THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

MATTHEW TAYLOR,

Grievant,

v. **Docket No. 06-09-451**

Denise M. Spatafore

Administrative Law Judge

DODDRIDGE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Matthew Taylor ("Grievant") initiated this grievance at level four on December 6, 2006, following a ten-day suspension imposed by his employer, Respondent Doddridge County Board of Education ("BOE"). Respondent seeks as relief to have the suspension expunged from his record, plus any lost wages. Following a telephonic scheduling conference conducted on January 19, 2007, the parties elected to have this matter decided based upon the record developed during a hearing conducted by the BOE on November 30, 2006. This grievance became mature for consideration upon receipt of the parties' fact/law proposals on March 2, 2007. Grievant was represented in this matter by Owens Brown of the West Virginia Education Association, and the BOE was represented by counsel, Gregory Bailey.

Synopsis

The BOE suspended Grievant for 10 days for insubordination as the result of a telephone conversation with his supervisor on November 2, 2006, during which the BOEalleges Grievant was angry, disrespectful and argumentative. Grievant had received three warning letters in the past, most recently in September of 2006, for similar insubordinate behavior. Grievant contends that he was not insubordinate during the telephone conversation and should not have been suspended.

Findings of Fact

1. Grievant has been employed by the BOE as a substitute bus operator for five years.

2. Grievant received a written reprimand on May 16, 2003, from his supervisor, Ed Cumpston (Transportation Director), as the result of two incidents of insubordinatebehavior, described as follows:

a.

> During the first incident, while in a meeting with other substitute drivers and Mr. Cumpston, Grievant had demonstrated an inappropriate “demeanor and nonverbal cues” that Mr. Cumpston viewed as “evidence of lack of respect for your supervisor.”

b.

> The second incident, which was the chief reason for the reprimand, resulted from Grievant's conduct during a discussion the previous day. Grievant had informed Mr. Cumpston that his girlfriend had wrecked his car, and he did not want to drive that day. Because the person Grievant was substituting for had called off at the last minute, Mr. Cumpston had asked Grievant to try to make other arrangements for his personal problem, so that he could drive. Grievant reacted angrily, got on his bus, and drove away from the garage at a high rate of speed.

3. In the May 16, 2003, reprimand, Mr. Cumpston advised Grievant that he “must gain control of [his] temper and work to develop a more positive attitude toward [his] job if [he] expect[s] to remain on the substitute school bus driver list.” He further advised Grievant that “[f]urther misconduct on your part could result in a recommendation that your name be withdrawn from the substitute bus operator list.”

4. Mr. Cumpston issued another written reprimand to Grievant dated December 1, 2003, regarding his continued “inappropriate attitude[.]” This reprimand referred to two incidents during which Grievant made disrespectful remarks about Mr. Cumpston to other employees, in Mr.

Cumpston's presence. The first incident occurred on October 9, 2003, during a meeting with all substitute employees, and the second occurred on November 21, 2003, in the presence of several other bus drivers, regarding Mr. Cumpston's handling of a problem on Grievant's bus, with Grievant stating that “[Mr. Cumpston] didn't do nothin'.” Mr. Cumpston advised Grievant in this reprimand that his “negative attitude” and “angermanagement” were a continuing problem.

5. Grievant claims not to have received the December 1, 2003, reprimand. His address did not change between May and December of 2003.

6. Mr. Cumpston reprimanded Grievant again in a letter dated September 19, 2006. Mr. Cumpston had ridden on Grievant's bus with him, because the particular run started near Mr. Cumpston's house, and he felt that Grievant drove too fast on a narrow road during a large portion of the run. When Mr. Cumpston attempted to discuss this with Grievant later, Grievant again reacted angrily, saying that Mr. Cumpston should “yell” at other drivers to slow down before saying anything to him. Grievant then walked away, angrily demanded that another driver who was blocking his path move his bus (so he could drive his bus out of the garage), and again exited the garage driving too fast.

7. Grievant did not grieve any of the reprimands discussed above.

8. On November 2, 2006, Mr. Cumpston telephoned Grievant's home at approximately 10:25 p.m. to ask him if he could drive as a substitute the following day. Because Grievant's wife was on the Internet, the call went to voice mail, and Mr. Cumpston left a message stating that he would wait until 11:00 p.m. to hear from Grievant before calling another substitute. Mr. Cumpston then called Grievant's cell phone and left a similar message. He also tried to phone Grievant's father several times, but the line was busy.

9. Mr. Cumpston fell asleep and did not wake until nearly 11:45 p.m. He checked his messages and had not heard from Grievant, so he called another substitute to take the bus run for the next day.

10. Grievant's wife retrieved Mr. Cumpston's message sometime after 11:35 p.m. She woke Grievant, told him what the message said, and advised Grievant he should call Mr. Cumpston back, just to make sure he had obtained another substitute.

11. Grievant called Mr. Cumpston back at approximately 11:50 p.m. on November 2, 2006. Mr. Cumpston advised Grievant that, since he did not hear from him by 11:00, he had called another

substitute. Grievant responded angrily, asking Mr. Cumpston why he had not called him twice, as per BOE policy. Mr. Cumpston responded that he had given Grievant more than a sufficient time to respond, and he also stated that he did not want to argue with Grievant. Grievant's response was that, for anyone else, “you would try and try and try.” Mr. Cumpston warned Grievant that there would be consequences for his further disrespectful attitude, at which time Grievant said “I don't want to listen to this,” and handed the phone to his wife. Apparently, the conversation ended at this point.

12. By letter dated November 8, 2006, Superintendent Janice Michels informed Grievant that she would be recommending to the BOE that Grievant be suspended for 10 working days, due to his insubordinate conduct toward Mr. Cumpston during the November 2 telephone conversation. She also referred to the previous warning regarding insubordinate conduct on September 19, 2006.

13. Following a BOE hearing on November 30, 2006, the Superintendent's recommended suspension was ratified.

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). "The 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*, 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).

W. Va. Code § 18A-2-7 states that “[t]he superintendent, subject only to approval of the board, shall have authority to . . . suspend school personnel.” In turn, *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, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge. . . .

"The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code §18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991). *See Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975)." *Graham v. Putnam County Bd. of Educ.*, Docket No. 99-40- 206 (Sep. 30, 1999).

Respondent has argued that Grievant's conduct constitutes insubordination. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrativesuperior." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Butts v. Higher Educ. Interim Governing Bd.,* 212 W. Va. 209, 569 S.E.2d 456 (2002). *See Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). "[F]or 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, supra*. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990).

Respondent contends that Grievant's conduct during the November 2, 2006, telephone conversation was further insubordinate behavior, of which he had been warned multiple times. Grievant argues that he was not disrespectful during the phone conversation, never raised his voice, and was only trying to understand why Mr. Cumpston had called another substitute before Grievant could return his call.

With regard to Grievant's behavior during the November 2 phone conversation, there are some disparities in the testimony. While Mr. Cumpston maintains that Grievant reacted angrily upon being informed that another substitute had been called, Grievant testified that he never raised his voice and only asked a reasonable question. However, Grievant also testified that neither he nor his wife actually listened to voice mail message, but only knew that Mr. Cumpston called from the caller ID mechanism; thus he did not know about the 11:00 deadline. Conversely, Grievant's wife testified that she explainedto him that she had listened to Mr. Cumpston's message and told Grievant exactly what he said. She also stated that, when Grievant told Mr. Cumpston he no longer wanted to listen and handed the phone to her, "his voice was shaking," presumably in anger.

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.ources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dept. of Health and Human Resources*, Docket No. 95- HHR-066 (May 12, 1995). The undersigned is charged with assessing the credibility of the witnesses, and where the evidence has been submitted on the record, this is an especially difficult task, as the undersigned has not had the opportunity to observe the witness' demeanor. Nevertheless, demeanor is only one of the factors to be considered in assessing the credibility of a witness. Other factors include the witness' opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the trier of fact should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of witness' information. *See Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994).

Grievant's testimony is found not to be credible regarding what transpired during the telephone conversation, as it is contradicted by the testimony of his own wife and by Mr. Cumpston. Therefore, Grievant knew when he called Mr. Cumpston at 11:50 that the 11:00 time had long passed, and that Mr. Cumpston had more than likely called another substitute. Nevertheless, Grievant did call Mr. Cumpston and reacted angrily, when he hadno reason to expect Mr. Cumpston to have waited. Grievant's wife's testimony that his “voice was shaking” is also supportive of Mr. Cumpston's testimony that, once again, Grievant spoke angrily to his supervisor. Finally, Grievant's angry reaction is consistent with the prior similar behavior he has exhibited toward Mr. Cumpston.

Although Grievant did attempt to dispute some of the prior events for which he was reprimanded, he did not file grievances regarding those issues. As Grievant did not grieve the prior discipline he received, “the merits of [that action] cannot be placed in issue now. *Jones v. W. Va. Dept. of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *See Stamper v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR- 144 (Mar. 20, 1996); *Womack v. Dept. of Admin.*, Docket No. 93-ADMN-430 (Mar. 30, 1994). Furthermore, all the information contained in the documentation of Grievant's prior discipline must be accepted as true. *See Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994).” *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT- 256 (Oct. 27, 1997). Even assuming Grievant did not receive the reprimand from December of

2003, as he contends, he did receive two prior warnings regarding anger control and disrespectful behavior, most recently less than two months prior to the event which led to the current suspension.

Respondent has proven by a preponderance of the evidence that Grievant was insubordinate toward his supervisor, for which suspension was appropriate. The following conclusions of law support this Decision.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing thecharges 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. An employee of a county board of education may be suspended or dismissed only for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge. W. Va. Code § 18A-2-8.

3. "The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code §18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991). *See Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975)." *Graham v. Putnam County Bd. of Educ.*, Docket No. 99-40-206 (Sep. 30, 1999).

4. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Butts v. Higher Educ. Interim Governing Bd.,* 212 W. Va. 209, 569 S.E.2d 456 (2002). *See Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89- 004 (May 1, 1989).

5. Respondent has proven by a preponderance of the evidence that Grievant was insubordinate toward his supervisor, and had been warned previously against similarbehavior, for which suspension was appropriate.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Doddridge 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.

Date: March 26, 2007 _____

DENISE M. SPATAFORE

Administrative Law Judge