WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

REBECCA HALE,

Grievant,

v. **Docket No. 07-21-335**

LEWIS COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Rebecca Hale ("Grievant") filed this grievance on June 25, 2007, following a ten-day suspension imposed by her employer. A hearing was conducted in the Grievance Board's office in Westover, West Virginia, on October 15, 2007, during which Grievant was represented by counsel, John E. Roush of the West Virginia School Service Personnel Association, and Respondent was represented by counsel, Harry M. Rubenstein. This grievance became mature for consideration upon receipt of the parties' fact/law proposals on November 8, 2007.

Synopsis

Grievant, a bus operator, was suspended for ten days, following an incident which occurred on her bus on April 19, 2007. As Grievant was letting students off the bus, a parent approached her to confront Grievant regarding a disciplinary situation involving the woman's son, a student riding Grievant's bus. While Grievant and the parent were arguing, the parent was standing with one foot in the stairwell of the bus. During the discussion, Grievant attempted to close the bus doors, which struck the parent slightly, and allowed the bus to move forward a short distance while the parent was

still standing in the doorway. Respondent proved by a preponderance of the evidence that Grievant's conduct constituted willful neglect of duty, justifying the suspension.

Based upon a detailed review of the record in its entirety, the undersigned makes the following findings of fact:

Findings of Fact

1. Grievant has been employed by the Lewis County Board of Education ("BOE") as a bus operator for approximately seven years.

2. On about April 17, 2007, a student on Grievant's bus was misbehaving, so she asked him to move to the front seat of the bus. When he did so, he walked on the cushions of the seats to get to the front. Grievant referred the student to the principal of his school for disciplinary action.

3. The student was suspended for his misconduct.

4. On April 19, 2007, during her afternoon bus run, Grievant stopped to unload this particular student, along with his younger brother, at their normal stop. The children's mother, Jennifer Marsh, was waiting to pick them up and approached the bus to talk with Grievant when the bus stopped.

5. Ms. Marsh placed her left foot in the stairwell of the bus, leaving her right foot on the ground, and confronted Grievant about "picking on" her son, asking Grievant "what's the problem." A somewhat heated discussion ensued, lasting only a couple of minutes, during which Grievant told her to take up the issue with the principal.

6. While Ms. Marsh and Grievant were arguing, Grievant attempted to close the doors of the bus, and she allowed the bus to move forward slightly. Apparently realizing that Ms. Marsh was still partially on the bus at this point, Grievant quickly stopped the busand opened the doors. Ms. Marsh angrily left the bus, saying "You ran me down, lady." She then proceeded to cross the street in front of the bus and return to her car on the opposite side.

7. While she was stopped and talking to Ms. Marsh, Grievant had her foot on the brake pedal, but had not set the parking brake. However, at the time of this incident, drivers were not required to set the parking brake while loading and unloading students, but it was recommended by transportation administrators.

8. Ms. Marsh was not seriously injured during the incident, but claimed to have received a bruise on her left hip when Grievant attempted to close the doors.

9. Grievant did not contact the bus garage during the confrontation, but did attempt to call the garage after Ms. Marsh had left, receiving no answer. The transportation supervisor was on extended leave at the time.

10. Shortly after this incident occurred, at a regularly scheduled BOE meeting, Ms. Marsh attended and asked to speak to the Board about Grievant's conduct on April 19, 2007. Several parents also attended this meeting, expressing their concerns regarding Grievant's behavior and the safety of her driving. During an executive session, the Board listened to Ms. Marsh's complaint about the incident, but did not take any action on the issue.

11. On April 30, 2007, Superintendent Joseph Mace met with Grievant to discuss her conduct on April 19. Grievant admitted that she attempted to close the door before Ms. March had left the bus and that she (Grievant) should not have done that. When advised that the bus videotape indicated that the bus had moved slightly during the discussion, Grievant merely stated that she should have set her emergency brake. 12. By letter dated May 15, 2007, Superintendent Mace advised Grievant that, as a consequence of her moving the bus with a person in the stairwell and attempting to close the door on her, she was being suspended for ten days. Also, because Grievant had received discipline in the past for speeding, Superintendent Mace also warned her in this letter that she was not to speed in her bus, run stop lights, or break bus rules and regulations.

13. A hearing regarding Grievant's suspension was conducted by the BOE on June 18, 2007, which Grievant attended with her counsel. After discovering that Ms. Marsh had appeared at a prior BOE meeting and had related the events in question to the Board, Grievant's counsel elected not to present evidence, alleging that the Board members should recuse themselves from any decision regarding Grievant's discipline. The BOE declined to do so.

14. By letter dated June 19, 2007, Superintendent Mace advised Grievant that the BOE had voted to uphold the ten-day suspension.

15. Grievant was not truthful about her conduct on the day in question, claiming she did not move the bus while Ms. Marsh was in the stairwell and that she thought Ms. Marsh had left the bus when she first attempted to close the doors.

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; (See footnote 1) *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). 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. “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).

As a preliminary issue, Grievant contends that she was deprived of her right to a fair hearing by the BOE, constituting a due process violation, because they had “prejudged” the issue after hearing the complaints of Ms. Marsh and others at the prior Board meeting. Grievant relies upon this Grievance Board's decision in *Warner v. Kanawha County Board of Education*, Docket No. 99-20-166 (July 29, 1999), in support of her argument, along with the Supreme Court of Appeals' opinion in *Lavender v. McDowell County Board of Education*, 174 W. Va. 513, 327 S.E.2d 691 (1984). However, as discussed below, theundersigned is not persuaded that Grievant was deprived of any due process right under the circumstances presented.

"Due process is a flexible concept, and . . . the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) (*citing Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). Prior to an unpaid suspension, an employee is entitled to a pre- suspension hearing, an explanation of the evidence, and an opportunity to respond. *Id*. at Syl Pt. 3; *Bd. of Educ. v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994); *See Starkey v. Jefferson County Bd. of Educ.*, Docket No. 02-19-010 (April 8, 2002).

“Prejudgment” of the grievant's proposed transfer was found by the Supreme Court in *Lavender*, *supra*, because the Superintendent discussed the proposal with the Board and obtained their tentative approval of the action, prior to notifying the grievant. The Court found the Superintendent's actions to be inconsistent “with the concept that the board is to make a detached and independent

evaluation of the employee's case." Conversely, in *Warner*, *supra*, the grievant failed to prove prejudgment because, although the Superintendent informed the Board that he had identified certain positions to be eliminated (Grievant's being one of them), he "never asked the board to approve his actions " prior to providing the grievant with a hearing on the issue. The administrative law judge further concluded that, based upon a review of the transcript of the transfer hearing Grievant later attended, there was "no indication that the prior proceedings deprived Grievant of a detached and independent evaluation of her case." Similarly, Grievant has failed to prove prejudgment or any due process violation in this case. There is no evidence indicating that, at the prior meeting, there was any discussion by the Board regarding discipline to be imposed upon Grievant, and, in fact, Board members stated that they merely listened to Ms. Marsh's complaint without even being told the identity of the driver involved. They did not comment on Ms. Marsh's statements or discuss her allegations, but merely asked the administration to investigate the incident after it had been described to them. Moreover, Grievant received a full evidentiary hearing with representation by counsel before the Board voted upon the recommended suspension. No prejudgment has been proven, and the undersigned finds that Grievant was provided with a hearing, notice of the charges, and an opportunity to respond prior to the imposition of any discipline.

As to the merits of this case, Grievant contends that she did nothing deserving of discipline. She argues that Respondent's evidence does not establish that she closed the door on Ms. Marsh, nor that she moved the bus during the altercation. She maintains that Ms. Marsh had stepped off the bus when she attempted to close the doors, which "lightly" brushed Ms. Marsh, at which time she immediately reopened them. She also asserts that the bus did not move as Respondent has alleged.

The videotape from Grievant's bus on the day in question was introduced as evidence at the BOE hearing and viewed at that time; it has also been provided to and viewed by the undersigned. Unfortunately, the camera, as with most video equipment placed on school buses, only captures a view from the front going to the back of the bus, so only the seats and the children are visible. However, one can hear Grievant and Ms. Marsh arguing on the tape, and it is obvious when the bus moves, because one can seethe exterior scenery moving past the bus windows. The undersigned's review of the tape establishes that, while Grievant and Ms. Marsh were still arguing, the bus did move at least several inches. It abruptly stopped, at which time Ms. Marsh can be heard saying "You ran me down, lady." Then, with the bus still stopped, one can see the students on the bus looking out

the front window, following something which passes in front of the bus, then looking at something out to the left front area, after which the bus begins moving again.

What can be seen and heard on the tape is consistent with Ms. Marsh's testimony at the Board hearing. She stated that, while she still had one foot in the stairwell, Grievant attempted to close the doors and move the bus. Then, realizing that Ms. Marsh was still partially in the stairwell, Grievant abruptly stopped the bus and reopened the doors, allowing Ms. Marsh to leave. Because Ms. Marsh had to walk in front of the bus to cross the street and reach her vehicle parked on the opposite side, this explains what the children were looking at through the windows before the bus began to move again.

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 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 Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999); *Perdue, supra*.

Grievant's version of the events in question is not credible. As set forth above, the videotape supports Ms. Marsh's version of events, which was that, while the women were still arguing, Grievant attempted to close the doors and move the bus. Grievant contends that only a “flicker” can be seen on the tape when the bus allegedly moved, and she has argued that this was caused by Ms. Marsh stepping off the bus. However, as one views the tape, it is obvious that the bus moved at least several inches, if not more, then abruptly stopped. Moreover, Grievant's conduct is even more troubling in that several moments then passed while she waited for Ms. Marsh to cross the street. If Grievant's version of events were to be believed, there should have been no reason for the bus to

move, even slightly, before Ms. Marsh had clearly exited the area and reached her vehicle, which had not yet happened when the bus moved. Therefore, the undersigned finds that Grievant was not truthful about the events that occurred, and Respondent has established by a preponderance of the evidence that she attempted to move her bus to end the altercation with Ms. Marsh, although Ms. Marsh had not yet left the stairwell. Neither the letter informing Grievant of the proposed suspension, nor the letter confirming the BOE's vote, specifically cites any of the offenses listed in Code § 18A-2-8. However, "[i]t is not the label a county board of education attaches to the conduct of the employee . . . that is determinative. The critical inquiry is whether the board's evidence is sufficient to substantiate that the employee actually engaged in the conduct." *Allen v. Monroe County Bd. of Educ.*, Docket No. 90-31-021 (July 11, 1990); *Duruttya v. Mingo County Bd. of Educ.*, Docket No. 29-88-104 (Feb. 28, 1990).

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. *Williams v. Cabell County Bd. of Educ.*, Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ.*, Docket No. 95-29-151 (Aug. 24, 1995); *Hoover v. Lewis County Bd. of Educ.*, Docket No.93-21-427 (Feb. 24, 1994). Willful neglect of duty encompasses something more serious than incompetence. *Bd. of Educ. v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120, 122 (1990); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996). 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).

Respondent has proven that Grievant engaged in the conduct alleged, which constitutes willful neglect of duty. Any reasonable person in Grievant's position would know that attempting to close the doors and move the bus while a person is partially in the stairwell is extremely unsafe and unacceptable conduct for a school bus operator. She isquite fortunate that no serious injuries resulted. Grievant's conduct was knowing and intentional, and the ten-day suspension was justified.

The following conclusions of law are appropriate in this matter.

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. 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. "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).

3. Prior to an unpaid suspension, an employee is entitled to a pre- suspension hearing, an explanation of the evidence, and an opportunity to respond. *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); *Board of Education of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994); *See Starkey v. Jefferson County Bd. of Educ.*, Docket No. 02-19-010 (April 8, 2002). 4. Under the circumstances presented, Grievant's due process rights were not violated, and the evidence does not establish that she was deprived of her right to a fair hearing before the BOE. *See Warner v. Kanawha County Board of Education*, Docket No. 99-20-166 (July 29, 1999) and *Lavender v. McDowell County Board of Education*, 174 W. Va. 513, 327 S.E.2d 691 (1984).

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. *Williams v. Cabell County Bd. of Educ.*, Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ.*, Docket No. 95-29-151 (Aug. 24, 1995); *Hoover v. Lewis County Bd. of Educ.*, Docket No.93-21-427 (Feb. 24, 1994). Willful neglect of duty encompasses something more serious than incompetence. *Bd. of Educ. v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120, 122 (1990); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996).

6. Respondent has proven by a preponderance of the evidence that Grievant knowingly and intentionally moved her bus with a person in the stairwell, while attempting to close the doors on that individual, constituting willful neglect of duty.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lewis County. Any such appeal must be filed within thirty (30) days of receipt of this decision. *See* W. Va. Code § 18-29-7 (repealed) (but see Executive Order No. 2-07, May 8, 2007). Neither the West Virginia Public Employees Grievance Board norany 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: December 19, 2007

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes and rules, which continue to control the proceedings in this case.