DAVID GROSS,

Grievant,

v. **DOCKET NO. 02-20-090**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, David Gross, was employed by Respondent, Kanawha County Board of Education ("KBOE"), as a regular bus operator until his dismissal on April 8, 2002. This grievance was filed at Level IV on April 11, 2002, as is permitted by W. Va. Code § 18A-2- 8, contesting his dismissal. The statement of grievance reads:

> The grievant, a bus driver for Kanawha County Schools, was terminated from his position on April 8, 2002. He feels that his termination was arbitrary and capricious and, also, that Kanawha County Schools violated his rights by viewing tapes without his consent.

As relief Grievant seeks reinstatement into his bus operator position, back pay, interest, lost benefits and seniority, and that all record of the dismissal be removed from his personnel file. (See footnote 1)

The following Findings of Fact are properly made from the record developed at Level IV.

Findings of Fact

1. Grievant was employed by KBOE as a regular bus operator from November 30, 1998, until his dismissal on April 8, 2002. Prior to his regular employment, he was employed by KBOE as a substitute bus operator for a year and a half.

2. Grievant was assigned to the Elkview bus garage. His supervisor was Nancy Bowen-Kerr.

3. On September 27, 2001, George Beckett, KBOE's Administrative Assistant for Pupil Transportation, received a telephone call from the parent of a student who rode Grievant's bus,

complaining that her child had told her Grievant had asked her and another student if they smoked dope; that he had stated to the students he had smoked a bowl; that he hoped a particular student died; that he was going to run the bus into something and kill them all; and that two girls were jackasses. She further reported that Grievant had hit the railroad tracks so hard with the bus that the students were bounced out of their seats and hit their heads on the ceiling, and that Grievant had stuck his head out the bus window and yelled at some women.

4. Each KBOE bus is equipped with a video monitoring system and recorder, which records for up to eight hours. The tape runs continuously while the bus is on, and shuts itself off a few minutes after the bus is turned off. At the end of eight hours of recording time, the tape rewinds, and begins recording over the previous eight hours. If the driver has an accident, or if disciplinary action is taken against a student, the video is pulled, reviewed if necessary, and stored in case a record would be needed in the future. The intent of the video monitoring is not to be “big brother.” The intent of KBOE in installing video equipment on buses was to provide a record when there were studentdiscipline problems. KBOE does not have a policy which states how the video tapes will be used.

5. The East Bank bus terminal was the first terminal to have video cameras installed on buses, and this was a pilot project. A group of East Bank bus operators filed a grievance over the cameras. In settlement of the grievance, KBOE agreed to certain conditions for use of the videos. Three of the nine conditions were that, “East Bank employees will have the opportunity to be present for each viewing,” “[s]hould an employee need to go [to] the bathroom (invasion of privacy), a section of the tape may be erased if necessary,” and “[m]istakes will be brought to the operator's attention (viewed on tape), but will not be used for evaluation.” These agreed to conditions were never adopted by KBOE as a policy applicable to all bus operators.

6. It is the practice in Kanawha County to make the bus operator aware if a tape is going to be pulled, and to give the driver the opportunity to view the tape with the supervisors who will be viewing it, if possible.

7. On September 27, 2001, Mr. Beckett called Ms. Bowen-Kerr, and asked her to contact Grievant and set up an appointment for him to pull the video tapes from his bus for September 26, 2001, so they could review them. Grievant was off work that day, so Mr. Beckett asked Ms. Bowen-Kerr to have the substitute pull the tape, and to have Grievant stop by his office the following morning after his bus run. The substitute pulled the tape and reviewed it.

8. Grievant stopped by Mr. Beckett's office the next morning, September 28, 2001, after his morning run. Ms. Bowen-Kerr was also there. Mr. Beckett told Grievant there had been a complaint made by two girls on his bus run, and asked him if he had made the statements alleged by the parent. Grievant denied making any of the statements attributed to him by the parent, except for the statement about smoking a bowl. Grievant's explanation for this statement was that it was just the way he talked to students, and hewas joking. Grievant also denied yelling out the bus window, and hitting the railroad tracks so hard that students were bounced into the air. Mr. Beckett, Ms. Bowen-Kerr, and Grievant began viewing the videotape. The videotape from the morning of September 26, 2001, had been taped over, but a portion of the afternoon run was still on the tape. Mr. Beckett decided to look at the tape from the morning of September 28, 2001, as the same students were on the bus, in order to observe the students. Grievant pulled the tape, and he, Mr. Beckett, and Ms. Bowen-Kerr viewed part of the tape. Grievant had to leave for another job. He told Mr. Beckett and Ms. Bowen-Kerr he might as well give them permission to view the tape in his absence, because Mr. Beckett was going to review it whether he gave him permission or not. Grievant was to return at 1:30 to continue reviewing the tapes, and to take a drug and alcohol test, as directed by Mr. Beckett. Later that morning Mr. Beckett received a telephone call from Grievant's union representative, who told Mr. Beckett she wanted to be present while they viewed the tapes. Grievant's representative could not come that afternoon, so they rescheduled for the following work morning. Mr. Beckett and Ms. Bowen-Kerr continued to view the tapes in Grievant's absence.

9. Grievant returned at 1:30 for the drug and alcohol test. Grievant was searched prior to taking the test, was required to leave his personal belongings at the counter, and was under observation while he provided a specimen. The test came back negative for drugs and alcohol.

10. Mr. Beckett was told by a representative of the drug testing company used by KBOE that a person can ingest a product which will cause the presence of drugs, particularly marijuana, to not show up on a test. From this, Mr. Beckett concluded that Grievant's drug test was not valid. No evidence was produced to support such a conclusion. 11. By letter dated October 2, 2001, Superintendent Ronald Duerring notified Grievant that he was suspended with pay effective October 3, 2001, pending further investigation of allegations of inappropriate conduct.

12. By letter dated November 9, 2001, Superintendent Duerring notified Grievant that a hearing would be held on November 15, 2001, to determine whether disciplinary action should be taken

against him based upon the following allegations of misconduct:

1. On September 26 and 28, 2001, you made offensive remarks to and about students assigned to your bus, including the following:

a) You asked two female Stonewall Jackson Middle students if they smoked dope and indicated that you had smoked a bowl. You indicated that you hoped one of the students died, called both students “jackasses”, and said you would run the bus into something to kill them

b) you used obscene language, including “fuck” and “shit”, in a conversation with two Herbert Hoover High students which included more drug references: “They were all smoking that shit”, “That's some good fucking shit”, “Real good shit” and “I hope they don't drug test me today”.

c) you told students to “Shut up, I'm tired of hearing your mouth”, remarked that “Women are good for taking men's money”, called students “liars”, told students “You're crazy” and “You're dumb” and asked about their boyfriends, girlfriends, dating and kissing.

d) you told students that you had lied about an accident.

e) you asked questions such as “Do you agree that women are good for nothing but cooking and cleaning?”, “Do you agree that women are useless?”, and “Do you think she is cute or ugly?”. You asked students to raise their hands to vote on whether another student was cute or ugly.

2. On September 28th you engaged in frequent conversations with your students rather than devoting full attention to your driving.

3. On September 28th you made several bus stops without properly using the amber warning lights.

4. On September 27th you drove a dump truck for another employer without an adequate rest period before driving your school bus.

5. On September 28th you pulled over to the side of the road and urinated in a plastic bottle on your bus.

6. On September 28th you allowed your son to stand beside you and steer the bus while in motion on the highway.

7. On September 28th you pulled your bus to the end of the Hoover parking lot and advised two female students where to stand so that they could not be seen and permitted them to smoke on the bus.

13. By letter dated November 16, 2001, William Courtney, Director, Employee Relations, confirmed the agreement to reschedule the hearing to November 28, 2001. The letter further advised that:

> In addition to the allegations set forth in the letter of November 9th, please be advised that it has been further alleged by Mr. Donald Cross of Clendenin that you have acted inappropriately and/or in an unsafe manner, including the following:
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> 1) Driving the school bus onto Mr. Cross' property;
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> 2) Driving the school bus at an excessive rate of speed;

3) Driving the bus too close to Mr. Cross while he was riding his bicycle and making an obscene gesture;

4) Driving the bus through a stop sign without coming to a complete stop; and

5) Allowing children on the bus to shout at Mr. Cross.

14. By letter dated November 20, 2001, Mr. Courtney advised Grievant that "[a]n additional allegation of misconduct has been made against you. It is alleged that earlier this year Mr. Cross came to the bus garage to make a complaint against you. You subsequently remarked: 'That old man will pay. I'll flatten his tires this weekend.'"

15. At some point, Ms. Bowen-Kerr told Mr. Beckett there were other tapes from Grievant's bus which were in storage, from September 4, 2001, August 31, 2001, January 23, and January 24, 2001. Mr. Beckett later spoke with Brenda Taylor, transportation supervisor, who found a tape from Grievant's bus for March 30, 2001. Mr. Beckett did not advise Grievant that he would be reviewing these tapes. Mr. Beckett did not believe he should bring Grievant onto KBOE property to view the tapes, because Grievant was on suspension. He further believed the videotapes belonged to KBOE, and he had the rightto view a videotape at any time. The record does not reflect whether anyone had viewed these videotapes when they were first pulled.

16. By letter dated December 20, 2001, Mr. Courtney advised Grievant that his hearing had been rescheduled for January 7, 2002, and that the memorandum from Mr. Beckett dated November 26, 2001, which was attached to the letter, outlined:

> additional allegations of misconduct as documented on videotapes for August 31, September 4, January 23 and 24, 2001, including the following:

1) Allowing students to stand and open roof hatches while the bus is in motion;

2) Allowing students to open the bus door;

3) Talking to a student about being ugly like a dog and saying “I'll punch you in the mouth”.

4) Hollering “Hello, beautiful!” to a passenger in a car;

5) Letting a student get off the bus and board again at a stop other than the student's designated stop;

6) Allowing a student to rub snuff and spit out the bus window;

7) Engaging in an inappropriate conversation with a student about sex and using the word “Pussy”.

8) Commenting that you “have some stuff in my pocket that will wake you up”;

9) Using the words, “nigger”, “asshole”, “damn”, “hell”, “fuck”, “god damn you son of a bitch” in the presence of students; and

10) another instance of your working at another position on September 25-26 without proper rest in violation of WV State Transportation Regulations page 52.

> In addition, it is alleged that, on one of the opening days of the current school year, you left your bus loaded with students to get a Gatorade and then told the secretary that [the] person on duty was a “bitch”.
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> It is also alleged that, during your service as a driver for the Capital High School alternative program, you became upset when your bus was water gunned by students waiting on the bus. You took a fire axe from the bus and exited the bus to chase people on Washington Street East at Ruffner Avenue. On another occasion, you became upset when a vehicle disregarded your flashing lights, threw your flag pole out the window andstruck the vehicle. This incident occurred on Washington Street West Near Rebecca Street.

17. By letter dated January 4, 2002, Mr. Courtney advised Grievant that additional allegations of misconduct had been received, and his hearing was rescheduled for January 22, 2002. Attached to the letter was a memorandum from Mr. Beckett dated January 2, 2002, with three pages detailing events observed by Mr. Beckett on a videotape from Grievant's bus from March 30, 2001.

18. Mr. Beckett recommended to Superintendent Duerring that Grievant be disciplined. He did not ask Ms. Bowen-Kerr for her input on the recommendation.

19. A disciplinary hearing was held on January 22 and 31, 2002, before Superintendent Duerring's designee, Barbara Redman. The record does not reflect Ms. Redman's qualifications or experience in disciplinary matters. On March 26, 2002, Ms. Redman sent her findings and recommendation to Superintendent Duerring. Ms. Redman found that:

> 7.
>
> The videotapes reveal numerous and shocking examples of serious misconduct and poor judgement by Mr. Gross. The September 26th tape showed Mr. Gross's discussion about drug usage with secondary students in which he made the following comments: “I drive [a] dump truck and shit.” “They were smoking that shit.” “That's good fucking shit, real good shit.” “I hope they don't drug test me today.”
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> 8.
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> The September 28th tape from Mr. Gross's morning [run] revealed several examples of Mr. Gross failing to activate the amber flashing lights 100 to 300 feet prior to a stop in violation of West Virginia School Transportation Regulation 126CSR92, VI.B.1.(f)4.a.(1).
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> 9.
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> . . . The company for which Mr. Gross was working confirmed that Mr.

Gross drove a dump truck from 7:00 p.m. on September 24th to 4:30 a.m. on September 25th. Mr. Gross reported to work for KCS on that day at approximately 6:00 a.m. Mr. Gross again drove the dump truck from 7:00 p.m. on September 26th to 3:30 a.m. on September 27th. He did not report to work for KCS on September 27th. Mr. Gross drove the truck from 6:30 p.m. on September 27th until 3:30 a.m. on September 28th. He then reported to work for KCS at approximately 6:00 a.m.

10.

Mr. Gross's work for the other employer resulted in violations of West Virginia School Transportation Regulation 126CSR92, XI. which states as follows:

C. Any person who performs responsibilities as a bus operator shall not be eligible to operate a school bus without a minimum of six (6) consecutive hours off duty time, for proper rest, between the conclusion of the previous day's regularly scheduled afternoon run and the beginning of the next day's regularly scheduled morning run.

11.

Continuing on the September 28th tape, after dropping off students at Herbert Hoover High School's main entrance, Mr. Gross allows two female students to stay on the bus with him and stops the bus on the far end of the lot. It is not clear what the girls are doing on the bus but Mr. Gross positions them so they can't be seen by the video camera. The students may have been smoking and/or reviewing pictures. In any event, the students should not have been alone with the bus operator under those circumstances.

12.

After leaving Hoover, Mr. Gross picks up his son. While the bus is moving, the son is standing in the aisle beside Mr. Gross. There is some item that needs to be pinned on the child and Mr. Gross says “I'll pin it on you. Grab the steer[ing] wheel, you can steer.” The tape shows the bus in motion, compelling the conclusion that the student was in fact holding the steering wheel while Mr. Gross pinned the object on him. This action violated West Virginia Transportation Regulation 126CSR92, VI.C.5. which states:

No unauthorized person shall be permitted to occupy the driver's seat, drive the bus, tamper with the engine or any of its controls.

13.

Later in that same morning run, Mr. Gross makes a number of inappropriate remarks to students, including telling them to “shut up, I'm tired of hearing your mouth”, “women are good for taking men's money”, “you're ugly”, “women are only good at cooking and cleaning.” He conducts a poll among the students as to who is cute or ugly. Mr. Gross is observed to be paying more attention to his on- going dialogues with his passengers than to operating his bus.

14.

The other tapes demonstrate that the kind of conduct observed on the September tapes was not out of character for Mr. Gross. On the September 4th tape Mr. Gross lets a child operate the door, remarks to a student “you're ugly as a dog”, “come here, I'll punch you in the mouth”, whistles and says “hello, beautiful” to someone outside the bus. He also has a discussion with students about sex, including remarks about using “protection”, “withdrawal system”, “deep, wet and wild like a swimming pool”, and “pussy.”

15.

On the August 31st tape he drives off with students not seated and tells a female student that she needs to slap a male student for what he said or to kick him between the legs.

16.

On the January 24th tape where middle school students are present on his bus, Mr. Gross makes a reference to “nigger music”. Anaccident occurs and Mr. Gross leaves the bus running while he gets off to investigate. He tells a student that “she is going to be an asshole about it”, apparently referring to the other driver.

17.

On the January 23rd tape Mr. Gross uses the words “damn”, “hell”, “fuck” and “god damn you son of a bitch” in the presence of students.

18.

On the March 30th tape Mr. Gross calls a student “stupid” and discusses kissing boys, slipping the tongue in a mouth and mononucleosis. He calls a student “ugly” and talks about a strip bar the bus is passing. In reference to trains at railroad crossings, he says “I don't care if I die.”

19.

Later that same day Mr. Gross violates department procedure by using a water hose to clean the inside of his bus (this can cause damage to the floor) and leaves the bus running in excess of 90 minutes to allow the heaters to dry the floor. A substitute driver leaves with Mr. Gross to learn his afternoon run and Mr. Gross provides information and advice to the substitute, including how he drives 60 m.p.h. in a 25 m.p.h. section of highway, doesn't always use the air brake as required, and allows his high school boys to rub snuff while prohibiting the girls from smoking because the camera can see them. He comments that he would “just as soon haul niggers” in Charleston and discusses how a bus can run 75 m.p.h. on the interstate. He advises the sub that it is appropriate to pull over rather than to get back in to the terminal early and to keep his mouth shut about schedules.

20.

Testimony was received from Mr. Donald Cross, a resident of the Clendenin area about his contact with Mr. Gross. Mr. Gross intentionally ran over his property, breaking rocks and cinder blocks put there by Mr. Cross to prevent the bus from crossing the property line. Mr. Gross made an obscene gesture to Mr. Cross when passing him on the highway. Mr. Cross observed Mr. Gross failing to come to a complete stop at a dangerous intersection on at least two occasions. Mr. Cross came to the terminal to complain about Mr. Gross's actions and Mr. Gross stated that he would take care of Mr. Cross that weekend and flatten his tires. No damage was in fact done. Mr. Cross's testimony is found to be credible.

21.

Testimony was also received from David Miller, assistant principal at Capital High School, concerning events he observed while riding the alternative school bus which Mr. Gross operated while serving as a substitute about three years ago. On one occasion when driving down Washington Street, the bus was squirted by kids with water guns. Mr. Gross ran off the bus with the fire ax and briefly chased them. On another occasion a car ignored the bus's flashing stop lights. Mr. Gross threw his crossing flag out the bus window and struck the car. Mr. Miller's testimony is found to be credible.

Ms. Redman further found that Grievant failed to abide by the terms of the agreement which is detailed in Finding of Fact number 41. Ms. Redman concluded that Grievant:

> has violated several transportation rules designed to insure student safety and his interactions with students and others are totally inappropriate. He demonstrated a blatant disregard for student safety and welfare. Further, his actions are so egregious and serious that any opportunity to improve is unwarranted and would put student safety and well being in jeopardy.

She recommended that Grievant's employment be terminated.

20. By letter dated April 1, 2002, Superintendent Duerring advised Grievant:

> I am in receipt of the attached decision of my designee wherein she determined that you had committed numerous acts of serious misconduct, including profane and abusive remarks to students, inappropriate conversations with students and violations of school bus transportation procedures regarding flashing lights when stopping, adequate rest time and unauthorized persons operating a bus. I concur with my designee's findings, conclusions and recommendation.
>
> You are hereby suspended without pay effective this date and I will recommend to the Board of Education that your employment be terminated. If approved, you will be notified of appeal rights.

21. By letter dated April 9, 2002, Superintendent Duerring notified Grievant that the KBOE had voted to approve Grievant's suspension, and terminate Grievant's employment, and had adopted the findings and conclusions of the Superintendent's designee.

22. The videotape from the afternoon of September 26, 2001, revealed Grievant talking to students, and stating, “I drive a dump truck and shit. They were all smoking that shit. I said, (inaudible) why not. I hope they don't drug test me today. That's good shit man, real good shit.” The sound quality of the tape admitted into evidence at the disciplinary hearing is not good enough to support a finding that Grievant used the word “fuck” at any time on this date, and the inaudible portion noted above does not sound like this word. 23. The videotape from the morning of September 28, 2001, shows that at least four times Grievant did not activate the amber flashing lights on the bus to give warning that he would be coming to a stop.

24. The videotape from the morning of September 28, 2001, shows Grievant letting all the students off the bus at school, except two girls. He pulled the bus forward and then stopped, and engaged in a conversation with the girls, telling them to face the middle of the aisle, so they could not be seen. Grievant could not explain why he had the girls face the middle of the aisle. The videotape does not show what the girls and Grievant are doing, but there is some discussion about pictures. The videotape does not show that the girls are smoking, and this reference in Ms. Redman's recommendation is pure speculation.

25. The videotape from the morning of September 28, 2001, shows Grievant's son is on the bus. Grievant's son is not on Grievant's route, but Grievant believed Ms. Bowen-Kerr had approved of Grievant transporting his son on the bus. Grievant told his son to come and stand beside him while

he pinned something on him. Grievant then told his son to grab the steering wheel and steer. The video camera does not record the area where the bus operator sits, so it does not show Grievant's son standing in the aisle, Grievant pinning anything on his son, Grievant's son holding the steering wheel, or any non-verbal communication between Grievant and his son. It appears from the video tape that the bus continues in motion during this conversation. There were no other students on the bus while Grievant's son was on the bus. Grievant's young son testified at the Level IV hearing that he did not ever have his hands on the steering wheel or steer the bus as Grievant had instructed, and this testimony is accepted as true.

26. On the videotape of the morning of September 28, 2001, Grievant can be heard telling students to “shut up, I'm tired of hearing your mouth,” stating “women are only good for taking men's money,” and yelling “you're ugly.” Grievant admitted he said thesetypes of things to students and asked girls about their boyfriends, and saw nothing wrong with it. Grievant also asked students if particular individuals were cute or ugly, and asked who thought a particular individual was ugly, at which point, all the girls on the bus except one raised their hands. It is clear from the videotape that Grievant is joking around with the students, and that the students are joking with Grievant and enjoying themselves. Grievant's statements were not made in a malicious manner.

27. On the videotape from September 4, 2001, the bus is stopped, and Grievant can be seen getting up from his seat and standing near the front of the bus. He tells a young student, who, based upon the preceding conversation appears to be of kindergarten or first grade age, to hurry up and open the door. The videotape does not show the area of the bus where the door is opened. It is more likely than not that Grievant was allowing the young student to help him open the door, but Grievant was standing right beside the student, making sure no harm came to the student or the equipment during this process, and quite possibly had his own hand on the equipment which opens the door, assisting the student.

28. On the videotape from September 4, 2001, Grievant jokingly tells a male student he is “about as ugly as a dog,” and tells a student, “come here, I'll punch you in the mouth.” Grievant and the one to three students on the bus then howl like dogs. Someone whistles, and Grievant says, “hello, beautiful,” referring to someone outside the bus. Grievant and the few students on the bus at the time then engage in a contest to see who can whistle the loudest. Grievant continues to tease the male student after other students board the bus, referring to him as a dog, and the student tells

Grievant to quit calling him a dog. It is clear that Grievant is teasing the student, and he is not being malicious.

29. On the videotape from August 31, 2001, Grievant has a discussion with one of the male students on the bus about the student having sex. There are four or five students on the bus, and the students at the front of the bus are older male students. Thetwo older female students on the bus are sitting in the back of the bus. Grievant asks the male student if he used protection, and then if he got some protection, telling him the withdrawal system doesn't always work. He then asks if “it” was “deep, wet, and wide like a swimming pool.” As the male student departs the bus the student uses the word “pussy.” Grievant does not use this word. The student then states in reference to the remaining female student on the bus, who is the only student remaining on the bus, “that's nasty pussy.” Grievant then asks the female student if she heard what the male student said about her, and, as she was in the back of the bus, she says she did not hear him. She runs to the front of the bus and yells at the male student, asking him what he said, and then asks Grievant what he said when the male student ignores her. Grievant will not tell her what the male student said, stating he can't repeat it, but that she needs to smack the male student for it. He later says she needs to slap the male student “real good” for it, “or kick him between the legs or something.” The videotape shows students are not always seated when the bus is in motion.

30. On the videotape from the afternoon of January 23, 2001, Grievant says, “hell, no,” in a conversation with a student, and then a little later, in reference to a person who is driving a vehicle with chains on, he states, “God damn you son of a bitch.” It appears from the videotape that there are three students on the bus, and all three are older students - either high school or middle school age, and are the same students who were on the bus in Finding of Fact number 29. These are the only instances of Grievant using profanity on the bus on this videotape. Grievant did not use the word “fuck” on this videotape.

31. On the videotape from the afternoon of January 24, 2001, Grievant uses the words, “nigger music” when asking a student what kind of music he likes. This is the same student Grievant had the discussion with about sex, referred to in Finding of Fact number 29. There were four or five older Caucasian students on the bus at the time, three of whichwere the same students who were referred to in the preceding Finding of Fact. Later, after all the students had been dropped off except one female student, who appears to be high school age, Grievant's bus was involved in an accident.

Grievant stated, in reference to the other driver, “she's going to be an asshole about it.”

32. Grievant admitted he had used the term, “nigger music,” and that he had said that a woman was going to be an “ass” about an accident, in front of female students. He stated he felt it was wrong to use this language in front of the female students, and apologized to both of them and to one of their mothers.

33. On the videotape from March 30, 2001, someone uses the word “stupid,” and it appears it is Grievant. It is not clear from the videotape who Grievant is referring to, as much of the conversation is inaudible. It appears there are some cars at the school which are in Grievant's way, and that he may be referring to them. It cannot be concluded that Grievant referred to one of the students as “stupid.” Grievant later asks a female student about kissing boys, and mentions slipping the tongue in the lips, and cautions her about mononucleosis. Grievant calls a student “ugly,” and says, “I know I'm ugly.” He asks a male student if he has been in a strip bar they are passing, tells him there are pretty girls in there, and tells him he has to be 18 to get in. He says, “I don't care if I die,” “you have to die sometime,” and that if students die over the weekend he won't have to transport them on Monday. It is clear that Grievant is joking with the students, and they are joking with him, and Grievant is not being malicious.

34. The videotapes demonstrate that Grievant does not use profanity continuously in his conversations with students, nor does he use profanity when younger passengers are aboard.

35. The videotape from March 30, 2001, shows Grievant at the Elkview bus terminal, hosing out the bus, and using a broom and a mop to clean the floor. Grievant later mentions he is going to call students down for leaving packages of mustard on thebus. Bus operators are only allowed to use a water hose on the bus with the permission of their supervisor. Ms. Bowen-Kerr did not recall ever giving Grievant permission to hose out the bus. In addition, Grievant left the bus running while he hosed out the bus, and continued to let it run, for about an hour and a half, while at the bus garage. Mr. Beckett stated buses are not to be left idling for more than 10 minutes at a time. No evidence was presented that the bus was damaged from any of this.

36. On the videotape from March 30, 2001, Grievant makes a number of statements to a substitute bus operator who is driving Grievant's route, while Grievant is riding with him, about things Grievant does and does not do, which, if they were true, would be inappropriate. The record does not reflect that Grievant has any duty to train substitutes in proper procedures. (See footnote 2) Grievant

uses the word “nigger” in a conversation with the substitute, who is Caucasian. There is one male Caucasian student on the bus at the time.

37. During one week in September, during the night, Grievant was driving a dump truck for a private employer. On September 24 and 25, 2001, Grievant worked at this other job from 7:00 p.m. to 4:30 a.m.; on September 26, 2001, from 7:00 p.m. to 3:30 a.m.; and on September 27, 2001, from 6:30 p.m. to 3:30 a.m. Grievant drove a school bus on September 25, 26, and 28, 2001, beginning a little before 6:00 a.m.

38. Grievant was driving the dump truck as a favor for an acquaintance who was in a bind. Grievant asked Ms. Bowen-Kerr if he could take off work on September 25, 2001. Ms. Bowen-Kerr was aware that Grievant was driving the dump truck at night. Two other bus operators heard Ms. Bowen-Kerr tell Grievant he was young, and he could sleep between runs. Ms. Bowen-Kerr asked Grievant to drive his run on September 25, tellinghim that if he took the day off, a particular employee would have to take his run, and would miss an extended run that was coming up, which she wanted that employee to have.

39. Mr. Cross had complained to Ms. Bowen-Kerr in the Spring of 2001, about Grievant running over blocks and rocks he had placed in an area which he asserted was his property, where Grievant turned the bus around; that Grievant had blown the horn at him while he was riding his bicycle; and that Grievant had directed an obscene gesture to him. Mr. Beckett and Ms. Bowen-Kerr addressed the turnaround issue with Grievant by directing him to quit turning the bus around at the Cross property. Ms. Bowen-Kerr had previously talked with Grievant about the horn blowing and the obscene gesture. Grievant denied the allegations made by Mr. Cross at that time, and Ms. Bowen-Kerr took no further action on the matter. Ms. Bowen-Kerr then heard Grievant comment after he left her office after their discussion that he would take care of Mr. Cross that week-end, and would flatten his tires. Ms. Bowen-Kerr took no action when she heard Grievant make this comment.

40. The allegations that Grievant got off the bus with a fire axe to chase children, and that he threw his flag at a vehicle which was running his flashing lights and hit the vehicle, causing it to stop as it was required to do, occurred when he was driving the alternative school bus when he was still a substitute, meaning this occurred prior to November 1998. Grievant's supervisor was aware of both of these incidents at the time they occurred. Grievant was instructed not to throw his flag again.

41. Grievant received a one day suspension in October 2000, for fighting with another

employee. Grievant and the other employee signed an agreement dated October 25, 2000, agreeing to “conduct themselves in an appropriate and professional manner toward each other, co-workers, students and all other persons with whom they interact in the course of their duties.”

42. Grievant received a performance evaluation dated April 23, 2001. It is difficult to discern where the checkmarks were placed on the document. It is clear thatGrievant received the highest possible rating of “outstanding,” in at least four areas, including “compliance with rules,” and “quality of work.” He received the second highest rating possible, “commendable,” in a number of areas, including “follows instructions,” and “operation and care of equipment.” His overall rating was “commendable,” with no areas noted as needing improvement.

43. The record does not reflect what training KBOE provides to bus operators on proper interaction with students, or that KBOE has any policies on proper interaction with students. The record does not reflect that Grievant was ever told he was not to engage in conversations with students.

Discussion

In disciplinary matters, the burden of proof is on the employer to substantiate the charges against an employee by a preponderance of the evidence. W. Va. Code § 18A-2- 8; Perkins v. Greenbrier County Bd. of Educ., Docket No. 94-13-019 (Aug. 12, 1994). The charges must be one or more of those listed in Code § 18A-2-8. Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995). A county board of education must act reasonably, not arbitrarily or capriciously. Rovello v. Lewis County Bd. of Educ., 181 W. Va. 122, 381 S.E.2d 237 (1989). Bell v. Kanawha County Bd. of Educ., Docket No. 91- 20-005 (Apr. 16, 1991). Code § 18A-2-8 provides that an employee may be suspended or dismissed at any time by a county board of education 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. The charges shall be stated in writing served upon the employee within two days of presentation of said charges to the board.

Grievant argued that dismissal was too severe a punishment for his actions, pointing in particular to the fact that Ms. Bowen-Kerr had entered a plea of no contest to a felony grand larceny charge

eight years ago, but had not been dismissed. He also argued he wasfired because he had not done something Ms. Bowen-Kerr had wanted him to do, although he did not indicate what this was. In his post-hearing written argument, he specifically pointed to Policy 5300.

What is commonly referred to as the State Board of Education's Policy 5300 requires that an employee's termination be based upon an evaluation of job performance, and that the employee be given an opportunity to improve his performance.

> 2.6. Every employee is entitled to know how well he/she is performing his/her job, and should be offered the opportunity of open and honest evaluation of his/her performance on a regular basis. Any decision concerning promotion, demotion, transfer or termination of employment should be based upon such evaluation, and not upon factors extraneous thereto. Every employee is entitled to the opportunity of improving his/her job performance, prior to the terminating or transferring of his/her services, and can only do so with the assistance of regular evaluation.

126 C.S.R. 141 § 2.6. "The provisions of Policy No. 5300(6)(a) must be strictly construed in favor of the employee to ensure that the employee receives the full guarantee of protection intended to be encompassed by the Policy." White v. Gilmer County Bd. of Educ., Docket No. 11-87-020-3 (Nov. 20, 1987) (citations omitted). This Policy is only applicable if the actions of the employee are correctable.

The Supreme Court of Appeals of West Virginia has lent further guidance on how to resolve the conflict which seems to exist between Policy 5300 and W. Va. Code § 18A- 2-8.

> What is "correctable" conduct does not lend itself to an exact definition but must, in view of the nature of the conduct examined in Trimboli [v. Bd. of Educ. of the County of Wayne, 254 S.E.2d 561 (W. Va. 1979)], supra., and in Rogers [v. Bd. of Educ., 25 S.E.2d 537 (W. Va. 1943)], supra., be understood to mean an offense or conduct which affects professional competency.

> Accordingly, we hold that the procedures specified in West Virginia Board of Education Policy No. 5300(6)(a) must be followed in every proceeding under W.Va. Code 18A-2-8 [1969] for the dismissal of a school employee on the ground of incompetency.

> While § 5300(6)(a) does not proscribe discharge for irremediable conduct, we note that it is not the label given to conduct which determines whether § 5300(6)(a) procedures must be followed but whether the conduct complainedof involves professional incompetency and whether it directly and substantially affects the morals, safety, and health of the system in a permanent, non-correctable manner.

Mason County Bd. of Educ. v. State Supt. of Schools, 165 W. Va. 732, 739, 274 S.E.2d 435, 439 (1980).

In Mason County Board of Education the Supreme Court of Appeals of West Virginia determined that the employee's behavior involved professional competency. One of these behaviors was directing profanity at students on occasion. The employee was a principal.

Finally, in assessing the penalty imposed, "[w]hether 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). “[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 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).” Meadows v. Logan County Bd. of Educ., Docket No. 00-23-202 (Jan. 31, 2001). The first issue is whether the videotapes could be used by KBOE to review Grievant's conduct and to serve as the basis for his dismissal. Grievant argued the videotapes from prior to September 26, 2001, should not have been admitted into evidence at the disciplinary hearing before Ms. Redman, because Grievant had not been made aware that the tapes were going to be reviewed and had not been present for the viewing, relying upon the agreement made with the East Bank bus operators, and past practice. He further argued the older tapes could not be used to discipline him because these tapes had nothing to do with the original complaint. Grievant provided no authority for this argument, and the undersigned is not aware of any. Respondent argued the videotapes belonged to KBOE, and could be viewed and used by KBOE personnel as was deemed appropriate.

It is quite apparent that the videotapes were never intended to be tools to evaluate the actions of

bus operators, and have not been used for this purpose in the past. If they were an evaluation tool, KBOE personnel would periodically, randomly, review videotapes from every bus, which has not been done. In fact, KBOE entered into an agreement with some of the bus operators in the county specifically agreeing that the videotapes would not be viewed without giving the bus operator the opportunity to be present, that if the bus operator had to use the bathroom on the bus, as Grievant did, that section of the videotape would be erased (which was not done in this case), and that, although mistakes would be brought to the bus operator's attention, the videotapes would not be used for evaluation purposes. The bus operators at the East Bank terminal were, in this way, granted rights that the other bus operators in the county have not been specifically granted. Meanwhile, KBOE has not developed any policy about how the videotapes will be used. This is disturbing.

However, even the agreement with the bus operators at the East Bank terminal does not provide that a bus operator cannot be disciplined if a serious violation is foundupon review of a tape. Further, the videotapes from Grievant's bus were reviewed based upon a parent complaint, and the observations made by Mr. Beckett upon review of the first videotape, which is different from using the videotapes as an evaluation tool. As Mr. Beckett explained, Grievant was not called in to review the older videotapes because he was on suspension, and was not to be on school property, which is a valid reason for not following the usual practice. The undersigned concludes that, on these set of facts, Mr. Beckett could view the older videotapes without Grievant being notified and given the opportunity to view them with Mr. Beckett.

Finally, although Grievant did not specifically argue that his constitutional rights had been violated, it will be noted that video monitoring of employees by their employers has been addressed by the courts, and has been found constitutional in certain settings. Vega- Rodriguez v. Puerto Rico Tel. Co., 110 F. 3d 174 (1st Cir. 1997).

> Employers possess a legitimate interest in the efficient operation of the workplace, see [O'Connor v. Ortega, 480 U.S. 709, 94 L. Ed. 2d 714, 107 S. Ct. 1492 (1987)] at 723, and one attribute of this interest is that supervisors may monitor at will that which is in plain view within an open work area. Here, moreover, this attribute has a greater claim on our allegiance because the employer acted overtly in establishing the video surveillance: PRTC notified its work force in advance that video cameras would be installed and disclosed the cameras' field of vision. Hence, the affected workers were on clear notice from the outset that any movements they might make and any objects they might display within the work area would be exposed to the employer's sight.

. . .

> video surveillance is a rational means to advance the employer's legitimate, work-related interest in monitoring employee performance. See O'Connor ("Public employers have a direct and overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner."); Alinovi v. Worcester Sch. Comm., 777 F.2d 776, 782 (1st Cir. 1985) (stating that an employee's privacy interest may be lessened due to a "supervisor's
>
> > legitimate oversight responsibilities and the special duties that may be owed by the employee by virtue of his employment").

Rodriguez supra. (Footnotes omitted.) Applying this constitutional analysis to this case, the undersigned concludes that Grievant had no reasonable expectation of privacy on the school bus, and his actions as well as his conversations with students could be recorded, and may constitutionally be used to evaluate his behavior.

At the disciplinary hearing, KBOE argued Grievant had exhibited “a complete disregard for the rules and appropriate ways of operating a school bus and interacting with the students and other folks,” which amounted to insubordination and willful neglect of duty. Ms. Redman did not identify the statutory reasons for dismissal in her recommendation, nor did the dismissal letter set forth the statutory reasons relied upon. KBOE did not identify the statutory reasons at the Level IV hearing. KBOE in its written argument submitted after the Level IV hearing for the first time characterized Grievant's discussions of drug use and sex, and use of profanity as immorality. It further characterized Grievant's violation of State Board of Education policies and KBOE's policy against sexual harassment as insubordination. This was the first time Grievant was advised that his actions were considered sexual harassment, no KBOE sexual harassment policy was placed into the record, and no evidence was presented that Grievant had received sexual harassment training, or even that Grievant was aware there was a sexual harassment policy. As Grievant was not on notice that his actions were considered sexual harassment, and had no opportunity to respond to this, the undersigned will not consider whether Grievant's actions violated any KBOE policy on sexual harassment.

Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." Butts v. Higher Educ. Interim Governing Bd. No. 30120 (W. Va. June 17, 2002)(per curiam). 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 theviolation, 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). "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).

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). “Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990). This is a fairly heavy burden, given that Respondent must not only prove that the acts it alleges did occur, but also that the reason for Grievant's neglect of duty was more than simple negligence.” Tolliver v. Monroe County Bd. of Educ., Docket No. 01-31-493 (Dec. 26, 2001).

> As is apparent from the foregoing definitions, the factor which distinguishes willful neglect of duty and insubordination from unsatisfactory performance is that the employee knows her responsibilities, and is competent to perform them, but elects not to complete them. When an employee's performance is unacceptable because she does not know the standards to be met, or what is required to meet the standards, and her behavior can be corrected, the behavior is unsatisfactory performance.

Bierer v. Jefferson County Bd. of Educ., Docket No. 01-19-595 (May 17, 2002).

> Incompetence, sometimes referred to as unsatisfactory performance, refers "to the individual's ability to perform all the expectations of a position, not just one." Zimowski v. Mineral County Bd. of Educ., Docket No. 98-28-050 (July 20, 1998); Sinsel v. Harrison County Bd. of Educ.,Docket No. 96-17-219 (Dec. 31, 1996). Generally, an employee whose performance is unsatisfactory due to a lack of ability or training may be found incompetent. Wilson v. Bd. of Trustees/W. Va. Univ., Docket No. 99-BOT-115 (Dec. 21, 1999).

Hixenbaugh v. Hancock County Bd. of Educ., Docket No. 01-15-023 (Mar. 6, 2001).

“'Immorality' is defined as 'conduct not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior.' Golden v. Bd. of Educ. of County of Harrison, 285

S.E.2d 665 (W. Va. 1981)." Hayes v. Kanawha County Bd. of Educ., Docket No. 94-20-1143 (June 28, 1995). "'Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires at least an inference of conscious intent.' See Hayes, [supra], citing Youngman v. Doerhoff, 890 S.W.2d 330 (Mo. 1994)." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). Most of the cases before the Grievance Board in which immorality has been found have involved improper advances toward students, or other sexual misconduct. Sexual harassment has been found to be a "species of immorality." Harry v. Marion County Bd. of Educ., 203 W. Va. 64, 506 S.E.2d 319 (1998).

The charges against Grievant are those found in Ms. Redman's recommendation, as these were the charges presented to KBOE and voted upon by it. The other allegations in the various letters to Grievant will not be considered.

The first charges which will be addressed are the allegations made by Mr. Cross, and the allegations about Grievant's actions when he drove the alternative school bus. The first allegation by Mr. Cross which will be addressed is that Grievant failed to come to a complete stop at a stop sign on two occasions. Mr. Cross testified he observed Grievant from his home coming to what he referred to as a "California stop" on two occasions, where Grievant slowed down at the stop sign, looked, and went on. It was clear that Mr. Cross does not like Grievant, and that he did not hesitate to complain to Grievant's supervisor. There was no testimony, however, that Mr. Cross ever told Grievant's supervisor that Grievant had not come to a complete stop at the time this allegedly occurred, nor did Mr.Cross state how he could see from his home that it was Grievant driving the bus, rather than a substitute. Finally, this alleged incident occurred quite some time ago, although Mr. Cross did not remember when it occurred. The undersigned does not find Mr. Cross's testimony to be credible.

While Ms. Redman did not address Mr. Cross's allegation that Grievant was driving at an excessive rate of speed, which is mentioned in the November 16, 2001 letter to Grievant, it is important to address Mr. Cross's testimony on this issue, as it is evidence of his willingness to embellish, and his willingness to express his unsubstantiated conclusions as fact. It will be noted that there was no testimony as to the speed limit, or what speed Grievant was alleged to be going. Mr. Cross simply stated his opinion that Grievant was going too fast when he hit a bump and that this caused the students to "come up out of their seats." The undersigned finds that Mr. Cross could not know from his observation point at his home, wherever that point was, that students were coming up

out of their seats, or that Grievant was traveling in excess of the posted speed limit, whatever it was.

As to the remaining allegations made by Mr. Cross, none of this came as a surprise to Ms. Bowen-Kerr. It is crystal clear that she was well aware of Mr. Cross's complaints at the time Grievant allegedly committed these acts, and she dealt with them at that time. She decided not to take disciplinary action against Grievant based upon the allegations, and in fact, gave him a good evaluation thereafter. It is also clear that Mr. Beckett was aware of the complaints about the turnaround area, and he also decided at the time that no disciplinary action should be taken against Grievant. The undersigned finds that those responsible for bringing any improper action by Grievant to the attention of KBOE and its Superintendent determined that Mr. Cross's allegations, at the time they were made, did not warrant any disciplinary action, and clearly, this was the correct determination. The same is true of the two incidents which occurred while Grievant was a substitute driving the alternative school bus, several years ago. Grievant's supervisor was well aware of the incidents at the time they occurred, and a determination was made at that time not to discipline Grievant. In fact, Grievant was later hired by KBOE as a regular bus operator.

Before addressing the charges which stem from Mr. Beckett's review of the videotapes, it is important to make clear what can be seen and heard on the videotapes. The sound quality is poor. Often, a radio is playing loudly, and in order to hear conversations on the copies of the tapes provided for the record, the volume on the television must be turned up as loud as it will go. It is often difficult to determine who is talking. The videotapes show the bus number, the date, and the time, to the second. When flashers are activated on the bus the letters “FSH” appear on the screen, and when the bus comes to a stop and the door is opened, “STP” appears on the screen. The videotapes do not show the bus operator or students in the very front of the bus, and for long periods, nothing can be seen on the bus, apparently because it is dark outside. Respondent did not undertake to have the videotapes transcribed.

KBOE has demonstrated that Grievant did not always activate his flashers prior to stopping, did not always wait until students were seated before placing the bus in motion, let a small student help him open the door, and did not give his full attention to his driving duties as he was often engaged in conversation with students. He further came to work after working most of the night at another job. These are the only safety related charges, and, only one of these charges is so serious that it “put student safety . . . in jeopardy,” as Ms. Redman concluded. Aside from Grievant's failure to get

adequate rest, these are all minor, clearly correctable, violations, which should have been brought to Grievant's attention, and which he should have been given an opportunity to correct. It is clear that Grievant's failure to activate his flashers was due to a lack of attention to his job duties, rather than an intentional disregard of rules, and does not constitute wilful neglect of dutyor insubordination. See Via v. Monroe County Bd. of Educ., Docket No. 97-31-281 (Nov. 19, 1997).

As to Grievant's work at night driving a truck during one week in September 2001, again, the undersigned finds that Ms. Bowen-Kerr approved of Grievant driving the school bus after working most of the night, and, in fact, encouraged him to do so. Grievant asked for time off from his bus operator duties so he could get sufficient rest. However, Ms. Bowen-Kerr denied his request to further her own agenda, and told him he was young and did not need to worry about getting sufficient rest. Grievant not only had his supervisor's approval to drive a school bus after working at night at another job, but he was given the impression by her attitude toward his request for time off, that this was not of any importance. Assuming the policy cited by KBOE specifically precludes Grievant's action, once Grievant's supervisor approved the policy violation, Grievant did not possess the intent to violate the policy. See Jarvis v. Dep't of Health and Human Resources, Docket No. 97-HHR-318 (July 22, 1999). Further, Grievant did not otherwise wilfully neglect his duty, as he took steps to take time off in order to rest, but this request was denied, and his actions were specifically approved by his supervisor. KBOE did not demonstrate an intentional disregard for policy by Grievant, and obviously Grievant was not insubordinate to his supervisor. If anyone should be held accountable for this, it is Grievant's supervisor.

Ms. Bowen-Kerr admitted she had heard Grievant say he was working another job, but denied that she had told Grievant “he was young and could handle it and could sleep between runs.” She further stated she had never told Grievant he could not take the day off, and she denied that she had asked him not to take a day off because she wanted a particular person to get an extra duty run. She did admit she had called Grievant at home, but denied that she had called him frequently. The undersigned does not find Ms. Bowen- Kerr's testimony to be credible. In assessing the credibility of witnesses, some factors to be considered are the witness's: 1) demeanor; 2) opportunity or capacity to perceive andcommunicate; 3) reputation for honesty; (4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher and William C. Jackson. Representing the Agency before the United States Merit Systems Protection Board 152-153 (1984). Additionally, the

Administrative Law Judge should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; (3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Rosenau v. Tucker County Bd. of Educ., Docket No. 99-47-192 (Nov. 1, 1999); Jarvis v. W. Va. Dep't of Health and Human Serv., Docket No. 97-HHR-318 (July 22, 1999); Burchell v. Bd. of Trustees, Docket No. 97-BOT-011 (Aug. 29, 1997).

Grievant called two fellow employees as witnesses, who testified they clearly heard the conversation between Grievant and Ms. Bowen-Kerr where she told him he was young and could handle it, and could sleep between runs. These two witnesses were very clear about what they had heard, and did not hesitate in describing the incident. There was no indication that either had anything to gain from lying for Grievant.

Grievant's wife was very credible in her testimony that Ms. Bowen-Kerr had called the house so frequently that she listened in on a conversation to find out exactly what was going on. She testified she had decided not to go to the bus terminal to confront Ms. Bowen-Kerr, as she did not want to cause a scene. It is quite obvious that Ms. Bowen-Kerr called Grievant at home so frequently that Mrs. Gross became suspicious that they were having an affair. Mrs. Gross's testimony that she overheard Ms. Bowen-Kerr ask Grievant to work so that a particular employee would not get a run, and that she had called late at night and asked Mrs. Gross to have Grievant call her from his other job, was much more believable than Ms. Bowen-Kerr's denial that she had called Grievant frequently at home, her denial of any conversation with Grievant about him being able to sleep between runs, and her denial that she had ever asked Grievant to work so a particular employee wouldnot get a run. Further, these are serious matters, and Ms. Bowen-Kerr would face her own disciplinary problems if she admitted to this conduct.

Another minor violation was Grievant's use of a water hose to clean his bus. Mr. Beckett testified a water hose can damage the bus floor, which is perhaps why Grievant left the bus running to dry it out. Mr. Beckett did not testify that the bus was in fact damaged. Grievant did not deny this charge or explain what happened. The violation here is not the use of the water hose, as KBOE acknowledged there are times when it is appropriate to use the water hose to clean the bus, such as when a student vomits on the bus. The problem is that KBOE does not believe Grievant had his supervisor's permission. Assuming Grievant did not have his supervisor's permission to use the water hose on the bus, this, again is a minor policy violation, requiring nothing more than instruction not to repeat this

behavior. It will be noted that it appears Grievant used the water hose on the bus while at the bus terminal, making no effort to hide this action from his supervisor, although the record does not reflect whether his supervisor was present at the time. Grievant's supervisor did not instruct him at the time that his action was inappropriate, and did not note this action on his evaluation the next month.

As to the charge that Grievant left the bus running for 90 minutes after using the hose on the bus, Mr. Beckett testified this was improper. Even so, this also is a minor violation. Again, unless Grievant's supervisor was absent at the time this occurred, she should have been aware that a bus was running at the bus terminal for 90 minutes.

The serious problems with Grievant's actions are his use of profanity in his conversations with students, and his other interactions with students. Grievant admitted he had used profanity when he had talked to some older students. He stated that was how he was able to relate to some of the students, and that the profanity was just part of the conversation. He stated he had used profanity when he drove the alternative school bus, and thought tapes of that run had been viewed before, and no one had ever called himdown. He stated he thought he should have a second chance, and if he needed help, then he ought to be given the opportunity to obtain that help.

Respondent has clearly demonstrated that Grievant does not interact appropriately with students, and he has used profanity in the presence of students on a regular basis, in addition to his improper and derogatory references to African Americans. The question here is whether Grievant's language and his other inappropriate interactions with students are correctable, and whether they are so egregious that he does not deserve the opportunity to correct his behavior.

Grievant is not the first school employee to use profanity in the presence of students. This Grievance Board has previously considered the use of profanity by a KBOE bus operator. In McVicker v. Kanawha County Bd. of Educ., Docket No. 95-20-059 (June 5, 1995), the bus operator had been disciplined for a number of things, including directing profanity toward students. Mr. McVicker's choice of expletives was not as extensive as Grievant's. The Administrative Law Judge concluded:

> However, it is also recognized that all county board of education employees (be they professional or service) must exhibit restraint in tempering their actions and language so as not to set bad examples of behavior for the students with whom they come in contact.

. . .

> The profane language which he has admitted to using occurred at times when it is apparent that he had lost his temper. And while Grievant's language or choice or words cannot be condoned, this charge upon which the Board uses [sic] to support his termination must be viewed as a minor one.

McVicker, supra. The Administrative Law Judge ultimately determined that Respondent had not proven all the charges against Mr. McVicker, and remanded the grievance for reconsideration of the penalty.

Two points should be noted here. First, there was no demonstration that Mr. McVicker used profanity in front of students on a regular basis; although, one could argue that directing profanity at students in an out of control manner is worse than Grievant's useof profanity. Second, the decision points out that Mr. McVicker had previously received a written warning for his administration of inconsistent and ineffective discipline on the bus, and the use of inappropriate language in talking with students; and he had then received a five day suspension for inappropriate language when communicating with students, using tobacco products on the bus, and failing to stop at a stop sign. Grievant did not have the benefit of a warning or a short suspension to warn him to change his behavior.

In Trembly v. Preston County Bd. of Educ., Docket No. 00-39-355 (Feb. 28, 2001), the Administrative Law Judge noted the grievant's use of the word “shit” in the presence of students did not support a suspension, and reduced the punishment to a written reprimand, noting:

> 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.

In Trembly, the grievant had previously been told by a principal that “'the context' in which the language is used can determine whether or not it is appropriate.”

Finally, in Hixenbaugh, supra, the Administrative Law Judge determined that a suspension was too severe a penalty when the bus operator responded to an inappropriate statement by an unruly

student passenger by calling him an “asshole.” The Administrative Law Judge further found that the grievant's use of this word did not constitute insubordination, and in determining that the discipline was too severe, noted that the grievant had not been previously made aware that his performance was unsatisfactory.

Finally, as previously noted, the Supreme Court of Appeals of West Virginia in Mason County Board of Education, supra, found the employee's behavior correctable, even though one of the behaviors was directing profanity at students, and the employee was a principal. While Grievant's use of profanity was more extensive than that used by the grievants in Trembly and Hixenbaugh, Grievant did not swear continuously as he drove the bus. The videotapes demonstrate that Grievant used a few expletives in conversations with a few older students, and that he directed profanity toward other drivers when annoyed with them. Grievant's use of profanity in front of even a few older students was obviously inappropriate, as was use of the word “nigger”. However, this is not grounds for dismissal, as has been noted by this Grievance Board on several occasions. It has previously been determined that this is correctable conduct.

Grievant's conversations with students about sex, safe sex, and drug usage, and his teasing of students, calling them names, asking about boyfriends, telling students to shut up, and asking students who was cute and who was ugly, also are inappropriate behaviors, and show poor judgement. However, as noted in the Findings of Fact, the students participated with Grievant in the teasing and joking, none of this was done in a malicious manner, and the students were not placed in any danger. Grievant simply acted like one of the kids, and because of this, he got along well with the students on his bus, and had a good time.

As to the conversation about drug usage, Grievant testified he was trying to get the students to open up to him. Quite reasonably, KBOE does not want Grievant to be one of the kids, or to act as a counselor, and Grievant admitted he had not had any training that this was an accepted method of interaction. KBOE wants Grievant to set a better example. Regardless of Grievant's intention, it was improper for him to tell students he had used drugs.

Likewise, KBOE is quite correct that it was inappropriate for Grievant to keep two female students on the bus after all the other students had departed. However, it is obvious that Grievant was not engaged in sexual misconduct with these girls. This was just another example of Grievant acting like he was one of the students. It is inappropriatebehavior, but not grounds for dismissal. See Petry v.

Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

"A charge of incompetency or unsatisfactory performance may include any aspect of the job which may be reasonably expected to be performed, such as appropriate interaction with students, classroom discipline, and other assigned duties. Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996)." Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 20, 1997). A review of Grievance Board cases shows that school boards, including Kanawha County, have often warned employees that their interaction with students was inappropriate, and given them the opportunity to improve, prior to dismissal. In Atkins v. Kanawha County Board of Education, Docket No. 99-20-360 (Jan. 14, 2000), the grievant had previously been warned that his behavior would not be tolerated after students had complained about Grievant touching and hugging them, often standing at the entrance to the dressing room where he probably could see students dressing, rubbing a student on the back, rubbing a student on the stomach, attempting to hold a student's hand, asking a student, "Do you love me," touching a student's legs, and using the words "'shit', 'hell', 'damn', and 'get the hell out of here' " in class. In Bradley v. Cabell County Board of Education, Docket No. 99-06-150 (Sept. 9, 1999), the grievant, an assistant principal, was suspended for three months and demoted to a teaching position after he commented to a female high school student on different occasions, "you don't know what you do to me when you wear that type of clothing," "how am I supposed to concentrate and do my work when you're in here," "when you don't wear baggy clothing, I can't concentrate," "you turn me on," and "you still have on the same green underwear you had on last week," and after he "reached his hand down the back of her pants and grasped her underpants, pulling them up and making some comment about her underwear." The undersigned concludes that Grievant's behavior doesnot warrant dismissal. However, his inappropriate conduct obviously warrants disciplinary action.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. In disciplinary matters, the burden of proof is on the employer to substantiate the charges against an employee by a preponderance of the evidence. W. Va. Code § 18A-2-8; Perkins v. Greenbrier County Bd. of Educ., Docket No. 94-13-019 (Aug. 12, 1994). The charges must be one or more of those listed in Code § 18A-2-8. Stover v. Mason County Bd. of Educ., Docket No. 95-26-078

(Sept. 25, 1995). A county board of education must act reasonably, not arbitrarily or capriciously. Rovello v. Lewis County Bd. of Educ., 181 W. Va. 122, 381 S.E.2d 237 (1989). Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). That Code Section provides that an employee may be suspended or dismissed 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. The charges shall be stated in writing served upon the employee within two days of presentation of said charges to the board.

2. What is commonly referred to as the State Board of Education's Policy 5300 requires that an employee's termination be based upon an evaluation of job performance, and that the employee be given an opportunity to improve his performance.

> 2.6. Every employee is entitled to know how well he/she is performing his/her job, and should be offered the opportunity of open and honest evaluation of his/her performance on a regular basis. Any decision concerning promotion, demotion, transfer or termination of employment should be based upon such evaluation, and not upon factors extraneous thereto. Every employee is entitled to the opportunity of improving his/her job performance, prior to the terminating or transferring of his/her services, and can only do so with the assistance of regular evaluation.

126 C.S.R. 141 § 2.6. "The provisions of Policy No. 5300(6)(a) must be strictly construed in favor of the employee to ensure that the employee receives the full guarantee ofprotection intended to be encompassed by the Policy." White v. Gilmer County Bd. of Educ., Docket No. 11-87-020-3 (Nov. 20, 1987) (citations omitted). This policy is only applicable if the actions of the employee are correctable.

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). 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). "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).

4. 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). "Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990). This is a fairly heavy burden, given that Respondent must not only prove that the acts it alleges did occur, but also that the reason for Grievant's neglect of duty was more than simple negligence." Tolliver v. Monroe County Bd. of Educ., Docket No. 01-31-493 (Dec. 26, 2001). 5. "'Immorality' is defined as 'conduct not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior.' Golden v. Bd. of Educ. of County of Harrison, 285 S.E.2d 665 (W. Va. 1981)." Hayes v. Kanawha County Bd. of Educ., Docket No. 94-20-1143 (June 28, 1995). "'Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires at least an inference of conscious intent.' See Hayes, [supra], citing Youngman v. Doerhoff, 890 S.W.2d 330 (Mo. 1994)." Petry v. Kanawha County Bd. of Educ., Docket No.96-20-380 (Mar. 18, 1997). Sexual harassment has been found to be a "species of immorality." Harry v. Marion County Bd. of Educ., 203 W. Va. 64, 506 S.E.2d 319 (1998).

6. "A charge of incompetency or unsatisfactory performance may include any aspect of the job which may be reasonably expected to be performed, such as appropriate interaction with students, classroom discipline, and other assigned duties. Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996)." Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 20, 1997).

7. Grievant's use of profanity, the word "nigger," and his discussions with students about sex and drug usage, were improper for a school employee.

8. Grievant's failure to activate his flashing lights on a few occasions, allowing a small student to assist him in opening the bus door, and his failure to wait until all students were seated before moving the bus were negligence, not willful neglect of duty or insubordination. See Via v. Monroe

County Bd. of Educ., Docket No. 97-31-281 (Nov. 19, 1997). Grievant is entitled to be warned about these behaviors, and given the opportunity to improve.

9. As Grievant's supervisor approved of Grievant driving the school bus without sufficient rest, and in fact asked him to do so when he asked for time off work, Grievant didnot possess the intent to violate policy, and was not guilty of insubordination or willful neglect of duty with regard to this action. See Jarvis v. Dep't of Health and Human Resources, Docket No. 97-HHR-318 (July 22, 1999).

10. Grievant's use of a water hose on the bus, and leaving the bus running for approximately 90 minutes, without his supervisor's approval, represent insubordination. However, these are minor violations.

11. Grievant's joking, non-malicious interaction with students, which did not place any students in danger, while inappropriate, is correctable behavior. Respondent was required to bring to Grievant's attention that his behavior was inappropriate, and provide him the opportunity to improve.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant to his position as a bus operator, to pay him back pay and benefits from the date of his dismissal to the date of his reinstatement, plus interest, less fifteen days' pay, to credit him with seniority and any other benefits from that date, and to place Grievant on a plan of improvement designed to correct his behavior.

Any party may appeal this Decision to the Circuit Court of Kanawha 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: August 30, 2002

Footnote: 1

A Level IV hearing was held on May 29, 2002. Grievant was represented by Rosemary Jenkins, and Respondent was represented by James W. Withrow, Esquire. This grievance became mature for decision upon receipt of the last of the parties' written arguments on July 16, 2002.

Footnote: 2

Grievant's statements to a substitute about what he does and does not do on the bus do not amount to proof that he in fact does or does not do these things, and will not be considered by the undersigned.