JOHN HEASTER,

Grievant,

v.

DOCKET NO. 02-13-196

GREENBRIER COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, John Heaster, filed this grievance against his employer, the Greenbrier County Board of Education ("Board"), on June 26, 2002, following a disciplinary hearing before the Board held on June 24, 2002: (See footnote 1)

> Grievant, a regularly employed school bus operator, has been suspended without pay for twelve days on the grounds that he tampered and overrode the child safety switch on his school bus. The Grievant alleges a violation of West Virginia Code § 18-2-8 and § 18A-2-7.
>
> Relief sought: Grievant requests retroactive wages, benefits, regular employment seniority, and interest on all monetary sums. Grievant also seeks the removal of any records pertaining to this suspension and dismissal from all records maintained by the Respondent.

Following the Board's disciplinary hearing on June 24, 2002, Grievant filed this grievance directly to level four as is permitted by W. Va. Code § 18A-2-8, and a level four hearing was held in the Grievance Board's Beckley, West Virginia, office, on August 20,2002. The matter became mature for decision on September 20, 2002, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by John E. Roush, Esq., West Virginia School Service Personnel Association, and the Board was represented by Erwin Conrad, Esq.

SUMMARY OF EVIDENCE

Joint Exhibit

Ex. 1 -

May 21, 2002 letter from Stephen Baldwin to John Heaster; May 28, 2002 letter from John Everett Roush to Stephen Baldwin.

Board Exhibits

Ex. 1 -

Piece of wire.

Ex. 2 -

May 21, 2002 letter from David L. Nalker to Kenneth Baker, with attachments; invoice from Mountain International Trucks, Inc. dated May 15, 2002.

Testimony

Grievant testified in his own behalf, and presented the testimony of Sandy Aldridge and James C. Cales. The Board presented the testimony of Fred Roth, David Workman, Kenny Baker, and Stephen Baldwin.

Based upon a review of the record in its entirety, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant is employed by the Board as a bus operator, and has been so employed for 17 years.

2. The bus assigned to Grievant is equipped with a “Child Monitor Device,” (“CMD”). The purpose of the CMD is to remind drivers to walk through their bus at the end of each run, to make sure all children are off the bus. The CMD is an alarm device whichrequires the bus operator to walk

to the rear of the bus and press a deactivation button within 30 to 60 seconds of turning off the engine. If the button is not pushed within that time limit, the bus horn starts blowing.

3. Grievant had been operating the bus with the CMD since its purchase, or approximately two years.

4. The minimum standards for the school buses under 126 C.S.R. 89 require buses purchased after April 18, 1999, to have an operational CMD.

5. Several weeks prior to May 7, 2002, the AM/FM radio on Grievant's bus was stolen. The radio was part of the equipment that came from the factory.

6. Grievant spoke with the head mechanic, Jim Workman, to see if the Board would replace the radio. (See footnote 2) Jim Workman advised Grievant the Board would not purchase the radio, nor would the mechanics install it. However, bus operators were permitted to purchase and install radios at their own expense.

7. On May 7, 2002, Jim Cales, a bus operator, agreed to help Grievant install the radio and hook up the speakers. Mr. Cales had an hour between 8 a.m. and 9 a.m. to work on the speakers before he had to take some students on an activity run. He and Grievant planned for Mr. Cales to use Grievant's bus for the activity run, and then drop off the bus at the garage for the mechanics to examine it because of an oil leak.

8. Grievant deactivated the CMD so he would not be required to go to the back of the bus and push the button every time he turned the ignition on and off while testingthe speakers. He fashioned a wire that served as a bypass device, which was placed behind the button. Grievant did not have to remove the entire panel to install this device.

9. As soon as he and Grievant were finished, Mr. Cales left for his activity run. Grievant forgot to disable the bypass device before Mr. Cales left for his run.

10. After completing his activity run, Mr. Cales took the bus to the garage. Fred Roth, a mechanic, got in the bus and noticed the CMD did not activate when he turned the ignition off. The bus was going to be taken back to the manufacturer for repair of the oil leak, and Mr. Roth made a note that the manufacturer should look at the CMD as well.

11. When David Workman, a mechanic, went to pick up the bus from the manufacturer, he was given a piece of wire that was found behind the CMD button which served to deactivate the alarm. David Workman took the wire back to the garage, and gave it to his supervisor, Kenny Baker.

12. Mr. Baker asked Grievant if he had installed the bypass wire, and he admitted he had.

13. Mr. Baker discussed the matter with Wayne Clutter, the State Transportation Director, who recommended a minimum 30-day suspension without pay.

14. Mr. Baker and Superintendent Baldwin discussed the matter, and based on Grievant's lengthy, unblemished work record, the Superintendent recommended a 16-day suspension, which would carry through the remainder of the school year.

15. On June 24, 2002, after a disciplinary hearing, the Board voted to accept the Superintendent's recommendation.

DISCUSSION

In a disciplinary matter the burden is upon the Board to prove the charges against the 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 authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8 as amended and must be exercised reasonably, not arbitrarily or capriciously. Rovello v. Lewis County Bd. of Educ., 181 W. Va. 122, 381 S.E.2d 237 (1989). Bell v. Lincoln County Bd. of Educ., Docket No. 91-20- 005 (Apr. 16, 1991); Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995). W. Va. Code § 18A-2-8 provides that an employee may be suspended or dismissed at any time by a county board for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, a felony conviction, entry of guilty plea or a plea of nolo contendere to a felony charge.

Grievant was charged by the Board with willful neglect of duty for tampering with and overriding the CMD safety device on his bus. (See footnote 3) Grievant admits he deactivated the CMD, but contends his conduct does not fall within any of the W. Va. Code § 18A-2-8 causes for discipline. Rather, Grievant avers he made a mistake from which no harm ensued, and a 16-day suspension without pay is simply too harsh a penalty.

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). Wayts v. Wetzel County Bd. of Educ., Docket No. 02-52-011 (Apr. 12, 2002); Sinsel v. Harrison County Bd. of

Educ., Docket No. 96-17-219 (Dec. 31, 1996).

The Board has proven the charge of willful neglect of duty. Grievant admitted he intentionally deactivated the CMD while working on his bus speakers so that he would not have to disengage it every time he turned the ignition on and off. While the undersigned believes Grievant did not intend for the CMD to be deactivated permanently, he did nevertheless tamper with the device and deactivate it.

The argument Grievant's suspension is excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

"When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997). Mitigation of a penalty is considered on acase by case basis. Conner v. Barbour County Bd. of Educ., Docket No. 95-01-031 (Sept. 29, 1995); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995).

A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. Pingley v. Div. of Corrections, Docket No. 95-CORR-252 (July 23, 1996). This Grievance Board has held that "mitigation 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 will not substitute her judgement for that of

the employer. Cooper v. Kanawha County Bd. of Educ., Docket No. 02-20-097 (July 31, 2002); 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).

In the instant case, Grievant has a lengthy and unblemished history of employment with the Board, and is considered a valuable employee. In determining the length of suspension, Superintendent Baldwin took these matters into account in fixing the term at16 days, despite the recommendation of Wayne Clutter, the State Transportation Director, of a term not less than 30 days. Because the Superintendent and the Board already carefully weighed these factors in imposing Grievant's suspension, the undersigned cannot find the penalty to be clearly excessive or arbitrary and capricious.

CONCLUSIONS OF LAW

1. In a disciplinary matter the burden is upon the Board to prove the charges against the 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 authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8 as amended and must be exercised reasonably, not arbitrarily or capriciously. Rovello v. Lewis County Bd. of Educ., 181 W. Va. 122, 381 S.E.2d 237 (1989). Bell v. Lincoln County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991); Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995).

2. W. Va. Code § 18A-2-8 provides that an employee may be suspended or dismissed at any time by a county board for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, a felony conviction, entry of guilty plea or a plea of nolo contendere to a felony charge.

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). "It encompasses something more serious than 'incompetence.'" Bd. of Educ. v. Chaddock,183 W. Va. 638, 398 S.E.2d 120, 122 (1990). Wayts v. Wetzel County Bd. of Educ., Docket No. 02-52-011 (Apr. 12, 2002); Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996).

4. The Board has proven by a preponderance of the evidence that Grievant's conduct in tampering with and deactivating the CMD constitutes willful neglect of duty.

5. The argument Grievant's suspension is excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

6. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997).

7. Grievant has failed to prove by a preponderance of the evidence that the Board's imposition of a 16-day suspension without pay was clearly excessive, or arbitrary and capricious.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Greenbrier County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: October 17, 2002

Footnote: 1

The transcript from the Board's disciplinary hearing has been incorporated into the record per the agreement of the parties, and references to the transcript will be "Tr. p. ___" and "____ Exh. ___."

Footnote: 2

Jim Workman, the head mechanic, should not be confused with Dave Workman, a mechanic, who testified at the hearing before the Board.

Footnote: 3

The Board argued for the first time in its post-hearing brief that Grievant was guilty of insubordination. This charge was not presented to Grievant before his disciplinary hearing, nor before the level four hearing, leaving Grievant with no opportunity to defend himself against it. Therefore, the charge of insubordination will not be considered.