CHARLES HENNEN,

Grievant,

v. **Docket No. 05-53-110**

WIRT COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

The grievant, Charles Hennen ("Mr. Hennen"), grieves the action of his employer, respondent Wirt County Board of Education ("BOE"), in suspending him for two days without pay. His statement of grievance is as follows:

> Grievant is employed as a bus operator. Respondent suspended Grievant for two days without pay for an incident which occurred on his bus on February 7, 2005. Grievant contends that his actions on that day did not constitute misconduct as provided in West Virginia Code § 18A-2-8 and did not merit the punishment of two days suspension without pay. Grievant contends that the board of educations [sic] action in this case are [sic] arbitrary and capricious and in violation of West Virginia Code § 18A-2-8.

For relief, Mr. Hennen "seeks compensation for all wages and benefits, including but not limited [sic] seniority, lost as a result of his suspension. He also seeks expungement of all references to his suspension from his file."

Procedural Background

Mr. Hennen was initially suspended on February 8, 2005, for a period of thirty days. This suspension was based upon an investigation into events that took place on Mr. Hennen's evening bus run on February 7, 2005. The investigation was prompted by complaints that Daniel C. Metz, Superintendent of the Wirt County schools ("Superintendent Metz"), received from parents. Subsequently, on February 10, 2005, Superintendent Metz reduced the thirty-day suspension to a two-day suspension. Becausehe had already been off for two days as a result of the thirty-day suspension, Mr. Hennen was able to return to work immediately.

An evidentiary disciplinary hearing was held before BOE on March 29, 2005. Hennen was represented at this hearing by attorney John Everett Roush of the West Virginia School Service Personnel Association. BOE's counsel, Kimberly Croyle, of Bowles Rice McDavid Graff & Love, presented the case on behalf of Superintendent Metz. At the conclusion of the hearing, BOE ratified the two-day suspension.

Pursuant to the provisions of West Virginia Code section 18A-2-8, Mr. Hennen filed his grievance directly to Level Four at the West Virginia Education and State Employees Grievance Board ("the Grievance Board") on April 12, 2005. A Level Four hearing was held on May 13, 2005, in the Charleston office of the Grievance Board. At the outset of the Level Four hearing, the transcript and exhibits from the disciplinary hearing before BOE were incorporated as part of the grievance record. (See footnote 1) Mr. Hennen was again represented by attorney John Everett Roush, and BOE was represented by attorneys Kimberly Croyle and Ashley Hardesty. This grievance matured for decision on June 14, 2005, after both parties had submitted proposed findings of fact and conclusions of law.

After careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1 1. Mr. Hennen, who has been employed by BOE as a bus operator for approximately 22 years, has always received good evaluations. On his current run, he transports kindergarten through twelfth-grade students.

2 2. At the outset of each school year, all BOE employees, including bus operators, are given training on the appropriate methods of dealing with student discipline. Tr.12. Mr. Hennen acknowledged that has received such training and is aware of the appropriate measures for disciplining a student. Tr.54. The provisions of the Employee Code of Conduct ("Code of Conduct") are also reviewed with all staff members at the beginning of the school year. Tr.16-17.

3 3. In pertinent part, the Code of Conduct requires that all West Virginia school employees "exhibit professional behavior by showing positive examples of preparedness, communication, fairness, punctuality, attendance, language, and appearance." W. VA. CODE ST. R. § 126-162-4.2.1(2002).

4 4. The Code of Conduct also requires that school employees "demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior." W.

VA. CODE ST. R. § 126-162-4.2.6(2002).

5 5. Bus operators are permitted to stop their bus to address serious discipline problems or other emergencies. Tr.12-13, 29.

6 6. Mr. Hennen, and other bus operators, have the ability to radio for assistance or guidance, when needed. Tr.9, 29. Mr. Hennen has availed himself of this option in the past. Tr.9.

7 7. This grievance arose out of events that took place while Mr. Hennen was driving students home on the evening of February 7, 2005

8 8. Superintendent Metz received complaints from parents that, on the February 7 evening run, Mr. Hennen stopped the bus so suddenly or swerved so sharply off of the road that students were flung from their seats and struck their heads. Tr.8, 10-11.

9 9. When questioned, the students who rode the bus gave consistent accounts about such an incident taking place. The consistency in their statements initially led Superintendent Metz to believe that the students' accounts were credible and the parents' complaints were warranted. Tr.11.

10 10. A video camera mounted in Mr. Hennen's bus operates automatically whenever the bus is started. Tr.18. Superintendent Metz and Douglas Craig Hill, Director of Transportation for Wirt County schools ("Director Hill"), reviewed the videotape from Mr. Hennen's bus to see if it corroborated the students' statements. They were initially unable to locate the portion of the videotape that was recorded during the evening run on February 7, 2005, [Tr.8] which led Superintendent Metz to believe that the videotape might have been tampered with or erased somehow.

11 11. Based on the complaints of the parents, the consistent statements taken from the students, and their inability to locate the pertinent portion of the videotape, Superintendent Metz and Director Hill concluded that the reported incident had taken place. As a consequence, Mr. Hennen was given a thirty-day suspension without pay.

12 12. Superintendent Metz and Director Hill subsequently located the portion of the videotape that had been recorded during the February 7 evening run. The recording did not substantiate the incident upon which the 30-day suspension was predicated.

13 13. Prior to February 7, Mr. Hennen had reported to Director Hill that a student on his bus was making an annoying squawking noise but Mr. Hennen had not been able to identify the culprit.

14 14. As captured by the camera mounted in the bus, a student near the back of the bus was

periodically making this squawking sound on February 7, 2005. Once such outburst caused Mr. Hennen to stop the bus quite abruptly, alarming the children and causing them to jerk forward.

15 15. When the bus came to the sudden stop, one student cried out, “What?!” It appears that one young boy in the lower left corner of the screen struck the back of the seat in front of him. A definite thud is discernible on the tape but it is unclear whether this noise came from students' belongings, the students themselves, or both.

16 16. Mr. Hennen then walked to the back of the bus and began berating the students. Much of what he was said was unintelligible except for “their ass is going off the bus.” Mr. Hennen does not dispute the fact that he used this language in addressing the students on his bus.

17 17. Contrary to his testimony at the disciplinary hearing [Tr.38-40] and Level Four, Mr. Hennen's actions do not indicate that he was merely investigating whether the squawking noise might have been a scream. Rather, his posture and tone reflect that Mr. Hennen was angry. Furthermore, he did not ask if anyone was hurt before he began addressing the students in an angry tone.

18 18. When Mr. Hennen stopped the bus to address the squawking sound, he had “a little more than the wheels off the road on the right side.” Tr.42. He stopped the bus onRoute 5, a short distance from a bridge, in an area where the speed limit was 45 miles per hour.

19 19. Route 5 is a two-lane highway. Shortly after the bridge on Route 5 there is a wide spot where a school bus could pull completely and safely off of the road. It would only have taken an additional minute of travel time to reach this wide spot.

20 20. A bus operated by Gary Robinson (“Mr. Robinson”) had to stop behind Mr. Hennen's bus due to on-coming traffic. Mr. Robinson observed that the rear of Mr. Hennen's bus stuck out into the travel lane further than the front. After the on-coming traffic passed, Mr. Robinson passed Mr. Hennen's bus. Two other buses followed Mr. Robinson and at least one of these two also passed Mr. Hennen's bus. To pass Mr. Hennen's bus, Mr. Robinson was forced to travel over the center line on Route 5.

21 21. Superintendent Metz determined that, although the parents' complaints were not substantiated, Mr. Hennen had violated safety regulations and the Code of Conduct. Tr.9, 17.

20. By correspondence, dated February 10, 2005, Superintendent Metz informed Mr. Hennen that the thirty-day suspension was being revoked and a two-day suspension was being imposed. (See footnote 2) The two-day suspension, which had already been served by that time, was predicated

on the “two proven allegations” that Mr. Hennen “did stop the bus on the major highway without a just reason to warrant the emergency stop, violating bus safetyregulations” and that Mr. Hennen “used profane language directed at the students . . ., which violated Wirt County School's Employee Code of Conduct.” The correspondence further informed Mr. Hennen that the suspension was pursuant to the provisions of West Virginia Code sections 18A-2-7 and 18A-2-8.

22 22. Superintendent Metz was not aware of any other instances of similar conduct by a bus operator. However, he believed that there were two instances in which teachers had been suspended for inappropriate actions and language directed at students. Although he had not been superintendent at that time, Superintendent Metz thought each of those teachers had been given a five-day suspension.

23 23. According to his Level Four testimony, if Superintendent Metz had been in possession of the correct information from the outset, he would have imposed a five-day suspension upon Mr. Hennen for stopping the bus as he did and for using profanity toward the students on his bus. As it was, he decided to go with two days because he believed that two days served the purpose and because Mr. Hennen had already been off two days when Superintendent Metz discovered the truth about the events of February 7, 2005.

24 24. Superintendent Metz felt “very strongly” that Mr. Hennen's reaction was inappropriate and created a hazardous situation for the students on his bus, as well as those on the buses that had to pull around Mr. Hennen's bus. In addition, neither students (See footnote 3) nor school employees are permitted to use profanity.

25 25. According to the testimony of Director Hill, where the bus was stopped created a safety issue, what was happening on the bus did not warrant stopping on the road, and the language used in response to the incident was inappropriate.

26 26. Mr. Hennen had previously been suspended for failing to respond appropriately to student discipline problems. The students on the bus had been making noise, so Mr. Hennen pulled his jacket up around his ears and turned the volume on his radio up to drown out the noise being created by the students. In addition, Mr. Hennen tilted his mirror so that he could not see the students. That prior incident had resulted in a five-day suspension.

27 27. At the disciplinary hearing, Mr. Hennen refused to concede that it was “wrong” to use the word “ass.” However, he did acknowledge that, if he had it to do over again, he would not use that

word. Tr.52.

Discussion

This grievance arises out of a disciplinary action. Therefore, BOE bears the burden of proving, by a preponderance of the evidence, that the two-day suspension was justified. W. VA. CODE ST. R. § 156-1-4.21(2004), 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). "The generally accepted meaning of preponderance of the evidence is 'more likely than not.' *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004)." *Cobb v. W. Va. Human Rights Comm'n ex rel. Wattie*, 2005 W. Va. LEXIS 112, *49 n.26 (July 7, 2005). Mr. Hennen does not dispute the fact that he pulled his bus partly off of Route 5 on February 7, 2005. Nor does he dispute having used the word "ass" in addressing the students on his bus. He does, however, claim that such actions are not "misconduct as provided in West Virginia Code § 18A-2-8" and does not merit a two-day suspension. By contrast, BOE asserts that Mr. Hennen was properly suspended, pursuant to the provisions of West Virginia Code section 18A-2-8, based upon insubordination and willful neglect of duty. Specifically, BOE cites his failure to comply with safety rules, his failure to properly employ procedures for disciplining students, and his violation of the Code of Conduct, as proper predicates for his two-day suspension.

West Virginia Code section 18A-2-8 provides, in pertinent part, that a board of education may suspend an employee at any time for "[i]mmorality, 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 disciplinary action, such as a suspension, must be predicated upon one or more of the listed grounds. In making a decision to take disciplinary action against an employee, the employer must act "reasonably, not arbitrarily and capriciously." *Bell v. Kanawha County Bd. of Educ*., Docket No. 91-20-005 (Apr. 16, 1991).

Insubordination

"In order to establish insubordination, the employer must not only demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, but that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination." *Montgomery v. Greenbrier County Bd. of Educ.*, Docket No. 97-13-427 (Mar. 18, 1998). More recently the Supreme Court of Appeals of West Virginia

has stated that “for there to be "insubordination," the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid.” *Butts v. Higher Education Interim Governing Board/Shepherd College*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(*per curiam*). BOE is correct in asserting that Mr. Hennen was aware of the disciplinary procedures that were available to him. The evidence clearly established that the procedures for student discipline were reviewed with bus operators at the beginning of each school year. Further, Mr. Hennen, a 22-year veteran bus operator, acknowledged that he had received such training and was aware of those procedures. There is no assertion on the part of Mr. Hennen that the disciplinary procedures or other pertinent policies are unreasonable.

BOE proved that Mr. Hennen's failure to properly implement student disciplinary procedures was knowing and intentional. Mr. Hennen had a radio available to him. He did not use it to obtain help in maintaining order on his bus. Instead, Mr. Hennen deliberately stopped the bus, walked to the back, and began berating the students. There was no emergency. His decision to stop the bus was predicated upon his annoyance with the squawking noise. This was not the first instance of squawking, as reflected by Mr. Hennen's prior discussions of the matter with his supervisor. It was a minor disciplinary problem that did not warrant abruptly stopping the bus, partially blocking a travel lane, or berating students, as he did. Mr. Hennen's failure and refusal to use the appropriate procedures for dealing with student discipline problems constitutes insubordination.

This is particularly true in light of the fact that he had previously been disciplined for failing to use the appropriate measures to control disorderly students. In that instance, Mr.Hennen simply pulled a jacket up around his ears and turned the volume up on the radio so that the music would drown out the noise the students were making. The incident on February 7, 2005, was another occasion when Mr. Hennen failed to properly apply the disciplinary procedures he had been taught and, instead, responded inappropriately to a frustrating situation.

Similarly, Mr. Hennen failed to abide by the Code of Conduct, which was reviewed with staff at the beginning of each school year. In part, the Code of Conduct requires school employees to “exhibit professional behavior by showing positive examples of preparedness, communication, fairness, punctuality, attendance, language, and appearance.” Mr. Hennen's behavior was less than professional when he lost his temper and abruptly stopped the bus, thereby alarming his young

passengers. Needless to say, his language was inappropriate when he used the word “ass.” In addition, to the word itself, the angry manner in which he addressed the students did not set a good example.

The anger component makes this grievance distinguishable from *Trembly v. Preston County Bd. of Educ*., Docket No. 00-39-355 (Feb. 28, 2001), in which the Grievance Board mitigated a suspension, despite having concluded that the employer had proven the underlying conduct by a preponderance of the evidence. Grievant Trembly was a bus operator who was having trouble getting a student to turn in a document that Grievant Trembly needed in order to complete a required report. When the student yet again failed to provide the needed document, and the deadline for submitting the report approached, Grievant Trembly said, “Shit, I need that paper.”

It was expressly noted that *Trembly* was “not a case in which profanity was used in an angry or threatening manner, which would warrant more severe punishment. *SeeFerrari v. Putnam County Bd. of Educ*., Docket No. 99-40-528 (Apr. 25, 2000).” Unlike Mr. Hennen, the grievant in *Trembly* “cursed from exasperation” and the profanity was not directed at the student. Again unlike Mr. Hennen, the grievant in *Trembly* “did not raise his voice or act in a threatening manner toward” the student. These factors led the Grievance Board to decide that the two-day suspension for inappropriate use of language was excessive. In addition to the factual distinctions, there is nothing in the *Trembly* decision that suggests that the employer relied upon the provisions of the Code of Conduct in assessing the wrongfulness of Grievant Trembly's conduct.

As BOE has pointed out, the children on a bus are a captive audience and there was no escape for them from Mr. Hennen's angry tirade. The evidence established that Mr. Hennen did, in fact, violate the above-quoted provisions of the Code of Conduct. In so doing, he was insubordinate.

BOE also cites the Code of Conduct's requirement that school employees “demonstrate responsible citizenship by maintaining a high standard of conduct, self- control, and moral/ethical behavior.” Mr. Hennen clearly lost his self-control in response to the squawking and, in so doing, further violated the Code of Conduct. Again, this constitutes insubordination.

Willful Neglect of Duty

The threat to student safety that resulted from Mr. Hennen's actions on February 7, 2005, have given rise to an allegation of willful neglect of duty. The Supreme Court of Appeals of West Virginia has acknowledged that, although our jurisprudence lacks a precise definition for this term, it

"encompasses something more serious than 'incompetence,' which is another ground for teacher discipline under W. Va. Code, 18A-2-8. The term 'willful' ordinarily imports a knowing and intentional act, as distinguished from a negligent act." *Bd. of Educ. v. Chaddock*, 183 W. Va. 638, 640, 398 S.E.2d 120, 122 (1990)*(per curiam*)(citing *Fox v. Bd. of Educ*., 160 W. Va. 668, 672, 236 S.E.2d 243, 246 (1977)).

It must be determined if Mr. Hennen's actions on February 7 fall within the scope of willful neglect of duty. Mr. Hennen claims that when he heard the squawking noise he was concerned that it might have been a student screaming and, as a consequence, felt compelled to stop the bus immediately to investigate.

This characterization of events is not supported by the record. Mr. Hennen had already told Director Hill, prior to this incident, that there was a student on his bus making an annoying squawking sound. This undercuts Mr. Hennen's assertion that he thought the sound might have been a scream, indicating that a student needed help. Mr. Hennen's testimony on this point is not credible. It is not consistent with the fact that he had heard the squawking noise before and, thus, knew it was not a scream.

Mr. Hennen's testimony on this point is also undercut by his behavior, as seen on the videotape. Several squawks were heard on the videotape before Mr. Hennen abruptly brought the bus to a halt. There is nothing to distinguish that final squawk from those that preceded it. Nor was there any scuffling noise to suggest a fight had broken out. The videotape reveals Mr. Hennen as angry rather than concerned. It shows that he did not make any effort to ascertain whether any child was in danger, injured, or in pain. Therefore, Mr. Hennen's testimony that he thought the squawk might be a scream is nothing more than a belated attempt to excuse his misconduct. As such, it is not deemed credible testimony. Counsel for Mr. Hennen argues that, with the benefit of hindsight, it is easy to second-guess a bus operator's actions, whereas the bus operator must deal with the situation as it is developing. This point is well-taken but does not apply to the circumstances of this case. As Director Hill pointed out, Mr. Hennen had complained about the squawking noises before February 7. Therefore, he was not taken by surprise when he heard them on that date, as well. No fighting or scuffling accompanied the noise. Mr. Hennen was aware that the noise, while annoying, was not harmful to the students.

By contrast, Superintendent Metz and Director Hall considered that Mr. Hennen's action in

abruptly halting the bus, without pulling completely off of the road, placed the students at risk. It was also a safety concern for the buses and other traffic that had to cross the center line in order to go around Mr. Hennen's bus. Thankfully this was accomplished without incident.

Mr. Hennen's counsel has implied that the absence of any untoward results excuses the conduct or negates the legitimacy of Director Hill's safety concerns. This is not so. It is the potential for a tragic outcome that is significant in assessing the safety of Mr. Hennen's decision to pull partly off of Route 5. Here the potential was great, whereas there was little or no benefit to be gained from stopping at that point. Mr. Hennen unnecessarily created a potentially hazardous situation. If he had waited one minute, until he had crossed the bridge, Mr. Hennen would have come to a much safer place to stop where he could have pulled his bus entirely off of the road. Mr. Hennen's actions in this regard constitute willful neglect of duty.

Mitigation

BOE has proven, by a preponderance, that the events of February 7, 2005, justify the disciplinary suspension. Mr. Hennen, however, argues that the two-day suspension is too harsh. Therefore, he seeks mitigation of the disciplinary action.

When seeking mitigation, a grievant bears the burden of demonstrating that the penalty that was imposed 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)." *Olson v. Kanawha County Bd. of Educ*., Docket No. 02-20-380 (May 30, 2003). Whether mitigation is appropriate must be evaluated against the backdrop of the general rule that an employer is vested with "substantial discretion to determine a penalty in these types of situations." *Santer v. Kanawha County Bd. of Educ*., Docket No. 03-20-092 (June 30, 2003). With respect to mitigation, the "'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)." *Santer v. Kanawha County Bd. of Educ*., Docket No. 03-20-092 (June 30, 2003).

Although Mr. Hennen's evaluations have been good, he was previously disciplined for failing to use the appropriate measures to maintain order on his bus. His length of service actually works

against Mr. Hennen's request for mitigation because, after 22 years of service, it is expected that Mr. Hennen has been thoroughly indoctrinated into themethods to be used in disciplining students, the safety requirements for driving a school bus, and the Code of Conduct that is reviewed with employees annually. In other words, a bus operator with his level of experience would be expected to demonstrate better judgment with respect to safety and discipline than Mr. Hennen showed on February 7, 2005. The annual training Mr. Hennen and other bus operators have received each year, as well as his earlier disciplinary suspension, speak to the fact that his employer's expectations were clearly communicated to Mr. Hennen.

In terms of the length of the disciplinary suspension, Superintendent Metz testified that, if he had known all of the facts earlier, he would have imposed a five-day suspension. This would have been consistent with the length of the suspensions that Superintendent Metz recalled were imposed upon two teachers for similar actions.

Mr. Hennen only received a two-day suspension. It is difficult to find that mitigation of a two-day suspension is appropriate in light of the fact that the suspension is already shorter, by three days, than would be the norm. Two days for placing the students on his bus and other buses in a potentially hazardous situation, for acting in anger, and for directing profanity at students cannot be considered disproportionate or clearly excessive. Nor could imposition of such a short suspension be deemed an abuse of his employer's discretion. Therefore, Mr. Hennen has failed to demonstrate entitlement to mitigation of his two-day suspension.

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

Conclusions of Law

1 1. Because this is a disciplinary action, BOE bears the burden of proving the charges by a preponderance of the evidence. W. Va. Code § 18-29-6, *Bays v. Fayette County Bd. of Educ*., Docket No. 05-10-103 (May 24, 2005), *Hoover v. Lewis County Bd. of Educ*., Docket No. 93-21-427 (Feb. 24, 1994). 2 2. “The generally accepted meaning of preponderance of the evidence is 'more likely than not.' *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004).” *Cobb v. W. Va. Human Rights Comm'n ex rel. Wattie*, 2005 W. Va. LEXIS 112, *49 n.26 (July 7, 2005).

3 3. In making a decision to take disciplinary action against an employee, the employer must act “reasonably, not arbitrarily and capriciously.” *Bell v. Kanawha County Bd. of Educ*., Docket No. 91-20-005 (Apr. 16, 1991).

4 4. West Virginia Code section 18A-2-8 provides, in pertinent part, that a board of education may discipline an employee for “[i]mmorality, 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.”

5 5. “In order to establish insubordination, the employer must not only demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, but that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination.” *Montgomery v. Greenbrier County Bd. of Educ.*, Docket No. 97-13-427 (Mar. 18, 1998). BOE established that Mr. Hennen was well-aware of the procedures for student disciplineand the requirements of the Code of Conduct, but that Mr. Hennen knowingly took actions that failed to conform to the requirements of either. Therefore, Mr. Hennen was insubordinate.

6 6. “'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).” *Opel v. Preston County Bd. of Educ.,* Docket No. 02-39-372 (Apr. 15, 2003). In failing to comply with safety requirements, by stopping on Route 5 where he could not fully pull the bus off of the road, and by placing other buses at risk when they had to cross the center line to pass him, Mr. Hennen's actions were knowing and intentional. Accordingly, these acts constitute willful neglect of duty.

7 7. The employer “has substantial discretion to determine a penalty in these types of situations[.]” *Bays v. Fayette County Bd. of Educ*., Docket No. 05-10-103 (May 24, 2005)(citing *Jordan v. Mason County Bd. of Educ*., Docket No. 99-26-8 (July 6, 1999), *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)). On these facts, that discretion was not abused.

8 8. With respect to mitigation, the “'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. ofEduc*., Docket No. 93-45-105 (Mar. 31, 1994)." *Santer v. Kanawha County Bd. of Educ*., Docket No. 03-20-092 (June 30, 2003). Application of the foregoing factors to the facts and circumstances of this grievance leads to the conclusion that Mr. Hennen failed to prove that mitigation was warranted.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wirt 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 West Virginia Code section 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:

September 30, 2005

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

References to pages in the transcript of the March 29, 2005, disciplinary hearing shall appear herein as "Tr.__."

Footnote: 2

The copy of this correspondence that was introduced as part of Administration Exhibit 1 at the disciplinary hearing was not completely legible because return receipt information partly obscured the body of the letter. At the conclusion of the Level Four hearing, the record had been left open so that Superintendent Metz could submit a legible copy. The legible copy was received at the Grievance Board, via facsimile transmission, on May 13, 2005.

Footnote: 3

There have been occasions when students were suspended from riding the bus because they used foul language.