**JOANN MEADOWS,**

**Grievant,**

**v. Docket No. 00-23-202**

**LOGAN COUNTY BOARD OF EDUCATION,**

**Respondent.**

# D E C I S I O N

**Grievant, Joann Meadows, grieves the written reprimand she received from the Logan County Board of Education ("LCBOE"). Her Statement of Grievance and Relief Sought states:**

> **I am grieving in regard to the letter of reprimand dated March 28, 2000. I feel the charges are grossly inaccurate and do ask that the letter be removed immediately.**

**This grievance was denied at all lower levels, and appealed to Level IV on June 14, 2000. A Level IV hearing was held on January 4, 2000, and this grievance became mature for decision on that date, as the parties elected not to submit proposed findings of fact and conclusions of law.** **(See footnote 1)**

**After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.**

## Findings of Fact

**1. Grievant is employed as a regular, full-time bus operator with LCBOE. She has been a regular bus operator for approximately seven years. 2. As a regular, full-time bus operator, Grievant is paid for seven and one half hours a day. Grievant is not normally required to work this many hours and can return to her home after her runs are completed.**

**3. If she wishes to conduct personal business between her runs, Grievant is required to change out of her uniform.**

**4. On March 16, 2000, Grievant was on her way home from her morning run, at**

**approximately 9:30 a.m., when she came to the scene of a school bus accident. The bus was the one her daughter rode, and she stopped to find her daughter.**

**5. This school bus, operated by a substitute, had been run off the road by another vehicle, but had not been struck. Grievant found the elementary students who had been riding the bus were out of control and were in one of the nearby houses and climbing trees. She believed the substitute was not properly performing his duties.**

**6. She found her daughter was in the nearby house, and Grievant was worried that her daughter's behavior might make her liable for some type of damages.**

**7. Some of the children were complaining of injuries. It is unknown if Grievant was aware of this at the time she arrived.**

**8. Grievant's neighbor children also rode this bus. These children were upset by the accident.**

**9. 911 had been called as was the normal practice. All riders in an accident are to be assessed for injuries at the site, and then transported to the hospital for further observation and treatment as needed. 10. Grievant decided to take her child and three neighbor children on to school in her personal vehicle. She told the substitute driver she was taking these children and gave him a list of their names.**

**11. LCBOE does not permit bus operators to transport students in their private vehicles.**

**12. The parents of these children had asked Grievant to look out for their children during her daily duties as a bus operator.**

**13. Contrary to Grievant's testimony, the parents of these children had not told Grievant to "always" take their children on to school in the event of an accident.** (See footnote 2)

**14. When school administrators arrived on the accident scene, they were informed Grievant had taken her child, as well as three other students, who had been involved in the accident. These four students were later examined by EMT's at the school to assess whether they had received any injuries.**

**15. As a bus operator, Grievant is trained in first aid, but she has no other medical training.**

**16. Contrary to Grievant's testimony, at the beginning of each school year, as well as throughout the year, Grievant receives training on the proper behavior in the event of an**

**accident. At this training, Grievant was informed 911 was to be called in the eventof any accident. Grievant has received a copy of the Policy that is to guide a bus operator's behavior in the event of an accident.**

**17. This Policy deals with the responsibilities of the bus operator in the event of an accident. A reading of this Policy demonstrates the thrust of the Policy is to enumerate the duties of the bus operator, who is operating the bus at the time of the accident.**

**18. The Policy does not require the bus operator to call 911 to have all passengers checked after an accident, but bus operators have been repeatedly told to do this during inservice training.**

**19. The Policy does tell the bus operator to not allow any "well-meaning" person to move or handle an injured person.**

**20. After discovery of Grievant's taking the neighbor's children, Dr. Pat White, Director of Transportation, and Superintendent Ray Woolsey discussed Grievant's behavior and the proper course of action to take.**

**21. Grievant was issued a written reprimand on March 28, 2000, stating she had violated school policy by removing the neighbor children from the scene of the accident before they were examined and assessed by paramedics. The written reprimand noted Grievant had the right to take her own child. The written reprimand cited two reasons for its issuance: "(1) poor judgement; and (2) violation of county policy with regard to accidents."**

## Issues and Arguments

**Respondent stands by its decision to discipline Grievant for her poor judgement and failure to follow policy. LBCOE points to the fact that Grievant is not trained to assess serious internal injury, and asserts Grievant's behavior placed LCBOE and herself at great risk for lawsuits relating to the potentially injured children she removed from the scene. Respondent notes that although Grievant was not driving a bus at the time she came upon the accident, she was wearing her uniform and receiving pay for her work day which is seven and one half hours.**

**Grievant argues she was not working at the time, and she was acting as a mother and a neighbor. She maintains she did not know what procedures she was to follow in the event of an accident, and she did not receive this training in her inservice. She also argues she did not**

**violate any portion of the policy relating to accidents.**

**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 evidence 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 be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. ofEduc., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.; See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).**

**The first issue addressed by the parties was whether Grievant was "working" or "on duty" at the time she picked up the children. Grievant had completed her morning run and was on her way home. She was in uniform, and if she wished to perform a non-work related task, such as grocery shopping, she is required to remove her uniform first. Grievant is paid for seven and one half hours.**

**From the facts of the case, the undersigned Administrative Law Judge finds Grievant was on-duty at the time she picked up the neighbor children and transported them to school in her private vehicle. In fact, it would appear the best thing Grievant could have done was to assist the substitute bus operator, as she clearly believed the children were in possible danger, and the students were out-of-control. However, LCBOE has not charged Grievant with any neglect of duty.**

**Further, even if Grievant was considered to be off-duty, an employee can be disciplined for this conduct if there is a nexus. Hurley v. Logan County Bd. of Educ., Docket No. 97-23-394 (Dec. 11, 1997). Here, Grievant chose to stop and chose to takeaction. Once she took this action, it was subject to review as an employee aware of the rules and regulations.**

**The next question is whether Grievant violated LCBOE's Policy; after all, she was not the bus operator who was involved in the accident. Pursuant to the Accident Policy, no one is to move "injured" students, and even though Grievant states she never heard of the Accident Policy, the undersigned Administrative Law Judge finds this testimony to be unbelievable.**

**Grievant states her actions were "O.K." because the three neighbor children she took to school did not look injured to her, and when they were checked they were found not to be injured. However, Grievant does not have the medical training to make this assessment. It is true that when EMT's checked these children at school, they were found to be alright, but this is not a diagnosis and assessment Grievant is qualified to make. By transporting these children, she placed the children at risk, and increased LCBOE's potential liability. It is understandable that Grievant was thinking like a "mother", and her actions with her own child are not at issue. However, Grievant, as a LCBOE employee, should not have assumed this risk for her employer with the other three children.**

**Additionally, the issue of whether the parents of the children approved of Grievant's actions is irrelevant. Grievant is to follow the rules and regulations of her employer, and LCBOE has the right to expect Grievant to follow these rules and regulations. The children were to be assessed by EMT's, and students should not be transported in her private vehicle. Grievant also testified she was not aware a bus operator is to call 911, and the children are to be checked when there is an accident; thus, she was not aware she was doing anything wrong. Again, the undersigned Administrative Law Judge finds this testimony is not credible. While not included specifically in the policy, this was LCBOE's long-standing practice, included in inservice training, and indeed, it appears the substitute bus operator knew to call for medical help and did. Accordingly, the undersigned Administrative Law Judge finds Grievant violated LCBOE's policy and past practice by removing children from the accident scene.**

**The undersigned Administrative Law Judge also finds Grievant used poor judgement in**

**removing the neighbor children from the scene. While Grievant has received First Aid training, this in no way compensates for the assessment of a professional trained in emergency care. Grievant placed the children in danger and her employer at great risk for liability by her actions.**

**The next issue to address is whether this discipline, a written reprimand, was too harsh for the situation. The argument that Grievant's written reprimand was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty 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 employeragainst 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. Conner v. Barbour County Bd. of Educ., Docket No. 95-01-031 (Sept. 29, 1995); 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 also 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 "mitigation of 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). Respondent has substantial**

**discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall not substitute her judgement for that of the employer. Tickett v. Cabell County Bd. of Educ., Docket No. 97-06-233 (Mar. 12, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997). In assessing the above-cited factors and considering the proper standard of review, the undersigned Administrative Law Judge is aware that a lesser penalty for Grievant's offense could have been given, especially in light of Grievant's past record as a "good" employee. However, LCBOE viewed this situation as very serious and wanted to make sure this type of behavior never occurred again.** (See footnote 3) **Accordingly, the undersigned Administrative Law Judge cannot substitute her judgement for that of LCBOE.**

**The above-discussion will be supplemented by the following Conclusions of Law.**

## 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). "A preponderance of the evidence is evidence 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 be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, andmanner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR- 486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.; See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).**

**2. Grievant was on-duty at the time she transported the three neighbor children from the**

**scene of the accident to school in her private vehicle.**

**3. Even if Grievant were not considered to be on duty, and employee can be disciplined for conduct, outside of work, that has a rational nexus to their job duties. Hurley v. Logan County Bd. of Educ., Docket No. 97-23-394 (Dec. 11, 1997).**

**4. LCBOE met its burden of proof and demonstrated Grievant used poor judgement in transporting neighbor children in her private vehicle.**

**5. LCBOE demonstrated Grievant knew these children should be assessed by emergency workers and should not be removed from the scene until this assessment had taken place.**

**6. LCBOE demonstrated Grievant committed a violation of the Policy and past practice.**

**7. The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating thepenalty 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).**

**8. "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. Conner v. Barbour County Bd. of Educ., Docket No. 95-01-031 (Sept. 29, 1995); 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 also 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).**

**9. "[M]itigation of 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 theseriousness 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). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall not substitute her judgement for that of the employer. Tickett v. Cabell County Bd. of Educ., Docket No. 97- 06-233 (Mar. 12, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997).**

**10. Grievant did not meet her burden of proof and demonstrate the punishment she received was excessive, clearly disproportionate, or an abuse of discretion. Thus, undersigned Administrative Law Judge cannot substitute her judgement for that of LCBOE.**

**Accordingly, this grievance is DENIED.**

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

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**JANIS I. REYNOLDS**

**Administrative Law Judge**

**Dated: January 31, 2001**

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***Footnote: 1***

***Grievant was represented by Cecil Spry and Donald Jarvis of the American Transportation Union, and Respondent was represented Attorney Brian Abraham.***

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***Footnote: 2***

***After Grievant received this written reprimand, she obtained written statements from the neighbor parents which stated Grievant had permission to transport their children to school on the day of the accident and in the future. At the Level IV hearing, Grievant placed into evidence a notarized affidavit from one of the neighbor parents stating the same thing. Grievant's representative indicated the other parent had moved, and Grievant was unable to obtain an affidavit from her. Of course, Grievant did not have written permission before or on the day of the accident.***

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***Footnote: 3***

***LCBOE was clearly upset by Grievant's reluctance to admit that she had done anything wrong, and her statement implying she would do the same thing again. Superintendent Woolsey indicated that had Grievant admitted her error, he would have removed the written reprimand at Level II. During the Level IV testimony, Grievant stated she had none nothing wrong and repeatedly argued with LCBOE's counsel during questioning. At the close of the hearing, Grievant's representative stated Grievant had misunderstood the questions, and she would not take the same course of action again, unless she felt there was grave danger. Grievant also asked to make an additional closing statement, and stated when she came upon the accident she was thinking as a mother.***