HESSIE GUNNELLS,

Grievant,

v.

DOCKET NO. 03-23-135

LOGAN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Hessie Gunnells ("Grievant") filed this grievance against her employer, the Logan County Board of Education ("Board") on May 27, 2003:

> I am grieving suspension from May 5 through May 7th. (1) The discipline was flawed. (2) The imposed discipline was more severe than the mistake.
>
> Relief sought: 3 days pay and restore seniority.

The grievant was filed directly to level four of the grievance process, and a level four hearing was held on July 24, 2003. Grievant was represented by Cecil H. Spry, Amalgamated Transit Union, Local 1539, and the Board was represented by Leslie Tyree, Esq. This matter became mature for decision on August 15, 2003, the deadline for the parties' submission of proposed findings of fact and conclusions of law.

SUMMARY OF EVIDENCE

Board Exhibits

Ex. 1 -

May 2, 2003 letter from David Godby, Superintendent, and Dr. Pat J. White, Asst. Superintendent to Hessie Gunnells.

Ex. 2 -

W. Va. School Transportation Regulations (4336), § 126-92-1, et seq.

Ex. 3 -

Logan County Schools Pupil Transportation Rules and Regulations.

Grievant's Exhibits

None.

Testimony

The Board presented the testimony of Dr. Pat J. White. Grievant testified in her own behalf, and presented the testimony of Michael Johnson, Debra Coply, Olive Smith, and Terry Garnes.

The material facts in this case are not in dispute, and are set forth in the following Findings of Fact.

FINDINGS OF FACT

1. Grievant is employed by the Board as a Bus Operator, and has been so employed for at least twenty years.

2. During the 2002-2003 school year, Grievant drove a special needs bus.

3. On the morning of May 1, 2003, Grievant picked up Dorothea Dingess, a special needs student at West Chapmanville Elementary, at her home as usual. The student's mother told Grievant she would not be there in the afternoon to receive the child, but that her father would be home.

4. That afternoon, Grievant picked up Dorothea for her afternoon delivery home.

5. When Grievant arrived at the home, no one was there to receive the child. 6. A neighbor came out and told Grievant that Dorothea's father had left for a moment, but would be back, and that she (the neighbor) would take responsibility for Dorothea.

7. Grievant left Dorothea with the neighbor.

8. All of the Board's school buses are equipped with radios. Grievant did not radio back to the school to report that no one was home to receive Dorothea, or to inform the school she was leaving Dorothea with the neighbor.

9. Dorothea's parents had not given written permission to the school for her to be left in anyone else's care after school.

10. State School Transportation Regulations provide that “[b]us operators will pick up and discharge passengers only at their designated stop(s). Any exception shall be clearly stated in the written county school transportation policy.” Bd. Ex. 2.

11. Logan County Pupil Transportation Rules and Regulations provide that “STUDENTS ARE TO BE RELEASED ONLY TO PARENTS OR GUARDIAN.” Bd. Ex. 3 (emphasis in original).

12. Grievant is aware of the standard policies with respect to discharging students, and admitted she made a mistake in leaving Dorothea in the care of the neighbor without prior written permission or authority.

13. Superintendent David Godby and Assistant Superintendent Dr. Pat J. White notified Grievant by letter dated May 2, 2003, that she was being suspended for three days without pay as a result of her mistake. Bd. Ex. 1.

DISCUSSION

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dept. of Health and

Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.; See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

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. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975). W. Va. Code § 18A-2-8 provides, in pertinent part:

> Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendre to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee evaluation pursuant to section twelve of this article.

The Board suspended Grievant for three days without pay for willful neglect of duty in discharging a special needs student to someone other than her parents or guardian without prior written permission or authority. To prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990). Although the West Virginia Supreme Court has not formulated a precise definition of “willful neglect of duty,” it does encompass something more serious than incompetence and imports “a knowing and intentional act, as distinguished from a negligent act.” Chaddock, supra.

Grievant admits she left the student in the care of a neighbor, and that she was aware that State and Board policies prohibited her from doing so. Therefore, the Board has proven the charges against Grievant.

Grievant contends, however, that the blame does not rest entirely with her, and that the penalty is too severe and should be mitigated. The employee bears the burden on any defense raised to the charges. Parham v. Raleigh County Bd. of Educ., Docket No. 91-41- 131 (Nov. 7, 1995). The undersigned may mitigate the discipline imposed if the penalty assessed is clearly excessive or clearly disproportionate to the offense. Factors to beconsidered in this analysis include the

employee's past disciplinary record, the clarity of notice to the employee of the rule violated, whether the employee was warned about the conduct, and mitigating circumstances. Knuckles/Burdette v. W. Va. State College, Docket No. 99-BOD-123/131 (Sept. 28, 1999); Jarvis v. W. Va. Dept. of Health and Human Resources, Docket No. 97-HHR-318 (July 22, 1999); Stewart v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91-ABCC-137 (Sept. 19, 1991).

Michael Johnson, Principal of West Chapmanville Elementary, testified that on the afternoon of May 1, 2003, the school received a telephone call from one of Dorothea's parents, instructing that Dorothea should not be put on the bus that afternoon, because she would be picked up at school. Debra Coply, the school secretary, confirmed that she had received the call. She further stated it had been a hectic day, and she almost forgot about the call until late that afternoon, when she told a custodian to relay the message to Dorothea's aide.

Olive Smith, Dorothea's aide, testified she did not receive any message regarding Dorothea that day, and only became aware of the message after Dorothea had been put on the bus. Apparently, no one at the school attempted to contact Grievant through her bus radio that Dorothea was not to be on the bus.

Dorothea's mother came to the school that afternoon to pick up her daughter, who had already been put on the bus and transported home. When Grievant returned to the school, her bus aide, Terry Garnes, saw Dorothea's mother in the school office. She told her they had not received any message about Dorothea, and had left her with the neighbor.

Grievant argues that had the message from Dorothea's mother been relayed as it should have been, she would never have been put in the situation which caused her toleave Dorothea with the neighbor. Grievant concludes that these factors should result in a mitigation of her penalty. Grievant's argument is not persuasive.

Grievant was well aware of the State and Board policies prohibiting bus operators from leaving students with anyone other than their parents or guardians without prior written approval. She knew when she left Dorothea she was not permitted to do so, and admits making the mistake. Grievant's decision to leave Dorothea with the neighbor was entirely her own, and any failure of the school personnel to relay the message that Dorothea was not to be put on the bus is completely irrelevant to Grievant's choice. This situation reminds the undersigned of the old television ad warning people not to leave their keys in their car to prevent “a good kid from going bad.” A kid's choice to steal a car

does become less of a choice just because someone left their keys in the car. Likewise, Grievant's choice to disobey the standard policies of the Board in leaving Dorothea with a neighbor does not become less of a choice because the school failed to relay the mother's message.

CONCLUSIONS OF LAW

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). 1997).

2. 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. Bell v. Kanawha CountyBd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

3. W. Va. Code § 18A-2-8 provides, in pertinent part:

> Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendre to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee evaluation pursuant to section twelve of this article.

4. To prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990). Although the West Virginia Supreme Court has not formulated a precise definition of “willful neglect of duty,” it does encompass something more serious than incompetence and imports “a knowing and intentional act, as distinguished from a negligent act.” Chaddock, supra.

5. The Board has proven Grievant's act in leaving a student with a non- authorized person constitutes willful neglect of duty.

6. The discipline imposed may be mitigated if the penalty assessed is clearly excessive or clearly disproportionate to the offense. Factors to be considered in this analysis include the

employee's past disciplinary record, the clarity of notice to the employee of the rule violated, whether the employee was warned about the conduct, and mitigating circumstances. Chaddock, supra; Knuckles/Burdette v. W. Va. State College, Docket No. 99-BOD-123/131 (Sept. 28, 1999); Jarvis v. W. Va. Dept. of Health and HumanResources, Docket No. 97-HHR-318 (July 22, 1999); Stewart v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91-ABCC-137 (Sept. 19, 1991).

7. Grievant has failed to establish any affirmative defenses, and failed to prove her suspension was clearly disproportionate to her misconduct.

Accordingly, this grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Logan County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: August 21, 2003