THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

WALLACE PARRISH,

Grievant,

v. **Docket No. 06-18-432**

Sue Keller

Senior Administrative Law Judge

JACKSON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Wallace Parrish ("Grievant"), employed by the Jackson County Board of Education ("JCBE") as a bus operator, filed a grievance directly to level four, as is permitted by *W. Va. Code* § 18-2-7, on November 20, 2006, after he was suspended for two days. Grievant requested expungement of this disciplinary action from his record, lost pay with interest, and restoration of his seniority. By letter telefaxed on April 12, 2007, John E. Roush, Esq., of the West Virginia School Service Personnel Association, advised the Grievance Board that due to ill health which would prevent Grievant from attending a hearing in the foreseeable future, he and JCBE counsel Howard E. Seufer, Jr., of Bowles Rice McDavid Graff & Love, LLP, agreed to submit the grievance for decision based upon the record developed at the predetermination hearing conducted by JCBE. (See footnote 1) The matter became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on May 14, 2007.

Synopsis

___Grievant was suspended for two days after stating to the school principal that he might "slap the shit" out of a student driver who, he perceived to be acting in an illegal and potentially dangerous manner. Grievant concedes the inappropriate use of the "mildly vulgar term" as the result of the provocation, but asserts the suspension was excessive. JCBE argues that mitigating factors were considered, and the suspension for an act which violated the Code of Conduct, and resulted in

insubordination, was not excessive. Grievant failed to prove that the discipline was excessive given the threatening nature of the comment.

The following facts have been derived from a preponderance of the credible evidence made part of the predisciplinary hearing.

Findings of Fact

1. At the time the grievance was filed, Grievant had been employed by JCBE as a bus operator for approximately six years.

2. On the afternoon of October 25, 2006, Grievant was parked at Ripley High School discharging elementary students and boarding high school students for transportation home, when he observed a vehicle passing by the line of busses. Because private traffic is not allowed in the area during this time, Grievant leaned out the window and waved his arm while leaning on the horn to get the vehicle stopped. The lights on his bus were also in operation.

3. Once stopped, a verbal exchange ensued between Grievant and the student operating the vehicle. The student became abusive to Grievant, calling him a “SOB”, and telling him that he would drive his “m___ f___” car anywhere he wanted.

4. Observing the encounter, another bus operator called for Principal ToddLayhew, who boarded Grievant's bus and asked what was happening.

5. Grievant advised Principal Layhew to the effect that he needed to tell the student what the stop sign on his bus meant before he got off the bus and slapped the “shit” out of him.

6. There were approximately forty-five students, ranging in age from pre-school to middle school, on board Grievant's bus at the time of the incident.

7. Based on a determination that the use of such language violated the Code of Conduct for Employees, and therefore constituted insubordination, Grievant was suspended without pay for two days.

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 defined as"evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a

whole shows that the fact sought to be proved is more probable than not." *Black's Law Dictionary* (6th ed. 1991), *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

The authority of a county board of education to suspend an employee must be based upon one or more of the causes listed in *W. Va. Code* § 18A-2-8, and must be exercised reasonably, not arbitrarily or capriciously. *Parham v. Raleigh County Bd. of Educ.*, 192 W. Va. 540, 453 S.E.2d 374 (1994), *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).

W. Va. Code § 18A-2-8 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 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.

JCBE argues that Grievant's actions were contrary to the Employee Code of Conduct set forth in State Department of Education Policy 5902, requiring all school employees to “[e]xhibit professional behavior by showing positive examples of preparedness, commendations, fairness, punctuality, attendance, language and appearance” and “demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior.”

JCBE further asserts that a violation of the Code of 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 administrative superior." *Butts v. Higher Educ. Interim Governing Bd.*, 569 S.E.2d 456 (W. Va. 2002)(*per curiam*). *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). Although the cases are not clear as to what constitutes "wilfulness," they seem to suggest that for a refusal to obey to be "wilful," the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of anorder.” *Butts, supra; Smith v. Parkways Economic Dev. and Tourism Auth.*, 05-PEDTA-166 (Aug. 26, 2005).

Grievant admits that his use of the profanity in front of students, and in reference to a student, was inappropriate. However, he contends that, under the circumstances, a suspension is excessive. JCBE argues that it did not abuse its discretion since the mitigating factors were considered, and the two-day suspension was not clearly excessive or inherently disproportional to the offense.

"Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995) (citations omitted).

Undeniably, school bus operators, teachers, and other school employees, are tested on a daily basis by the students they serve. Nevertheless, they are expected to exercise self control, and the use of foul language or cursing is not acceptable. In a previous case of this nature, the Grievance Board determined that a two-day suspension was excessive when a bus operator expressed his frustration with a student who repeatedly did not return an enrollment form which grievant needed to complete a report by stating, “Shit, I need that paper.” The suspension was mitigated to a written reprimand because that grievant was not angry during his conversation with the student, and did not raise his voice or act in a threatening manner toward the student. *Trembly v. Preston County Bd. of Educ.*, Docket No. 00-39-355 (Mar. 30, 2004). However, the mitigation was reversed on appeal to theKanawha County Circuit Court. *Preston County Bd. of Educ. v. Trembly,* Civil Action #01- AA-43; (Nov. 1, 2002).

In the present case, Grievant was angry that the student was acting in a manner which he believed was improper and potentially dangerous to the students who were exiting and boarding the buses. Further, the comment could reasonably be interpreted as a threat to the student. While it appears that Grievant was provoked, the exclamation was contrary to the Code of Conduct. Although Grievant had completed six years of employment with a flawless record, given the circumstances of the situation, it cannot be determined that JCBE's imposition of a two-day suspension was excessive.

Consistent with the foregoing, the following conclusions of law are made.

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. The authority of a county board of education to suspend an employee must be based upon one or more of the causes listed in *W. Va. Code* § 18A-2-8, and must be exercised reasonably, not arbitrarily or capriciously. *Parham v. Raleigh County Bd. of Educ.*, 192 W. Va. 540, 453 S.E.2d 374 (1994), *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). 3. A board of education employee may be suspended at any time for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea of nolo contendere to a felony charge. *W. Va. Code* § 18A-2-8.

4. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Butts v. Higher Educ. Interim Governing Bd.*, 569 S.E.2d 456 (W. Va. 2002)(*per curiam*).

5. JCBE has proven by a preponderance of the evidence that Grievant used unacceptable, threatening, language in front of students, and in reference to a student, while addressing the school principal.

6. "Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ*., Docket No. 95-54-041 (May 18, 1995) (citations omitted).

7. The penalty imposed upon Grievant was not unreasonable or clearly excessive under the circumstances presented in this case.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Jackson County. Any such appeal must be filed within thirty (30) days ofreceipt 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: JUNE 11, 2007

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Grievant expired sometime prior to May 14, 2007.