ROGER K. OPEL,

Grievant,

v. Docket No. 02-39-372

PRESTON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

___Grievant, Roger K. Opel, employed by the Preston County Board of Education (Respondent) as a bus operator, filed a grievance directly to level four, as is permitted by W. Va. Code § 18-29-4(c), after being suspended without pay for three days. Grievant requests that the suspension be rescinded, lost compensation, legal fees, a public apology, removal of all false accusations from his personnel file, and no further reprisals be taken. A level four hearing was conducted on February 28, 2003, at which time Grievant was represented Jeffrey D. Cramer, Esq., of Berry, Kessler, Crutchfield, & Taylor. Respondent was represented by Kimberly S. Croyle, Esq., of Bowles Rice McDavid Graff & Love. The matter became mature for decision upon receipt of the parties proposed findings of fact and conclusions of law on March 24, 2003.

Background

By letter dated October 2, 2002, Preston County Superintendent, Dr. Tauna J. Cole, notified Grievant that he would be suspended, with pay, beginning immediately, for five days. The purpose of this suspension was to
allow time for an investigation into allegations that you havethreatened the welfare and safety of the students in your care. Specifically, for neglect of duty and cruelty to students. Examples of allegations include the use of profanity and improper use of braking whereby students were put at risk.

On October 4, 2002, Lance Steelman, Director of Transportation, recommended to Dr. Cole that appropriate disciplinary action be taken due to "allegations by parents involving safety and proper conduct on the bus operators part." Dr. Cole notified Grievant that she would

recommend that he be suspended for three days without pay, for cruelty, insubordination and willful neglect of duty. "Specifically, you failed to respond to students in an appropriate manner and made cruel statements resulting in a hostile invironment and causing students to become fearful". Following a hearing held on October 28, 2002, PCBE ratified the five-day suspension with pay, and the three-day suspension without pay.

The following findings of fact are derived from the evidence submitted at level four.

Findings of Fact

1. Grievant has been employed by Respondent as a bus operator for thirteen years. Grievant's run during the 2002-2003 school year requires that he transport sixty-five to seventy-five students, grades K-12, for as long as one hour and forty-five minutes.

2. On August 28, 2002, Linda Pyles, grandmother of two children who ride Grievant's bus, called PCBE to complain that it had been reported to her that Grievant was using unacceptable language on the bus.

3. On September 23, 2002, Bradley Lawson contacted Dr. Cole to complain that Grievant had "yelled" in his eight year old son's face, and called the students "stupid idiots." Mr. Lawson expressed concern that his son no longer wanted to go to school as a result of this incident. The reason for Grievant's alleged behavior was that the student hadmarked on the seat with a marker.

4. As a result of these and other complaints, Dr. Cole directed Mr. Steelman to conduct an investigation of Grievant's behavior. Either the school principal or guidance counselor met with the students who ride Grievant's bus, some individually and others in a group, and asked the following four questions: 1) Are there anythings [sic] that could be improved on the bus; 2) Has there been inappropriate language used on the bus - who has been using it; 3) Did anything happen last week that we should know about; and, 4) Is there [anything] happening on the bus we should be aware of?

5. Many of the students responded that Grievant shouted at them, called them names, cursed, made the younger students cry, and slammed on the brakes of the bus to quiet them down.

6. Parent Kelly Jenkins called Mr. Steelman on September 26, 2002, to complain that Grievant had moved her son to the front seat of the bus and told him "to keep his mouth shut

or he would lose his job."

7. Similar complaints regarding Grievant were filed by parents in 1991, 1994, 2000, and 2001. Eleven complaints of a similar nature were made during the 2000-2001 school year. By memorandum dated October 16, 2000, then Transportation Director E. Gene Davis advised Grievant that he had received six complaints from parents. All of the parents were concerned about his "slamming on the brakes," and five complained about his screaming at the students. Mr. Davis recommended that Grievant not yell or scream at the students. Mr. Steelman spoke with Grievant regarding parental complaints twice during the 2001-2002 school year. Grievant denied the allegations during both these discussions. 8. Grievant was placed on a plan of improvement in October 2002, to "improve his behaviors and interactions with the children in his care". Grievant's bus was equipped with a video camera at this time, and the tapes will be reviewed periodically.

Discussion

In disciplinary matters, the employer bears the burden of proving the charges by a preponderance of the evidence. W. Va. Code §§18-29-6; 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). A preponderance of the evidence is evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proven is more probable than not. It may not be determined by the number of witnesses, but by the greater weight of all evidence presented, which means that such factors as opportunity for knowledge, information possessed, and manner of testifying determines the weight accorded to testimony rather than the greater number of witnesses. See Black's Law Dictionary 1344-45 (4th ed. 1968); Wilkerson v. Lincoln County Bd. of Educ., Docket No. 99-22-420 (Mar. 27, 2000); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

Respondent argues that the suspensions, with and without pay, were appropriate given

Grievant's history of intimidating students. In addition to the notes taken from the student interviews, a senior high school student testified that she had witnessed Grievantslamming on the brakes, getting in a student's face, and using inappropriate language. Five parents consistently testified of Grievant's actions, as reported to them by their children and/or older students.

Grievant concedes that he once made a comment to the effect that "eighty percent of the world is idiots and most of them are on this bus," and that it was probably inappropriate. He also admits to yelling "shut up," which he believes to be language familiar to the students. Grievant denies ever using profanity. Grievant further admits to hitting the brakes suddenly because the road is narrow, and visiblity limited, but insists that he does not do it to quiet the students. Grievant concludes that his own son rides the bus, and he would be equally at risk. Grievant concludes that Respondent has not proven the charges stated by Dr. Cole in the October 10, 2002, letter.

Because Grievant's testimony is contradicted by that of Respondent's witnesses, it is necessary to make a determination as to credibility. In assessing the credibility of witnesses, some factors to be considered are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 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).

The extraordinary number of complaints from parents and students have consistently addressed Grievant's inappropriate use of language and braking the bus. These complaints have been ongoing for more than eleven years. Grievant's opinion that these individuals are lying, or misperceive the situation, is not supported by the evidence, and his testimony is not credible. Therefore, it is appropriate to determine whether the evidence supports the charges.

W. Va. 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.

Cruelty includes deliberately seeking to inflict pain and suffering. Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990). Behavior directed toward a student, to include slapping the student, without the need for self-defense, meets this definition. Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996). See Eggleston v. Greenbrier County Bd. of Educ., Docket No. 94-13-395 (Dec. 29, 1994). 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., ___W. Va.___, 569 S.E. 2d 456 (2002). In order to establish insubordination, an employer must demonstrate that a policyor 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).

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). "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).

In the present case, braking the bus, which could cause physical harm to students, could be considered cruelty when the purpose is to cause the children to be quiet. Both the braking

and yelling were intentional, and having been warned to cease such actions, constituted insubordination. Therefore, Respondent has proven the charges upon which the suspension was based by a preponderance of the evidence.

However, it is noted that the evidence suggests that Grievant's actions arise from an inability to maintain discipline on his bus. It may be that Grievant simply has been given no training on how to deal with the students while on the bus. The situation is undoubtedly complicated by the fact that his run is so long. Students who are tired and bored will be difficult. Generally, an employee whose performance is unsatisfactory due to a lack of ability or training may be found incompetent. Hixenbaugh v. Hancock County Bd. of Educ.,Docket No. 01-15-023 (Mar. 6, 2001); Wilson v. Bd. of Trustees/W. Va. Univ., Docket No. 99-BOT-115 (Dec. 21, 1999). If a lack of training is indeed the cause of Grievant's behavior, Respondent should provide him with assistance during his period of improvement.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of proving the charges by a preponderance of the evidence. W. Va. Code §§18-29-6; 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).

2. 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. W. Va. Code § 18A-2-8.

3. Cruelty includes deliberately seeking to inflict pain and suffering. Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990). Behavior directed toward a student, to include slapping the student, without the need for self-defense, meets this definition. Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996). See Eggleston v. Greenbrier County Bd. of Educ., Docket No. 94-13-395 (Dec. 29, 1994).

4. 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., ___ W. Va. ___, 569 S.E. 2d 456 (2002).

5. 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). "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).

6. In assessing the credibility of witnesses, some factors to be considered are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; (4) attitude toward the action; and 5) admission of untruthfulness. 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).

7. Respondent has proven the charges by a preponderance of the evidence, and the suspensions are therefore upheld.

Accordingly, the grievance is DENIED.

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

DATE: APRIL 15, 2003 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE