WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

STEPHEN CARPENTER,

Grievant,

v. **Docket No. 06-20-413**

Sue Keller

Senior Administrative Law Judge

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Stephen Carpenter ("Grievant"), employed by the Kanawha County Board of Education ("KCBE") as a bus operator, filed a grievance directly to level four on November 8, 2006, after he was suspended without pay. Grievant filed a second grievance directly to level four on November 22, 2006, following his dismissal. (See footnote 1) A level four hearing on the consolidated grievances was conducted in the Grievance Board's Charleston office before Administrative Law Judge Wendy Campbell on March 6, 2007. Grievant was represented by John E. Roush, Esq., of the West Virginia School Service Personnel Association, and KBOE was represented by James W. Withrow, Esq. Proposed findings of fact and conclusions of law were filed by the parties on April 20, 2007. Subsequent to the resignation of ALJ Campbell, the case was transferred to the undersigned on June 21, 2007.

The following facts are derived from a preponderance of the credible evidence made part of the level four record.

Findings of Fact

___1. Grievant has been regularly-employed by KCBE as a bus operator since January, 2000, and has been assigned to the Elkview Terminal at all times pertinent to this grievance.

2. On June 5, 2006, KCBE Superintendent, Dr. Ronald E. Duerring, advised Grievant that he had been made aware of several alleged wrongdoings by Grievant. Due to the serious nature of the

allegations, Grievant was to be suspended, with pay, effective June 5, 2006, pending further investigation.

3. Dr. Duerring notified Grievant by letter of June 30, 2006, that a hearing would be conducted to determine whether disciplinary action should be recommended as a result of the following allegations:

1. On April 7, 2006 you disregarded instructions on testing procedures for the WV School Bus Driver certification test and failed to turn in your test booklet. It is further alleged that you removed the test booklet from the testing area.

2. On May 15 -19, 25, 26, and 30, 2006 you failed to perform pre-trip inspections on your bus in violation of WV School Transportation regulations (attached).

3. You turn off your video monitoring system during the Capital High School portions of your morning and evening runs.

4. You do not perform post-trip inspections of the interior of your bus in violation of WV Transportation regulations and have, without authorization, used a key to turn off the child minder system.

5. You leave your bus running for extended periods of time, sometimes in excess of one hour, and leave your bus unattended while running in violation of WV Transportation regulations.

6. You make stops on the morning and evening portions of your run to obtain food and/or drinks and leave the bus running and unattended.

7. You have been observed talking on your cell phone while driving despite being advised not to do so.

8. You failed to report an accident where you struck a mirror on another bus at Piedmont Elementary School.

9. You have attempted to harass and intimidate a female bus operator, Nanette Smith, including nearly hitting her with your bus when pulling out from a parking spot on Bigley Avenue during the week of May 22-26. Other incidents include intentionally blocking her bus at Capital High School, following her from room to room to room and discussing her personal information with others.

10. You have attempted to harass and intimidate a female bus monitor aide, LaDonna Darby, including remarks about bidding on her bus to put her in her place, having no right to say anything because she was just an aide, and wondering how her husband lives with her and how he likes being married to a dictionary.

4. By letter dated August 10, 2006, Dr. Duerring provided Grievant an addendum to the list of charges, including driving with four way hazard lights for extended periods of time, pulling away from bus stops before students are seated, failure to activate hazard lights and open the door at railroad crossings, plus additional railroad crossing violations, exiting the bus with students on board, failure to set the parking brake when loading/unloading students, and transporting a wheelchair without properly securing it.

5. By letter dated October 11, 2006, Dr. Duerring notified Grievant that he had been made aware of actions taken by Grievant to harass Nanette Smith, a complainant in the pending disciplinary case, contrary to the directive that no retaliation was to be taken against any witness.

6. Following the hearing on the charges, Dr. Duerring suspended Grievant without pay, on October 31, 2006. Grievant was terminated from his employment by KCBE on November 16, 2006.

7. KCBE bus operators were scheduled to take their annual certification test on April 7, 2006, at Riverside High School. Brenda Taylor, Supervisor of Transportation forSafety and Training, instructed the bus operators to raise their hand when they completed the test, and she or one of her assistants would collect the answer sheet and test booklet.

8. When Grievant completed his test he proceeded to the table where individuals were grading the tests. He placed his answer sheet on the table, but neither Ms. Taylor nor any of her four assistants saw him return the test booklet. When Grievant was returning to his seat, bus operators Paul and Teresa Cochran saw him fold a booklet and place it in his rear pants pocket.

9. Grievant returned to the table, and told Mr. Cochran “I got one.” Grievant asked Mr. Cochran to take the booklet, and after he refused, Grievant left the test area and placed the booklet on top of a vending machine. Ms. Taylor recalled Grievant to the test area, reminding him that he was to remain until excused. Grievant later returned to the vending machine, and retrieved the booklet.

10. Grievant became close friends with another bus operator, Nanette Smith. When his wife received a telephone bill listing approximately 130 calls in one month to Ms. Smith, Grievant's

relationship with her changed.

11. In May 2006, Grievant, Ms. Smith, and Ms. Cochran parked their buses on Bigley Avenue, across the street from a Go Mart, prior to beginning their morning runs. Ms. Cochran took the opportunity to smoke a cigarette while Grievant and Ms. Smith went across the street to get a drink or a snack. As Ms. Smith was beginning to cross the street to return to her bus Grievant abruptly pulled out of his parking place, causing Ms. Smith to retreat toward the sidewalk. Ms. Cochran opined that Grievant was not operating the bus in a safe manner when he pulled out into the street so quickly. 12. Some time later, Ms. Smith was parked on Bradford Street to pick up students at Piedmont Elementary School. Grievant pulled his bus in front of Ms. Smith's, clipping the mirror with the rear of his vehicle. A third bus operator, Robert Flinner, also witnessed the incident. The molding on the mirror of Ms. Smith's bus was scratched, and a mark was left on Grievant's bus. Neither Ms. Smith nor Grievant reported the accident, as was required. Ms. Smith interpreted both of these events as attempts by Grievant to intimidate her.

13. At the end of the 2005-2006 school year, Grievant requested overtime compensation for cleaning his bus. George Beckett, Administrative Assistant for Pupil Transportation, asked Nancy Bowen-Kerr, Supervisor, to review the bus videos to determine how long Grievant had spent cleaning the bus.

14. While reviewing the video, Ms. Bowen-Kerr discovered that the video recorder had been turned off. Mr. Beckett then reviewed the tapes from May 15 through June 2, 2006, and found that Grievant had engaged in numerous violations of rules and procedures, including but not limited to, failing to stop at railroad crossings 7 times, leaving the bus unattended 27 times, failing to conduct pre-trip inspections 19 times, turning the camera system off 18 times, failing to conduct post-trip inspections 14 times, talking on his cell phone while driving 23 times, playing the am/fm radio while student were on board, exceeding the speed limit, eating and drinking on the bus, and bypassing the Childminder system with the use of an unauthorized key. (See footnote 2) 15. Prior to his suspension, Grievant's performance evaluations had been satisfactory.

16. Grievant has been treated for an unspecified period of time for depression, or mood swings. He was first prescribed Zoloft, and was later prescribed Wellbutrin and Prozac. Sometime in the spring of 2006, Grievant decided, without consulting his doctor, to discontinue the Wellbutrin.

18. Some controversy arose in the Transportation Department in Spring 2006, when the am/fm

radios were disabled on the buses. KCBE administrators did not want the radios to be played while students were on the buses, citing offensive lyrics and safety concerns. The bus operators wanted the radios to remain for their personal entertainment when students were not aboard. Initially, Grievant agreed with Mr. Beckett that the radios should not remain, but later changed his mind and signed a petition requesting they remain.

Discussion

Grievant is challenging his suspension and termination, disciplinary actions in which 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 grounds upon which a Board may dismiss any person in its employment are immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance substantiated by an employee performance evaluation, or conviction on 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 ofthe causes listed in *W. Va. Code* § 18A-2-8, and must be exercised reasonably, not arbitrarily and capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991).

Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education." *Blake v. Kanawha County Bd. of Educ*., Docket No. 01-20-470 (Oct. 29, 2001).

In the November 17, 2006, letter notifying Grievant of his dismissal, Dr. Duerring did not cite any of the statutory basis for the action, but referred to the recommended decision rendered by Gary Hendricks following the predetermination hearing. In that decision, Mr. Hendricks found that Grievant had engaged in insubordination and willful neglect of duty when he violated multiple rules and

regulations relating to the safe operation of a school bus, and when bullying, harassing and intimidating fellow employees. Mr. Hendricks also found that Grievant had not been honest in his dealings with his employer, his supervisors, or his fellow employees. Grievant asserts that KCBE failed to prove that he took a certification test, and that while he did not show the best judgment on April 7, 2006, he did nothing worthy of dismissal. Grievant claims that he had a 2005 test in his possession, which he received “from another county.” Grievant attributes the fact that he took the test to the testing site due to carelessness, and the attempt to pass it off to another employee and then hiding it on top of a vending machine, to panic. Grievant also asserts that KCBE failed to prove that he harassed Ms. Smith, and dismisses any claim that he attempted to run over her with the statement that this was not the first time Ms. Smith has walked in front of a moving bus.

Grievant admits the various rule infractions recorded on the video tapes, but asserts that his performance was related to the drugs he had been prescribed to treat his depression. He further argues that the period of time his performance was deficient was an aberration, supported by the testimony of his supervisors. Even if it is not accepted that his problems were caused by the medication, Grievant insists that he was entitled to an evaluation and opportunity to improve his performance prior to termination.

Grievant claims that other employees who committed similar offenses were subject to less severe discipline. For example, an employee who had turned off the child minder system was not suspended. Neither was Ms. Smith suspended for leaving her bus to go into Go Mart, or for failing to report the minor accident with Grievant. Finally, Grievant opines that to allow the termination to stand is contrary to *W. Va. Code* §§ 18A-2-12a and 18A-2-8, and will cause a chilling effect on the rights of employees to exercise their freedom of speech relating to employment issues, and the right of an employee to seek overtime compensation. KCBE charges Grievant with insubordination and willful neglect of duty. Insubordination "includes, and perhaps requires, a willful 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.*, 212 W.Va. 209, 569 S.E.2d 456 (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). 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. *Hoover v. Lewis County Bd. of Educ.*, Docket

No. 93-21-427 (Feb. 24, 1994). *See Bd. of Educ. v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120 (1990). Although the West Virginia Supreme Court has not formulated a precise definition of "willful neglect of duty," it does encompass something more serious than incompetence and imports "a knowing and intentional act, as distinguished from a negligent act." *Chaddock, supra.*

The charges upon which the dismissal was based fall into three primary categories: the driving infractions, the test, and Grievant's interaction with Ms. Smith. Grievant concedes the driving infractions, as they were recorded by the on-board monitoring system. The failure to stop at railroad crossings, turning the video monitor off, talking on the telephone, speeding, overriding the child minder system, are all violations of state or county policies, and his failure to observe them constitutes insubordination and willful neglect of duty, as contemplated by *W. Va. Code* § 18A-2-8. (See footnote 3) Because of the variance in the testimony regarding the issues of the test and the intimidation, it is necessary to examine the credibility of the witnesses. Grievant's testimony is in direct conflict with virtually all of KCBE's witnesses. Grievant does not believe that he hit Ms. Smith's bus while two employees saw it happen, and the marks left verify that it occurred. Grievant attempts to place the blame on Ms. Smith for walking in front of his bus, while a third bus operator testified that he acted unsafely pulling out into the street. Grievant denies intimidating Ms. Smith, but happened to cross her work path on three occasions after the predetermination hearing had started. Grievant's own testimony regarding the test booklet is contradictory and illogical.

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

Grievant disputes any assertion that he was attempting to steal a test. He testified that he did have a 2005 test which he was using as a study guide, but did not explain this to Ms. Taylor, because she acts strictly by the rules, and he had too much respect for her to admit to what he had done. Grievant's explanation lacks credibility for a number of reasons. First, since the tests are to be turned back in, he should not have had a test booklet from any year, or from any county. Second, since everyone routinely passed the test, it is questionable why he would feel the need to bring it to the test. Certainly, Grievant's other actions are indicative of ill motive. Attempting to get another bus operator to take the booklet, and then placing it on top of the vending machine are not actions which proclaim innocence. Finally, both Mr. and Mrs. Cochran saw him folding and placing a booklet in his pocket. There is no evidence that either of these individuals had an axe to grind with Grievant, or that their testimony was otherwise suspect. Thus, Grievant's testimony that the booklet was from 2005, is deemed to lack credibility. Grievant's failure to follow directions regarding the test was a knowing and willful act of insubordination.

In regards to Grievant's behavior toward Ms. Smith, the undersigned believes that a great deal has been left unsaid. Both testified they were the best of friends, and both believed that the other wanted it to be more than that. After Grievant's wife learned of the many phone calls being made to Ms. Smith, things did not simply calm down, but a great deal of animosity appears to have developed on Grievant's part. It is not certain that Grievant intended to run over Ms. Smith at the Go Mart, but a third employee who was at the location testified that his departure was such that he was not driving safely. Likewise,it cannot be determined that he intentionally hit her bus at Piedmont Elementary School, but he continued to deny that the accident happened even when another employee stated that he witnessed it, and marks were left on both vehicles. It appears that Grievant was attempting to intimidate Ms. Smith, and his actions continued, despite a warning from the hearing evaluator during the predetermination hearing. After her testimony at that hearing, Grievant made a point of appearing at points on Ms. Smith's route. He once flipped her the bird, and on a second occasion, shouted “F... you!” A third incident took place as Ms. Smith was leaving the bus garage after her morning run. Grievant was parked across the street in a vacant lot, gunned the car he was driving causing substantial noise from the engine and tires, fishtailed, and sped off. Again, this would appear to have

been for Ms. Smith's benefit, and was contrary to the KCBE's Policy C53, “Bullying, Harassment and Intimidation.” (See footnote 4)

In response to the charges, Grievant argues that his actions were affected by medication, that he had not had any deficiencies brought to his attention and given an opportunity to improve, and the dismissal was retaliation. If proven, any of these matters will serve as a basis for review of the discipline, notwithstanding the fact that the charges have been proven.

Grievant has proven that he has been under the care of Dr. Nohl Braun for an unspecified period of time, and has been treated for depression. Grievant was first placed on Zoloft, but did not tolerate it well. He was then prescribed Wellbutrin and Prozac. However, sometime in the spring of 2006, Grievant decided, without consulting Dr. Braun, that he would discontinue the Wellbutrin. Grievant stated that he had not recognized the effect the drugs were having at the time, but can now see that he just did not care about many things. Grievant opines that his medication has been corrected, and he now feels much better. However, he offered no testimony from Dr. Braun, or any other medical professional, to substantiate that his actions could reasonably have been precipitated by the medication. Additionally, Grievant's claim at the predetermination hearing that he now is much better is undermined by his subsequent interaction with Ms. Smith.

Grievant next argues that KCBE acted in violation of *W. Va. Code* § 18A-2-8 because any deficiencies were not brought to his attention through evaluation, and he was not given an opportunity to improve. Although the dismissal letter does not identify any statutory basis for the action, it refers to the recommended decision issued following the predetermination hearing, which specifically finds Grievant engaged in insubordination and willful neglect of duty. Grievant was not charged with unsatisfactory performance. Of course, insubordination and willful neglect of duty are unsatisfactory, but improvement plans are only required for correctable conduct, which involves professional incompetency. *Mason County Bd. of Educ. v. State Supt. of Schools*, 165 W. Va. 732, 739, 274 S.E.2d 435, 439 (1980). As observed by the West Virginia Supreme Court in *Maxey v. McDowell County Board of Education*, 212 W. Va. 668, 575 S.E.2d 278 (2002), “where it is clear that the underlying complaints regarding a teacher's conduct relate to his or her performance as a teacher . . . Policy 5300 . . . require[s] an initial inquiry into whether that conduct is correctable.” Enacted pursuant to *W. Va. Code* § 18A-2-12, Policy 5300 requires that a“professional whose performance is . . . unsatisfactory shall be given notice of deficiencies” and “[a] remediation plan to correct [those]

deficiencies." (See footnote 5)

The undersigned finds that, under the facts and circumstances presented here, an improvement plan was not required. Willful acts of disobedience and neglect do not constitute "incompetence" or "unsatisfactory performance" which can be corrected through a plan of any sort. Moreover, Grievant's actions exhibit poor judgment, at best, which is an inherent trait that cannot simply be called to someone's attention and corrected.

Grievant also asserts that after disagreeing with Mr. Beckett about the radios in the buses, and his request for overtime, he was suddenly subjected to close review which led to dismissal. This assertion is, essentially, that the dismissal was reprisal for exercising his opinion regarding a work-related matter. *W. Va. Code* § 29-6A-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a *prima facie* case of reprisal a grievant must establish by a preponderance of the evidence the following elements:
1) that he engaged in protected activity, e.g. filing or participating in a grievance;

2) that he was subsequently treated in an adverse manner by the employer or an agent;

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or
5) the adverse action followed the employee's' protected activity within such a period of time that retaliatory motivation can be inferred.

Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251(1986).

Administrative notice is taken that bus operators are typically allocated time at the end of the year to clean their buses. Thus, a request for overtime for this purpose would reasonably raise the question of why the additional time was needed. The video could have provided a record of the time Grievant spent on the bus. Only because the video had been turned off were the additional days reviewed. In this case, the videos provided a record of many violations, which independently serve as a basis for dismissal. The evidence does not support Grievant's claim that the termination was

motivated by either his stand on whether radios should be allowed on the buses, or his request for overtime. Therefore, Grievant has failed to prove that KCBE's action to terminate his employment constituted reprisal.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. In a disciplinary case, 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 grounds upon which a Board may dismiss any person in its employment are immorality, incompetency, cruelty, insubordination, intemperance, willful neglect ofduty, unsatisfactory performance substantiated by an employee performance evaluation, or conviction on 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, and must be exercised reasonably, not arbitrarily and capriciously. *Syl. Pt. 3, Beverlin v. Bd. of Educ*., 158 W. Va. 1067, 216 S.E.2d 554 (1975); *Bell v. Kanawha County Bd. of Educ*., Docket No. 91-20-005 (Apr. 16, 1991).

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.*, 212 W.Va. 209, 569 S.E.2d 456 (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).

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. *Hoover v. Lewis County Bd. of Educ*., Docket No. 93-21-427 (Feb. 24, 1994). *See Bd. of Educ. v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120 (1990).

6. KCBE has proven by a preponderance of the evidence that Grievant's conduct was both insubordinate and constituted willful neglect of duty.

7. Improvement plans are only required for correctable conduct, which involves professional

incompetency. *Mason County Bd. of Educ. v. State Supt. of Schools*, 165 W. Va. 732, 739, 274 S.E.2d 435, 439 (1980). 8. Grievant was not entitled to an improvement plan for his acts of malfeasance, which did not involve correctable incompetence or performance issues.

9. Grievant failed to prove that he was disabled during the period of time in question due to ill effects of his self-medication, or that he has since recovered.

10. "Reprisal" is defined as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." *W. Va. Code* § 29-6A-2(p).

11. To demonstrate a *prima facie* case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that he engaged in protected activity, e.g. filing or participating in a grievance;

2) that he was subsequently treated in an adverse manner by the employer or an agent;

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's' protected activity within such a period of time that retaliatory motivation can be inferred.

Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251(1986).

12. Grievant failed to prove that his dismissal was the result of reprisal, as defined by statute.

Accordingly, this grievance is **DENIED**. Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." 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 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 circuit court.

DATE: AUGUST 8, 2007

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

This grievance was initially assigned Docket No. 06-20-434.

Footnote: 2

[2]The Childminder system is an alarm to ensure that no child is left on the bus. The bus operator is required to walk to the back of the bus and press a button to stop the alarm from sounding, and presumably, check the seats for children as they walk back and forth.

Footnote: 3

See generally, Kanawha County Board of Education School Bus Safety Rules, Pupil Transportation - Personnel Handbook, BOE Policy G68 "Fleet Safety," and W. Va. Department of Education "School Bus Transportation Policy and Procedures Manual," also identified as Policy 4336, and codified at 126 CSR 92.

Footnote: 4

The Policy states that bullying, harassment, and/or intimidation occurs whenever a person "repeatedly and consistently inflict[s] physical, verbal or emotional abuse on one or more other persons. . . ."

Footnote: 5

Naturally, the same review would apply to service personnel.