted with Medbrook to assist it in the administration of its DAT Policy, including conducting drug and alcohol testing of employees as required under that policy. Among the testing required under the DAT Policy is random alcohol testing of employees. Medbrook handles the administration of the random
alcohol testing under the DAT Policy, including generating the random list of names of employees to be tested and communicating that list in a confidential manner to the Barbour County Transportation Department. In addition to a regular list of employees to be randomly tested for alcohol, Medbrook also generates an alternate list in the event an employee whose name comes up on the regular list is absent or sick on the date established for testing. In this case, Medbrook provided that service, and Grievant became one of the employees who was required to submit to a random alcohol test on October 3, 1996. BH Tr. 11- 15 and 52-53.

15. Under Respondent's DAT Policy, if an employee has an alcohol concentration of 0.02 or greater but less than 0.04, the employee is to be removed from safety-sensitive duties until the start of the next regularly scheduled duty period, but not less than twenty-four hours following the administration of the test. Under the DAT Policy, for an individual to have a verified positive there must be an initial test result and a confirmation test result each of 0.02 or greater. Moreover, under Respondent's DAT Policy, if an individual registers an alcohol concentration of 0.04 or greater, that person must be immediately removed from any safety- sensitive duties. Under the heading "Consequences of Positive Alcohol Testing", Respondent's DAT Policy provides that "Disciplinary action pursuant to the School Laws of West Virginia may be initiated up to and including dismissal."

16. Transportation Director Zinn explained the DAT Policy, the alcohol concentration levels set by the DAT policy, and the consequences of violating the DAT policy, with the Barbour County bus

drivers, including Grievant.

17. In addition to its DAT Policy, Respondent has a Drug-Free Workplace Policy. Respondent's Drug-Free Workplace Policy prohibits employees from reporting to work while under the influence of an illegal drug or alcohol. Grievant verified his knowledge of and agreement to abide by the Drug-Free Workplace Policy in a signed verification dated August 27, 1990, in which, among other things, he agreed not to report for work while under the influence of alcohol. BH Exh. #4 and #5.

18. Following the confirmation test on Grievant, the calibration check on the equipment following the confirmation test, and the completion of the Testing Form, Mrs. Antulov contacted Mr. Zinn who joined Mrs. Antulov and Grievant in the testing area. Mr. Zinn suspended Grievant with pay pending the return of Superintendent John Hager who was out of town.

19. Superintendent Hager and Mr. Zinn held a meeting with Grievant and Grievant's representative, Mr. White, on October 8, 1996, in Superintendent Hager's office. In that meeting, Grievant admitted to Superintendent Hager that he drank six to eight beers the night before he was tested, and that he was not sure how many beers he drank the night before. BH Tr. 17. At the Board Hearing, Grievant was not sure how many beers he drank, but estimated it was less than twelve, but probably six to eight, 12-ounce beers late the night of October 2, 1996. BH Tr. 101. Superintendent Hager suspended Grievant without pay for insubordination, wilful neglect of duty and intemperance. BH Exh. #11.

20. On October 28, 1996, Respondent conducted a personnel hearing concerning the suspension of Grievant from his employment as a bus operator, and the recommendation of Superintendent Hager, that Grievant be terminated from his employment. At the conclusion of the Board Hearing, Respondent upheld Superintendent Hager's recommendations to suspend Grievant from employment and to terminate his employment.

21. Grievant received no training or education in alcohol absorption rates.

DISCUSSION

In his proposed findings of fact and conclusions of law, Grievant asks the Undersigned to consider a less severe punishment because of the “correctable nature of any alleged infraction on Grievant's part.” If Grievant is suggesting that an improvement period (as provided for in W. Va. Code §18A-2-12 and State Board of Education Policies 5300 and 5310) is applicable given the facts of this case, his reliance is misplaced. In this case, the problem is not a deficiency in Grievant's professional skills.

The intended purpose of Policy 5300 evaluations is to encourage improvement of school personnel skills which, in turn, will benefit the students. Hosaflook v. Nestor, 346 S.E.2d 798 (W.Va. 1986). Furthermore,

"the factor triggering the application of the evaluation procedure
and correction period is 'correctable' conduct. What is 'correctable' conduct does not lend itself to an exact definition but must, ... be understood to mean an offense or conduct which affects professional competency." Rovello v. Lewis County Bd. of Educ., 381 S.E.2d 237 (W.Va. 1989), citing Mason County Bd. of Educ. v. State Superintendent of Schools, 165 W.Va. at 739, 274 S.E.2d at 439. Therefore, W. Va. Code §18A-2-12 and State Board of Education Policies 5300 and 5310 do not apply.

Even though Grievant's above contention is rejected, it is Respondent's burden to prove the charges in a disciplinary matter by a preponderance of the evidence. Respondent must also prove by a preponderance of the evidence that its actions were not arbitrary or capricious.

As a bus operator, Grievant is responsible for the safety of the students he transports on his bus from their homes to their assigned schools at the beginning of each school day, and from their assigned schools to their homes at the conclusion of each school day. Because of their responsibilities and duties, bus drivers occupy safety-sensitive positions and perform safety-sensitive duties. Respondent proved, by a preponderance of the evidence, that Grievant tested positive for alcohol on a random alcohol test, conducted on October 3, 1996, after Grievant had made his morning bus run. Therefore, Grievant was in violation of Respondent's DAT Policy.

Superintendent Hager testified at the Level IV hearing that he relied on the Federal Act (See footnote 5) and the significance attached to an alcohol concentration level of 0.04 or above as an indicator of impairment of a driver in deciding to recommend the termination of Grievant's employment. Grievant's alcohol concentration level of 0.048 on his confirmation test placed him above the positive level under the DAT Policy, and above a level at which dismissal is expressly identified as a consequence under Respondent's DAT Policy.

During the Level IV hearing, Mr. Forrester, the CEO of Intoximeters, Inc., qualified as an expert in fuel cell technology for breath alcohol analyzing devices and the AS/RBT IV because he (a) meets the minimal educational or experiential qualifications, (b) is in a field that is relevant to the subject

under investigation, (c) which will assist the trier of fact; and (d) Mr. Forrester's area of expertise covers the particular opinion to which he testified. Mr. Forrester testified at the Level IV hearing concerning the scientific methodology of fuel cell equipment, including the AS/RBT IV, and the scientific reliability of the test results obtained from the equipment concerning the testing of Grievant.

The record developed at Level IV clearly established that the AS/RBT IV is based on a scientifically and technically valid theory which is supported by scientific, technical, and specializedknowledge and produces scientifically reliable results. Also contrary to Grievant's implicit assertions, there is no approval or acceptance process or procedure required in West Virginia for the use of the AS/RBT IV as an evidential breath testing device for use under the federal act or any of West Virginia's 55 counties' drug and alcohol testing for transportation department personnel policies. The approval process alluded to by Grievant pertains to devices utilized for DUI criminal cases, and not administrative hearings.

Contrary to Grievant's assertions, the AS/RBT IV is an evidential breath testing device as opposed to a preliminary breath testing device for alcohol testing under Respondent's DAT Policy, and the AS/RBT IV is and has been on the Conforming Products List for instruments that conform to the Model Specifications for Evidential Breath Testing Devices published by the United States Department of Transportation, National Highway Traffic Safety Administration. (BH Exh. #10, Level IV Respondent's Exh. #2 and testimony of Mr. Forrester at the Level IV hearing).

Grievant was suspended for insubordination, wilful neglect of duty, and intemperance. Insubordination is usually defined by this Grievance Board as "a deliberate, wilful or intentional refusal or failure to comply with a reasonable order of a supervisor." Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990), citing Gill v. W.Va. Dept. of Commerce, Docket No. COMM-88-031 (Dec. 23, 1988). See, Thompson v. Logan County Bd. of Educ., Docket No. 95-23-127 (July 17, 1995). Furthermore, in orderto establish a charge of insubordination, the employer must demonstrate that the employee's failure to comply with a directive was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995).

Grievant intentionally drank beer, and intentionally disregarded the fact that he consumed numerous alcoholic beverages within approximately six hours before he got behind the wheel of his assigned school bus. In doing so, he failed to comply with Respondent's DAT Policy and failed to

abide by Respondent's Drug- Free Workplace Policy which prohibits employees from reporting to work while under the influence of alcohol. The objective results of a scientifically reliable test established that Grievant's alcohol level at 9:30 a.m., after he had driven his bus route, was above 0.04.

Respondent established Grievant's insubordination by proving by a preponderance of the evidence that: (a) the DAT Policy was in existence and in effect on October 3, 1996, the date of Grievant's positive alcohol confirmation test; and (b) Grievant's failure to comply with the DAT Policy was sufficiently knowing and intentional to constitute defiance of authority. See, Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995), Rogliano v. Fayette County Bd. of Educ., Docket No. 94-10-164 (Oct. 25, 1994).

To prove willful neglect of duty under W.Va. Code §18A-2-8, Respondent must establish that Grievant's conduct constituted a knowing and intentional act, rather than a negligent act. Bd. ofEduc. of County of Gilmer v. Chaddock, 183 W.Va. 638, 398 S.E.2d 120 (1990); Hoover v. Lewis County Bd. of Educ., Docket No. 93-21- 427 (Feb. 24, 1994). Grievant began driving his bus early in the morning of October 3, 1996, knowing he had consumed numerous beers late the night before. Again, Grievant intentionally ignored the effects alcohol may have on his system, and the level of alcohol that may have remained in his system, despite the plain language of the zero tolerance DAT Policy and the training he received under the DAT Policy (which prohibits, among other things, a person from operating a motor vehicle with an alcohol concentration level of 0.04 or above) thereby placing students on his bus in danger. Grievant testified that when he began his bus run on the morning of October 3, 1996 he had no idea what level of alcohol was in his system, despite his understanding of the consequences of testing above the proscribed limits under the DAT Policy. Therefore, Grievant's actions on October 3, 1996, also amount to willful neglect of duty within the meaning of W.Va Code §18A-2-8.

Respondent's third charge against Grievant is intemperance. (See footnote 6) However, it is not necessary for the Undersigned to address this charge since Respondent proved, by a preponderance of the evidence,the charges of insubordination and wilful neglect of duty. Moreover, the Grievance Board has held, in prior cases, it is not the label a county board of education attaches to the conduct of the employee in the termination notice that is determinative. The critical inquiry is whether the board's evidence is sufficient to substantiate that the employee actually engaged in the conduct.

Allen v. Monroe County Bd. of Educ., Docket No. 90-31-021 (July 11, 1990); Duruttya v. Mingo County Bd. of Educ., Docket No. 29-88-104 (Feb. 28, 1990).

Even though Respondent proved by a preponderance of the evidence the allegations of insubordination and wilful neglect of duty, Grievant may offer evidence in hope of mitigating the punishment. “When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluation; whether the penalty is clearly disproportionate to the offense proven; the penalties imposed 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.” Parham v. Raleigh County Bd. Of Educ., Docket No. 91-41-131 (Nov. 7, 1991).

Although Grievant has an almost impeccable work history with Respondent, Grievant has not offered sufficient evidence to warrant mitigation of the punishment in this case. Grievant knew or should have known the seriousness of Respondent's DAT Policy and its Drug- free Workplace Policy. Although Respondent failed to provide any training in alcohol absorption rates, this information is widelyavailable and easily obtained. Since Grievant is apparently the first employee, or first bus operator, who tested positive under Respondent's new DAT Policy, he could not establish that other employees have been treated differently under this policy. Nor can the Undersigned find that the penalty, in this case, is clearly disproportionate to the offense proven, given the potential harm that could have resulted to school children because of Grievant's drinking.

Therefore, Grievant failed to prove that the penalty in this case should be altered. Grievant also failed to prove that Respondent acted arbitrarily and capriciously in terminating his employment.

In addition to the foregoing findings of fact and narration, it is appropriate to make the following conclusions of law.

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; Bierer v. Jefferson County Bd. of Educ., Docket No. 95-29-558 (Apr. 8, 1996).

2. A county board of education must exercise its discretion in personnel matters in a manner which is not arbitrary or capricious. State ex rel. Melchiori v. Bd. of Educ., 188 W.Va. 575, 425 S.E.2d 251 (1992); Dillon v. Bd. of Educ. of the County of Wyoming, 177 W.Va. 145, 351 S.E.2d 56 (1986); State ex rel. Hawkins v. Tyler County Bd. of Educ., 375 S.E.2d 911 (W.Va. 1981). 3. Mr.

Forrester qualified as an expert at the Level IV hearing in fuel cell technology for breath alcohol analyzing devices and the AS/RBT IV. Gentry v. Mangum, 195 W.Va. 512, 466 S.E.2d 171 (1995).

4. Mr. Forrester's expert testimony reflects scientific knowledge, the findings he discussed are derived by scientific method, and his work product amounts to good science. Mr. Forrester's scientific testimony was relevant to the issues presented in the case at bar. Gentry, supra.

5. Grievant's alcohol concentration test results produced by the AS/RBT IV are relevant and scientifically reliable.

6. Insubordination, intemperance, and wilful neglect of duty are three 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).

7. It is not the label a county board of education attaches to the conduct of the employee in the termination notice that is determinative. The critical inquiry is whether the board's evidence is sufficient to substantiate that the employee actually engaged in the conduct. Allen v. Monroe County Bd. of Educ., Docket No. 90-31-021 (July 11, 1990); Duruttya v. Mingo County Bd. of Educ., Docket No. 29-88-104 (Feb. 28, 1990).

8. Respondent proved, by a preponderance of the evidence, Grievant's actions on October 3, 1996, constituted willful neglect of duty and insubordination within the meaning of W. Va. Code §18A- 2-8. 9. Under all of the facts and circumstances of this case, the level of discipline invoked by the Respondent was not arbitrary or capricious, and was in the best interests of the schools in Barbour County. Hoover v. Pendleton County Bd. of Educ., Docket No. 95-36-425 (Oct. 19, 1995), citing, Harrison v. Ginsberg, 169 W.Va. 162, 286 S.E.2d 276 (1982).

10. The intended purpose of Policy 5300 evaluations, improvement plans, is to encourage improvement of school personnel skills which, in turn, will benefit the students. Hosaflook v. Nestor, 346 S.E.2d 798 (W.Va. 1986).

11. “The factor triggering the application of the evaluation procedure and correction period is 'correctable' conduct. What is 'correctable' conduct does not lend itself to an exact definition but must, ... be understood to mean an offense or conduct which affects professional competency." Rovello v. Lewis County Bd. of Educ., 381 S.E.2d 237 (W.Va 1989), citing Mason County Bd. of Educ. v. State Superintendent of Schools, 165 W.Va. at 739, 274 S.E.2d at 439. Grievant's misconduct is not a matter of professional competency.

12. Respondent proved, by a preponderance of the evidence, that the dismissal of Grievant was not arbitrary or capricious, and was appropriate given all of the circumstances in this case.

Accordingly, this grievance is **DENIED.**

Any party may appeal this DECISION to the Circuit 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.

DATED: 2/28/97 _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1

BH refers to the Board's Hearing (Grievant's disciplinaryhearing) held pursuant to W. Va. Code §18A-2-8.

Footnote: 2

The background to the federal act reflects that the 0.04 alcohol concentration level was chosen purposely because information reviewed during the development and implementation of the act revealed that a person's ability to operate a motor vehicle is impaired at the 0.04 level and rapidly deteriorates above that level. Level IV, Respondent's Exh. #5.

Footnote: 3

BH Exh. 12.

Footnote: 4

While calibration checks were not recorded at exact monthly intervals on the AS/RBT IV as suggested by the manufacturer's guidelines, such a failure does not equate to a fatal flaw in the accuracy of test results using the equipment for Grievant's screening and confirmation tests on October 3, 1996. Given the calibration check performed on the equipment on October 1, 1996, the blank check performed between Grievant's screening test and confirmation test on October 3, 1996, and the calibration check performed on the equipment following the confirmation test on Grievant on October 3, 1996, the AS/RBT IV was working properly and provided reliable and accurate readings for Grievant's screening and confirmation tests.

Footnote: 5

The Omnibus Transportation Employee Testing Act of 1991. For more information, see the "Background" section of this decision.

Footnote: 6

While W. Va. Code §18A-2-8 includes "intemperance" among the causes for dismissal of school personnel, the Code does not include a definition of intemperance. Similarly, neither party cited any case law in this state defining intemperance.

The Grievance Board has ruled on cases alleging intemperance under W. Va. Code §18A-2-8. See, Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994); Rowan v. Upshur County Bd. of Educ., Docket No. 91-49-193 (Dec. 31, 1991); Copenhaver v. Raleigh County Bd. of Educ., Docket No. 41-86-175-1 (Aug. 15, 1986).