MARY MONTGOMERY,

Grievant,

v. **DOCKET NO. 97-13-427**

GREENBRIER COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant Mary Montgomery is employed by Respondent Greenbrier County Board of Education ("GBOE") as a regular bus operator. She was suspended without pay by letter dated September 5, 1997, from Superintendent Stephen Baldwin, effective September 8, 1997, for insubordination and willful neglect of duty as,

> a result of you cursing your immediate supervisor by calling him a "suck ass" and making further degrading remarks about his leadership ability and also by refusing to pick up students at Greenbrier East as directed in violation of County Transportation and Safety Policies and your job description and after earlier suspension for violation of transportation and safety requirements.

Superintendent Baldwin also notified Grievant in this letter that he was recommending her termination to GBOE on September 23, 1997, at 9:00 a.m. A hearing was held on that date before GBOE, at which time it voted to uphold the suspension without pay. Superintendent Baldwin notified Grievant by letter dated September 24, 1997, that GBOE had voted to suspend her for an additional six weeks. Grievant filed her grievance at Level IV, in accordance with W. Va. Code § 18A-2-8, by letter dated September 26, 1997. No grievance form was ever filed. The letter simplystates, "[t]his letter will serve as a formal appeal and request for a Level IV hearing based on the decision made in the above referenced matter on the 23rd day of September, 1997." (See footnote 1)

After this grievance had been set for hearing at Level IV, the parties agreed to submit the grievance for decision on the record developed before GBOE on September 23, 1997, supplemented by the evidentiary deposition to be taken of Danny James Midkiff. Mr. Midkiff's deposition was taken on January 12, 1998, and was submitted on January 30, 1998. The transcript of the September 23, 1997 GBOE hearing and the ten Exhibits thereto are **ORDERED** admitted into evidence as Joint

Exhibit 1. The evidentiary deposition of Danny James Midkiff is **ORDERED** admitted into evidence as Joint Exhibit 2. (See footnote 2)

The following Findings of Fact are properly made from the testimony given and exhibits in Joint Exhibits 1 and 2.

Findings of Fact

1. Grievant has been employed 18 years by GBOE as a regular bus operator. Jt. Ex. 1 at pp. 191, 295.

2. As part of her afternoon bus run, Grievant picks up students at Greenbrier East Junior High School, and then goes to Greenbrier East High School ("Greenbrier East") to pick up students. Jt. Ex. 1 at pp. 314-315, 341.

3. Buses are to follow a particular pattern to pick up students in the afternoon at Greenbrier East. They are to enter a circle in front of the school, line up in a particular order, and pick up the students at a designated spot. This is referred to as "running the circle." This plan has been in effect for more than 25 years, with some revisions from year to year, and is designed to assure maximum safety of the students, and that students can be observed by school personnel on bus duty while they are waiting to board the buses. Jt. Ex. 1 at pp. 27-29, 31-34, 40-41, 76, 96-97, 108, 111, 122, 148, 161-162.

4. Grievant was aware that each year the buses are to line up in the circle in a particular order, although as her bus was one of the later buses, she would sometimes arrive at Greenbrier East ahead of one or two of the buses which were supposed to be in front of her. Jt. Ex. 1 at pp. 343-346.

5. At the beginning of the 1997-98 school year, the annual diagram of the circle at Greenbrier East was made available to the bus operators and was posted at the high school. The diagram shows where the buses are to line up and pick up students. Grievant was supposed to pick up students at a designated location shown on the diagram, and referred to as the top of the circle. Jt. Ex. 1 at pp. 40, 161. 6. Grievant did not look at the diagram, but decided she would pick up students in the same location at Greenbrier East as she had for the last several years. Jt. Ex. 1 at pp. 319-320, 343- 344.

7. Grievant had been told two to four times during the 1996-97 school year that she was to run

the circle at Greenbrier East. She had been told this because she had not been running the circle. After she was told to run the circle she would do so for awhile, and then quit running the circle. Jt. Ex. 1 at pp. 36-39, 62, 165-168, 389-390.

8. On the first or second day of the 1997-98 school year, Grievant failed to run the circle at Greenbrier East. She did not stop at the top of the circle either day, but picked up students around the corner from the school, along the highway. Two students chased the bus on one of these days, but Grievant did not see them and did not stop. Several students were not picked up the first day because they were waiting where Greenbrier East's Principal, Robert Carlisle, had told them to wait, at the spot at the top of the circle designated for Grievant's bus to stop. Jt. Ex. 1 at pp. 42, 46-48, 56, 57, 67, 79.

9. No other bus operator who is supposed to run the circle fails to do so, unless they are driving for Grievant and following her instructions or the instructions of the students on the bus. Jt. Ex. 1 at pp. 36, 91, 165, 249-252, 287, 290.

10. Mr. Baker approached Grievant at the bus garage on the morning of the third day of the 1997-98 school year and told her to run the circle and to stop at the top of the circle. Grievant questioned Mr. Baker's order and his authority, was abusive to him, used profanity in referring to him or the board of education and the superintendent, was openly defiant regarding his efforts to discipline her, accused him of making a decision out of spite toward her, and accused him of treatingher unfairly when she had been suspended nearly four months earlier. Jt. Ex. 1 at pp. 172-174, 184- 185, 320-323.

11. After being told by Mr. Baker on the third day of the 1997-98 school year to run the circle and stop at the top of the circle, Grievant ran the circle and stopped at the designated spot until she was suspended. Jt. Ex. 1 at pp. 49, 59, 172, 327.

12. Grievant had been told during the 1996-97 school year that she did not address Mr. Baker in a proper manner, and that he did not want to hear her use profanity. Jt. Ex. 1 at pp. 176- 178, 180.

13. Grievant received a written warning from Mr. Baker dated February 8, 1996, regarding her conduct toward him and her statement to him that he would not be in his job much longer. Administration Exhibit 2 to Jt. Ex. 1. Jt. Ex. 1 at pp. 175-176.

14. Grievant was suspended without pay for five days on May 12, 1997, for failure to report an accident within 24 hours as required by the state rules and regulations, and continuing to drive a

damaged bus while students were on board. She did not grieve this suspension. Administration Exhibit 4 and Employee Exhibit 3 to Jt. Ex. 1.

15. Grievant received a reprimand several years ago from a different Transportation Director for fueling her bus with students on board. Jt. Ex. 1 at pp. 234-235, 351.

16. Grievant's most recent evaluation, for the 1996-97 school year, rated her performance as satisfactory in every category except "has good attitude and is cooperative," and "is reliable, punctual and accurate with reports." In those categories she was rated needs improvement. Employee Exhibit 2 to Jt. Ex. 1.

Discussion

Pursuant to W. Va. Code § 18-29-6, the burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994).

W. Va. Code § 18A-2-8 provides that school service personnel may be suspended or dismissed at any time for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, a felony conviction, or entry of a guilty plea or a plea of nolo contendere to a felony charge.

Grievant argued that a charge of insubordination should require a showing of gross action by a subordinate which effectively undermines the control and authority of a supervisor. Grievant provided no authority for this proposition. It is well established that "[I]nsubordination involves `willful failure or refusal to obey reasonable orders of a superior entitled to give such order.' [Citations omitted.] In order to establish insubordination, the employer must not only demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, but that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination." [Citations omitted.] Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995). "`Generally, an employee must obey a supervisor's order and take appropriate action to challenge the validity of the supervisor's order. Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions.' Reynolds [v. Kanawha-Charleston Health Department, Docket No. 90-H- 128 (Aug. 8, 1990)], citing

Meads v. Veterans Admin., 36 M.S.P.R. 574 (1988) [other citationsomitted]." Stover v. Mason County Bd. of Educ., Docket No. 94-26-640 (Feb. 23, 1995). "Uttering abusive language to a supervisor may constitute insubordination. Payne v. W. Va. Dept. of Transp., Docket No. 93-DOH-454 (Apr. 29, 1994). See Burton Mfg. Co. v. Boilermakers Local 590, 82 Lab. Arb. (BNA) 1228 (1994) (Holley, Arb.)." Conner v. Barbour County Bd. of Educ., Docket No. 94- 01-394 (Jan. 31, 1995).

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).

Regarding the incident in the bus garage, Mr. Baker's rendition of what was said differs somewhat from Grievant's, but either story supports the charge of insubordination. Mr. Baker related that he was in the bus garage on the third day of school when Grievant arrived. He approached her and told her he had been called by the principal at Greenbrier East, "and we have failed to do what we're supposed to do there. You're going to have to do it." He stated she responded, "[n]ow, you listen to me," and he told her "[n]o. Ms. Montgomery, I don't have to listen to you. I'm just telling you what you're doing is not right, and this needs to be corrected and be done, and we can correct our problem." He stated he told her all she had to do was go through the circle and do her job, and he started to walk away. He testified that Grievant raised her voice and said, "I'm not a just a `--' just a suck ass like you are, and I don't care about your board members or Mr. Baldwin." He responded to her that if he could not do anything about it, she would have to talk to the board or Mr. Baldwin. Jt. Ex. 1 at pp. 172-174, 184.

Grievant stated she responded to Mr. Baker's direction that she run the circle by telling him she had always picked students up at a different spot from the place he told her to stop. She statedhe told her to shut up, that she was not going to tell him how to pick up students or how to do his job. She stated she told him, "[w]e do live in a democracy, and when you are finished, then I will get my chance to speak." She stated he then told her that she would pick up the students in the circle. She responded by telling him her method had worked well for five years,

> And that it seemed to me that since it had worked so well, why were we making a change. I told him I felt he did not want anybody to think, just to do everything the same. If one bus did something, then every bus must do the same. Didn't consider that each bus had different schedules, a different set of kids.

> Okay. I then told him to -- and I think he'll remember this -- to mark the spot. Get a can of paint and put No. 7-61 (See footnote 3) on where ever he wanted me to stop, and I would stop exactly where he wanted. By this time it seemed enough had been said on the subject of stopping and going around the circle. Jt. Ex. 1 at pp. 320-321.

Grievant then related that she had asked Mr. Baker if they were still having their scheduled meeting regarding another matter, and he said no, they would not be meeting on that subject. Jt. Ex. 1 at pp. 321-322.

> I said to him, "I guess it's payback time now. I haven't done exactly as you want, so you're going to punish me by not meeting about the bus runs," as only forty eight (48) hours before we had agreed to do. He then told me he did not like my attitude. He would have me before Mr. Baldwin and the board of education. I said, "Go right ahead. I would not kiss Mr. Baldwin's ass or anybody else's to keep a job." Jt. Ex. 1 at p. 322.

Grievant then related that she had continued when Mr. Baker told her she would receive more severe punishment this time than she did when she was suspended in May 1997, telling Mr. Baker that it had not been worth $425 (one-fourth of her monthly salary) for her to appear before the Board, that "I was due to be off that week anyway. That I had written a letter and accepted my due punishment." Mr. Baker, not surprisingly, again told her he did not like her attitude. She continued,however, asking him why he had not punished three other drivers, and stated what they had done which she believed was similar to her failure to report an accident, accusing Mr. Baker of not treating her the same way he treated other drivers. Jt. Ex. 1 at pp. 322-323. Grievant offered that "Mr. Baker can provoke you. He can -- he can say that he doesn't like your attitude or whatever, but his attitude can be such as -- you know, like I told him, it was pay back time. I hadn't acted the way that he wanted, so we would no longer discuss putting these bus runs back together." Jt. Ex. 1 at p. 324.

Grievant's multiple responses to her supervisor were inappropriate and demonstrate a lack of respect for his authority. Grievant admitted as much, but felt justified because, "Mr. Baker brings out the worst in people," and had threatened her. Jt. Ex. 1 at pp. 336-337. Regardless of whether she called her supervisor a "suck ass," or said she would not kiss anyone's ass, her statement constitutes insubordination. Further, her supervisor had specifically told her not to use profanity, and she ignored this directive.

Grievant's statements that she was not affected by her previous suspension can best be characterized as thumbing her nose at her supervisor's efforts to correct her behavior, or defiance of authority. Her references to what other employees had done and were not punished, while she was

punished for not reporting an accident, can only be seen as a statement that her supervisor was not treating her fairly. While her manner of relaying this feeling was inappropriate, it was highly inappropriate for her to raise this matter at all and to make such an accusation when she had chosen to accept her punishment at the time, and waived her right to challenge the suspension. If she thought she was not being treated fairly, she should have brought it up when she was suspended, rather than accepting the punishment and holding a grudge against her supervisor, and throwing it in his face later. While our government is democratic, and employees have certain rights, the Transportation Department need not be run as a democracy. If Grievant's input is not desired by her supervisor, she has no right to make herself heard in the matter of how bus routes are to be run so long as her statutory rights are not affected. Mr. Baker is in charge, whether she likes it or not, and her duty is to obey his instruction.

Regarding Grievant's failure to run the circle and pick up students at a designated spot, although it is not clear that Grievant knew she was to pick up students at a particular spot at Greenbrier East, she did know the buses were to line up in a particular manner, and that this line-up changed slightly each year. Rather than making an effort to find out whether her position in the line- up had changed, however, she decided she would just do what she had always done because she thought her method worked well. "An employee is not justified i[n] disobeying a reasonable order simply because he/she does not agree with it." Stover, Docket No. 94-26-640, supra. Grievant knew she was supposed to run the circle. The plan that all bus operators would run the circle, and pick up children at a particular location, was designed to make sure the students could be properly supervised while waiting to board the buses, and that they were as safe as possible. Grievant's knowing and intentional failure to run the circle, and her knowing and intentional failure to check to see whether her position in the bus line-up had changed compromised the safety of the students, and constitute insubordination and willful neglect of duty.

Grievant presented testimony that another employee had been insubordinate and had not been punished. Although Grievant was represented by an attorney, no argument was presented either at the hearing before GBOE or to the undersigned regarding how this evidence affects this grievance. Although the undersigned could construct various arguments for Grievant from this evidence, thatis not an appropriate role, and Respondent must know what a grievant is arguing in order to properly respond. Grievant did argue that the punishment imposed was excessive. Accordingly, this evidence

will be considered solely in evaluating the punishment imposed.

"Whether 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). Grievant argued she should have received a verbal or written reprimand at most.

In February of 1996, another bus operator, Danny James Midkiff, had questioned Mr. Baker's authority, and in a second instance about six weeks later he had likewise challenged his authority, told him he was not his boss, and challenged him to fight it out after working hours, but was not disciplined. Mr. Midkiff stated that he and Mr. Baker had been friends a long time, and had shaken hands and agreed to drop the matter. Jt. Ex. 2 at pp. 4-10, 13-14.

Mr. Baker testified Mr. Midkiff had said he was sorry, and that he did not mean what he had said, and he did not recall Mr. Midkiff using profanity. Jt. Ex. 1 at pp. 185-188. Mr. Baker testified he had likewise forgiven Grievant many times when she had said she was sorry, but that he had to draw the line somewhere, and would not accept an apology from her in this instance in place of discipline. He pointed out that, unlike Mr. Midkiff, Grievant had also failed to run the circle as she had been told to do, which involved student safety. Jt. Ex. 1 at pp. 213-214.

The evidence does not support a finding that the punishment imposed was clearly excessive. The undersigned finds no mitigating circumstances to excuse Grievant's inappropriate attitudetoward and response to her supervisor, or to excuse her blatant disregard of the policy that she was to run the circle and pick up her students at a designated spot. This case differs from the Midkiff incident in several respects. Mr. Midkiff did not act in a manner which endangered students as Grievant did in failing to run the circle; he had not been disciplined twice before for actions which affected student safety as Grievant had; he did not use profanity; and Grievant continued to the end to see nothing wrong with what she had done, blaming Mr. Baker for her failure to control herself. Further, Grievant had been insubordinate several times before, and was given a second chance just as Mr. Midkiff was, before she was given a written warning, and then suspended the next time. It is clear that Grievant does not respect Mr. Baker, and believes she knows better than he does. Even if she were right, it would not excuse her behavior.

Grievant raised several arguments which may be quickly disposed of. She argued the diagram of where the drivers were to stop in the circle at Greenbrier East was of such poor quality it raised a significant question as to whether Grievant was to run the circle or stop adjacent to the circle. Since Grievant never looked at the diagram, its quality is not at issue.

Grievant also argued evidence presented at the suspension hearing before GBOE of past incidents where no discipline was imposed should have been excluded, as Grievant was not on notice these incidents would be considered, and this violated her right to due process of law. The undersigned has reviewed the record thoroughly, and has been able to locate only one instance where an objection was made at the board hearing to the introduction of any such evidence at the time it was elicited, and the objection was not sustained or withdrawn. The single instance where the objection was not acted on in Grievant's favor involved the testimony of Superintendent Baldwin regarding unsubstantiated complaints that Grievant had made a racial comment and had spokenrudely to students. Indeed, such testimony was irrelevant to the issues at hand, but its introduction was harmless given the charges which were substantiated. The undersigned is not going to rule on whether any other specific evidence should have been excluded, as no objection was made at the time of the hearing, and Grievant has not otherwise identified with specificity which parts of the testimony should have been excluded. Further, evidence of past incidents where discipline was imposed is relevant to evaluation of the proper penalty in this case, and there is no indication that it was introduced for any other purpose.

Finally, Grievant argued that the suspension voted upon by GBOE was six weeks, not six additional weeks after the September 23, 1997 hearing, as was imposed. The hearing transcript reflects that GBOE voted to suspend Grievant without pay, but does not reflect the length of the suspension. Superintendent Baldwin's letter to Grievant after the hearing reflects that GBOE voted to suspend her for six additional weeks. The undersigned cannot conclude from this that the suspension was to be six weeks. (See footnote 4)

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The employer bears the burden of proving the charges in a disciplinary proceeding by a preponderance of the evidence. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb.

24, 1994).

2. Pursuant to W. Va. Code § 18A-2-8, school service personnel may be suspended or dismissed at any time for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, a felony conviction, entry of a guilty plea or a plea of nolo contendere to a felony charge.

3. "Insubordination involves `willful failure or refusal to obey reasonable orders of a superior entitled to give such order.' [Citations omitted.] In order to establish insubordination, the employer must not only demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, but that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination." [Citations omitted.] Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (September 25, 1995).

4. "`Generally, an employee must obey a supervisor's order and take appropriate action to challenge the validity of the supervisor's order. Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions.' Reynolds [v. Kanawha-Charleston Health Department, Docket No. 90-H-128 (Aug. 8, 1990)], citing Meads v. Veterans Admin., 36 M.S.P.R. 574 (1988) [other citations omitted]." Stover v. Mason County Bd. of Educ., Docket No. 94-26-640 (Feb. 23, 1995). "Uttering abusive language to a supervisor may constitute insubordination. Payne v. W. Va. Dept. of Transp., Docket No. 93-DOH-454 (Apr. 29, 1994). SeeBurton Mfg. Co. v. Boilermakers Local 590, 82 Lab. Arb. (BNA) 1228 (1994) (Holley, Arb.)." Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

5. Respondent proved it had a clear policy that all buses were to run the circle at Greenbrier East High School, and that Grievant had been made aware of this policy.

6. Respondent proved that Grievant had been told not to use profanity when speaking to her supervisor, and that she had received a written warning regarding her improper behavior toward her supervisor.

7. Respondent proved Grievant was insubordinate by uttering derogatory statements to her supervisor, using profanity in referring to him, questioning his authority, failing to run the circle at Greenbrier East High School, and failing to stop at a designated spot at Greenbrier East High School to board students. See Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

8. Respondent proved the charge of willful neglect of duty, by proving Grievant was aware of the policy that buses run the circle at Greenbrier East High School, that she was aware the buses were to line-up in a particular order and that this changed from year to year, yet she failed to run the circle, failed to make any effort to determine where her bus was to line up, and that her action compromised the safety of students.

9. "Whether 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). 10. The punishment imposed was not clearly excessive. See Conner, supra.

Accordingly, this grievance is **DENIED**.

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

BRENDA L. GOULD

Administrative Law Judge

Dated: March 18, 1998

Footnote: 1

Grievant raised for the first time in her late filed written argument after the record was closed, and after Respondent had presented its written argument, the argument that "the Superintendent's actions were in part redress for her activities while serving as a representative and president of the local school service personnel organization." As is the Grievance Board's policy, this argument will not be considered. Although some testimony was elicited at the hearing before GBOE on Grievant's service as an officer in the local union, that testimony was related to evidence regarding why Grievant was so

frequently in Mr. Baker's office. Respondent was not placed on notice that Grievant was arguing retaliation or reprisal, and it would not be fair to allow this argument at this late date. See Beckley v. Lincoln County Bd. of Educ., Docket No. 95-22-107 (Feb. 29, 1996).

Footnote: 2

This case became mature for decision on January 30, 1998, upon receipt of Joint Exhibit 2. Respondent had already submitted its written argument on January 21, 1998, as directed by the undersigned. Grievant's counsel submitted his written argument late, on February 2, 1998. No objection was received to this late filed submission, and as it was received prior to the issuance of this decision, and summarizes Grievant's position, it will be considered as though timely filed.

Footnote: 3

This is Grievant's bus number.

Footnote: 4

Perhaps Grievant should simply ask the Board which it intended if she doubts Superintendent Baldwin's letter. Surely the Board would make the appropriate adjustments if it intended that she be suspended six weeks.