STEVEN WAYTS,

Grievant,

v. **Docket No. 02-52-011**

WETZEL COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Steven Wayts ("Grievant") appealed this matter directly to level four on January 14, 2002, challenging the decision of the Wetzel County Board of Education ("WCBOE"), suspending him for three days without pay. A level four hearing was held in the Grievance Board's office in Wheeling, West Virginia, on March 4, 2002. Grievant was represented by counsel, John E. Roush, and WCBOE was represented by counsel, Larry W. Blalock. This matter became mature for consideration upon receipt of the parties' fact/law proposals on April 3, 2002.

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

Findings of Fact

1. Grievant has been employed by WCBOE as a bus operator for approximately twenty years.

2. On November 14, 2001, Grievant drove the debate team from Magnolia High School to a competition at the Stifel Center in Wheeling, West Virginia.

3. Although this was an extra duty trip, for which Grievant was entitled to compensation, Grievant did not accept any pay for the trip. Grievant had driven thestudents to the same competition for approximately fifteen years, and it was his practice to often waive compensation for organizations whose trips were not financed by the Board. (See footnote 1)

4. A day or two before the November 14 trip, Grievant's fiancé, Lisa Fagan, was with him at Magnolia High School while he discussed the upcoming trip with Eileen Miller, the debate team sponsor. Ms. Miller, who is apparently acquainted with Ms. Fagan, suggested that Ms. Fagan come

along on the debate team trip so they could have lunch together.

5. Ms. Fagan accepted Ms. Miller's invitation and rode along with the debate team on the November 14 trip. Ms. Fagan is not a Board employee and was not approved as an official chaperon for the trip.

6. After dropping off the debate team at the Stifel Center, Grievant asked Ms. Miller if it would be all right if he went to the nearby Northern Regional Jail to visit his son, who was incarcerated there. Ms. Miller told Grievant it was all right with her, as long as he returned to pick up the students at the designated time.

7. Grievant drove to the jail, approximately twenty miles from the Stifel Center, and visited his son for approximately one hour. He returned in plenty of time to pick up the students.

8. WCBOE policies prohibit the use of school buses for personal business.

9. WCBOE policies also provide that school bus operators may only transport enrolled pupils, employees, and persons approved by the Board. Chaperons forextracurricular activities are to be approved by the school's principal.

10. On August 24, 2001, Jay Yeager, Transportation Director, circulated a memorandum to all bus operators regarding proper locations for parking buses. The memo also stated “School buses are not to be used for personal business such as going shopping, visiting friends/relatives, and etc. Exceptions will be made only in the event of emergencies with the superintendent or transportation director's permission.” Grievant did not recall this memo.

11. On January 8, 2002, WCBOE voted to ratify the superintendent's decision to suspend Grievant for three days without pay for willful neglect of duty.

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. ofEduc., 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.

Respondent contends that Grievant's actions, both using the bus to visit his son and transporting an unauthorized non-employee on the bus, constitute willful neglect of duty.
An employer asserting willful neglect of duty "must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act." Jones v. Mingo County Bd. of Educ., Docket No. 95-29-151 (Aug. 24, 1995). "It 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). Respondent argues that Grievant knew or should have known about its policies prohibiting these activities, yet he disregarded them.

As to Ms. Fagan's presence on the trip, Grievant testified that he believed that since Ms. Miller invited her and Ms. Miller was “in charge” of the trip, she would take care of any authorizations if needed. Grievant stated that he had previously encountered a problem with an unauthorized person riding on his bus, and when Grievant advised his supervisor that the individual had been invited on the trip by the team's coach, no more was mentioned about it. Accordingly, Grievant assumed that if the teacher in charge on a trip invites someone, it is that teacher's responsibility. Grievant also credibly testified that hehad no knowledge of the county policy requiring a principal's approval of chaperons. After working as a bus driver for twenty years, Grievant stated he has never been shown

a chaperon list when driving extra duty runs for school teams. Therefore, he did not believe he was required to obtain anyone's “permission” to take Ms. Fagan on the trip, especially since it was not his idea. Although she has been the debate team sponsor for many years, Ms. Miller testified that she did not even know that permission was required to take extra people on such trips, and she had no familiarity with the chaperon approval process. The undersigned finds that Grievant did not knowingly or intentionally violate Respondent's policy when he took Ms. Fagan along on the trip, so this action did not constitute willful neglect of duty.

As to the trip to the jail, Grievant testified that he honestly believed he was doing the right thing by asking Ms. Miller for permission. Although Grievant's supervisor testified that drivers had been cautioned in the past about doing personal things while on trips, like going shopping, etc., Grievant did not recall being told that an excursion like this one would be prohibited, especially if he asked permission. Grievant noted that drivers are allowed to leave the location where the students have been dropped off to get something to eat a short distance away, and he believed that “common sense” was the governing rule. Since Ms. Miller did not mind him leaving, as long as he returned in time, Grievant believed he had obtained the necessary approval.

Because he has been employed as a bus operator for 20 years, it is difficult to believe that Grievant did not realize that a trip such as this one would not be allowed. This was not a routine lunch excursion, which Respondent does not dispute drivers are allowed to make when waiting for students on a extracurricular trip. Grievant did not merely travelto the closest location to eat, but he took an extra 20-mile excursion to engage in blatantly personal business. Drivers have been cautioned in the past about taking such trips without proper permission, and the issue has apparently been discussed on more than one occasion among the drivers and their supervisors. Accordingly, the undersigned finds that Grievant knowingly engaged in misconduct by visiting his son at the jail, constituting willful neglect of duty.

However, the undersigned does believe that Grievant was attempting to “do the right thing” by asking Ms. Miller's permission, although he should have realized she was not the proper authority to give permission to allow a bus to be taken on such a lengthy personal trip. Therefore, mitigation would seem appropriate. "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). Grievant is an exemplary employee of 20 years, who has refused to accept compensation--to which he is entitled--in order to help school groups such as the debate team. Under these circumstances, a suspension without pay seems an extreme punishment for an error in judgment which did not harm anyone. Therefore, Grievant's suspension should be reduced to a written 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. Pursuant to W. Va. Code § 18A-2-8, school personnel may be suspended or dismissed at any time for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, a felony conviction, entry of a guilty plea or a plea of nolo contendere to a felony charge. The authority of a board of education to discipline an employee must be exercised reasonably, and not arbitrarily and 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. An employer asserting willful neglect of duty "must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act." Jones v. Mingo County Bd. of Educ., Docket No. 95-29-151 (Aug. 24, 1995).

4. Respondent has proven by a preponderance of the evidence that Grievant engaged in willful neglect of duty when he took a school bus to the Northern Regional Jail for personal business.

5. "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) (citationsomitted).

6. 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 Jefferson 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: April 12, 2002 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Respondent's policy requires the students or the school to pay the driver when such organizations travel to competitions.