CHARLES TREMBLY,

Grievant,

v. **Docket No. 00-39-355**

PRESTON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Charles Trembly ("Grievant") filed this grievance directly at level four on November 17, 2000, challenging a two-day suspension without pay. He seeks reimbursement for his lost pay and benefits, plus interest, and restoration of lost seniority during the suspension period. A level four hearing was held in the Grievance Board's office in Morgantown, West Virginia, on January 24, 2001. Grievant was represented by counsel, John E. Roush of the School Service Personnel Association, and Respondent was also represented by counsel, Gregory W. Bailey. This matter became mature for consideration upon receipt of the parties' fact/law proposals on February 20, 2001.

The following findings of fact are made from a preponderance of the credible evidence of record.

Findings of Fact

1. Grievant is employed by Respondent as a bus operator.

2. Grievant's bus run has been fraught with disciplinary problems for the past few years.

3. Grievant was counseled in February of 1999 by LeJay Graffious, Principal of Bruceton School, regarding his dealings with some difficult students on his bus. Aportion of the problems included parents' complaints about Grievant using inappropriate language. However, Grievant's language was not discussed with him at this time, and the meeting focused upon how Grievant could better deal with disciplinary problems.

4. On June 1, 2000, Grievant was again counseled by Principal Graffious regarding his dealings with a problem student. Grievant was accused of using the words "hell" and "damn" when

talking to the student. When Grievant asked Principal Graffious whether these were considered curse words, Mr. Graffious responded “that it depended on the context of the use.” Resp. Exhibit 2.

5. In September of 2000, Grievant was having difficulty getting an eighth-grade student, S.S., (See footnote 1) to return an enrollment form, which was required to be completed by every student riding Grievant's bus. Grievant was required to complete a report, based upon information in the enrollment forms, by September 15, 2000. Grievant had requested the form from S.S. several times, and S.S. reported each time that it had been lost or destroyed in some manner.

6. On September 5, 2000, Grievant again requested the form from S.S., who promised to have it the following morning, and agreed to meet Grievant in front of the school when Grievant's bus arrived. (See footnote 2) When Grievant approached S.S. the next day, S.S. again responded that he did not have the form. Grievant responded “Shit, I need that paper.” This conversation was overheard by Principal Graffious.

7. Grievant was not angry during his conversation with S.S., and he cursed fromexasperation that S.S. had once again failed to complete the form. Grievant did not raise his voice or act in a threatening manner toward S.S.

8. On November 14, 2000, Grievant was suspended for two days without pay for using inappropriate language in front of students.

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 be proved 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.

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, unsatisfactoryperformance, 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.

Respondent did not specifically identify which of the statutory reasons were the basis of Grievant's suspension. However, the proper focus is whether the charge of misconduct is proven, not the label attached to such conduct. Gillespie v. Kanawha County Bd. of Educ., Docket No. 90-20-496 (June 6, 1991) (citing Russell v. Kanawha County Bd. of Educ., Docket No. 90-20-415 (Jan. 24, 1991)). Nevertheless, in its post- hearing submission, Respondent has alleged that Grievant's conduct constitutes insubordination.

Insubordination is the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Directors, So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). It "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." Sexton v. Marshall Univ. , Docket No. BOR2-88-029-4 (May 25, 1988) (citing Weber v. Buncombe County Bd. of Educ. , 266 S.E.2d 42 (N.C. 1980)). In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ. , Docket No. 94-01-394 (Jan. 31, 1995).

Respondent contends that Grievant had been previously counseled about usinginappropriate language in front of students. In addition, Respondent argues that the use of profanity in the presence of children by school employees is implicitly prohibited by the existence of a prohibition of such conduct by students themselves in the county's Student Code of Conduct. Accordingly, if

students are punished for using profanity, then school employees should know that they will be punished for the same conduct. Respondent could point to no specific policies prohibiting particular language or defining words which are inappropriate, but offered the testimony of Sharon Harsh, Assistant Superintendent, who testified that the superintendent has repeatedly stressed intolerance for profanity from staff. Gene Davis, Transportation Director, testified that, although bus operators have not been specifically instructed not to use profanity in the presence of students, they are expected to use “common sense.”

Grievant admits that his use of the word “shit” in front of a student was inappropriate. (See footnote 3) However, he contends that, under the circumstances, a two-day suspension is excessive. Although Grievant has been previously counseled regarding his problems dealing with the difficult children on his bus, he testified that he has only been told to try to “be professional,” and his language has not specifically identified as a problem. In fact, the undisputed evidence offered by Respondent indicates that Mr. Graffious himself told Grievant that “the context” in which the language is used can determine whether or not it is appropriate.

"Whether to mitigate the punishment imposed by the employer depends on a findingthat the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995) (citations omitted). Grievant has been employed by Respondent for eight years with an unblemished personnel record. When disciplinary problems have arisen with students on his bus, Grievant has been cooperative and receptive to the counseling he has received from his superiors. Additionally, while Respondent contends that the use of profanity is implicitly prohibited conduct, the evidence in this case does not rise to the level of a flagrant disregard of authority. In fact, Grievant has been specifically instructed that profanity may not be inappropriate in some contexts. Moreover, this is not a case in which profanity was used in an angry or threatening manner, which would warrant more severe punishment. See Ferrari v. Putnam County Bd. of Educ., Docket No. 99-40-528 (Apr. 25, 2000). While Grievant's conduct admittedly showed poor judgment--and profanity before children should not be encouraged--it did not warrant a suspension without pay, and this punishment was excessive in light of the circumstances presented, in the absence of a prior specific warning or reprimand.

Consistent with the foregoing, the following conclusions of law are made.

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 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).

3. A board of education employee may be suspended 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. W. Va. Code § 18A-2-8.

4. In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ. , Docket No. 94-01-394 (Jan. 31, 1995).

5. Respondent has proven the charges against Grievant by a preponderance of the evidence.

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

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to remove the suspension letter from Grievant's personnel file and replace it with a written reprimand. Respondent is **FURTHER ORDERED** to reimburse Grievant all lost wages, benefits, and seniority, plus interest at the statutory

rate.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Preston 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.

Date: February 28, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Consistent with Grievance Board practice, only the initials of minor students will be used, in order to protect their privacy.

Footnote: 2

S.S. only rode Grievant's bus in the afternoon.

Footnote: 3

Principal Graffious believed that he also heard Grievant say the word "damn" when he was speaking to S.S. about the form. However, Grievant was forthright in admitting what was said, and he did not recall using that term. Nevertheless, Grievant's use of one curse word or two curse words has no bearing on the ultimate outcome of this case.