LINDA HAMMER,

Grievant,

v. **Docket No. 01-13-352**

GREENBRIER COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Linda Hammer, filed this grievance against her employer, the Greenbrier County Board of Education ("GCBOE" or "Board"). The Statement of Grievance reads:

> **Grievant, a regularly employed school bus operator, has received a written reprimand for an alleged violation of the Respondent's Dress Code policy. The Grievant contends that the policy was unenforceable as it is not uniformly applied to all regularly employed school bus operators in Respondent's employ and alleges that the Respondent has acted in an arbitrary and capricious manner in issuing the written reprimand to the Grievant.**
>
> **Relief Sought: Grievant seeks removal of the written reprimand from her personnel records and all official records maintained by the Respondent or its agents.**

This grievance was filed on March 26, 2001, and denied at Level II on March 28, 2001. The grievance was filed to Level II on March 30, 2001, and denied on May 16, 2001. Grievant elected to by-pass Level III and appealed to Level IV on May 16, 2001. A Level IV hearing was held in the Grievance Board's Beckley office on September 17, 2001. This grievance became mature for decision on October 5, 2001, after receipt of the parties' proposed findings of fact and conclusions of law. **(See footnote 1)**

Issues and Arguments

Respondent asserts Grievant violated County Policy 6.85 by not wearing the required bus operators' uniform. Respondent maintains the punishment Grievant received was pursuant to the guidelines of the Policy. Grievant received a written reprimand on this occasion because

this was the second time she had violated the Dress Code Policy. Grievant had previously received an oral reprimand for her first violation. The Policy requires a written reprimand for the second offense.

Grievant alleges Respondent's Policy is void and unenforceable because it is not applied to all bus operators. Grievant notes it is not possible for the board of education to observe the bus operators at all times to see who is and is not in compliance. This failure to monitor these bus operators constantly results in some violators of the Policy not "being caught"; thus, punishment is unfairly meted out. (See footnote 2) **Grievant also argues she was punished for not wearing a uniform skirt, and she is not required to wear a skirt. Grievant also argues she should not receive a written reprimand because the clothing she was wearing was similar to the required uniform.**

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 has been employed as a bus operator by GCBOE for approximately 13 years.

2. Prior to the adoption of the Dress Code for bus operators, Grievant attended GCBOE's meeting to discuss the issue and noted her disagreement with the Policy. 3. GCBOE adopted Policy 6.85. This Policy notes that wearing the required uniform "provides a visible system of locating the person who has the authority to operate the bus and establish the disciplinary procedures necessary for safe driving. . . . Shirts and pants (or skirts) make up the full uniform, no substitutes are allowed." (Emphasis Added.) Jt. Exh. 1 at Level II.

4. Bus operators are required to wear their uniforms "at all times when operating a school bus in his/her official capacity." Jt. Exh. 1 at Level II.

5. The Policy contained the punishments that would be received for failure to follow the regulations. For a first offense, an employee would receive an oral reprimand, and for a second offense the punishment was a written reprimand. Jt. Exh. 1 at Level II.

6. Grievant received an oral reprimand on January 2, 2001, for a first offense failure to follow the uniform Policy. Grievant agrees she was not wearing her uniform that day. She did not grieve this oral reprimand.

7. On or about January 3, 2001, Grievant asked the Director of Transportation, Kenneth Baker, to order her skirts to wear, instead of the pants she had originally received.

8. Mr. Baker ordered three skirts per Grievant's directions, and they were given to her on January 9, 2001.

9. On January 15, 2001, Grievant returned the skirts to Mr. Baker informing him the skirts were too small. Mr. Baker reordered the skirts, and the replacement skirts were delivered to Grievant on January 19, 2001.

10. Grievant frequently stored her skirt on the floor of her bus. She would put the skirt on over the shorts she was wearing. (Grievant's test.) 11. On February 14, 2001, while Mr. Baker was delivering informational papers to the 33 bus operators lined up at Eastern Greenbrier Junior High School, he observed Grievant was not wearing the required uniform. Mr. Baker informed Grievant she would be receiving a written reprimand for her second violation of the Dress Code. Grievant offered no reason for her failure at this time.

12. Grievant admitted she was not wearing the required uniform, as she was not wearing the required uniform pants. Mr. Baker first noticed Grievant was not wearing one of the skirts he has specially ordered for her. He then noticed the pants Grievant wore were not the required uniform pants, but he did not remember exactly what type of pant Grievant was wearing. Mr. Baker did not see the required smock.

13. Grievant was wearing the required smock, but because she had tucked the collar in her T-shirt and put a jacket over the smock, no one looking at her would be able to tell she was wearing the uniform, and was an individual with "the authority to operate the bus and establish the disciplinary procedures necessary for safe driving. . . ." (See footnote 3) **Jt. Exh. 1 at Level II.**

14. After Mr. Baker left her bus, Grievant called the bus garage and asked one of the mechanics to meet her bus after she finished her run. Grievant asked the mechanic who met her bus if she was in uniform, and he said no. Grievant then unzipped her jacket and he said yes. This witness only noticed Grievant's slacks were a dark color, but could not say if they were uniform pants. 15. Mr. Baker has disciplined all other bus operators he has seen violate the Dress Code pursuant to the Policy. During this school year, Mr. Baker has issued seven verbal warnings and two written reprimands. If someone reports to Mr. Baker that a bus

operator is out of uniform, he then checks on this driver.

16. At Level IV for the first time, Grievant presented pictures she had taken in the Spring of 2001 of other bus operators who were out of uniform. (See footnote 4) Grievant did not tell Mr. Baker about these violations, either at the time they occurred or at any other time. The first time Mr. Baker was informed of these violations was at the Level IV hearing on September 17, 2001, many months after they had occurred.

17. Two of three skirts were returned by Grievant to Mr. Baker unopened and still in the original package.

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 oftestifying[; 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).

W. Va. Code §18A-2-8 identifies the types of conduct that can result in disciplinary action and 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**

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.

A. Insubordination

Grievant's behavior is viewed as insubordination. Insubordination involves 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). This Grievance Board has previously recognized that insubordination "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. BuncombeCounty 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).

An employee's belief that management's decisions or directions are incorrect, absent a threat to the employee's health or safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. Lilly v. Fayette County Bd. of Educ., Docket No. 97-10-084 (Feb. 11, 1998). See Parker v. W. Va. Dep't of Health and Human Resources, Docket No. 97-HHR-042B (Sept. 30, 1997). See generally, Meckley v. Kanawha County Bd. of Educ., 181 W. Va. 657, 383 S.E.2d 839 (1989) (per curiam). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dep't, Docket No. 90-H-128 (Aug. 8, 1990) (citing Meads v. Veterans' Admin. 36 M.S.P.R. 574 (1988)). An employee may not disregard a direct order or the directions of a supervisor based upon his belief that the order is unreasonable or without merit. See McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992).

"W. Va. Code §18-5-13 provides that, '"[t]he boards, subject to the provisions of this chapter and the rules of the state board, have authority: . . .(13) To provide appropriate uniforms for school service personnel.'" Butts v. Berkeley County Bd. of Educ., Docket No.

01-02-053 (Apr. 3, 2001). See Randolph v. Putnam County Bd. of Educ., Docket No. 00-04-012 (May 4, 2000). Accordingly, GCBOE's requirement to wear a uniform is reasonable and in keeping with its discretion.

Respondent has met its burden of proof and demonstrated Grievant committed a second violation of the Dress Code. By her own admission, Grievant acknowledged she was not wearing the required uniform on February 14, 2001. Grievant was guilty of insubordination when she knowingly and willingly disregarded a direct order. It appears Grievant committed this violation based upon her belief that the order was unreasonable, without merit, and that other drivers were also violating the Dress Code. These beliefs do not excuse Grievant's failure to follow this directive. See McKinney, supra.

B. Was Grievant disciplined for her failure to wear a skirt?

This argument is without merit. Grievant was disciplined for not wearing the required uniform. The fact that Mr. Baker knew Grievant had requested skirts and was not wearing one on February 14, 2001, does not change the fact Grievant was not in uniform on the day in question. While the written reprimand notes Grievant did not wear the skirts she had personally requested, this does not make the written reprimand invalid. Both Grievant and Mr. Baker agreed, Grievant was not wearing the required uniform pants. The Policy is specific and states, "no substitutes are allowed." Of course, Mr. Baker would expect to see Grievant wearing the skirts, since they had been specially ordered for her, and he believed that granting this reasonable request by Grievant would prevent further problems. This was the first thing he noticed, but he also noted the pants Grievant was wearing were not the uniform pants required by the Policy.

C. Is the Policy unenforceable because someone is not monitoring bus operators at all times to insure compliance?

This argument is also without merit. An employer has the right to expect an employee will follow the reasonable rules imposed. Reynolds, supra. Certainly the requirement to wear a uniform is reasonable. An employer is not required to constantly monitor its employees to insure compliance. Bus operators are adults, and GCBOE has every right to expect them to comport themselves as such. Contrary to Grievant's allegations, there was no showing that the Policy was enforced in an arbitrary and capricious manner. Each time Mr. Baker saw an

infraction, the employee was punished pursuant to the Policy.

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, and manner 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 truethan 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. W. Va. Code §18A-2-8 identifies the types of conduct that can result in disciplinary action and 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 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.**

3. Insubordination involves 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).

4. Insubordination "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)).

5. 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). 6. An employee's belief that management's decisions or directions are incorrect, absent a threat to the employee's health or safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. Lilly v. Fayette County Bd. of Educ., Docket No. 97-10-084 (Feb. 11, 1998). See Parker v. W. Va. Dep't of Health and Human Resources, Docket No. 97-HHR-042B (Sept. 30, 1997). See generally, Meckley v. Kanawha County Bd. of Educ., 181 W. Va. 657, 383 S.E.2d 839 (1989) (per curiam). 7. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dep't, Docket No. 90-H-128 (Aug. 8, 1990) (citing Meads v. Veterans' Admin. 36 M.S.P.R. 574 (1988)). An employee may not disregard a direct order or the directions of a supervisor based upon his belief that the order is unreasonable or without merit. See McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992).

8. "W. Va. Code §18-5-13 provides that, '"[t]he boards, subject to the provisions of this chapter and the rules of the state board, have authority: . . .(13) To provide appropriate uniforms for school service personnel.'" Butts v. Berkeley County Bd. of Educ., Docket No. 01-02-053 (Apr. 3, 2001). See Randolph v. Putnam County Bd. of Educ., Docket No. 00-04-012 (May 4, 2000).

9. GCBOE has met its burden of proof and demonstrated Grievant was guilty of insubordination when she knowingly and wilfully disregarded a direct order to wear her uniform pursuant to Policy.

10. Grievant did not demonstrate her written reprimand was the result of her failure to wear the uniform skirt. 11. Grievant did not meet her burden of proof and demonstrate

the Policy, as written, was unenforceable, or GCBOE has a duty to monitor the clothing worn by every employee every day or that the Policy was unfairly applied.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of the Greenbrier 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: November 21, 2001.

Footnote: 1

Grievant was represented by Attorney Kimberly Levy from the West Virginia School Service Personnel Association, and Respondent was represented by Attorney Erwin Conrad.

Footnote: 2

Grievant notes her bus is parked close to the Department of Transportation office.

Footnote: 3

The undersigned Administrative Law Judge is giving Grievant the benefit of the doubt here, as Mr. Baker said he saw no smock and no jacket, as it was a nice day.

Footnote: 4

Although Grievant had this information at the Level II hearing she did not present it. Her attorney stated they did not want to get other drivers in trouble.