MARILYN CARLSON,

Grievant

v. Docket No. 97-19-263

JEFFERSON COUNTY BOARD OF EDUCATION,

Respondent

D E C I S I O N

Marilyn Carlson, Grievant, employed as a bus operator by the Jefferson County Board of Education, Respondent, filed a level four grievance, pursuant to W. Va. Code §18A-2-8, on May 29, 1997, following Respondent's decision to terminate her employment. An evidentiary hearing, twice continued for good cause shown, was held in the Grievance Board's Morgantown office on November 10, 1997, and the matter became mature for decision with the filing of post-hearing proposed findings of fact and conclusions of law on or before December 29, 1997.

Grievant was first employed by Respondent as a substitute bus operator in November 1990. In January 1992, Grievant was placed on an Improvement Plan developed to assist her with student discipline, incomplete reports, tardiness, and exercise of better judgment. Despite an evaluation completed in March 1992, which reflected two on-the-job accidents attributed to "hurrying and not allowing enough time to prepare for run", a failure to promptly and accurately complete reports, and maintain equipment, Grievant was reemployed as a substitute in June 1992. Grievant was placed on a second Improvement Plan in December 1992, again to assist her with student discipline. In January 1993, Grievant was awarded a regular, full-time position, "with reservation". Effective June 1, 1993, Grievant was placed on a third Improvement Plan addressing her care of the bus, discipline, and problems reporting time.

An evaluation dated December 8, 1993, documented the problems as on-going, and notedthat parental complaints had been filed. On February 22, 1994, Grievant was issued a

memorandum regarding the lateness of her bus run. In March 1994, Grievant's evaluation noted a failure to complete tasks with a minimum of supervision, and other deficiencies regarding timeliness, discipline, failure to exercise good judgment, and involvement in a preventable accident on November 5, 1993. Grievant was rated as “needs improvement” in all areas under performance. Notwithstanding this record, Grievant was awarded a second probationary contract for the 1994-95 school term.

Grievant's January 1995, evaluation noted five (5) areas in which she did not meet performance standards, including continued complaints regarding timeliness. Nevertheless, Grievant was re-employed for the 1995-96 school term, and in August 1995, Grievant was placed on a fourth Improvement Plan to correct her failure to follow instructions and the bus schedule, as well as student management. An evaluation in December 1995, noted no deficiencies; however, she was placed on a fifth Improvement Plan in February 1996. This Plan addressed Grievant's need to consistently complete her run in a timely fashion, conduct pre-trip inspections of the bus every day, and arrive at work in time to complete pre-trip inspections.

In March 1996, an evaluation noted that Grievant needed to improve student management, and complete her run as scheduled. No further documentation of Grievant's deficiencies was made until April 1997, following an extraduty assignment transporting students to the All-State Choir in Elkins, West Virginia. As a result of complaints made by parents and staff regarding Grievant's performance during the Elkins trip, then-Superintendent Judson Romine suspended Grievant, with pay, effective April 15, 1997, pending the outcome of further investigation. By letter dated May 9, 1997, Superintendent Romine advised Grievant that he would recommend her dismissal as a resultof the following allegations:

repeatedly failing to conduct pre-trips; repeated reckless driving; repeatedly failing to pick up the students on time; repeatedly failing to drop off the students at their destination and, instead, forcing them to walk ¼ to 1/8 mile and across the highway; failing to pick up the students on the evening of April 11, 1997; and failing to devise a planned route for the trip. Additionally, after the initial allegations were made, witnesses came forward in connection with the Elkins trip and reported allegations of prior inappropriate, unsatisfactory and unsafe behavior and conduct in connection with the trip made by you last year to Morgantown; the

Pop Singers trip over Spring Break; and the trip to Hampshire County this year.

Following an evidentiary hearing on May 22, 1997, the Board accepted Superintendent Romine's recommendation that Grievant's employment be terminated. While the incidents which occurred during the Elkins trip led to Grievant's dismissal, the parties offer very differing accounts of the events.

The group, which consisted of junior high and high school students, their teachers Ms. Roberta Ranelli and Mr. Harold Chamblin, and parent chaperones, were scheduled to depart from Charles Town on the morning of April 10, 1997, and were to arrive in Elkins for an afternoon rehearsal. (See footnote 1) Additional practice sessions were scheduled for Friday, April 11, and they were to return to Jefferson County following the final concert on Saturday, April 12, 1997. Their initial departure was delayed when a bomb threat was called into Jefferson High School; however, following some discussion as to which route to take, the group proceeded, led by Mr. Chamblin in a van, followed by the bus carrying approximately thirteen (13) students, Ms. Ranelli, and parent chaperone Becky Geyer. Chaperones Michael and Darlene Cross completed the caravan in their personal vehicle. It was soon discovered that the door to the storage compartment on the bus was not tightly secured, but this situation was quickly rectified and the group proceeded. Both of the teachers and all three parents testified that Grievant exhibited difficulty in driving the bus. Mr. Cross noted that she had crossed the center line a number of times, and all stated that the bus frequently left the pavement with the right tires on the shoulder of the road. Ms. Ranelli testified that the students became a “little panicky” when the bus was so close to guardrails on the edge of the road and moved to the left side of the bus. Ms. Geyer confessed that she too was frightened. During a rest break, Mr. Cross inquired about removing his child from the bus, but decided not to do so after speaking with Ms. Ranelli. Both Ms. Ranelli and Ms. Geyer stated that during the trip Grievant had participated in conversation to a great extent, and that she frequently taken her eyes off the road, and her foot off the gas pedal, when she would turn around and talk. They both also noted that the speed of the bus fluctuated, and that Mr. Chamblin had called back on the radio to inquire why Grievant was so far behind. Mr. Cross stated that he also noticed that one of the taillights had been improperly installed on the bus and was on throughout the trip.

At Seneca Rocks, the party encountered highway construction which required that they negotiate a narrow passage between a mountain and construction equipment. Ms. Ranelli and Ms. Geyer both stated that they felt the bus hit something, either the ledge or a piece of equipment, both in the front and rear sections while passing through, although Ms. Geyer noted that two tractor- trailers had been able to pass without incident. The Crosses confirmed that the back of the bus struck a ledge at this point. The group eventually arrived in Elkins, without further incident.

Ms. Ranelli stated that she ordered wake-up calls for herself and Grievant for the following morning, but that when the group was ready to depart for breakfast Grievant was not present and thebus was not warmed up. Several witnesses testified that when Grievant arrived, she started the bus and proceeded to the restaurant without conducting a pre-trip inspection. Ms. Ranelli noted that upon their arrival at Shoney's, Grievant did not let the group out at the door or park in the Shoney's lot, but rather pulled the bus into an adjoining parking lot, causing them to walk some distance.

That evening, when Grievant transported the group to C.J. Maggie's, a restaurant in downtown Elkins, she again did not park or allow the students to disembark at the door, but proceeded to the City Hall parking lot, which Ms. Ranelli estimated to be “a couple of blocks away”, and required the students to cross a street. At 6:30 p.m., Grievant returned the group to Elkins High School for an evening rehearsal. Ms. Ranelli testified that she directed Grievant to return for them at 8:45 p.m. When Grievant had not arrived by 9:00, she asked Ms. Geyer, along with Mr. Geyer who had arrived earlier, to conduct a search for Grievant.

Ms. Geyer testified that they saw the school bus parked in the WalMart parking lot, and she proceeded into the store to find Grievant. She observed Grievant in an office with several other individuals, including a uniformed officer, and immediately left, not wanting to become involved. She returned to the school and advised Ms. Ranelli of her discovery. Ms. Ranelli requested the Geyers to transport several of the students back to the motel and to ask others to come for the rest. After the Geyers departed, Grievant arrived; however, Ms. Ranelli testified that she was crying and in such a state of distress, that she did not trust Grievant to safely transport the students. She directed Grievant to return to the motel, and she and the remaining students waited for the chaperones to return.

Ms. Ranelli stated that after she had the students settled for the evening she went to speak with Grievant, and learned that she had been detained at WalMart for shoplifting. She observed thatGrievant was very upset, and was to appear for a preliminary proceeding at 11:00 p.m. that evening. Ms. Ranelli testified that the following morning Grievant again was not at the bus at the appointed time and that, again, no pre-trip inspection was conducted prior to departure. Grievant transported the students to McDonald's for breakfast; however, Ms. Ranelli stated that she was not pleased when Grievant did not park at the restaurant, but across the street in the Krogers' parking lot. Ms. Ranelli noted that they were required to walk some distance, and cross a busy street.

Following breakfast, Grievant delivered the students to Davis and Elkins College. Based upon a rainy weather forecast and a belief that Grievant was not emotionally stable, Ms. Ranelli testified that she arranged for all the students and herself alternate transportation, and advised Grievant that she could return home at that time. Ms. Ranelli also stated that Grievant had been assigned to a similar excursion the previous year and had experienced a “few challenges” in maneuvering the bus on that occasion as well. She concluded by stating that she would not participate in any future trips with Grievant as the bus operator.

Transportation Supervisor Rebecca Stokes testified that a pre-trip inspection is to be made prior to each time the bus is used to ensure that all lighting systems, including turn signals, headlights, and clearance lights, are working, that the tires are properly inflated, the oil is adequate, the belts tight, and the windshield wipers, heating system, emergency doors and windows are properly functioning. Ms. Stokes noted that the continuing malfunctioning brake light, noted by Mr. Cross, indicates that no pre-trip inspection was conducted. Ms. Stokes also opined that Grievant's failure to be ready in the mornings, and very early morning inspections followed by a return into the motel, were not appropriate. She also agreed that Grievant should have allowed the passengers to disembark at the restaurant door, or as close as possible, and then locate a parking spot. Ms. Stokestestified that she had inspected the bus for possible damage incurred at the Seneca Rocks construction site, and concluded that the front looked like it had been “touched”, but there were no marks on the back. She also conceded that the bus was older and that the stepwell was lower to the ground than other buses.

Testifying in her own behalf, Grievant stated that the highway chosen by Mr. Chamblin was very narrow, winding, and mountainous, and that while she generally drove on the pavement, it was necessary a “number” of times to drop on to the shoulder of the road when passing oncoming vehicles. Grievant denies colliding with either the mountain or any construction equipment at Seneca Rocks, and explained that what Ms. Ranelli and Ms. Geyer heard was the stepwell dragging on uneven terrain.

Grievant asserts that she did park in the Shoney's lot on the second day of the trip, and explained that she could not park in front of C.J. Maggie's that evening because traffic was heavy. She explained that had anyone asked, she would have stopped to allow the students to disembark, but because of the traffic and her experience that people do not always observe the bus stop lights, she determined it to be safer to park at City Hall. Grievant stated that she did not park at McDonald's the following morning because there were already three buses on the lot. In both instances she used her red flag to assist the students across the street.

Grievant expressly claims to have conducted pre-trip inspections both mornings at approximately 5:45 a.m. Because the bus was so dirty from the trip, Grievant stated that after she completed the five (5) to ten (10) minute inspection, she returned to her room to shower, change clothes, and wait for the group to depart.

Grievant explained that her detention at WalMart was based upon mistaken identity, and thatthe matter had been dismissed from Magistrate Court because no written complaint had been filed prior to the hearing. As of the date of the level four hearing, no subsequent complaint had been filed. Grievant concedes that she was reasonably upset by the entire incident, but denies that she was unable or unwilling to drive the students home.

Addressing the 1996 trip she had taken with Ms. Ranelli, Grievant opined that her operation of the bus had been adequate, and claimed that Ms. Ranelli had complimented her on her parking. At the hearing conducted by Respondent, Grievant offered the testimony of four co-workers who observed her conduct pre-trip inspections, and that she completed her runs as scheduled. A parent also testified that, in his opinion, Grievant had satisfactorily transported his child to and from school for two years.

In summary, Respondent argues that Grievant has been granted five (5) Improvement Plans to correct performance deficiencies and this is more than adequate under the

provisions of W. Va. State Board of Education Policy 5300. Respondent notes that of the five (5) plans given to Grievant, all address at least one of the areas of deficiency which led to her termination, and that neither W. Va. Code §18A-2-8, nor any other statutory provision requires that employees who perform unsatisfactorily be given endless opportunities to improve. In consideration of Grievant's failure to improve in areas which are correctable and to perform her duties in a satisfactory manner, Respondent asserts that the decision to dismiss her was well-founded, reasonable, and procedurally appropriate.

Grievant asserts that Respondent has failed to prove the charges against her by a preponderance of the evidence, and that an employee may not be dismissed for "correctable" misconduct unless the employee is evaluated and given an opportunity to improve. Grievant also contends that the perception of Respondent's witnesses was clouded by incidents for which theGrievant bears no blame. For example, the delay in departure threatened to make the students late, and resulted in a higher than normal anxiety level for the students, parents, and faculty sponsors. Grievant suggests that the anxiety level snowballed when the cargo door unlatched, the narrowness of the road, and the delay at the construction site. Grievant asserts that the failure to promptly collect the students after rehearsal on Friday evening due to her unfortunate detention at WalMart was probably the last straw in that it left the students stranded and resulted in the students, parents, and faculty sponsors viewing her as a criminal. Grievant opines that the shoplifting charge has colored the entire proceeding, and because the specific incidents cited by Respondent were either not proven, or are correctable, she requests that she be reinstated as a bus operator.

Discussion

In disciplinary matters, the employer bears the burden of proving the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Hoover v. Lewis County Bd. of Educ., Docket No. 93-21- 427 (Feb. 24, 1994); Lilly v. Fayette County Bd. of Educ., Docket No. 89-10-436 (Dec. 11, 1992); See W. Va. Code §18-29-6. A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

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:[n]otwithstanding 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 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 dismissal letter sets forth a number of charges which may be categorized as unsatisfactory performance. Prior to dismissal, charges of unsatisfactory performance must be brought to the employee's attention by evaluation, and, if the conduct is correctable, the employee must be given an opportunity to improve, as provided by W. Va. State Board of Education Policy 5300. Trimboli v. Bd. of Educ., 163 W. Va. 1, 254 S.E.2d 561 (1979).

Ms. Ranelli offered testimony regarding Grievant's performance on a trip to Morgantown in 1996; however, the record includes no evidence regarding trips with the Pop Singers over Spring Break or to Hampshire County, which were included in the dismissal letter. Additionally, the evidence does not support the charge that Grievant had failed to “devise a planned route for the trip.” At the hearing conducted by Respondent, Mr. Chamblin stated that Grievant had a piece of paper with apparent directions on it, but that he insisted upon taking Route 33 because he had conferred with several individuals who had recommended that itinerary, and because he did not believe that Grievant was familiar with the route she was ready to take. This testimony indicates that Grievant had prepared a planned route for the trip. “Failing to pick up the students on the evening of April 11, 1997" is not entirely accurate in that she was detained not of her own volition, and did appear to transport the students, albeit later than the scheduled time.

Grievant offers what initially appears to be a logical explanation for her failure to drop

offstudents at their destination; however, it was not impossible for her to drop the students at the doors of the restaurants and would have been the safer alternative. Further, her failure to negotiate the bus in a fashion to place it in front of the restaurants is indicative of Grievant's lack of confidence and/or ability, to satisfactorily perform her duties. Grievant does not deny the reckless driving change, but admits that the bus left the pavement on the trip to Elkins. Again, she contends that this action was not her fault but was due to the narrowness of the road. While it is true that the road taken by the group does not provide much leeway for a wide vehicle, it is noted that school buses travel these roads on a daily basis. Therefore, Grievant must bear the responsibility for her failure to operate the vehicle in a safe manner.

One issue on which the parties entirely disagree is whether Grievant conducted pre-trip inspections prior to transporting the students on April 11 and 12. Several of the parent chaperones testified that they were early risers and were outside by 6:00 a.m., and did not see Grievant inspecting the bus. Grievant conveniently explained that she had completed the inspection at 5:45 a.m. The ruling on this charge must be determined based upon Grievant's credibility. Grievant's testimony was generally somewhat nonresponsive to the questions posed, but her explanation regarding this issue again appears superficially reasonable. Nevertheless, even if Grievant's testimony would be accepted, inspecting the bus so far in advance of usage is not proper procedure according to the Transportation Supervisor. Since the purpose of the inspection is to insure that all the devices are in working order after the bus has been unattended for a period of time, it is logical that the inspection should take place immediately prior to usage. Further, the later inspection time would coincide with warming the bus up, both for the comfort of the passengers and the mechanical functioning of the vehicle. Grievant's claim that she conducted the inspection before 6:00 a.m., sothat she could then shower and change clothes is inconsistent with the usual practice of bus operators who conduct the pre-trip inspection and then begin their runs. Accepting that the bus was dirty from the trip would not justify the change in procedure.

Finally, the charge of “repeatedly failing to pick up the students on time” was confirmed by Respondent's witnesses who consistently testified that the driver had to be located on both mornings. Grievant claimed that she was ready and waiting in her room until notified that it was time to leave. It is unlikely that Ms. Ranelli would not tell Grievant what time they would

be leaving in the mornings, and if she did not, it was Grievant's responsibility to ask. Grievant should have learned the time of departure and conducted the pre-trip inspection immediately prior to that time.

Respondent has proven that Grievant has a history of unsatisfactory performance which has been brought to her attention through evaluations, and for which she has been given five (5) Improvement Plans for the purpose of correcting the deficiencies. The subsequent reoccurrence of identified problems establishes a continuing pattern of behavior which has proven not to be correctable. Even if, as Grievant contends, Respondent's action was motivated by the shoplifting charge, Respondent has proven by a preponderance of the evidence the charges of unsatisfactory performance. Therefore, Respondent's decision to dismiss Grievant from employment was not in violation of W. Va. Code §18A-2-8, or W. Va. State Board of Education Policy 5300.

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

Findings of Fact

1. Grievant began employment with the Jefferson County Board of Education on November 13, 1990, as a substitute bus operator. Grievant was subsequently rehired in this capacityfor the 1991-92, and 1992-93 school years.

2. Despite being placed on Improvement Plans in January and December 1992, for problems including “being late”, and an evaluation in March 1992, which reflected problems including punctuality and keeping her work environment and equipment well maintained, Grievant was employed as a full-time bus operator in January 1993.

3. Grievant was placed on a third Improvement Plan in June 1993, again for reasons of not allowing enough time to properly take care of her bus, problems reporting time, and other job related problems.

4. Grievant's December 1993 evaluation noted ongoing unsatisfactory performance. In February 1994, the Transportation Director issued Grievant a memorandum relating to the lateness of her run.

5. Grievant's March 1994, evaluation stated that Grievant “needs improvement in all

areas under performance", and specifically noted deficiencies in timeliness and involvement in a preventable accident.

6. In January 1995, Grievant's evaluation listed five (5) areas in which she did not meet performance standards, including timeliness.

7. In August 1995, Grievant was placed on a Improvement Plan to correct her failure to follow the schedule, student management, and following instructions.

8. Grievant's fifth Improvement Plan was developed in February 1996, to assist her in running her schedule consistently every day, completing pre-trip inspections every day, and arriving at the bus lot in time to conduct the inspections.

9. Grievant's March 1996, evaluation noted that she needed to improve studentmanagement and run her schedule on time.

10. In April 1997, Grievant was assigned an extra-duty trip transporting students from Charles Town Junior High School and Jefferson High School to the All-State Choir in Elkins, West Virginia.

11. During the trip, Grievant experienced difficulties keeping the bus on the pavement, and passing through a construction area. Additionally, the speed of the bus fluctuated and the cargo door unlatched, requiring that she stop to reclose it.

12. While in Elkins, Grievant did not allow the students to disembark from the bus at restaurant doors, but parked some distance away, causing them to cross streets. On the second day she did not appear on schedule to transport the students from the school to the motel because she was detained at WalMart on a charge of shoplifting. This charge was ultimately dismissed; however, Grievant was upset during the trip as a result of the incident. Grievant was not observed conducting pre-trip inspections, and was not at the bus at the time of departure, on either morning.

13. Based upon a concern for Grievant's emotional stability and her ability to navigate the roads in rainy weather, Ms. Ranelli arranged alternative transportation for herself and the students and sent Grievant back to Charles Town with an empty bus on April 12, 1997.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of proving the charges by a

preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Hoover v. Lewis County Bd. of Educ., Docket No. 93-21- 427 (Feb. 24, 1994); Lilly v. Fayette County Bd. of Educ., Docket No. 89-10-436 (Dec. 11, 1992); See W. Va. Code §18-29-6. A preponderance of the evidence is generally recognized as evidenceof greater weight, or which is more convincing than the evidence which is offered in opposition to it. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

2. 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).

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

[n]otwithstanding 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 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.

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4. Prior to dismissal, charges of unsatisfactory performance must be brought to the employee's attention by evaluation, and, if the conduct is correctable, the employee must be given an opportunity to improve, as provided by W. Va. State Board of Education Policy 5300. Trimboli v. Bd. of Educ., 163 W. Va. 1, 254 S.E.2d 561 (1979).

5. Respondent proved by a preponderance of the evidence that Grievant's deficiencies have been brought to her attention through multiple evaluations, and that she had been given ample opportunity to cure said deficiencies with the assistance of five (5) Improvement Plans. Respondent further proved that Grievant engaged in acts of unsatisfactory performance in April 1997, which were substantially similar to matters addressed in her prior evaluations and plans of improvement, establishing that her ongoing performance problems were not correctable. 6. Respondent's decision to terminate Grievant's employment was made in

compliance with W. Va. Code §18A-2-8, and the W. Va. State Board of Education Policy 5300.

Accordingly, the grievance is DENIED.

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

Date: January 30, 1998 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Ms. Ranelli is also referred to as Ms. Rinaldi and Ms. Rinellie in the record.