HAROLD W. SCOTT,

Grievant,

v. DOCKET NO. 99-33-112

MCDOWELL COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Harold W. Scott (Grievant), is employed by Respondent, McDowell County Board of Education (MCBE), as a bus operator. Grievant alleges that MCBE improperly suspended him for three days without pay. As this was a disciplinary action, Grievant appealed directly to Level IV pursuant to W. Va. Code § 18A-2-8. A Level IV hearing was held on June 3, 1999, before the undersigned Administrative Law Judge, at the Grievance Board's Beckley office. Grievant was represented by John Roush, Esq., and MCBE was represented by R. E. Blair, Esq. The parties were given until July 9, 1999, to submit proposed findings of fact and conclusions of law, and this grievance became mature for decision on that date.

FINDINGS OF FACT

1. Grievant is employed by MCBE as a bus operator. He has been in his current position for three years, and also operated a bus for MCBE from 1982 to 1985.

2. On the morning of December 2, 1998, Grievant found his usual morning route blocked by a coal train. He took an alternative route, Burke Mountain Road. On that road,Grievant struck the right mirror of his bus on a tree limb, damaging the mirror beyond repair.

3. Grievant properly reported this damage to MCBE.

4. On the afternoon of December 2, 1998, Grievant was making his usual run from Northfork Middle School (school). This run requires him to exit the school through an alley between the school and Northfork United Methodist Church (church).

5. The school is on the left side of the alley, and the church is on the right. The alley is narrow, with approximately eight inches of clearance on either side of Grievant's bus. The alley is also potholed, which causes a bus to rock from side to side.

6. The right mirror of Grievant's bus, which is located approximately five feet from the ground, touched the side of the church. Some of the glass that was cracked by the tree branch fell from the mirror.

7. Earl Crigger (Crigger), Transportation Director for MCBE, later took photographs of the side of the church that faces the alley.

8. Crigger's photographs show that the damage to the church is located on the far side (from Grievant's direction of approach) of a protruding pilaster. To strike that area with his right mirror, Grievant would have had to stop his bus and back into it at an angle.

9. The church is constructed of brick covered with a masonry veneer, sometimes called formstone, approximately one inch thick. Grievant's photographs show extensive damage to the church, particularly on the far side of the pilaster. A crack, approximately six inches wide, runs from the ground to a height of approximately ten feet. In several places, the masonry veneer has separated from the brick substructure byseveral inches, and piles of deteriorated mortar, approximately one foot high, lie at the base of the cracks. The base of a weatherbeaten board, covering a gap in the veneer approximately one foot wide, has been pushed approximately one foot away from the church by one of the piles of deteriorated mortar.

10. The photographs do not show any particular damage to the church at the height of the mirror of Grievant's bus.

11. The damage to the church is plainly the result of years of neglect and deterioration.

12. An official of the church called MCBE and claimed that Grievant's bus caused the damage to the church.

13. MCBE denies liability for damage to the church.

14. By letter dated February 9, 1999, MCBE suspended Grievant for three days without pay, for alleged willful neglect of duty in failing to report his mirror's contact with the church.

15. Grievant has a history of otherwise satisfactory work performance.

DISCUSSION

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to beproved is more probable than not." Black's Law Dictionary (6th ed. 1991), Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

As a result of the incident described in Finding of Fact six, WCBE suspended Grievant for three days without pay for willful neglect of duty, alleging he failed to report touching the church with his bus mirror. Grievant does not deny touching the church with his mirror, but argues that he was not required to report the incident because he did not damage the church, and because his mirror had been damaged beyond repair earlier that day, damage that he properly reported. Grievant seeks reimbursement of his lost wages, benefits, interest, removal of references to this suspension from his file, and seniority. (See footnote 1)

The authority of a county board of education to suspend an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, and must be exercised reasonably, not arbitrarily or capriciously. Parham v. Raleigh County Bd. of Educ., 192 W. Va. 540, 453 S.E.2d 374 (1994); 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:

> Notwithstanding 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 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.

To prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. Williams v. Cabell County Bd. of Educ., Docket No. 95-06-325 (Oct. 31, 1996); Jones v. Mingo County Bd. of Educ., Docket No. 95-

29-151 (Aug. 24, 1995); Hoover v. Lewis County Bd. of Educ., Docket No.93-21-427 (Feb. 24, 1994). Willful neglect of duty encompasses something more serious than incompetence. Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120, 122 (1990); Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996). Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990).

MCBE alleges that Grievant violated West Virginia School Transportation Regulations VI, E, 3(a), which states: “[i]f the school bus bumps, touches or scrapes another vehicle or object and causes damage, this is considered an accident, and it must be reported.”

MCBE does not dispute that the tree limb on Burke Mountain Road effectively destroyed the mirror on Grievant's bus. It is also not disputed that the right mirror of Grievant's bus touched the church, and that he did not report this contact. However,Grievant argues that the phrase “and causes damage” absolved him from the policy's reporting requirement, because he did not cause damage to the church, or further damage to the mirror.

Grievant's only witness, bus operator Arnold Hughes (Hughes), testified that he also drives the alley between the school and the church; that there is very little clearance in the alley; that potholes in the alley cause buses to rock; that the cracks and piles of mortar described in Finding of Fact nine have been there for a long time, and have increased over time; that his house has this type of masonry facing, which falls off as its mortar deteriorates; and that Grievant's bus could not have caused the damage to the far side of the pilaster without backing into it and ”tearing up” the whole bus.

Hughes was a credible witness, who answered questions in a quiet and straightforward manner. His credibility was bolstered when he answered some questions in a way not favorable to Grievant, including stating that, if he had hit the church, he would have reported it. Hughes' testimony, combined with Grievant's photographs, lead the undersigned to conclude that Grievant caused very, very little damage to the church. (See footnote 2) However, it is hard to believe that Grievant's mirror did not cause any damage at all to the church, particularly given the precarious state of its masonry facing, and the fact that some of the glass that was cracked by the tree branch fell from the mirror when it touched the church. It is reasonable to conclude that Grievant's bus caused at least nominaldamage to the church. Therefore, it is concluded that Grievant's mirror's contact with the

church triggered a duty to report an accident. Grievant did not. MCBE has established that Grievant violated West Virginia School Transportation Regulations, and thus failed to perform a work-related responsibility. Adkins, supra.

Grievant bears the burden of demonstrating that the penalty imposed by MCBE, a three day suspension without pay, was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed 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." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997).

Mitigation of a penalty is considered on a case by case basis. McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and include consideration of an employee's long service with a history of otherwise satisfactory work performance. Pingley v. Div. of Corrections., Docket No. 95-CORR-252 (July 23, 1996). This Grievance Board has held that “mitigationof the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation.” Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

Applying the factors set forth in Phillips to this grievance, it is concluded that neither party presented any evidence regarding whether Grievant had ever before been the subject of disciplinary action by MCBE. MCBE has apparently never disciplined another bus operator for this offense, and presented no policy mandating or even permitting a suspension under these circumstances. (See footnote 3) The penalty employed by MCBE for this offense is disproportionate to the offense proven,

particularly in these peculiar circumstances, where Grievant properly reported the accident that damaged his mirror beyond repair, further damaged a mirror that had already been effectively destroyed, and did only nominal damage to the church. The undersigned finds that, by a preponderance of the evidence, mitigating circumstances exist for Grievant. These circumstances support a reduction in the excessive penalty assessed against Grievant, in the interest of fairness and objectivity,and considering his six years of service with a history of otherwise satisfactory work performance. Pingley, supra.

Therefore, the only issue remaining to be resolved is what remedy should be granted. W. Va. Code § 18-29-5 provides that "[h]earing examiners are hereby authorized and shall have the power to . . . provide such relief as is deemed fair and equitable in accordance with the provisions of this article, and such other powers as will provide for the effective resolution of grievances not inconsistent with any rules or regulations of the board or the provisions of this article." This provision was construed by the West Virginia Supreme Court of Appeals in Graf v. West Virginia University, 189 W. Va. 214, 429 S.E.2d 426 (1992), as follows: “[c]learly the Legislature intended to give the examiners who hear the grievances the power to fashion any relief they deem necessary to remedy wrongs done to educational employees by state agencies.”

Consistent with this Board's authority to fashion relief, the following relief is deemed fair and equitable in this grievance. Respondent MCBE will be ordered to issue a written reprimand to Grievant; to reimburse him for his lost wages and benefits, with interest; to remove references to his suspension from his file; and to restore his seniority.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd.of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

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, 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 states that a board of education 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 of nolo contendere to a felony charge.

4. To prove willful neglect of duty, an employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. Williams v. Cabell County Bd. of Educ., Docket No. 95-06-325 (Oct. 31, 1996), Jones v. Mingo County Bd. of Educ., Docket No. 95-29-151 (Aug. 24, 1995), Hoover v. Lewis County Bd. of Educ., Docket No.93-21-427 (Feb. 24, 1994).

5. Willful neglect of duty encompasses something more serious than incompetence. Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120, 122 (1990); Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996). Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990).

6. MCBE proved, by a preponderance of the evidence, that Grievant was guiltyof willful neglect of duty for failure to report an accident.

7. When considering whether to mitigate a penalty, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed 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." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997).

8. A three day suspension without pay was an excessive penalty in light of Grievant's six years of service, the fact that he had never been disciplined by MCBE, his otherwise satisfactory work performance, the fact that MCBE has never disciplined any other bus operator for this offense, and

particularly in the peculiar circumstances of this grievance.

9. W. Va. Code § 18-29-5(b) authorizes the undersigned to provide such relief as is fair and equitable. In this case, the undersigned concludes that the punishment leveled was too severe under the circumstances, but a lesser sanction is appropriate. See Gilmer County Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990).

Accordingly, this grievance is **GRANTED IN PART**, and Respondent MCBE is **ORDERED** to issue a written reprimand to Grievant; to reimburse him for his lost wages and benefits, with interest; to remove references to his suspension from his file, and to restore his seniority.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of McDowell 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. However, the appealing party is required by W.Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

-

ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated: July 19, 1999

Footnote: 1

At his disciplinary hearing, Grievant alleged that he was the victim of retaliation for a previous grievance against MCBE, citing remarks allegedly made by Crigger. Although MCBE gave Grievant a difficult time at this hearing, by not allowing his counsel to pursue a relevant line of questioning, and by seeking to blame Grievant for taking two and one-half days of personal leave in 1984 to take a physical and work for a coal company, Grievant did not pursue a retaliation claim at Level IV, and it is deemed abandoned.

Footnote: 2

Crigger testified at Grievant's disciplinary hearing that there is no way to say that Grievant's bus caused the

damage to the church, and agreed that "it looks like an awful lot of damage from one little crack."

Footnote: 3 *The undersigned has reviewed the 296 Level IV decisions involving bus operators without finding an instance of a bus operator suspended for failure to report an accident. See Conner v. Barbour County Bd. of Educ. Docket No. 95-01-031 (Sept. 30, 1995)(Grievant reasonably allowed police to notify school officials of accident; grievant's termination modified to suspension); Spaulding v. Fayette County Bd. of Educ., Docket No. 95-10-181 (August 3, 1995)(Grievant terminated for having accidents over fifty percent of the time when driving and parking bus and not reporting any of them.)*