REX TONEY,

Grievant,

v. **DOCKET NO. 98-22-048**

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant Rex Toney, a regular bus operator, represented by Anita Mitter, filed this grievance at Level IV of the grievance procedure on February 18, 1998, against the Lincoln County Board of Education ("LBOE"), represented by Charles Damron, Esquire, challenging his suspension without pay for five working days, beginning February 18, 1998. The relief sought was compensation for the wages lost and that the suspension be removed from his personnel file. (See footnote 1)

Grievant was suspended without pay for five days by letter dated February 16, 1998, from Superintendent Rick P. Powell, for insubordination and willful neglect of duty. The suspension was upheld by LBOE on March 3, 1998, and Grievant was so notified by letter dated March 4, 1998. The charges resulted from Grievant taking one-half day of personal leave on February 11, 1998, after being told he could do so only if a substitute was available. Grievant was aware that a substitute was not available. The following findings of fact are necessary to the determination of the issues in this matter, and were properly made from the Level IV record.

Findings of Fact

1. Grievant has been employed by LBOE as a regular bus operator for 20 years. He drives a regular route and a vocational route, both in the Harts geographic area. In the afternoon, Grievant's regular route begins at Harts High School, where students board the bus around 2:30 p.m. His vocational run is from 7:30 a.m. to 12:00 p.m.

2. LBOE's substitute bus operators are assigned to geographic areas. Two substitutes are assigned to the Harts area, and one of them was on medical leave on February 11, 1998.

3. If no substitutes assigned to the Harts area are available, Transportation Director Johnnie Adkins' policy is that substitutes in other geographic areas are called and asked to take the run only in case of emergency. Substitute bus operators who drive in geographic areas other than their assigned areas may lose runs in their own geographic areas if they do so. A grievance is currently pending against LBOE regarding a substitute losing a run in his assigned geographic area, and that is the reason for Mr. Adkins' policy. (See footnote 2)

4. When Mr. Adkins allows substitutes to be called to drive outside their geographic areas, the policy is to call substitute bus operators from the adjoining geographic area. The geographic area adjoining the Harts area is Guyan Valley. It is difficult to find substitutes willingto drive out of area to serve the Harts area, because it is located in an outlying area of the county, near the Logan County line.

5. LBOE's leave policy, 8-06.00, provides that notice of personal leave is to be given to the employee's supervisor at least 24 hours in advance, and "the use of such day, other than in the case of sudden and unexpected circumstances, may be denied if, at the time notice is given either fifteen percent (15%) of the employees or three (3) employees - whichever is greater - under the supervision of the principal or immediate supervisor, have previously notified the principal or immediate supervisor of their intention to use that day for such leave."

6. It is also the policy of LBOE that an employee must receive his supervisor's written approval before he can take personal leave. Whether this policy is a written policy is unknown. Grievant was not aware he needed his supervisor's written approval to take personal leave.

7. On February 10, 1998, Grievant asked Tina Black, the Secretary/Switchboard Operator in the Central Office, who was in charge of calling out substitutes that day, to call a substitute for him for the afternoon of February 11, 1998, because he needed to take personal leave. She informed him she already had two bus operators off on February 11 in the Harts area, and he would have to talk to Mr. Adkins about taking leave that day. Grievant told her she could check other areas for substitutes, and mentioned Mark Miller, a substitute bus operator assigned to the Hamlin area. She told him she had other drivers off in the Hamlin area. She subsequently found a note from a previous day indicating that a third bus operator in the Harts area would be off work on February 11.

8. Grievant did not tell Ms. Black that his supervisor had approved his personal leave request, or otherwise check with her again regarding obtaining a substitute for him. 9. On February 10,

1998, Grievant brought Lorareda Gay Topping, Transportation Secretary, his request for personal leave for the following afternoon. She told him Mr. Adkins had to sign all personal leave requests, and that he would have to make sure a substitute was available.

10. Grievant asked Mr. Adkins if he could take one half day personal leave on February 11, 1998. Mr. Adkins told him he could take leave as long as a substitute was available. Mr. Adkins then talked to Ms. Black and learned of the substitute shortage for February 11. He called several bus operators, and two of the three regular bus operators in the Harts area who had asked for leave on February 11 agreed to withdraw their requests for leave that day. The Harts area still had one other regular bus operator who would be off work that day, other than Grievant, and his run would be covered by the only substitute for the area.

11. Mr. Adkins then told Grievant he did not know if a substitute would be available on February 11. He told Grievant to check with him the next morning to make sure a substitute was available. He told Ms. Black he had told Grievant to call in the next morning to see if a substitute was available. Grievant told Mr. Adkins that Mark Miller would drive for him.

12. Ms. Topping is responsible for finding bus operators to make vocational runs when the regular bus operator is on leave. She placed some telephone calls to locate a driver for Grievant's vocational run, and was able to find a driver. She told Grievant over the telephone on February 10, 1998, that his vocational run would be covered by Geneva Ramey, and that he was to call the main office the next morning and make sure a substitute was available to make his afternoon run. Grievant had already arranged for his brother to drive his vocational run, and Ms. Topping told him that was fine. 13. Grievant told Ms. Topping that Mark Miller would be available to drive his regular run. Ms. Topping is not responsible for calling substitute bus operators to drive regular routes, and she told Grievant this.

14. Grievant was aware there were no substitutes available in the Harts area for February 11, 1998. He stated to other bus operators around 2:30 p.m., on February 10, 1998, while they were waiting for the Harts High School students to be released, that he had not missed one of his daughter's basketball games yet, and he was not going to miss the one on the 11th, and he was going to be off work the next day for the basketball game. Just prior to this, the drivers were discussing that one of the drivers present, Jerry Adkins, had wanted off work on the 11th, but that Johnnie Adkins had called him and asked him to drive because there was a shortage of substitutes.

Jerry Adkins drove his route on the 11th, and did not take the leave he had requested. Jerry Adkins had made his request for leave prior to Grievant asking for leave. He had requested leave for a doctor's appointment.

15. Grievant did not call Mr. Adkins or any other employee of LBOE on the morning of February 11, 1998, to see if a substitute was available to take his afternoon run.

16. Ms. Topping attempted to contact Grievant on the morning of February 11, 1998, at Harts High School and at his home to inform him that a substitute was not available, and he would have to make his afternoon run. Grievant was not at Harts High School or at his home when Ms. Topping called, and she left messages at both locations for Grievant to call her. Grievant did not return to his home that morning. His brother told him Ms. Topping had called the high school looking for him, and Grievant made one attempt for eight to ten minutes to return Ms. Topping's call,but he could not reach Ms. Topping because students were using the telephone where Grievant was, and the main office telephone line was busy when he tried to call.

17. Mr. Adkins believed Grievant would make his afternoon run, as he had not called in on the morning of February 11, 1998, to check to see whether a substitute was available, as he had been directed to do.

18. Ms. Black made no further attempts to find a substitute for Grievant, until the afternoon of February 11, because she did not believe Grievant's leave request had been approved. At 12:55 p.m. on February 11, 1998, Ms. Black asked Mr. Adkins what to do about Grievant's afternoon run. Mr. Adkins asked her to call Duval High School, where Grievant's daughter was playing basketball that afternoon, have Grievant paged, and tell him no substitutes were available, and he needed to make his afternoon run. She placed the call, had Grievant paged, and Grievant came to the telephone. She asked him if he was going to make his afternoon run. He told her "no," and she told him she did not know if she could get a substitute to make his run. He told her he had to be off work that afternoon, and she told him again they had no substitutes. She did not tell him to make his afternoon run.

19. Ms. Black then tried to get a substitute from the Guyan Valley area. Three of the four substitutes were already driving for someone that afternoon, and the fourth substitute refused to drive Grievant's run on short notice.

20. Mark Miller did not appear to make Grievant's afternoon run, as he had told Grievant he

would. His understanding was that Grievant would have to tell the person in charge of calling out substitutes, which on February 10 and 11 was Ms. Black, that he would be off, and then shewould have to call him. He called Ms. Topping around 11:00 a.m. and asked if anyone had called for him to drive, and she told him no.

21. In order to cover Grievant's afternoon run, two schools released students early on February 11, 1998, and two drivers split Grievant's run. LBOE was not able to notify parents of the early dismissal, and some students arrived home about one hour early.

22. Grievant attended his daughter's basketball game at Duval High School which began at 1:00 p.m. and ended about 2:15 p.m., on February 11, 1998.

23. In determining the appropriate penalty for Grievant, Superintendent Powell considered the chaos and confusion Grievant's action had caused in that two schools had to release students early, and other drivers had to assume Grievant's job and make his run, that Grievant had been informed that no substitutes were available and that he had to work, and that Grievant had in the past had difficulty following orders.

24. All of Grievant's evaluations have shown his performance meets performance standards. His most recent evaluations noted no deficiencies, no improvement in performance was needed, that he "[e]xhibits sound judgement in performing assigned tasks," "[a]ccepts responsibility for assigned duties," is "[c]apable of following instruction and/or directions, both oral and written," and "[u]nderstands all phases of assigned duties."

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 suspendedor 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.

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 Dept., 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).

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). See Bd. of Educ. v. Chaddock, 398 S.E.2d 120 (W. Va. 1990).

Grievant's testimony regarding what happened differed somewhat from that of several other witnesses in key areas. Accordingly, the undersigned must make a credibility determination. In assessing the credibility of witnesses,

> some factors to be considered . . . are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher and William C. Jackson. Representing the Agency before the United States Merit Systems Protection Board 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id.

Burchell v. Bd. of Trustees, Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

In this case, in order to accept Grievant's version of events, the undersigned would have to make a determination that Ms. Black, Mr. Adkins, and Ms. Topping were lying. All three testified they told Grievant he would have to make sure a substitute was available before he could take personal leave. Ms. Black testified she told Grievant she had no substitutes available both on February 10 when he first asked for personal leave, and on February 11 when she talked to him at Duval High School. Mr. Adkins testified he heard Ms. Black tell Grievant on February 11 that no substitutes were available. Both Mr. Adkins and Ms. Topping testified Grievant was told to call in on the morning of February 11

to make sure a substitute was available to take his afternoon run. Grievant denies he was told to call in on the morning of February 11 to make sure a substitute was available, and testified he was not aware there was a problem with substitutes until Ms. Black talked to him on the telephone at about 1:00 p.m. on February 11.

First, regardless of the conflicting testimony, Grievant admitted he was told he could not take personal leave unless a substitute was available, and he knew at 1:00 p.m. that a substitute was not available. He still had time to make his afternoon run at that time, although he may have been a little late. Once he became aware at 1:00 p.m. on that day that a substitute was not available, his intentional refusal to make his afternoon run constituted insubordination and willful neglect of duty. Grievant's testimony that he was not aware until 1:00 p.m. that there was a problem with substitutes is incredible. If he was not aware of the problem before that time, he would not have asked Mark Miller if he would be willing to make his run. Further, Grievant told several of the bus operators on February 10 around 2:30 p.m. that he had not missed one of his daughter's basketball games yet, and he was not going to miss the one the next afternoon. The operators were discussing the lack of substitutes at the time, and the fact that one of the operators in the group had also asked for the 11th off, and had agreed to work due to the lack of substitutes on that day. Finally, Grievant repeatedly testified that when he talked to Ms. Black on the telephone at about 1:00 p.m. on February 11, the only thing she said to him was, "are you going to make your afternoon run." He denied that she told him she had no substitutes available, as both she and Mr. Adkins testified. How Grievant could have known from Ms. Black's single question that no substitutes were available is a mystery. He later testified that Ms. Black may have told him she might be short of substitutes when he had talked to her on the 10th, and he told her Mark Miller would take his run.

Grievant's credibility is further called into question by his repeated attempts to explain that it was not the basketball game, but an important appointment in Huntington at 4:30 p.m., which was the reason he needed the afternoon off. First, it is clear that even without attending this appointment, Grievant could not have attended his daughter's basketball game and also made his afternoon run. The basketball game started at 1:00 p.m. at Duval High School, and it is about an hour drive from Duval High School to Harts High School, where Grievant's run begins around 2:30 p.m. Second, Grievant testified his wife also had to take the afternoon off to attend the Huntington appointment; however, he then admitted that she gets off work at 2:45, and it takes about an hour to get to

Huntington. Finally, when asked whether Mr. Adkins had told him to call in the next morning to make sure a substitute was available, Grievant was evasive. He answered the question by repeating that, Ms. Topping had told him everything was alright. Ms. Topping, of course, testified very clearly that she arranged for coverage of Grievant's vocational run only, and that she made it clear to him that she was not responsible for his afternoon run, and that he needed to call in the next morning. Mr. Miller knew this, as his testimony was that Grievant needed to talk to Myra Johnston, for whom Ms. Black was substituting, and have her call him to substitute for Grievant, even though he was standing with Grievant when he told Ms. Topping that Mr. Miller would substitute for him on the afternoon run.

Accordingly, the undersigned has accepted the testimony of the witnesses other than Grievant in making the foregoing findings of fact. Grievant knowingly and intentionally violated his supervisor's order to call in on the morning of February 11, 1998, to make sure a substitute was available, and he knowingly and intentionally violated his supervisor's order to make his afternoon run if a substitute was not available. LBOE has proven the charges of insubordination and willful neglect of duty.

Grievant focused much attention on the fact that LBOE's leave policy does not allow it to deny him leave in these circumstances. While that may be true, it does not justify his insubordination and willful neglect of duty. He was required to obey the orders given to him by his supervisor in these circumstances, and then grieve the policy violation. Stover v. Mason County Bd. of Educ., Docket No. 94-26-640 (Feb. 23, 1995).

Finally, in assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee'spast 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). Mr. Powell explained he determined the appropriate penalty after considering the chaos and confusion Grievant's action had caused in that two schools had to release students early and other drivers had to assume Grievant's job and make his run, that Grievant had been informed that no substitutes were available and that he had to work, and that Grievant had in the past had difficulty following orders. No evidence was presented to substantiate the allegation that Grievant had had difficulty following orders in the past, and no such problem was noted on Grievant's performance evaluations. The one reference to such an incident was a letter from Ms. Topping indicating that Grievant had told her he was too sick to

make his vocational run, but that he would probably be able to make his afternoon run. There is nothing in this letter which indicates any order or instruction of any kind was given to Grievant, and no evidence was presented to substantiate the inference by Ms. Topping that Grievant was not ill. As no other incidents were noted, Grievant had no opportunity to rebut the specific allegation, and it will be disregarded. Nonetheless, Grievant failed to prove the penalty chosen by LBOE was clearly excessive.

The discussion is supplemented by the following Conclusions of Law.

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 Dept., 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). 5. 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).

6. Respondent proved that Grievant knowingly and intentionally violated his supervisor's order to call in on the morning of February 11, 1998, to make sure a substitute was available, and he knowingly and intentionally violated his supervisor's order to make his afternoon run if a substitute was not available. LBOE has proven the charges of insubordination and willful neglect of duty.

7. In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995) (citations omitted).

8. The penalty imposed was not clearly excessive under the circumstances.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lincoln 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: April 21, 1998

Footnote: 1

The Level IV hearing was held on March 20, 1998, and this matter became mature for decision on April 8, 1998, with receipt of Grievant's proposed findings of fact and conclusions of law. Respondent declined to submit written argument.

Footnote: 2

There is some indication in the record that Mark Miller is the driver who had lost runs in his area by driving out of area, and had questioned the fairness of this. Mr. Miller himself at first testified that if it meant he would lose a run in his own area, he would not have driven for Grievant on the 11th; but when asked to explain this, he said he did not mean to say

that.