GARNET EDWARDS, JR.

v. Docket No. 93-33-138

McDOWELL COUNTY BOARD OF EDUCATION

DECISION

The grievant, Garnet Edwards, Jr., was employed by the McDowell County Board of Education (Board) as a physical education teacher at Iaeger Elementary School (IES) and track coach at Welch Junior High School (WJHS) until his dismissal for immorality and willful neglect of duty on April 19, 1993. He filed an appeal of that action directly to Level IV on April 28, 1993, and a hearing was held November 2, 1993. The parties submitted briefs in support of their positions by December 7, 1993.

The grievant was first hired by the Board as a physical education instructor and track coach at WJHS in 1989. He transferred to a physical education position at IES in 1991 but retained his coaching job at WJHS. The grievant's personnel evaluations for both positions for school years 1989-90, 1990-91 and 1991-92 were favorable. IES Principal Claude Roberts ranked him as unsatisfactory in his teaching position for the 1992-93 yearand placed him on an improvement period which required that he correct deficiencies in the area of supervision of students.

On April 5, 1993, at approximately 2:00 p.m., Olivia, (See footnote 1) a twelve-year old student in one of the grievant's physical education classes, reported to Christine Jones, her assigned sixth-grade teacher, that the grievant had placed his hand on her buttocks during an exercise period in the IES gymnasium that morning and that the contact had been intentional on his part. (See footnote 2) Ms. Jones escorted Olivia to Mr. Roberts' office where the student explained in more detail the nature of the grievant's actions. Because the school day was about to end, Mr. Roberts' hurriedly made notes on the charges and advised Olivia that he would continue their discussion the next day.

On the evening of April 5, Olivia advised her mother, Kathy Lambert, of what had occurred. Ms. Lambert called Mr. Roberts and was told that a full investigation of the matter would be conducted and that she should escort her daughter to school the next day. Ms. Lambert also reported to Mr. Roberts that Olivia had advised her on at least two previous occasions that the grievant had made physical contact with her which she considered inappropriate.

On April 6, 1993, Olivia recounted the April 5 incident to Mr. Roberts and Assistant Superintendent Roger Miller. She explained that she had approached the grievant with a question about the proper procedure for assisting her "partner" in performing sit-ups and was waiting while he talked to another student. Olivia alleged that while she was facing her partner, with her back to the grievant, his hand brushed her buttocks several times prompting her to take a step away from him. She advised Mr. Roberts and Mr. Miller that the grievant then reached forward and "grabbed" her buttock and rested his hand there for several seconds.

Olivia also informed the principal and the assistant superintendent that during the previous school year the grievant had engaged in a practice of rubbing her back "under her bra strap" and that her discomfort over the practice caused her to try and avoid him. She also stated that prior to the April 5 incident, the grievant had been her favorite teacher and that she was concerned that her charges might result in his dismissal. The student further related that on several occasions the grievant had sung parts of the song "Let's get Physical" by singer Olivia Newton-John in her presence and had substituted "Olivia" for the word "Physical" in the song's chorus. She indicated that he had only done so when there was no one else in their immediate vicinity.

Following the discussion with Olivia, Mr. Roberts questioned her gym partner on the day in question and determined that she had not witnessed anything out of the ordinary. He advised Mr. Miller that the grievant had left the school and per his schedule shouldbe at WJHS for track practice. Mr. Miller proceeded to the WJHS track field and the school but the grievant was not at either location. Recalling that the grievant had at one time performed volunteer coaching duties at Mount View High School, Mr. Miller called there and was advised that the grievant had not been at the school that day. After several unsuccessful calls to the grievant's home, Mr. Miller called Mr. Roberts and directed him to have the grievant report to him at the Board's central office the next morning.

The grievant reported to work at IES on the morning of April 7 and per Mr. Miller's directions, Mr. Roberts advised him that he should turn over his keys to the gym and report to Mr. Miller's office. In his subsequent discussion with Mr. Miller, the grievant was advised of the student's charges and given the opportunity to respond. The grievant replied that the charges were false and that he knew of no reason why the student would make them. At the conclusion of their discussion, Mr. Miller advised that he was inclined to believe the student and that the grievant would likely be suspended pending a hearing before the Board.

By letter dated April 8, 1993, Superintendent of Schools Kenneth Roberts advised the grievant that an investigation had revealed that the student's allegations "appeared to be correct" and that it had been discovered that he had "failed to fulfill" his duties as the WJHS track coach. Superintendent Roberts further informed the grievant that he was suspended without pay for thirty days and that he would recommend to the Board on April 19, 1993,that his employment be terminated for immorality and willful neglect of duty.

During the April 19 hearing before the Board, Olivia, the grievant, Mr. Miller, and Principal Roberts testified. (See footnote 3) Superintendent Roberts advised the grievant by letter dated April 20, 1993 that the Board had considered the evidence and voted to terminate his employment for immorality and willful neglect of duty. Superintendent Roberts also informed the grievant of his W.Va. Code §18A-2-8 right to appeal the decision.

In a disciplinary action, the respondent board of education has the burden of proving its case by a preponderance of the evidence. Camiolo v. McDowell County Bd. of Educ., Docket No. 92-33-245 (Jan. 26, 1993); Allen v. Monroe County Bd. of Educ., Docket No. 90-31-021 (July 11, 1990). At the Level IV hearing, the Board presented the testimony of Olivia, Ms. Lambert, Principal Roberts, Assistant Superintendent Miller, Christine Jones and WJHS Principal William Slade. The grievant presented his testimony and that of IES teacher Deborah Damron and Mt. View head track coach Leon Gravely. The grievant also presented documents related to his coaching schedule and personnel evaluations. For the reasons hereinafter discussed, the undersigned concludes that the Board has met its burden in the case. (See footnote 4)

Resolution of the charge of immorality is essentially dependent upon determinations regarding the relative credibility of Olivia and the grievant. The only evidence presented tending to corroborate the student's testimony was the testimony of her mother, Mr. Roberts, and Mr. Miller that she was crying and otherwise visibly upset on each occasion that she related what had occurred in the gym on April 5. (See footnote 5) Similarly, the only exculpatoryevidence presented by the grievant was the testimony of others in the gymnasium at the time that they had not witnessed any improper conduct on the grievant's part.

Olivia's Level IV testimony was wholly consistent with her testimony at the April 19 Board hearing. The following Level IV testimony in response to Board counsel's questions is the most succinct account she provided of what occurred.

MR. BLAIR:

Okay, now I'm going to call your attention to an occurrence that happened during the physical education class that you had. Would you tell us what happened on this day?

OLIVIA:

We was getting ready to...

MR. BLAIR:

...Now, when you say we, who?

OLIVIA:

The class. We was getting ready to go to gym and we went down there about 9:30 and we was in the gym and he told us we was going to do chin-ups and then do the push-ups -- not push-ups -- but sit-ups, and we did our, you know, chin-ups and he went over there and told us to pick a partner and I picked my partner.

MR. BLAIR:

Alright, who was your partner?

OLIVIA:

Devin Phillips.

MR. BLAIR:

Okay.

OLIVIA:

And we went over there and I was going to hold her feet first, and he told us to get down on our knees, and I got down on my knees, but I, you know, the people beside me -- they looked different than I did -- so, I stood back up and as...you know, he was talking to Jeff Steel and I asked him I said: "Mr. Edwards, is this right", and he wasn't paying attention -- he was talking to Jeff -- and, he didn't say nothing, and then all the sudden hegrabbed me on my butt and I didn't know what was happening, so I stepped up, you know, and he followed me, and I got real nervous, and I you know -- I was just standing there; I was in shock; I didn't know what to do, and I was looking down at Devin, you know, trying to give her some kind of face, or whatever...

MR. BLAIR:

Let me stop you right there. Your partner was on her knees facing you in front of you, is that correct?

OLIVIA:

She was like sitting down, laying down on her back.

MR. BLAIR:

Okay, on the mat and you were standing up?

OLIVIA:

Yes.

MR. BLAIR:

Okay, now you may be seated,[(See footnote 6)] and your mother can be seated, okay? Alright, then what happened after that?

OLIVIA:

And, then I...after we...he...I got ready to walk away and he told me: "No". So, I came back over there, because I was scared I would get a zero (0).

MR. BLAIR:

He told you not to walk away from him?

OLIVIA:

He said: "Don't walk away...don't walk away; go ahead and finish them".

MR. BLAIR:

Alright.

OLIVIA:

So, after I did mine, and after Devin you know did hers, I went over there and Rialda (sic) Blankenship was standing there, but, you know I told her: "Rialda (sic), come over here and sit down" and we went over there and sat down and I told her, I said: "Come on, we've got to go to the office", and you know, I was scared that he was going to come close... -- well, first we went to the office, and I tried to call mommy, but she wasn't home, and then we went back down to the gym and then we sat down over there on the bleachers. I wasscared that he was going to come close now, you know, try to come and talk to me or something and I didn't want to talk to him, and then Ms. Jones come downstairs, and we left and I didn't tell her about it, until about 1:30 or 2:30, somewhere like that.

Olivia further testified that although there were numerous other students in the gymnasium at the time, it would have been difficult for them to observe what happened because of the manner in which the grievant positioned himself behind her. She asserted that prior to this incident, the grievant had been her favorite teacher at IES.

The grievant simply testified that he did not touch the student and did not recollect that anything out of the ordinary happened on the day in question. On cross-examination, however, he testified rather specifically that at no time during the gym period in question had he ever stood behind Olivia.

He did not recollect observing her leave the gym prior to the end of the period. The grievant also represented that he had never had occasion to discipline the student and knew of no reason why she would make the charges.

There was nothing in Olivia's demeanor during her Level IV testimony or the manner in which she responded to questions which would indicate that she was being untruthful. Of considerable significance is that she appeared sincere in her representation that the grievant had been her favorite instructor. The student seemed to view her revelation of his conduct as a very unpleasant task and did not exhibit, either in words or demeanor, any signs ofill-will toward the grievant. She was responsive to all questions posed and did not appear to be exaggerating or embellishing her account of what occurred. In sum, the student exhibited a high degree of credibility.

The grievant's demeanor during most of his testimony was not in and of itself indicative of untruthfulness. It was such, however, that he did not convey the degree of conviction in his statements as that shown by the student. The grievant's assertion that he had never stood behind the student during the time in issue appeared markedly calculated. He seemed evasive when questioned as to why he could recall with such particularity that he had never stood behind Olivia but yet could only recall generally other aspects of his movements during the class period. After careful consideration of all evidence of record and observations of the two primary witnesses, the undersigned concludes that the student was the more credible and that the Board has, therefore, established by a preponderance of the evidence that the grievant, unseen to others, grasped the student's buttock on the date in question and held it for several seconds.

W.Va. Code §18A-2-8 allows a board of education to suspend or dismiss an employee for immorality. That term has been defined as "conduct which is not in conformity with accepted principles of right and wrong behavior, which is contrary to the moral code of the community, which is wicked, and which, especially, is not in conformity with acceptable standards of proper sexual behavior."

Golden v. Bd. of Educ. of the County of Harrison, 285 S.E.2d 655 (W.Va. 1982). Little analysis is needed to conclude that the grievant's conduct fits this definition. The contact was not the type of occasional incidental touching to be expected between physical education teacher and student nor was it part of an effort to assist the student in completing an assignment. It is obvious that the grievant was engaging in contact of a sexual nature with a twelve-year old student and that such

conduct "is not in conformity with acceptable standards of proper sexual behavior."

Because of the conclusions reached on the charge of immorality, it is not necessary to address the accusation of neglect of duty in any detail. The immoral conduct alone was adequate grounds for the termination of both the grievant's teaching contract and extracurricular track coach contract. While the transcript of the April 19 hearing before the Board reflects that its members considered and deliberated upon the evidence on both charges, it is inconceivable that they would have found cause to dismiss the grievant from his teaching position but retain him as WJHS track coach. Nevertheless, since neglect of duty was the cause listed in the dismissal letter for the termination of the grievant's extracurricular contract, the undersigned has reviewed the evidence relating to the charge and concludes that the grievant was also guilty of that offense.

The evidence essentially establishes that per a pre-arranged schedule with Principal Roberts and WJHS Principal Slade, the grievant was supposed to conduct track practice at WJHS on theafternoon of April 6 but instead proceeded to a car dealership in Princeton, West Virginia to conduct personal business. While there is some evidence of record tending to mitigate against a conclusion that the grievant was acting in complete disregard of his coaching duties, the record as a whole establishes that he was fully aware that he should have attended to those duties or requested permission of one of the principals to take personal time. Thus, the record sufficiently establishes that his dereliction was willful and constituted grounds for the termination of his coaching contract. See Hartlieb v. Ohio County Bd. of Educ., Docket No. 93-35-301 (Feb. 24, 1994).

In addition to the foregoing, the following findings of fact and conclusions of law are made.

FINDINGS OF FACT

1) The grievant was employed by the McDowell County Board of Education as a physical education teacher at Iaeger Elementary School and track coach at Welch Junior High School until his dismissal effective April 20, 1993 for immorality and willful neglect of duty.

2) On April 5, 1993, Olivia, a twelve-year old student at Iager Elementary School, reported to her regular sixth-grade teacher, Christine Jones, that the grievant, her physical education teacher, had "grabbed her butt" during that morning's gym class. The student subsequently advised Claude Roberts, the school's principal, and Assistant Superintendent of Schools Roger Miller of the grievant's conduct.

3) Mr. Miller and Mr. Roberts conducted an investigation of the charges which included interviews with the student's mother, the grievant and other persons present in the gym during the time in question. They ultimately determined that the charges were valid and so advised Superintendent of Schools J. Kenneth Roberts.

4) During his investigation, Mr. Miller also determined that the grievant was supposed to have held track practice at Welch Junior High School on the evening of April 6, 1993 but did not. This finding was also reported to Superintendent Roberts.

5) On April 19, 1993, the Board, after affording the grievant a hearing on the charges, voted to terminate his teaching and coaching contracts of employment. The grievant made a timely appeal of this action to the West Virginia Education and State Employees Grievance Board.

CONCLUSIONS OF LAW

1) In a disciplinary action, the respondent board of education has the burden of proving its case by a preponderance of evidence. Allen v. Monroe County Bd. of Educ., Docket No. 90-31-021 (July 11, 1990).

2) A preponderance of the evidence establishes that on April 5, 1993, the grievant approached Olivia, a student in his physical education class, from behind and grasped her buttock for several seconds. It also establishes that the grievant willfully and purposefully elected to attend to personal business on that date instead of conducting a scheduled track practice session at Welch Junior High School.

3) Pursuant to W.Va. Code §18A-2-8, a county board of education may suspend or dismiss an employee for immorality or willful neglect of duty. The grievant's conduct with the student on the date in question was immoral under that statutory provision. The dereliction of his coaching duties constituted willful neglect of duty under the statute.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of McDowell County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so

that the record can be prepared and transmitted to the appropriate court.

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JERRY A. WRIGHT

CHIEF ADMINISTRATIVE LAW JUDGE

Dated: July 13, 1994

Footnote: 1It is the practice of the Grievance Board that the initials and not the names of minor students be used in cases involving allegations of sexual misconduct. In the present case, the nature of one of the allegations requires that the student's first name be revealed.

Footnote: 2IES apparently operates on a "self-contained" classroom concept in which students are provided instruction by one teacher in all areas except Music and Physical Education. The record is somewhat unclear, but it appears that the students receive Physical Education instruction three days per week.

Footnote: 3The transcript of this hearing and attached exhibits is part of the record herein.

Footnote: 4The parties' legal positions are straightforward. The Board asserts that its evidence establishes that the grievant committed the acts for which he was dismissed and the grievant maintains thatit does not. It is noted that the grievant makes no due process-related claims and no deficiencies in the manner in which the dismissal was effected are found.

Footnote: 5As previously noted, Olivia charged that the grievant, prior to April 5, had made improper physical contact with her. The dismissal letter, which is very specific as to the offenses alleged and the dates on which they were to have occurred, makes no mention of any pre-April 5 misconduct. Accordingly, the student's testimony at the Board hearing and the Level IV hearing regarding those allegations has been afforded no probative value herein. It was deemed relevant only to the extent that it tended to show that the witness was consistent.

The dismissal letter also makes no reference to the grievant's singing the aforementioned Olivia Newton-John song to the student. While the student's testimony suggests that she perceived the grievant to be making a subtle sexual overture by interposing her name in the lyrics of the song, the record as a whole does not establish that he was. The grievant was credible in his testimony that he initially used the song as a method of remembering the student's name and that he chose it because she had the same first name as the singer. In any event, since the matter was not made a part of the grounds for dismissal, it has been given no consideration.

Finally, it should be noted that during Mr. Miller's Level IV testimony regarding his investigation of the student's charges, he made mention of "similar" charges levied against the grievant while he was assigned to a teaching position at WJHS which were "resolved" without disciplinary action. The undersigned ruled that counsel for the grievant, in his attempt to show that Mr. Miller's investigation was inadequate, had elicited the information and that it might be relevant on

that issue. Upon a careful review of the record it is determined that the ruling was in error and that the witness was being unresponsive to counsel's questions. For this reason and because no reference to the charges were made in thedismissal letter or at the Board hearing, the evidence has been deemed wholly irrelevant.

Footnote: 6During the hearing, the student, with the assistance of her mother, demonstrated her and the grievant's relative positions and the area of her body where the contact was to have occurred.