JOHN MESSER,

Grievant,

v v.

DOCKET NO. 00-29-332

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, John Messer, filed this grievance against his employer, the Mingo County Board of Education ("Board") on October 18, 2000:

> Grievant, a regularly employed bus operator, was charged with first offense DUI during the summer of 2000. The incident leading to this charge occurred off duty during the summer and had no relation to his duties as a regularly employed school bus operator. Although final disposition of the criminal charge or the administrative proceeding has not yet taken place, the Respondent has voted to terminate Grievant's employment. Grievant alleges a violation of West Virginia Code § 18A-2-8 & § 18A-2-7. He further alleges disparate treatment, favoritism, and discrimination in violation of West Virginia Code § 18-29-2.
>
> Relief sought: Grievant seeks reinstatement to his position as a school bus operator, wages, benefits and seniority retroactive to the date of his suspension, removal of any reference of this suspension and dismissal from his personnel records, and interest on all monetary sums.

An expedited level four grievance hearing was held on January 18, 2001, in accordance with W. Va. Code § 18A-2-8, and this case became mature for decision on April 6, 2001, the conclusion of the briefing schedule for the parties' proposed findings offact and conclusions of law. (See footnote 1) Grievant was represented by John E. Roush, Esq., West Virginia School Service Personnel Association, and the Board was represented by Hannah B. Curry, Esq., Kay Casto & Chaney.

SUMMARY OF EVIDENCE

Board's Exhibits

Ex. 1 -

West Virginia D.U.I. Information Sheet, dated June 16, 2000.

Ex. 2 -

Mingo County Magistrate Court Criminal Complaint Case No. DOM-920, dated June 17, 2000.

Ex. 3 -

Mingo County Magistrate Court Guilty or No Contest Plea, Case No. DOM- 920, dated January 9, 2001.

Ex. 4 -

West Virginia School Transportation Regulations, 2000 Revised Edition.

Ex. 5 -

August 9, 2000 letter from Bill Kirk, Transportation Director, to Mr. Wayne Clutter, West Virginia Department of Education.

Ex. 6 -

Continuing Contract of Employment for Service Personnel for Johnnie Messer, dated August 27, 1992.

Ex. 7 -

August 15, 2000 suspension letter from John T. Mattern, Superintendent, to Mr. Johnnie Messer.

Ex. 8 -

September 8, 2000 dismissal letter from John T. Mattern, Superintendent, to Mr. Johnnie Messer.

Ex. 9 -

September 7, 2000 minutes of the Mingo County Board of Education meeting.

Grievant's Exhibits

Ex. 1 -

Level One Grievance Decision, dated August 31, 2000.

Testimony

The Board offered the testimony of Deputy Michael J. Vance, William Kirk, Nell Hatfield, and David Temple. Grievant testified in his own behalf, and presented the testimony of Patricia Grubb.

FINDINGS OF FACT

After a careful review of the testimony and evidence, I find the following facts have been proven by a preponderance of the evidence.

1. Prior to his termination, Grievant was employed by the Board in the bus operator classification.

2. On June 16, 2000, Deputy Michael Lee Vance of the Mingo County Sheriff's Department stopped Grievant at around 11:08 p.m. for running off the road several times and for a left of center violation.

3. Deputy Vance has been trained to assess whether people are intoxicated. Deputy Vance detected an odor of an alcoholic beverage on Grievant's breath and observed Grievant slurring his speech. Deputy Vance gave Grievant three (3) types of field sobriety tests which Grievant failed. At this time, Deputy Vance arrested Grievant for probably cause.

4. Once Grievant was transported to the Mingo County Courthouse, Grievant signed a West Virginia Implied Consent Statement, consenting to an intoxilyzer test. In the early morning hours of June 17, 2000, Deputy Vance performed the intoxilyzer test which Grievant failed. Grievant's intoxilyzer test result was .191. Deputy Vance charged Grievant with First Offense DUI on June 17, 2000.

5. Deputy Vance testified that the health department records indicate that the intoxilyzer equipment (#68-000983) was calibrated and updated. Deputy Vance further testified that the intoxilyzer equipment was calibrated before and after Grievant's test and that the calibration results fell within acceptable range (.090-.100). 6. After learning of Grievant's arrest and charge for DUI

from other bus operators, Bill Kirk, Director of Transportation, contacted the Mingo County Sheriff's Department and obtained documentation of Grievant's arrest and charge, including the results of Grievant's intoxilyzer test. Mr. Kirk also consulted the State of West Virginia School Transportation Regulations for guidance. (See footnote 2)

4. On June 23, 2000, Grievant was called in to the Board office for a conference with Bill Kirk, Transportation Director, and W. C. Totten, Safe School Coordinator, regarding this incident. At that meeting, Mr. Kirk informed Grievant he would be taking steps to remove him from the list of certified bus operators. Mr. Kirk sent a letter to Mr. Wayne Clutter of the West Virginia Department of Education on August 9, 2000, informing him of the incident and the June 23, 2000 meeting, and that he, Mr. Kirk, would be takingthe necessary steps to remove Grievant from the list of certified bus operators. Mr. Kirk enclosed a copy of the police report. R. Ex. 5. (See footnote 3)

5. On August 15, 2000, Superintendent John Mattern notified Grievant by letter that he was being suspended from his position without pay, and that the Superintendent would be recommending to the Board that his employment contract be terminated effective September 8, 2000. In that letter, Superintendent Mattern informed Grievant he had a right to a hearing before the Board, and to let him know by September 1, 2000, whether he wished to have a hearing. Grievant received and signed for this letter on August 18, 2000. R. Ex. 7.

6. Grievant did not contact Superintendent Mattern to request a hearing before the Board.

7. The Board met on September 7, 2000, at which time Superintendent Mattern recommended Grievant's contract of employment be terminated. R. Ex. 9.

8. On September 8, 2000, Superintendent Mattern notified Grievant in writing that the Board had accepted his recommendation and had voted to terminate Grievant's contract of employment because of his charge and arrest for driving under the influence of alcohol on June 17, 2000. R. Ex. 8. 9. On August 31, 2000, Grievant initiated a grievance at level one of the grievance procedure protesting his suspension of August 15, 2000. His immediate supervisor responded he had no authority to resolve the grievance, and “pass to next level.” G. Ex. 1.

10. David Temple, Administrative Assistant for the Board, received a copy of the level one grievance form and response in the Board office on or about August 31 or September 1, 2000. Because there was no request for a level two hearing, and he was not sure “what they had”, Mr. Temple instructed Mr. Totten to try to contact Grievant. Mr. Totten attempted to contact Grievant

without success, and the Board did no further follow up to the level one grievance form.

11. Grievant subsequently contacted the county school service personnel association president and the state school service personnel association office. Upon receiving contact from Grievant, counsel for the state association filed a level four appeal on or about October 18, 2000.

12. School bus operator certifications expire at the end of each school year or June 30. The names of all operators whose certificates are to be renewed are subsequently forwarded by the counties to the State Transportation Department. As Grievant's certificate had expired on June 30 of its own accord, the Board took no further action regarding the certificate after Grievant's suspension and termination. 13. In the late 1980's, E. B., a bus operator, was dismissed by the Board after a guilty plea to a DUI charge. (See footnote 4) Upon the advice of his county association representative, E.B. appeared before the Board to plead his case. The Board and E.B. reached a settlement whereby E.B. was reassigned to a half-time custodian position.

14. In 1993, R. D. resigned as a bus operator after a DUI arrest. He was hired the same day as a substitute Lubrication Man, and worked a few days in the bus garage. He was later terminated as a substitute on November 2, 1995.

15. E. B.2 was arrested for insurance fraud in the 1980's. The Board did not terminate her employment as a bus operator, because the State Board of Education found no rational nexus existed between her arrest and her employment as a bus operator.

16. On or about January 9, 2001, Grievant pled no contest to the charge of first offense DUI and paid a $100.00 fine. Grievant was also sentenced to twenty-four (24) hours in jail with nine and one-half (9 ½) hours credit for time served.

PRELIMINARY ISSUE OF TIMELINESS

The Board filed a Motion to Dismiss the grievance on the basis that it was untimely filed. Pursuant to W. Va. Code § 18A-2-8, a board may suspend or dismiss any person in its employment for reasons listed in the statute, and “[t]he employee so effected shall be given an opportunity, within five days of receiving such written notice, to request, in writing, a level four hearing and appeals. . .”. The Board argues Grievant did not perfecthis appeal of his suspension or dismissal within the prescribed five-day time limit, thus rendering the grievance untimely.

The legislature did not intend the grievance process to be a procedural quagmire where the merits

of the case are forgotten. In many instances, such as this, the grievant will not have a lawyer; therefore, the process should remain relatively simple. Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990). It follows, then, that the timeliness of a grievance claim is not necessarily a cut-and dried issue because a tribunal must apply to the timeliness determination the principles of substantial compliance and flexible interpretation to achieve the legislative intent of a simple and fair grievance process, as free as possible from unreasonable procedural obstacles and traps. Hale v. Mingo County Bd. of Educ., 199 W. Va. 387, 484 S.E.2d 640 (1997).

1. Suspension Grievance.

The evidence shows Grievant received and signed for his letter of suspension on August 18, 2000. He filed a level one grievance with his immediate supervisor on August 31, 2000, and forwarded the level one grievance and response to the Board on September 1, 2000. Thereafter, the Board attempted to contact Grievant without success, and Grievant made no attempt to contact the Board regarding processing the grievance. After that, neither party made any real attempt to process the grievance further.

It is true Grievant did not file an appeal of his suspension within five days following receipt of his suspension letter. However, a review of the suspension letter reveals why Grievant may have been confused about his appeal rights. Superintendent Mattern instructs Grievant in the suspension letter that, if Grievant wishes to have a hearing beforethe Board concerning his suspension, he is to notify him prior to September 1, 2000. Superintendent Mattern does not give Grievant any instruction about filing a direct level four appeal of his suspension as set forth in W. Va. Code § 18A-2-8. Thus, it is reasonable for Grievant to assume that he had at least until September 1, 2000, to notify the Board of his intent to appeal his suspension, and he did so by filing a level one grievance form on August 31, 2000. It is apparent Grievant was following the appeal provisions set forth in W. Va. Code § 18-29-1, et seq., rather than those contained in Code § 18A-2-8, and the former provides the Grievant fifteen days to file a level one appeal following the event giving rise to the grievance. Grievant complied with that Code provision in filing his level one appeal with the Board.

2. Termination Grievance

Grievant was terminated on September 8, 2000. Having had no response from the Board from his level one suspension grievance, Grievant contacted his county association president and the state association. Thereafter, his counsel filed a level four appeal of Grievant's suspension and dismissal

on October 18, 2000. Grievant contends he was confused about the grievance process, because he had heard nothing from the Board regarding his suspension grievance. After he was terminated, he contacted his representatives, and the grievance challenging his dismissal was then filed.

This Grievance Board has held in the past that where the facts giving rise to a suspension are the same as those which the employer relied upon to justify the dismissal, and the dismissal is merely the final discipline imposed, it is not necessary for a second grievance to be filed. See Lough v. W. Va. Dept. of Health and Human Resources, DocketNo. 99-HHR-323 (Aug. 29, 2000). Therefore, the dismissal grievance will be deemed timely filed, and this case will be decided upon the merits.

DISCUSSION

In a disciplinary grievance, the board of education bears the burden of proving the charges by a preponderance of the evidence. W. Va. Code § 18-29-6; Nicholson v. Logan County Bd. of Educ., Docket No. 95-23-129 (Oct. 18, 1995). “The preponderance of the evidence 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. Dept. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993).

The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

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

> 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 or a plea of nolo contendre to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee evaluation pursuant to section twelve of this article.

The Board contends that Grievant's arrest and charge of DUI falls squarely within the statute, and its decision to suspend and dismiss him was not arbitrary or capriciouswhere the available evidence at the time clearly demonstrated Grievant had committed a criminal act directly involving his occupational duties as a school bus operator.

Grievant does not deny he was arrested and charged with DUI, but argues (1) that his off-duty DUI has no “rational nexus” to his responsibilities as bus operator; (2) that at the time of his suspension and dismissal, he had not been convicted of the charge; and (3) that he has been discriminated against with regard to the discipline imposed upon him.

In order to discipline a school employee for acts performed at a time and place separate from his employment, the board must demonstrate a “rational nexus” between the conduct performed outside the job and the duties the employee is to perform. Syl. Pt. 2, Golden v. Bd. of Educ., 169 W. Va. 63, 285 S.E.2d 665 (1981)(rational nexus does not exist between misdemeanor conviction for shoplifting and duties as high school guidance counselor/teacher). A rational nexus exists if the conduct performed outside of the job directly affects the performance of the occupational responsibilities of the employee, or, if without contribution on the part of school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the employee to discharge the responsibilities of the position. Rogliano v. Fayette County Bd. of Educ., 176 W. Va. 700, 347 S.E.2d 220 (1986)(rational nexus does not exist between misdemeanor charges for possession of marijuana and duties as teacher). Criminal acts directly involving a school board employee's occupational responsibilities constitute a rational nexus for which an employee may be dismissed. Bledsoe v. Wyoming County Bd. of Educ., 183 W. Va. 190, 394 S.E.2d 885 (1990)(guilty plea to charges of conspiracy toextort money from supplier directly affects the performance of occupational responsibilities of maintenance supervisor in charge of purchasing materials).

This Grievance Board has held previously held that a rational nexus exists between an arrest for DUI and duties as a school bus operator. See Stewart v. Marion County Bd. of Educ., Docket No. 96-24-151 (July 23, 1996). In Stewart, a substitute bus operator was arrested for DUI and subsequently suspended, pending the outcome of a magistrate hearing. Although criminal charges for DUI were later dropped, the Grievance Board found that the bus operator's arrest established a valid basis for concern by the school board and that the suspension of the bus operator was not an arbitrary or capricious act. The Grievance Board further found that the Board's action was in the best interest of the children based on the arrest which was the only available information at the time.

In this case, the Board not only had information that Grievant had been arrested for and charged with DUI, it also had the results of Grievant's intoxilyzer test of .191 which it found to be clear and conclusive proof that Grievant was driving under the influence of alcohol. (See footnote 5) The

evidence before the board established a valid basis for concern about Grievant's ability to responsibility carry out his duties as a bus operator transporting the county's children to and from school. Furthermore, the Board's disciplinary action was not conditioned upon or limited by the outcome of the criminal charges brought against Grievant where the preponderance of the evidence established that Grievant committeda criminal act directly involving his occupational responsibilities. See Thurmond v. Steele, 159 W. Va. 630; 225 S.E.2d 210 (1976), where the Court stated:

> Indeed, the cases which we have found from other jurisdictions clearly indicate that if a State employee's activities outside the job reflect upon his ability to perform the job or impair the efficient operation of the employing authority and bear a substantial relationship to the effective performance of the employee's duties, disciplinary action is justified, **and is not conditioned upon or limited by the outcome of any criminal charges which may have been brought against the employee.**

Id. at 212 (citations omitted)(emphasis added). While Grievant ultimately pled no contest to the charge of DUI, the Board also substantiated through testimony of the arresting officer, the intoxilyzer results, and other evidence that Grievant, in fact, committed a criminal act directly involving his occupational duties as a school bus operator.

Grievant also alleges favoritism, discrimination, and disparate treatment in violation of W. Va. Code § 18-29-2. “Favoritism” is defined by W. Va. Code § 18-29-2(o) as “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.” “Discrimination” is defined by W. Va. Code § 18-29-2(m) as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” A claim of discrimination is often referred to as disparate treatment in cases where discipline has been imposed. See McVicker v. Kanawha County Bd. of Educ., Docket No. 95-20-339 (Feb. 9, 1996). In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show: (a)

> that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

> that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c)

that such differences were unrelated to actual job responsibilities of the Grievant and/or the other employee(s) and were not agreed to by the Grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once Grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Thereafter, Grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986).

Grievant presented evidence of instances, remote in time, of prior bus operators discharged for various criminal conduct being allowed to either return as bus operators or move to other positions. The two cases where bus operators returned to their positions involved reinstatements on appeal because it was found that a rational nexus did not exist between their criminal conduct (election fraud and insurance fraud) and driving a bus. In the other two cases involving bus operators with DUI, neither individual was allowed to return to his position as a bus operator.

With regard to the two bus operators who were disciplined for DUI, but allowed to retain employment in other capacities, Grievant has established a prima facie case ofdiscrimination. However, the Board has presented evidence to demonstrate legitimate reasons for the differences in treatment of those individuals vis-a-vis Grievant.

E.B. was reinstated as a substitute custodian after he pled guilty and was terminated as a bus operator. However, E.B. was reinstated in another position as part of a settlement agreement, not as a result of any Board policy. In the case of R.D., he was allowed to work in another position pending his termination for DUI, but he voluntarily resigned to avoid the process of his termination. This evidence is insufficient to prove that the Board treated Grievant unfairly as demonstrated by preferential treatment of other employees, or to prove that the Board has a policy allowing bus operators with DUIs to work in other areas of the school system in lieu of discipline. Therefore, Grievant's claims
of favoritism, discrimination, and disparate treatment must fail.

CONCLUSIONS OF LAW

1. In the absence of any evidence of bad faith, a grievant who demonstrates substantial compliance with the filing provisions contained in W. Va. Code §§ 18A-2-8 and 18-29-1, et seq., is entitled to a hearing. Duruttya v. Board of Education, 382 S.E.2d 40 (W. Va. 1989). Grievant established substantial compliance, and his suspension and dismissal grievances were timely filed.

2. In a disciplinary grievance, the Board has the burden of proving the validity of the charges against the employee by a preponderance of the evidence. W. Va. Code § 18-29-6; Nicholson v. Logan County Bd. of Educ., Docket No. 95-23-129 (Oct. 18, 1995); Webb v. Mason County Bd. of Educ., Docket No. 26-88-206 (Jan. 5, 1989). 3. In order to discipline a school employee for acts performed at a time and place separate from his employment, a board must demonstrate a “rational nexus” between the conduct performed outside the job and the duties the employee is to perform. Golden v. Bd. of Educ., 169 W. Va. 63, 285 S.E.2d 665 (1981).

4. A rational nexus exists if the conduct directly affects the performance of the occupational responsibilities of the employee, or, if without contribution on the part of the school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the employee to discharge the responsibilities of the position. Rogliano v. Fayette County Bd. of Educ., 176 W. Va. 700, 347 S.E.2d 220 (1986).

5. Where a school board employee commits a criminal act directly involving the employee's occupational responsibilities, a rational nexus exists, and the employee may be dismissed. Bledsoe v. Wyoming County Bd. of Educ., 183 W. Va. 190, 394 S.E.2d 885 (1990).

6. Disciplinary action is not conditioned upon or limited by the outcome of any criminal charges which may have been brought against the employee. See Thurmond v. Steele, 159 W. Va. 630, 225 S.E.2d 210 (1976).

7. A rational nexus exists between an arrest and charge of DUI and duties as a school bus operator. See Stewart v. Marion County Bd. of Educ., Docket No. 96-24-151 (July 23, 1996).

8. The Board has proven the existence of a rational nexus between Grievant's arrest and charge for DUI and Grievant's duties as a school bus operator. Based upon thisnexus, the reasonable concern for the safety and welfare of the students, and its high risk of liability, the Board's decision to suspend Grievant prior to resolution of the criminal offense was not arbitrary and

capricious.

9. "Favoritism" is defined by W. Va. Code § 18-29-2(o) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

10. "Discrimination" is defined by W. Va. Code § 18-29-2(m) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." A claim of discrimination is often referred to as disparate treatment in cases where discipline has been imposed. See McVicker v. Kanawha County Bd. of Educ., Docket No. 95-20-339 (Feb. 9, 1996).

11. In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a)

that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c)

that such differences were unrelated to actual job responsibilities of the Grievant and/or the other employee(s) and were not agreed to by the Grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once Grievant establishes a prima facie case of discrimination, the burden shifts to the employerto demonstrate a legitimate, non-discriminatory reason for the employment decision. Thereafter, Grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986).

12. Grievant has failed to demonstrate favoritism, discrimination, or disparate treatment in

violation of W. Va. Code § 18-29-2 with respect to his suspension for DUI.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo 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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MARY JO SWARTZ

Administrative Law Judge

Dated: May 16, 2001

Footnote: 1

Grievant submitted additional documentation for consideration after the close of the level four hearing, but did not request such documentation be entered into evidence. The information merely clarified the level four testimony of Patricia Grubb and William Kirk, and its presentation raised no objection by the Board, and as such, has been given no additional weight in the undersigned's determination of this grievance.

Footnote: 2

The West Virginia Board of Education promulgated the West Virginia School Transportation Regulations ("regulations") pursuant to the general authority granted in West Virginia Code § 18-5-13(6) and the specific instruction in West Virginia Code § 17C-14-12(a) to "adopt and enforce regulations not inconsistent with [Chapter 17C] to govern the ... operation of all school buses used for transportation of school children. ..." Section 17C-14-12(b) states, in pertinent part: "Any ... employee ... who violates any of said regulations ... shall be guilty of misconduct and subject to removal from ... employment." See Hare v. Randolph County Bd. of Educ., 183 W. Va. 436, 396 S.E.2d 203 (1990).

Section X(D)(1) of the regulations governing the refusal or recall of certification provides in pertinent part:

> *The State Superintendent of Schools may recall, refuse or suspend any school bus operator applicant/employee certification for any of the following reasons:*

. . .

j. *has been convicted of and/or has DMV suspension or revocation of license, on a charge of operating a motor vehicle while under the influence of alcohol, drugs or narcotics, or clear and convincing evidence presented, such as positive breath or blood test, of operating a motor vehicle under the influence of same.*

Note: New federal regulations for commercial drivers will be the standard for determining maximum BAC/DUI limits.

See Board Ex. 5. According to W. Va. Code § 17E-1-14, the BAC/DUI limit for commercial drivers is four hundreths of one percent (.040).

Footnote: 3

Mr. Clutter later informed Mr. Kirk that the State Superintendent did not take any action to remove Grievant from the list of certified bus operators under West Virginia School Transportation Regulations because Grievant is not on the list of certified bus operators. The regulations require that a school bus operator be certified by the county direction of transportation every year. As Director of Transportation, Mr. Kirk did not certify Grievant as a school bus operator for the school term 2000-2001 due to Mr. Kirk's responsibility for the safety of the students, his review of Section X(D)(1)(j) of the regulations (see fn. 1), and the compelling evidence that Grievant had operated a vehicle while under the influence of alcohol.

Footnote: 4

Pursuant to agreement of the parties, initials will be used for these individuals.

Footnote: 5

W. Va. Code § 17C-5-2(d) provides that any person who drives a vehicle in this state while he has an alcohol concentration in his blood of ten hundredths of one percent (.100) or more is guilty of a misdemeanor.