STEPHEN JOHNSTON,

Grievant,

v. **Docket No. 04-31-234**

MONROE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Stephen Johnston, an employee of the Monroe County Board of Education ("MCBOE"), filed this grievance on June 16, 2004. His Statement of Grievance (See footnote 1) reads:

> Grievant, a substitute bus operator, was suspended for thirty days without pay by the Respondent. Grievant contends he did nothing worthy of a suspension and alleges a violation of West Virginia Code §§ 18A-2-8 & 18A- 2-12.
>
> Relief sought: Grievant seeks reinstatement, back pay with interest for all wages lost during his suspension, reinstatement of seniority lost by the suspension, and removal of all references to the suspension from his file.

As this grievance concerned a suspension, it was filed directly to Level IV. A hearing was held on August 9, 2004, at the Grievance Board's Beckley Office. (See footnote 2) This case became mature for decision on September 9, 2004, after receipt of the parties' proposed findings of fact and conclusions of law.

The parties agreed to utilize the pre-disciplinary hearing transcript instead of taking extensive testimony at the Level IV hearing. The parties also agreed that the pre-disciplinary hearing transcript and the Level IV hearing of a companion case, Hodges v. Monroe County Board of Education, Docket No. 04-31-233 should be used in this case. After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed as a substitute bus operator for five years. He is near the top

of the substitute list in seniority. Grievant has a good work record.

2. Grievant had driven the Special Education route in question one time a couple of months before the incident. As with all Special Education buses, there is a packet on the bus telling the driver the information about his passengers. Grievant did not review this packet prior to performing the run.

3. Student BM was on this run as was Sandra Hodges, the regular Aide assigned to care for BM. (See footnote 3)

4. BM is 13 years old and is considered "medically fragile." He is paralyzed from the waist down, has recurring urinary tract infection, cerebral palsy, hydrocephalus, and cannot communicate verbally. Because of paralysis he is confined to a wheelchair and has very brittle bones. He recently fractured a femur while he was being turned/ repositioned. BM seldom cries at school and is usually calm and happy. The one day BM cried all day, the teacher called CM, his father, who took the child home.

5. BM has an older brother, BBM, who is also in a wheelchair. BBM also has an aide, but she does not ride the bus home with him. BBM and BM ride the same bus. 6. On May 14, 2004, Grievant drove BM's bus route, and CM put his son on the bus in the morning as usual. His son was suffering from a urinary tract infection, but was calm and able to attend school.

7. During the day, the occupational therapist saw BM from 8:30 a.m. to 9:00 a.m. She noted BM was asleep until she used a cold cloth to increase BM's alertness. BM did not participate in any of his activities.

8. The nurse's notes for May 14, 2004, noted BM had been sleeping most of the day but could be awakened. Although not reflected by the nurse's notes, the nurse usually visits BM around lunch time.

9. The teacher's notes for May 14, 2004, stated, "O.T. puts cool paper towel on student's face to wake him up for therapy. Otherwise student sleeps all day and snores." Exh. 2, Pre-disciplinary hearing.

10. BM lives a short distance from the school, approximately two blocks. On May 14, 2004, Grievant drove BM home from school. He operated the wheelchair lift to place BM on the bus, and Ms. Hodges strapped BM's wheelchair to the vehicle. Grievant asked Ms. Hodges if she needed any assistance in strapping the wheelchair, and Ms. Hodges replied in the negative. Grievant did not check the wheelchair to see if it was properly attached to the floor of the bus.

11. Grievant did not receive any specific training on how to strap a wheelchair onto the bus during his orientation. (See footnote 4) 12. Ms. Hodges did not securely place the straps on the wheelchair.

13. The bus went short distance to a stop sign. After the stop sign, Grievant made a left turn and then Grievant heard Ms. Hodges yell for help. He saw the wheelchair on the floor of the bus on its right side.

14. Grievant properly stopped the bus and assisted Ms. Hodges in setting the wheelchair upright.

15. Edward Looney was on the street and saw the wheelchair through the back window of the bus. It was lying on its side.

16. BM began crying after this event. (See footnote 5)

17. Ms. Hodges then restrapped the wheelchair to the floor of the bus. Grievant again asked Ms. Hodges if she had secured the wheelchair, and Ms. Hodges again answered in the affirmative. Again, Grievant did not check the straps.

18. Contrary to Grievant's assertions, a bus operator is required to check to see that restraints are "securely fastened before putting the bus in motion again" and the bus operator is to "assist the aide in guiding the [wheel] chair onto the bus and securing it in place inside the bus." Resp. No. 2 at Level IV. (See footnote 6)

19. When the bus arrived at BM's house, CM asked Ms. Hodges what was wrong with his son. Ms. Hodges answered that she did not know, and BM had been like that allday. One of BM's shoulder restraints was off the wheelchair and had been placed in the wheelchair with BM.

20. Grievant made no response to CM's inquiry.

21. Grievant did not report this accident to his supervisor, Quince Galford.

22. It took BM's parents an hour to calm him down. BM's behavior after he returned home was unusual. As BM is non-verbal, he had no way to tell his father what happened on the bus.

23. That evening Ms. Hodges called Grievant and asked if he had told CM that BM's wheelchair had fallen over. Grievant answered in the negative. Ms. Hodges asked Grievant if they should report the accident, and he told Ms. Hodges it was up to her, as she knew the child, and he was just a substitute. Grievant indicated he was not going to report the incident, but, if asked, he would tell the truth.

24. The West Virginia School Bus Operator Instructional Program (See footnote 7) states at I-4 that the bus operator has

> the responsibility of reporting to the school authorities or to the parent specific incidents, attitudes, etc,. which may be significant in the treatment of the child. . . . . You may spend much time learning how to care for each child under the many circumstances that might occur while the children are on your bus.

Resp. No. 2 at Level IV.

25. On May 20, 2004, while CM was out walking his dogs, a woman stopped him and asked him if knew that one of his children's wheelchairs had fallen over on the bus Thursday.

26. CM called BBM's aide and asked her if BMM's wheelchair had fallen over. She said no, but she would see if she could find out any information for CM.

27. At some point, CM called Ms. Hodges and asked her if anything had happened on the bus the prior week with BBM. She replied no. Upon continued questioning, as to why someone would tell him that, Ms. Hodges finally told CM, BM's wheelchair had "wobbled."

28. BBM's Aide called CM back and informed him something had happened on the bus, but the child in question was BM.

29. Ms. Hodges called Grievant to tell him that CM was aware of the accident.

30. CM questioned Grievant about the incident on the afternoon of May 20, 2004, and Grievant told CM that BM's wheelchair had fallen over on the bus. (See footnote 8)

31. CM is an ardent advocate for his children, and he has had disagreements with MCBOE about the care BM should receive. Grievant had a disagreement with CM earlier in the year.

32. When Superintendent Lyn Guy found out about these events she conducted an investigation.

33. Superintendent Guy checked the straps on the bus, and found they functioned properly. 34. During Superintendent Guy's May 21, 2004 conversation with Ms. Hodges, she stated she caught the wheelchair as it was falling, and it did not "hit" the floor. Ms. Hodges told Superintendent Guy she did not tell CM because she was fearful he would be very angry.

35. During this May 21, 2004 conversation, Superintendent Guy asked Ms. Hodges if she had called Grievant, and Ms. Hodges stated she had not. As Superintendent Guy was leaving after the interview, Ms. Hodges admitted she had called Grievant.

36. During Superintendent Guy's conversation with Grievant, Grievant told Superintendent Guy the wheelchair had fallen over. He stated he did not report it to CM because it was not his responsibility. Grievant also divulged he had prior problems with CM, and he did not want to get into it with CM. Pre-disciplinary hearing Transfer. at 68.

37. Pursuant to the West Virginia School Transportation Regulations, an accident is defined as, "[i]f the school bus bumps, touches or scrapes another vehicle or object and causes damage, this is considered an accident and must be reported. If the school bus makes contact with a person, this must be considered an accident, and it must be reported." This same booklet states the bus operator's first responsibility in the event of an accident is the care of the students on the bus, and a bus operator is to report the accident. Resp. No. 4 at Level IV.

38. By letter dated May 21, 2004, Superintendent Guy informed Grievant she would recommend a ninety-day suspension at the June 3, 2004 board meeting. (See footnote 9) Superintendent Guy noted Grievant had failed to check the security of the wheelchair while it was on his bus and failed to report an accident involving the child who was seated in the unsecured wheelchair. Superintendent Guy noted the medical status of the child and the potential for this accident to be life-threatening.

39. At the June11, 2004 board meeting, MCBOE reduced Superintendent Guy's recommendation to a thirty-day suspension. (See footnote 10)

40. In 2000, regular Bus Operator Martin Tolliver received a five-day suspension for an injury to a student who was standing while the bus was in motion. Mr. Tolliver was also placed on an Improvement Plan. Mr. Tolliver reported this accident as soon as he returned to the bus garage by leaving a note on the Director of Transportation's desk. (See footnote 11)

Issues and Arguments

Respondent, while noting Grievant's failure to check whether the wheelchair was secure was a serious matter, believes the real problem was Grievant's failure to report the accident.

Grievant asserts he did not report this incident because he did not believe it was an "accident" as defined by the transportation regulations, and because he was just the substitute bus operator. He believed this decision should be left to Ms. Hodges, as she was the regular aide and knew the student. Grievant was allowed to amend his Statement of Grievance at the hearing by agreement of MCBOE. Grievant then asserted he has been subjected to discrimination, as he was treated more

harshly than a similarly situated bus operator.

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 areasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Res., 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).

I. Credibility

An issue that must be addressed is credibility. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Res., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Res./Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). "The fact that [some of] this testimony is offered in written form does not alter this responsibility." Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996).

The Grievance Board has applied the following factors to assess a witness's testimony: 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'sinformation. (See footnote 12) See Holmes v. Bd. of Directors/W. Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

One issue involving credibility is whether or not BM was crying from the time he was placed on the bus, and the second issue is how the shoulder restraint came off. Grievant asserts he remembers no change in BM's behavior, in fact he does not remember anything about BM's demeanor. Grievant does not even remember whether BM was crying when he got off the bus, even though both Ms. Hodges and CM testified to this fact. Further, Grievant testified he has no recollection how BM's left shoulder restraint came off. These portions of Grievant's testimony are just not credible. As the bus operator and the individual in charge of the bus, it is difficult to believe he did not observe the behavior of BM at the time he loaded him into the bus, or when he helped pick him up off the floor. Additionally, the left shoulder restraint is one of the most likely hand holds in lifting the wheelchair off the ground. Since BM weighted approximately 75 pounds and the wheelchair approximately twenty-five pounds, Grievant had to exert some force to set the wheelchair upright. Both these statements are not believable.

II. Merits

W. Va. Code §18A-2-8 identifies the types of conduct that can result in disciplinary action and 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, unsatisfactoryperformance, 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.

A. Willful Neglect of Duty

Respondent has charged Grievant with willful neglect of duty in relation to this incident. MCBOE must prove a charge of willful neglect of duty by a preponderance of the evidence. Arbaugh v. Putnam County Bd. of Educ., Docket No. 90-40-437 (May 22, 1991). Although the West Virginia Supreme Court of Appeals 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." Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990). Hence, 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 Chaddock, supra.

Grievant attempted to excuse his actions by saying he was "just the substitute bus operator," and the decision to report the accident should be up to Ms. Hodges. Further, Grievant averred the fall did not meet the definition of an accident in the regulations, so it did not need to be reported. Grievant also stated he used his best judgment, and if that is wrong, he should not be punished because he was never told how to handle such a situation.

The Findings of Fact demonstrate Grievant acted to protect himself from CM's and MCBOE's dissatisfaction when he failed to report the wheelchair accident. Grievant noted he was close to receiving a regular position, as he is near the top of the substitute senioritylist. While it is understandable that he did not want to jeopardize his chances at full-time employment, his dereliction of duty could have resulted in severe harm to BM. Additionally, this incident met the definition of accident, and the direction to report all accidents is clear. MCBOE has met its burden of proof and demonstrated Grievant was guilty of willful neglect of duty. Grievant failed to check the straps both before and after the wheelchair fell. Additionally, Grievant did not inform CM about the fall, when he asked why his child was crying, and Grievant did not report this accident to anyone.

B. Discrimination

Grievant asserts he has been discriminated against and treated differently than another similarly situated employee. Discrimination is defined in W. Va. Code § 18-29- 2(m), as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 13) of discrimination under W. Va. Code § 18-29-2(m), must demonstrate the fol lowing:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

Once a grievant establishes a prima facie case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94- DOH-376 & 377 (Feb. 23, 1995).

Grievant asserted he was similarly situated to Mr. Tolliver who received only a five- day suspension for failing to report an accident involving injury to a student. Grievant has misstated the facts. First, Mr. Tolliver was a regular employee; second, he reported the accident; and third, he was placed in an Improvement Plan, as well as the five-day suspension. Grievant has not established a prima facie case of discrimination, as he has not shown he was similarly situated to Mr. Tolliver.

III. Mitigation/Severity of Penalty

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 a case 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 Res./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. Tickett v. Cabell CountyBd. 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).

The undersigned Administrative Law Judge cannot find that ninety-day suspension, reduced to a thirty-day suspension, was excessive given the failure of Grievant to follow the regulations governing his duties and his failure to report the accident.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

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

2. "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. Dep't of Health and Human Res., 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, 142W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

3. A county board of education possesses the authority to suspended an employee, but this authority cannot be exercised in an arbitrary and capricious manner. W. Va. Code §18A-2-8. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23- 235 (Dec. 29, 1995).

4. Willful neglect of duty is among the causes listed in W. Va. Code §18A-2-8 for which an education employee may be disciplined. See Rovello v. Lewis County Bd. of Educ., 181 W. Va. 122, 381 S.E.2d 237 (1989); Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975); Woo v. Putnam County Bd. of Educ., Docket No. 93-40-420 (June 2, 1994), aff'd 202 W. Va. 409, 504 S.E.2d 644 (1998); Jones v. Mingo County Bd. of Educ., Docket No. 95-29-151 (Aug. 24, 1995).

5. 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).

6. "Willful neglect of duty," encompasses something more serious than incompetence and denotes "a knowing and intentional act, as distinguished from a negligent act." Chaddock, supra.

7. MCBOE has met its burden of proof by a preponderance of the evidence and demonstrated Grievant is guilty of willful neglect of duty under W. Va. Code § 18A-2-8. 8. Discrimination is defined in W. Va. Code § 18-29-2(m), as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

9. This Grievance Board has determined that a grievant, seeking to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m), must demonstrate the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the

other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

10. Once a grievant establishes a prima facie case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

11. An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, orreflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. Conner v. Barbour County Bd. of Educ., Docket No. 94- 01-394 (Jan. 31, 1995). See Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

12. Grievant did not establish a prima facie case of discrimination.

13. "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).

14. "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 Res./Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

15. 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. 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). 16. Given the charge proven against Grievant, the penalty is not disproportionate or excessive, nor is the penalty arbitrary and capricious. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994); Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha or Monroe 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: September 30, 2004

Footnote: 1

Grievant amended his Statement of Grievance at the Level IV hearing with the agreement of MCBOE. See the Issues and Arguments section, infra at 8.

Footnote: 2

Grievant was represented by John Roush, Esq., from the West Virginia School Service Personnel Association, and Respondent was represented by Greg Bailey, Esq. of Bowles Rice McDavid Graff and Love.

Footnote: 3

In keeping with Grievance Board policy, initials are used instead of names when discussing students.

Footnote: 4

The strapping of the wheelchair on the bus does not appear to require a training session, only common sense. There are four straps, two in the front and two in the back. These straps are hooked into the floor of the bus, there are hooks on the ends of the straps that attach to the wheelchair, and a tightening mechanism on the straps similar tothat used in an airplane seatbelt that are used to tighten the straps once they are attached.

Footnote: 5

Grievant stated he did not notice the child's behavior and could not remember if he was crying either before or after the incident or at any time during the run.

Footnote: 6

The West Virginia School Transportation Regulations states, "[t]he bus operator and/or aide shall assure that the protective safety devices are utilized." Resp. No. 4 at Level IV.

Footnote: 7

Grievant stated he has never heard this information, even though he received a copy of this manual, and Mr. Galford went over it with him during his orientation prior to his test for certification.

Footnote: 8

It is noted that Grievant was already aware that CM knew of the accident, as Ms. Hodges had called him to tell him.

Footnote: 9

Because Superintendent Guy wanted Grievant to be suspended for a period equivalent to a thirty-day suspension, she asked the payroll clerk how many days it tookGrievant to work thirty days. The answer was ninety-seven days. Superintendent Guy made her recommendation for a ninety-day suspension on this data.

Footnote: 10

While not explained by the parties, it appears that Grievant's pre-disciplinary hearing was rescheduled for hearing to June 11, 2004, probably because Ms. Hodges's hearing was held on June 3, 2004.

Footnote: 11

It is noted that the Director of Transportation, Quince Galford, did not remember that Mr. Tolliver reported the accident. MCBOE was not aware this testimony would be elicited at the hearing and had not reviewed the information prior to hearing. Given this set of facts, Superintendent Guy called her office, the information was obtained over the telephone, and she credibly testified Mr. Tolliver had indeed reported the accident the same day it happened.

Footnote: 12

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).

Footnote: 13

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th ed. 1968).