NORMAN LILLY,

Grievant,

v v.

Docket No. 03-10-395

FAYETTE COUNTY BOARD OF EDUCATION,

Respondent,

and

JULIUS "BUDDY" CALES,

Intervenor.

D E C I S I O N

Grievant, Norman Lilly, filed this grievance on or about September 16, 2002, against his employer, the Fayette County Board of Education ("FCBOE" or "Board"). (See footnote 1) Grievant grieves a written reprimand for harassment of a fellow employee. Julius Cales asked to intervene, as he was the employee harassed. (See footnote 2)

Grievant's Statement of Grievance states:

> The Grievant, a regularly employed school bus operator, alleges that the Respondent erred in determining that the Grievant had harassed another employee and in reprimanding the Grievant for that alleged behavior. Grievant contends that he did not commit the acts of harassment and that the conduct of the investigation was flawed and conducted contrary to county policy. (See footnote 3)
>
> Relief sought: The Grievant seeks removal of the letter of reprimand and the expungement of all references to the alleged incident of harassment from personnel records maintained by the Respondent.

This grievance was denied at Level I on September 25, 2003. A Level II hearing was held on February 12, 2003, and September 11, 2003. The Level II Decision was issued on November 21, 2003, denying the grievance. At Level III on December 15, 2003, FCBOE unanimously denied the

grievance after reviewing the record from below, and notified Grievant by letter dated December 16, 2003. (See footnote 4) Grievant appealed to Level IV on December 23, 2003, and a Level IV hearing was held on March 2, 2004, at the Grievance Board's office in Beckley. This case became mature for decision on April 7, 2004, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 5)

Issues and Arguments

FCBOE avers the investigation into Intervenor's complaint established Grievant was guilty of the offense charged, and Grievant was given the least punishment allowable by the policy. Intervenor asserts the Grievance Board does not have jurisdiction over this matter as the harassment policy originated from federal law. (See footnote 6) Grievant argues the investigation was so flawed the charges should be dismissed. Grievant also maintains hecould not have committed the acts he was charged with, as he was completing his bus run at the time, and Intervenor made up the charges because they disagree on many issues.

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 bus operator by FCBOE for many years and currently drives out of the Fayette Bus Garage.

2. Intervenor has been employed as a bus operator by FCBOE for many years and currently drives out of the Oak Hill Bus Garage.

3. The Fayette Bus Garage is approximately six to seven miles from the Oak Hill Bus Garage, and this distance can be driven in seven to ten minutes. (See footnote 7)

4. On April 10, 2002, at approximately 4:10 p.m. to 4:15 p.m., during his extracurricular assignment, Intervenor stopped by the Oak Hill Bus Garage to inform a substitute driver, Carol Dick, that she was parking her bus in the wrong place, and this action kept Intervenor from being able to park his bus in the garage. (See footnote 8) There were students on Intervenor's bus at the time he stopped.

5. At approximately 4:15 p.m. to 4:20 p.m., while Intervenor and Ms. Dick were talking,

Grievant drove up in his truck and approached Intervenor in an angry and hostile manner. 6. Grievant accused Intervenor of filing a grievance about the incentive program, and he told Intervenor he should not have done this without talking to Grievant first. Intervenor indicated he had not filed a grievance, and Grievant called him a liar and proceeded to curse at Intervenor using words such as "shit", "fucking", "son-of-a-bitch," and "God damn." (See footnote 9)

7. Grievant also told Intervenor that if he continued with these actions, he knew important people, and he would see that he lost his bus operator's position. (See footnote 10) Grievant also bragged about how he had gotten board members off the board and the current Superintendent, Charles Garvin, his position.

8. Grievant also indicated he "wasn't afraid of anyone" and he could "kick anyone's ass." Resp. No. 1, at Level II.

9. Ms. Dick observed Grievant "get in" Intervenor's face and yell at him. After observing this verbal attack for a short while, she got in her personal vehicle, and left before it was concluded. Ms. Dick had her nephews with her, and she did not want them to see this angry outburst and cursing. Resp. No. 1, at Level II.

10. Teenage boys on Intervenor's bus also observed Grievant's verbal attack, and although they did not know who Grievant was, they gave written statements about the events. 11. Student B.C. reported Intervenor stopped at the Oak Hill bus garage, and a man came over "saying all kinds of stuff" and called him stupid and an "S.O.B.", and "like asshole." Resp. No. 1, at Level II.

12. Student B.A. reported they were at the bus garage, and Intervenor was locking up the garage and talking to another lady and her kids, when a man drove up in a truck and was cursing and said bad words. Resp. No. 1, at Level II.

13. Intervenor was very upset by Grievant's actions, and after taking the students home, talked to Galen Horrocks, the Director of Transportation. He also called the students' principal, Mr. David Perry, to warn him that he might receive some parental complaints about the incident.

14. At some point in time, Intervenor and Mr. Horrocks went to Interim Superintendent Charles Garvin to complain, and they were informed Intervenor should start the process by filing the complaint with his principal, Fred McLain.

15. Intervenor then went to his immediate supervisor, Principal McLain. He was given the

"Alleged Harassment and Violence Complaint Form" to complete. Resp. No. 1, at Level II.

16. The exact dates all these meetings occurred was unclear, but the form was completed on April 19, 2002. Resp. No. 1, at Level II.

17. Principal McLain sought directions from his supervisor, Director of Secondary Schools Chris Perkins, and was told to conduct an investigation, which he did.

18. On April 24, 2002, after Principal McLain had finished talking to and taking statements from Intervenor, Ms. Dick, and the two students who were on the bus, he completed the "Alleged Harassment and Violence Investigation Report Form." He checkedthe line that states, "there is a preponderence of the evidence to substantiate the allegation as factual and a violation of policy." Resp. No. 1, at Level II.

19. On April 25, 2002, Principal McLain wrote Interim Superintendent Garvin noting he had completed his investigation, attached a copy of his report, and recommended someone in the Fayetteville area interview Grievant.

20. Principal Bryan Parsons, Grievant's immediate supervisor, was given directions by his supervisor, Director Perkins, to complete this portion of the investigation.

21. Principal Parsons made arrangements to meet with Grievant on May 8, 2002.

22. Acting Principal Parsons informed Grievant of the purpose of the meeting, and then read Principal McLain's report to him in its entirety.

23. After hearing this information, Grievant responded by orally reviewing the sections of Policy A-32 he believed had been violated by the investigation (See footnote 11), including asserting the complaint was untimely filed. (See footnote 12)

24. During the meeting, Principal Parsons took notes, as is his usual practice. Grievant informed Principal Parson he could not take notes, as this was violation of his rights. Principal Parsons indicated his notes were to make sure he had accurate information. Grievant got up, firmly placed or slapped his papers on the desk, and toldPrincipal Parsons the meeting was over. Principal Parsons responded "OK", and indicated the meeting was over by putting his papers away.

25. Grievant did not leave, but sat back down and the meeting continued with Principal Parsons continuing to take notes. Principal Parsons did not see this behavior as insubordination, as Grievant frequently acts in this manner and does not leave.

26. Grievant, while not specifically denying the charge, informed Principal Parsons he could

not have been at two places at once, and Principal Parsons should pull his bus schedule and note what time this schedule states he finishes his run. The form Grievant referred to is a schedule filled out by all bus operators the first month of school.

27. Grievant also stated he "pleaded the 5th amendment concerning these allegations." Resp. No. 2, at Level II.

28. Superintendent Garvin has seen Grievant in his truck leaving the bus garage at 4:00 p.m.; one of these times was shortly after he received the complaint. Ms. Dick drove Grievant's run one time as a substitute, and she had no trouble completing the run by 4:00 p.m. (See footnote 13)

29. Principal Parson completed his report on May 9, 2002, and sent his report to Interim Superintendent Garvin.

30. On June 17, 2003, Superintendent Garvin, who is also the Title IX officer, after reviewing all the information, issued Grievant a written reprimand for his actions on April 10, 2002. Superintendent Garvin noted Grievant violated Policy A-32 and had harassed another staff member. This written reprimand noted his inappropriate behaviorwould not be tolerated and future violations would result in more severe disciplinary action. Grievant also received a copy of the Findings of Fact and Conclusions of the investigation. As per procedure, a copy of this report was also sent to the West Virginia Department of Education.

31. One time during the Summer of 2000 or 2001, Grievant had a run-in with Ms. Dick while she was working in a non-education position. Grievant remembers this run-in as serious, but Ms. Dick does not.

32. Grievant stated at the Level IV hearing, "I never hung around [Intervenor] and never wanted to see him because I don't care for Mr. Cales." Grievant described Intervenor's union, the West Virginia Education Association, as being the "mortal enemy" of his union, the West Virginia School Service Personnel Association. However, another union member and former officer in Grievant's union, bus operator James Buffington, did not agree with this assessment. Test. Buffington, Level IV Hearing.

33. Intervenor occasionally curses, but these words are limited to "damn" and "shit"; he does not use the "F" word or take the Lord's name in vain. (See footnote 14) Test. Intervenor, Level II Hearing; Test. Intervenor & Mr. Bennett, Level IV Hearing.

34. Grievant testified at the Level IV hearing. When discussing his response to Principal

McLain's findings, Grievant stated, "Well, it instantly outraged me . . . uh . . . of course being the driver I am, the previous twenty years I hadn't been accused of anything similar to that or anything close to it." 35. In a prior disciplinary action and grievance, Grievant, although he denied the event, was found to have threatened a witness/fellow bus operator prior to a grievance hearing. Lilly v. Fayette County Bd. of Educ., Docket No. 97-10-084 (Feb. 11, 1998).

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. Dep't of Health & 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).

I. Credibility An issue that must be addressed is credibility, as the testimony of Grievant and Mr. Buffington is in direct opposition to Respondent's witnesses. 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 Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Resources, 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 & Human Resources/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's information. (See footnote 15) See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra. In assessing the testimony presented, the undersigned Administrative Law Judge cannot accept Grievant's version of the facts. His response to the allegations is he was not there, and all the witnesses who said he was, were liars. Grievant has been found to have threatened a fellow bus operator in the past, and others gave examples of Grievant having a short fuse. Test. Parsons, Level IV Hearing. Further, when Grievant was originally asked about the events by Principal Parsons, he pled "the Fifth," and did not say, "I did not do this." What he did say basically was, "I could not have been there, look at my schedule." Additionally, the undersigned Administrative Law Judge noted that while Grievant had detailed memory of what he did that day more than two years ago, he did not remember that he had ever been accused of similar behavior, and found guilty of it.

The undersigned Administrative Law Judge did not have the opportunity to see Ms. Dick testify, but was able to compare her Level II testimony with her signed statement. No inconsistency was noted, her reputation for honesty was not impugned, and the story told by Grievant about a summer discussion several years ago was insufficient to demonstrate a motive to lie both under oath and in a written statement.

Additionally, the undersigned Administrative Law Judge did not find Intervenor to be untruthful. Grievant makes much of the fact that Intervenor stated he did not curse and put on evidence to show he did; thus, he must be lying about the April 10, 2002 event. Intervenor did indeed state he seldom cursed, but admitted he said "shit" and "damn" occasionally. This is exactly what Grievant's witness, Mr. Bennett, who also noted that he had not heard Intervenor curse in a year, stated. Additionally, Intervenor's testimony was consistent with the testimony of other witnesses, and was plausible given

Grievant's prior behavior. The undersigned Administrative Law Judge finds the testimony of Mr. Buffington to be false. Mr. Buffington asserted Intervenor approached him, on or about April 10, 2002, and asked him to sign the incentive petition. (See footnote 16) He indicated he said no, and Mr. Buffington testified Intervenor responded with these "exact" words, "I see you've got your head stuck so far up Norman's asshole that you're going to suffocate and it's going to make Becky a widow and the Board is going to have to post another position." Test. Buffington, Level II Hearing at p. 189. He indicated Intervenor got in his truck and left. Intervenor did not own a truck at this time, but a van. Intervenor now owns a truck which he purchased in July of 2003.

It is just not plausible Intervenor said these things to Mr. Buffington on the very day or day before Grievant verbally assaulted Intervenor. The coincidence is just too great, and, if indeed, Intervenor did say those horrendous things to Mr. Buffington, it unclear why he did not complain. Further, as discussed, Intervenor while saying a curse word here and there, was not in the habit of making these types of statements.

II. Hearsay

The comments written by the two students are hearsay, but relevant hearsay is admissible in administrative hearings. Gunnells v. Logan County Bd. of Educ., Docket No. 97-23-055 (Dec. 9, 1997). The key question is whether these statements are credible, and what weight, if any, to give these statements. The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. (See footnote 17) Id.; Sinsel v. Harrision County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996); Perdue, supra; Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't, Docket No. 90-8-115 (June 8, 1990).

The statements from the students were written by them, signed and taken within two weeks of the

alleged events. They acknowledged witnessing a confrontation between the two men and reported what they heard and saw. Their statements were basically consistent with the testimony of Intervenor and Ms. Dick. Additionally, the parties did not indicate any negative comments about the character or truthfulness of the students, and there was no indication the students were other than disinterested witnesses. Accordingly, the written statements of the students are accepted as true.

III. Alleged Policy A-32 violations In his original grievance, Grievant asserted the investigation was not properly conducted for many reasons. At Level IV, only two major assertions were made, and these will be the ones addressed here. First, the investigations were conducted by the principals of Intervenor and Grievant, and these people were within their chain of command. Grievant asserts the assignment of this duty to the principals was a violation of Policy A-32. The Policy at page 6 states that if a complaint is against a school-assigned employee, the principal will notify his/her immediate supervisor, who, in conjunction with the building principal, will see that an investigation is conducted. This portion goes on to say that either the principal or his supervisor will prepare a report from the gathered facts and present it to the Title IX officer. In the attachments to the Policy, under the "Harassment and Violence Investigation Suggestions" Section, the recommendation is the investigator should be outside the parties' chain of command and should ideally be an ombudsman. (Emphasis added).

It is clear from review of the Policy that the decision of who to investigate was to be made by Mr. Perkins and/or Superintendent Garvin. They made this decision, and each employee was interviewed by his immediate supervisor. The undersigned Administrative Law Judge finds no violations of the Policy with these assignments. Indeed, another investigator may have found Grievant's behavior during the interview insubordinate, but since Mr. Parsons knew Grievant, he was able to take his outburst and threatening to walk out in stride.

The second major assertion is the "'final' adjudication of guilt" was made by an administrator who did not hear both sides of the story. Grievant's Proposals. This assertion is incorrect. While Principal McLain made his findings of guilt based on hisportion of the investigation, the administrator who made the "'final' adjudication of guilt" was Superintendent Garvin, and this was after he had read the reports of Principal McLain and Principal Parsons, and had reviewed the Policy.

IV. Merits

A detailed discussion of the merits of this case is unnecessary. The issue is already decided by

the credibility and hearsay rulings made above. Grievant asserts he was not there, and the four witnesses made up these allegations. The undersigned Administrative Law Judge has found Grievant's testimony to lack credibility, and the testimony and statements of the other witnesses to be valid. Accordingly, FCBOE has met its burden of proof, and demonstrated Grievant did threaten Intervenor. As the discipline received was the least severe one listed on the harassment form, the undersigned Administrative Law Judge finds the penalty appropriate.

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). "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 greaternumber 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 & 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).

2. 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 & Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

3. 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 Resources, Docket No. 96-HHR- 371 (Oct. 30, 1996); Pine v. W. Va. Dep't

of Health & Human Resources, Docket No. 95- HHR-066 (May 12, 1995).

4. "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).

5. Relevant hearsay is admissible in administrative hearings. Gunnells v. Logan County Bd. of Educ., Docket No. 97-23-055 (Dec. 9, 1997). 6. Respondent met its burden of proof by a preponderence of the evidence and established Grievant harassed Intervenor.

7. No Policy violations were proven.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Fayette 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: April 23, 2004

Footnote: 1

On June 10, 2002, Grievant requested an extension to file a grievance because his employment term had ended. This request was granted.

Footnote: 2

The issue of whether Intervenor could intervene in this grievance was argued and resolved at Level II and was not addressed again at Level IV.

Footnote: 3

Grievant's original Statement of Grievance contained numerous points discussing the flaws in the investigative process. This original Statement of Grievance did not contain the assertion Grievant did not commit the act complained of, but it such assertion was inherent in Grievant's rhetoric. Additionally, in the Level II and IV hearings, Grievant asserted Intervenor's complaint was untimely filed.

Footnote: 4

It is unclear from the record why this grievance took so long to get through the system. It is noted the continuances of record were requested by Grievant, and he also requested to place this grievance in abeyance over the 2002 Summer. It is also noted this extensive delay had the effect of creating a lack of clarity on dates and memories.

Footnote: 5

Grievant was represented by John Roush, Esq., from the West Virginia School Service Personnel Association, Intervenor was represented by Anita Mitter of the West Virginia Education Association, and FCBOE was represented by Erwin Conrad, Esq.

Footnote: 6

The undersigned Administrative Law Judge finds that as this grievance was filed as the result of a written reprimand generated by a FCBOE Policy that she has jurisdiction.

Footnote: 7

Some assertions were made that there was construction on this road, and this factor increased the trave time, but the truth of this assertion was not clear from the record.

Footnote: 8

The times identified by the parties have varied slightly. The original complaint filed by Intervenor stated the events occurred between 4:10 p.m. and 4:30 p.m.

Footnote: 9

Intervenor had started a petition to keep FCBOE's incentive program. This program pays employees for sick leave days they do not use.

Footnote: 10

In retrospect, Intervenor admitted it was very unlikely Grievant could achieve this goal, but in the heat of the moment, Intervenor felt his employment was threatened.

Footnote: 11

The testimony of Principal Parsons and Grievant differs as to whether he was told what the meeting was about ahead time. Grievant said he was told nothing, and Principal Parsons indicates he told Grievant it was about a complaint from the Oak Hill bus garage. It is unclear to the undersigned Administrative Law Judge how Grievant would be prepared to discuss the policy in such detail, if he had no idea what the meeting was about.

Footnote: 12

Grievant also asserted Principal McLain had not completed his report in a timely fashion and should face disciplinary action. Intervenor had agreed to a waiver of the timelines.

Footnote: 13

Mr. James Bennett, mechanic, noted other bus operators have talked about Grievant frequently completing his run before the recorded time.

Footnote: 14

Mr. Buffington's testimony about the string of profanity Intervenor directed toward him the same day or the day before the April 10, 2002 incident is specifically rejected and found to be false. Mr. Buffington identified the vehicle Intervenor had that day as the truck Intervenor now has, not the van he had then. See discussion of credibility infra. Test. Intervenor & Mr. Bennett, Level IV Hearing.

Footnote: 15

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: 16

Mr. Buffington states he was at the Oak Hill bus garage to wash his bus for inspection.

Footnote: 17

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing hearsay. See Borninkhof v. Department of Justice, 5 MSBP 150 (1981).