THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

VALERIE J. TIBBS,
Grievant,

v. **DOCKET NO. 2012-0102-HanED**

HANCOCK COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed by Grievant, Valerie J. Tibbs, on December 14, 2010, contesting a three-day suspension without pay imposed by her employer, the Hancock County Board of Education. The statement of grievance reads:

> On June 30, 2011[,] I received notice the Hancock County Board gave me 3 days suspension without pay, 18A-2-8 Retaliation, Reprisal, Haras[s]ment, singled out and not being treated uniformly.

The relief sought by Grievant is "I want my 3 day's [sic] back, time spent paid."[1]

On August 3, 2011, the parties agreed to waive levels one and two of the grievance procedure, and a level three hearing was held before the undersigned Administrative Law Judge on April 11, 2012, at the Grievance Board's Westover office. Grievant was represented by Owens L. Brown, West Virginia Education Association, and Respondent was represented by William T. Fahey, Esquire, Hancock County Assistant Prosecuting Attorney. This matter became mature for decision on receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on May 16, 2012.

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[1] Grievant did not clarify what this meant.

Synopsis

Grievant, a bus operator, was suspended for three days without pay for insubordination, when her supervisor observed her, and did not see her perform a pre-trip inspection of her bus after being told by him to be careful to check the oil when she did her pre-trip inspection. Respondent did not demonstrate that this charge, if proven, would amount to the wilful failure to obey an order necessary to prove a charge of insubordination.

The following Findings of Fact are made based upon the record developed at level three.

Findings of Fact

1. Grievant has been employed full-time by the Hancock County Board of Education ("HBOE"), as a bus operator since 1985, and she was employed as a substitute before that.

2. For safety reasons, bus operators are required to do a pre-trip inspection of the bus they will be driving before operating the bus. The pre-trip inspection takes about 20 minutes, on average, and includes inspection of the wheels, lug nuts, tie rod ends, kingpins, fluids, belts, mirrors, lights, and tires. Grievant is able to complete a pre-trip inspection in 11 to 15 minutes.

3. On April 29, 2011, John Barber, a substitute school bus operator for HBOE, drove Bus Number 23 in the afternoon, which was the bus assigned to Grievant. When Mr. Barber pre-tripped the bus, the dipstick showed that there was very little oil in the bus. Mr. Barber added approximately 17 to 19 quarts of oil. The bus had a capacity of 31

quarts of oil, including the oil filter, and would, under normal conditions, use approximately 2 quarts of oil per day.

4. Grievant had reported to the HBOE mechanics that morning that the bus was not running properly, and the mechanics worked on the bus that morning.

5. Timothy Reinard, HBOE's Transportation Coordinator, observed Mr. Barber adding the oil to Bus Number 23.

6. Sometime in May of 2011, Mr. Reinard advised Grievant that her bus had been very low on oil, and to be more careful when she pre-tripped the bus.[2]

7. On May 25, 2011, Mr. Reinard arrived at the area where Grievant parks Bus Number 23, about 20 minutes before Grievant was scheduled to depart the parking area, with a video recorder. He parked where he thought he would not be seen, and waited for Grievant to arrive so that he could observe whether she pre-tripped her bus, and he recorded his observations. The recorder also had an audio feature, and Mr. Reinard reported what he was observing on the recorder. Mr. Reinard's recorded statements make it clear that he did not wish to be seen, and that he was not interested in observing the actions of any bus operator other than Grievant, even though other buses were parked in the same lot. Mr. Reinard saw Grievant pull into the parking lot, exit her truck, board and then exit the bus, walk around the bus, look at and perhaps push down on the left hood latch, board the bus again, start the bus, and pull out about six minutes after her arrival.

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[2] Mr. Reinard believed this occurred on May 20, but Grievant thought it occurred on May 11, when he gave her her evaluation. Catherine Gruda, the Aide on Grievant's bus at the time, recalled that Mr. Reinard had stepped on the bus one day and cautioned Grievant about performing the pre-trip inspection, but she did not recall the date. Mr. Reinard did not explain why he would have waited almost a month after the April 29th oil issue, which was the triggering event, to talk to Grievant about this issue.

Grievant did not do a complete pre-trip inspection during the time Mr. Reinard was watching the parking area.

8. Mr. Reinard allowed Grievant to make her bus run that morning, knowing that she had not done a pre-trip safety inspection.

9. Mr. Reinard provided a written report of his May 25, 2011 observations to HBOE Superintendent Suzan Smith.

10. Superintendent Smith met with Mr. Reinard, HBOE Assistant Superintendent Wayne Neely, Owens Brown, Grievant's representative, and Grievant on June 6, 2011, regarding the failure to pre-trip the bus on May 25, 2011. Grievant had been advised that the meeting would be to discuss a disciplinary matter, and that she could bring representation, but she was not told prior to the meeting the details of what would be discussed. When she was told that Mr. Reinard had observed that she had failed to conduct a pre-trip inspection, she responded by saying that if she was running late she may not have done a pre-trip inspection of the bus.[3]

11. Grievant could not explain with certainty what had occurred on the morning of May 25, 2011, because the issue was not brought to her attention until 12 days later. By that point in time, Grievant had no specific recollection of that day.

12. Grievant was not made aware that Mr. Reinard had videotaped his observations on May 25, 2011, until Mr. Reinard was called as a rebuttal witness at the

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[3] Grievant's recollection was somewhat different. Her recollection was that she was only asked why she would not have checked the oil. Mr. Neely's notes that he made during the meeting reflect what is stated in this finding of fact, and are found by the undersigned to accurately reflect what occurred at the meeting. It is possible that Grievant is merely confusing her statements made during the Board hearing with those made during this meeting. *See Finding of Fact 13, infra.*

level three hearing held in this matter almost a year later. This videotape was not presented to the Board of Education for its review, nor was Grievant given the opportunity to present her perspective on what was being observed on the videotape to the Board of Education.

13. Grievant admitted at the hearing before the Board of Education on June 27, 2011, that "if I'm running late - - I'll be honest with you - - there has been some occasions where I didn't pull that oil stick out."

14. After Grievant viewed the videotape at the level three hearing, she concluded from her observations that it looked like she had come from another parking area where she had been talking to a friend, and that she must have arrived very early that morning, and had done her pre-trip inspection before Mr. Reinard's arrival.

15. Mr. Reinard asked Superintendent Smith to fire Grievant, and he recommended that the State Board of Education be notified for a review of whether her bus operator certification should be revoked.

16. Superintendent Smith recommended to HBOE that Grievant be suspended for three days without pay for the failure to conduct a pre-trip inspection on May 25, 2011, in "direct defiance of [Mr. Reinard's] authority," after Mr. Reinard had advised Grievant that she needed to be more careful in conducting pre-trip inspections.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). A preponderance of the evidence is 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 proven is more probable than not. *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in WEST VIRGINIA CODE § 18A-2-8, 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). WEST VIRGINIA CODE § 18A-2-8 provides that "[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."

Respondent charged Grievant with insubordination, specifically, defying Mr. Reinard's authority by not performing a pre-trip inspection on May 25, 2011, after being told by him sometime shortly prior to this to be more cautious when she conducted her pre-trip inspection. Grievant denied the charges.

Insubordination has been defined as the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *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). In order to establish 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 v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). *See Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *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).

"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). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. *See Day v. Morgan Co. Health Dep't*, Docket No. 07-CHD-121 (Dec. 14, 2007). "An employee's belief that management's decisions are incorrect or the result of incompetence, absent a threat to the employee's health and safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. *Vickers v. Bd. of Directors/W. Va. State College,* Docket No. 97-BOD-112B (Aug. 7, 1998). *See Parker v. W. Va. Dep't of Health and Human Resources*, Docket No. 97-HHR-042B (Sept. 30, 1997)." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003).

It is clear from the videotape presented at the level three hearing that Grievant did not perform a pre-trip inspection of her bus during the 20 minutes Mr. Reinard was watching Grievant's bus on May 25, 2012. However, as Grievant watched the videotape at the level three hearing for the first time, her conclusion as to what had occurred was

completely different from that of Mr. Reinard. Grievant disagreed with Mr. Reinard's statement that the videotape showed her pulling in from a street. Grievant testified that the videotape showed her coming from another parking area. She concluded that she had arrived at work before Mr. Reinard arrived to watch her, had done her pre-trip inspection, and had then gone to another parking area to talk to her friend until it was time to leave. Grievant pointed out that the videotape supports her story, because it shows her pushing down on the hood of the bus, demonstrating that she had previously had the hood open and did not get it latched properly. She also testified at the level three hearing that she may not have checked the oil at the parking lot because she needed to fuel the bus that morning, and may have waited until she fueled the bus to check the oil. No evidence was presented to dispute that she had fueled her bus that morning, or that it would be improper to check the oil at that time.

The undersigned does not doubt that Grievant believed the videotape showed her coming from a parking area, while Mr. Reinard believed it showed her coming from the street. In this case, one of them is simply wrong as to the layout of the area and what is being observed. While Grievant's story has not been entirely consistent, this can be attributed to the fact that Grievant was not allowed to see the videotape when she was first presented with the allegations, and also to the fact that Respondent did not bring the allegations to Grievant's attention until 12 days had passed. Grievant had no specific recollection of the morning of May 25, 2011, by then, but she did not trust that Mr. Reinard's allegations were accurate. Grievant has been trying to piece together what really happened since she was confronted with the charges.

Ultimately, however, if, in fact, Grievant did not perform the pre-trip inspection because she was running late, while this behavior cannot be condoned, the undersigned cannot conclude that this action would amount to the *wilful failure to obey an order* necessary to a finding of insubordination, which was the reason for the suspension. Respondent did not prove the charge of insubordination.[4]

Grievant alleged that Mr. Reinard made the allegations against her in reprisal for filing other grievances, that he harassed her, and that she was not treated the same as other bus operators. These issues must also be addressed. Grievant bears the burden of proving these claims by a preponderance of the evidence.

WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer 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, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) that he engaged in protected activity (i.e., filing a grievance);
> (2) that he was subsequently treated in an adverse manner by the employer or an agent;

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[4] Respondent argued that even if Grievant did the pre-trip and then left the bus to talk to her friend for 20 minutes, that she lost control of the bus and was required by law to conduct another pre-trip inspection. While this may or may not be what is required, it is irrelevant. Grievant was suspended for insubordination, having been charged with defying Mr. Reinard's authority by not conducting a pre-trip inspection at all after being told by Mr. Reinard to be more cautious in conducting a pre-trip inspection. She was not charged with a technical violation of the law related to pre-trip inspections, and Respondent cannot change the charges when the evidence it springs on Grievant in rebuttal during the level three hearing results in Mr. Reinard's observations being called into question. All this being said, there is no excuse for not performing complete pre-trip inspections, whether Grievant is running late or not. In fact, in Grievant's job, it is imperative that she make sure that she is not running late because if she is, she places the safety of children at risk.

> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.,* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). "[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action." *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994).

If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id. See Mace v. Pizza Hut, Inc.,* 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n,* 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.,* Docket No. 89-26-56 (Sept. 29, 1989). "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994). *See Sloan v. Dept. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

While Grievant presented no evidence related to other grievances, the undersigned will take judicial notice that Grievant has filed other grievances. While it is clear that Mr. Reinard harbored ill will toward Grievant, as will be discussed, it is also clear that he did not fabricate the charges. Further, no evidence of a causal connection between the grievances and the suspension was placed into the record. Grievant did not meet her burden of proof on this issue.

WEST VIRGINIA CODE § 6C-2-2(l) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." What constitutes harassment varies based upon the factual situation in each individual grievance. *Sellers v. Wetzel County Bd. of Educ.*, Docket No. 97-52-183 (Sept. 30, 1997). "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96-BOT-462 (Aug. 29, 1997)." *Pauley v. Lincoln County Bd. of Educ.*, Docket No. 98-22-495 (Jan. 29, 1999). A single incident does not constitute harassment. *Johnson v. Dep't of Health and Human Res.*, Docket No. 98-HHR-302 (Mar. 18, 1999); *Metz v. Wood County Bd. of Educ.*, Docket No. 97-54-463 (July 6, 1998).

The record in this case reflects only the one instance of Mr. Reinard checking up on Grievant to see whether she was performing a pre-trip inspection. While Mr. Reinard's actions are not to be condoned, as will be discussed, this one instance does not rise to the level of harassment.

Grievant alleged in her statement of grievance that she was treated singled out and not treated the same as other employees, which amounts to a claim of discrimination and favoritism. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). Favoritism is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). In order to establish a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant did indeed demonstrate that she was singled out by Mr. Reinard for observation. Although other buses were parked in the same lot as Grievant's bus, and Catherine Gruda, a bus Aide employed by HBOE, testified that it is common knowledge that certain drivers do not perform pre-trip inspections, Mr. Reinard's commentary accompanying the videotape makes it crystal clear that he was watching only Grievant's

bus, not anyone else's. Mr. Reinard testified that he had used a video camera to record the actions of other bus operators, but not on this occasion. His rationale for placing Grievant under surveillance in this instance was that he had recently told her to use more caution in conducting her pre-trip inspections, and he used the video camera because he was tired of Grievant calling him a liar. The undersigned fails to see how this justified Mr. Reinard's action. It does, however, serve to call into question Mr. Reinard's motives.

The undersigned will take judicial notice that Grievant has in other grievances questioned Mr. Reinard's actions toward her, but was unable to prove her suspicions and allegations. Mr. Reinard's actions in this instance and his commentary on the videotape make clear that he harbored ill will toward Grievant, and was pleased when he observed that she had not performed the pre-trip safety inspection. His recommendation that she be reported to the State Board of Education was a further effort by him to hurt Grievant by having her license revoked for a technicality. As Grievant pointed out, had Mr. Reinard seriously believed Grievant's actions placed the students at risk, he should have taken some action to make sure she did not continue her route and pick up students. Mr. Reinard admitted that Grievant knew her bus well enough to know whether it was not running properly.

While Grievant has no doubt irritated Mr. Reinard over the years, the undersigned finds his behavior in this instance to be inappropriate for a supervisor. It is certainly Mr. Reinard's job to make sure that *all* the bus operators understand that it is critical that they perform pre-trip inspections, and to recommend corrective action if they fail to do so. It is not appropriate, however, for a supervisor to focus on one employee and then take pleasure when that employee fails. A good supervisor helps his employees to succeed,

not only for the good of that employee, but for the good of the organization, and most importantly, for the safety of the students. Respondent is directed to take action to make clear that it does not condone Mr. Reinard's behavior, and to assure that this scenario is not repeated.

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. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in WEST VIRGINIA CODE § 18A-2-8, 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).

3. WEST VIRGINIA CODE § 18A-2-8 provides that "[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."

4. In order to establish 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 v. Higher*

Educ. Interim Governing Bd., 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). *See Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *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 did not demonstrate that Grievant wilfully refused to obey an order or directive.

Accordingly, this grievance is **GRANTED.** Respondent is **ORDERED** to remove the three-day suspension without pay imposed on Grievant from Grievant's record, to pay her back pay for the three days,[5] and credit her with any benefits she lost due to the three days of suspension.

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[5] As Grievant did not request interest in the relief sought, none will be awarded.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *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 (2008).

BRENDA L. GOULD
Acting Deputy Chief
Administrative Law Judge

Date: June 21, 2012