THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

JOHN M. WIMMER,

Grievant,

v.

DOCKET NO. 2008-1497-BraED

BRAXTON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant John M. Wimmer, employed by the Braxton County Board of Education (Respondent) as a school bus operator, filed this grievance on April 24, 2008, challenging the disciplinary action of his employer. Grievant asserts that he "has been disciplined in disregard of the relevant facts and in violation of WV Code Section 18A-2-7." As relief, Grievant seeks lost wages, attorney's fees, court costs, and that he be returned to his prior bus run. (See footnote 1) This grievance was filed directly to level three as permitted by W. Va. Code § 6C- 2-4(a)(4). A level three hearing was conducted before the undersigned on June 17, 2008, at the Board's Charleston Office. Grievant appeared in person, and was represented by Eric Gordon, Esquire. Respondent was represented by Rebecca Tinder, Esquire. The matter became mature for decision on July 17, 2008, upon receipt of the parties' fact/law proposals.

Summary

Grievant is employed by the Respondent as a regular bus operator. Grievant has been a full time regular bus operator since April 1997. On November 9, 2007, Grievantwas operating his bus while performing his regular morning bus run. Among the students on his bus was a minor child, J.M. (See footnote 2) During the course of his bus run on November 9, 2007, Grievant ordered J.M. to look out the side window. J.M. refused Grievant's directive. Grievant placed his hand on top of J.M.'s head,

and twisted his head to the side of the window. J.M. complained to the Principal of Flatwoods Elementary that Grievant had touched him, and forcefully twisted his head toward the side window of the bus.

The Superintendent notified Grievant that he was suspended without pay on January 10, 2008. Grievant was also notified that the Superintendent would be recommending his termination to the Respondent. An evidentiary disciplinary hearing was held before the Respondent on March 5, 2008, and was concluded on April 9, 2008. The Board of Education rejected the Superintendent's recommendation for termination, and reduced Grievant's unpaid suspension to three weeks. Grievant acknowledged the touching of J.M.'s head was not appropriate. Respondent has met its burden of proof by a preponderance of the evidence. This grievance is denied.

After thorough review of the record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by Respondent as a regular bus operator. Grievant has been employed as a full time bus operator since April 15, 1997.

2. In-service training is provided at the beginning of each school year,instructing bus operators on how to discipline students. The bus operators are instructed not to touch the students unless they are endangering themselves or others.

3. On November 9, 2007, Grievant was operating his bus during the regular morning bus run. Among the passengers on his bus was J.M.

4. J.M. is a fourth grade student at Flatwoods Elementary School.

5. On November 8, 2007, Grievant disciplined J.M. for poking another student with a straightened paperclip.

6. During the course of his bus run on November 9, 2007, Grievant instructed J.M. to look out the side window. Grievant was displeased with this student because of his past incorrigible behavior. J.M. refused the directive, and told Grievant he did not have to look out the window.

7. At that time, Grievant placed his hand on top of J.M.'s head and physically forced J.M. to turn his head.

8. After exiting the bus, J.M. went to the principal's office of his school. He reported to Principal Allen that Grievant had twisted his neck, and he wanted to call his lawyer.

9. Upon learning of the incident on Tuesday, November 13, 2007, the Superintendent directed an investigation be conducted. The Superintendent also directed that the videotape from the school bus be recovered.

10. After viewing the tape, the Superintendent reported the incident to the West Virginia Department of Health and Human Resources. The Superintendent placed Grievant on a paid suspension, pending the outcome of the county and state investigation. 11. The report from the West Virginia Department of Health and Human Resources found that “information gathered during the course on [sic] this investigation supports a finding of Child Abuse.” The report concluded that child abuse had occurred.

12. Students riding on the morning bus corroborated J.M.'s account of Grievant twisting his head toward the side window of the bus.

13. After the completion of the investigation, on January 10, 2008, Grievant was suspended without pay. The Superintendent notified Grievant that she would be recommending his termination to the Board of Education.

14. An evidentiary disciplinary hearing was held before the Board of Education on March 5, 2008, and April 9, 2008. The Board of Education rejected the Superintendent's recommendation for termination. Grievant's unpaid suspension was reduced to three weeks as the discipline for his actions.

15. Grievant did not testify at level three. (See footnote 3) The videotape of the incident does not show what happened between Grievant and J.M.; however, the audio portion of the videotape is probative on the events. Grievant did testify before the Board of Education, and acknowledged he was not permitted to use physical force to discipline students.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by apreponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "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 & 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.*

The grounds upon which a Board may discipline 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. Cruelty is a deliberate act to inflict pain and/or suffering. Behavior which is directed toward a student, and which may include harassment, belittling, threatening, and/or grabbing, slapping, and restraining, without the need for self-defense, meets this definition. *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996). The authority of the Board 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. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991).

Respondent asserts that Grievant had no just cause for touching the student, and his doing so resulted in physical harm to J.M. Grievant does not seek mitigation of the suspension. Instead, Grievant argues that Respondent presented no evidence that Grievant was trained or aware of any policies regarding an inability on his part to physicallytouch a student. (See footnote 4) As such, the Respondent did not present sufficient evidence to prove Grievant has willfully neglected any duty on his part in relation to his conduct toward J.M. on November 9, 2007. The undersigned disagrees.

The videotape of the incident establishes two disturbing facts. First, Grievant became outraged at the students on the bus to the point of being out of control. Second, the video image of the students reminds the viewer that these are young children. The video also reveals the anxious expressions on their faces as they watch Grievant confront J.M. While not showing the actual contact with J.M., the video does show Grievant requiring a student to read a portion of the school bus rule to the other students on the bus. For no apparent reason, Grievant begins shouting at J.M. to look out the window. It does not appear J.M. was being incorrigible. J.M. refused the order, and told Grievant he did not have to look out the window. This set off the chain of events that led to Grievant's suspension.

Students interviewed in the course of the ensuing investigation corroborated J.M.'s account of the incident. They are consistent in their statements that Grievant grabbed the top of his head, and physically forced J.M. to turn his head. The students that witnessed the incident noted that J.M.'s neck made a cracking noise, and J.M. appeared as if he wasabout to cry. J.M.'s mother used warm

compresses to treat her son's neck complaints. When J.M.'s neck was still hurting on the following Tuesday, she took him to the local hospital, where he was diagnosed with a cervical strain. The issue of J.M.'s alleged injury is the major point of contention in this matter. In fact, Karen Harper, who worked in the cafeteria at Flatwoods Elementary School, stated she observed J.M. at lunchtime on the day of the incident laughing and having a good time. It is understandable that Grievant contests the extent of any injury J.M. may have sustained. However, Grievant's actions in this matter meet the definition of cruelty as previously set out.

Grievant, to his credit, acknowledged that what he did was wrong. (See footnote 5) Grievant also acknowledges that he was trained on appropriate conduct when interacting with students. When questioned concerning putting his hands on students during the hearing before the Board of Education, Grievant responded, “I know you're not supposed to do that.” Page 200, Recommendation for Suspension of Employment Hearing Transcript, March 5, 2008. The State Board of Education's Employee Code of Conduct directs all West Virginia school employees to “exhibit professional behavior,” “maintain a safe and healthy environment, free from harassment [and] intimidation,” “create a culture of caring through understanding and support,” and “demonstrate responsible citizenship by maintaining a high standard of conduct, self-control.” Respondent's Exhibit 3, Recommendation for Suspension of Employment Hearing, March 5, 2008. The Respondent established, by a preponderanceof the evidence, that Grievant failed to comply with the Employee Code of Conduct, and that his failure to comply was intentional.

Grievant attempted to down play the severity of his actions when testifying at the evidentiary disciplinary hearing. Grievant's testimony suggests a calm setting where, after a student read the rules of the bus, he:

> “walked up to J.M. and I put my hand on his head, because J.M. was kind of slouched _ looking downwards, okay. And I put my hand on his head, and he looked up at me, and I said, J.M., I want you to look out the window, he turned his head toward me, and then I said _ like I'm tapping on this table _ look out the window (indicating). I want you to look out the window until you get to school or until we get going . . . when I told him that I wanted him to look out the window, he automatically turned to look out the window, and I let go of him. And then I started tapping on the window (indicating) I want you to look out that window.” Pages 186-187, Recommendation for Suspension of Employment Hearing Transcript, March 5, 2008.

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 ofbias, 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 is claiming he laid his hand on J.M. before he told J.M. to look out the window, and that J.M. turned his head as instructed. This is contrary to the videotape audio in which J.M. can be heard to defiantly say he would not turn his head. The audio of the tape also reveals that this exchange between J.M. and Grievant took place before Grievant confronted J.M. This account is also in conflict with the numerous students that consistently describe Grievant forcibly moving J.M.'s head to the side. In addition, Barbara Allen, Principal at Flatwoods Elementary, testified that J.M. informed her that Grievant twisted his head on the day of the incident. Pages 16-18, Recommendation for Suspension of Employment Hearing Transcript, March 5, 2008. In consideration of the videotape audio of the incident, and witness accounts, Grievant's recollection of events is not plausible. This testimony was given by Grievant when he was fighting for his job. Grievant's motivation to frame his conduct in a more favorable light is understandable. However, this motivation, and the implausible context of the testimony when examining the evidence, discredit the account of Grievant.

The evidence, in spite of Grievant's attempt to minimize his actions, indicates that Grievant intentionally put his hand on the head of J.M., and forced his head to turn. The evidence also indicates that Grievant lost his temper when confronting the students on the bus. One has to remember that these are fourth grade students. They are young children.The Respondent's imposition on Grievant of the lesser disciplinary action of a three week unpaid suspension is not disproportionate to Grievant's offense. The Respondent has met its burden of proof by a

preponderance of the evidence, and demonstrated that Grievant's behavior was such that he may be disciplined in accordance with W. Va. Code § 18A-2-8.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. The grounds upon which a Board may discipline 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 the Board 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. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991).

3. Cruelty is a deliberate act to inflict pain and/or suffering. Behavior which is directed toward a student, and which may include harassment, belittling, threatening, and/or grabbing, slapping, and restraining, without the need for self-defense, meets this definition. *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996). 4. 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).

5. 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*.

6. Respondent has met its burden of proof and established the allegation of willful neglect of duty, and cruelty on the part of Grievant. Its decision to impose a three week unpaid suspension was not such an excessive penalty as to be arbitrary and capricious.

Accordingly, this grievance is **DENIED**. Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: August 14, 2008

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Ronald L. Reece

Administrative Law Judge

Footnote: 1

Prior to the level three hearing, the Respondent voted to return Grievant to his original bus run. As a result, Grievant indicated on the record that he is withdrawing that portion of his relief sought.

Footnote: 2

In accordance with Grievance Board practice and procedure, minor students will be identified only by their initials, in order to protect their privacy.

Footnote: 3

(See footnote 6) The level three hearing consisted solely of the testimony of Superintendent Long.

Footnote: 4

No evidence was offered by Grievant to prove any elements of the asserted violation of W. Va. Code § 18A-2-7 contained in the Statement of Grievance. This section sets forth the authority of a superintendent to suspend school personnel on a temporary basis pending a hearing before the board of education. A review of the lower level record

reflects that the asserted violation was not raised at that level. The Grievance Board has long held that elements or allegations of the grievance which are raised, but not pursued or developed, will be considered abandoned. Church v. McDowell County Bd. of Educ., Docket No. 33-87-214 (Nov. 30, 1987).

Footnote: 5

This acceptance of responsibility, along with favorable years of service, may be a window into the Respondent's vote to reject the termination recommendation of the Superintendent.

Footnote: 6

The level three hearing consisted solely of the testimony of Superintendent Long.