STEPHEN HOPKINS,

Grievant,

v. DOCKET NO. 95-20-116

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Stephen Hopkins, had been employed by the Kanawha County Board of Education (Board) in excess of ten years as a special needs, band and civics teacher at East Bank High School when, on February 13, 1995, he was advised by Superintendent Jorea Marple that a hearing would be held to determine the appropriate discipline for

> certain allegations of inappropriate conduct by you toward a senior female student. Specifically, it is alleged that during the month of December, 1994, you attempted to establish an inappropriate personal relationship with student J.H. . . . (See footnote 1)

A disciplinary hearing was held before Associate Superintendent Chris Smith on March 7, 1995. Subsequently, on March 9, 1995, Superintendent Marple advised Grievant she was recommending to the Board that his employment be terminated, and incorporated aMarch 9, 1995, memorandum from Mr. Smith into her notice letter to Grievant. The March 9, 1995, memorandum concluded that:

> Mr. Hopkins' actions were inappropriate, unprofessional and contrary to acceptable student-teacher behavior standards. Given the nature of the misconduct, severe disciplinary action, with a minimum of a thirty day suspension and up to and including termination, should be considered.

Grievant was notified by letter on March 14, 1995, that the Board had accepted the Superintendent's recommendation, and voted to terminate his employment effective March 13, 1995.

Grievant appealed the Board's decision to terminate his employment on March 17, 1995. A level

four hearing was conducted on May 10, 1995, and this matter became mature for decision upon receipt of the Grievant's proposed findings of fact and conclusions of law on August 7, 1995. Respondent elected to rely on the evidence established at the disciplinary hearing, the transcript and exhibits of which have been incorporated into the record, and the subsequent decision by Mr. Smith dated March 9, 1995.

The evidence of record establishes that on or about January 9, 1995, Richard Clendenin, Principal of East Bank High School, received an unsigned letter which stated that a teacher, Grievant, was harassing a female student, J. H. KCS Ex. 2. Mr. Clendenin met with the student, a seventeen year old senior, and she confirmed that she had received letters of a personal nature from Grievant.

Mr. Clendenin then met with Grievant to discuss the allegations. Grievant admitted writing letters to J.H., suggesting that she go with him to the movies, and sending her roses atschool. He also admitted that he was in love with her but stated that the relationship had ended. Mr. Clendenin's investigation resulted in the scheduling of the disciplinary hearing on March 7, 1995.

J.H. testified that she had known Grievant for several years through their community and church. Grievant would sometimes give J.H. rides home from volleyball practices and matches and they would have friendly conversations. The relationship began to change in the latter part of November, 1994, when Grievant gave J.H. the first of several letters. In that letter, Grievant expressed, among other things, his appreciation for their friendship. KCS Ex. 3.

In early December, 1994, Grievant gave J.H. a ride home from volleyball, but instead of going straight home, took her to his favorite place, a scenic viewing spot near the McJunkin building, many miles from the community in which Grievant and J.H. live. J.H. testified that they sat and talked until about 8 or 9 p.m. Grievant discussed his marital problems with J.H., and she confided personal thoughts of her own.

The following day J.H. received roses at school from a "secret admirer." She asked Grievant if he sent the roses, and he confirmed that he did. She asked him not to do it again.

Shortly thereafter, Grievant gave J.H. a second letter at school, in which he expressed jealousy that she was considering dating an older boy. J.H. testified that the portion of the letter admitted into evidence was just the first page of a two-pageletter. Grievant also invited J.H. to a movie on the second page of the letter. J.H. testified that the letter made her angry and she threw away the second page. KCS Ex. 4.

On December 13, 1994, Grievant asked J.H.'s history teacher to excuse her from class and send her to his (Grievant's) office. During that class period, Grievant and J.H. talked and "he apologized for everything." Tr., p. 47. J.H. remained in Grievant's classroom the entire period and part of lunch. When J.H. finally got up to leave, Grievant attempted to kiss her on the cheek, and she turned her head away. J.H. testified that Grievant got angry and threw a portable C.D. player down on his desk. Grievant admits attempting to kiss J.H., but denies throwing anything. Grievant testified regarding that meeting that "I didn't really want it to be (over) at that time, but, yet, it was." Tr., p. 74.

Grievant then gave J.H. a third letter at school in mid-December, which is reproduced in its entirety:

> Well, it was still good to talk to you even if I did all of the talking. I am sorry if I made you mad but it is nothing more than frustration coming out because I cannot get you to tell me anything. I do have a hard time dealing with this. It hurts! It hurts because I know you will not be around me, enjoy each other, or even be a part of my life to the point of riding home with me. All of this even though you love me (implied?), & even though that's true from me. If you would at least give me a reason for not wanting to then we could try to work through it or decide that it is the best for us. At least I would know something. Right now, you have made the choice without me and won't even tell me why. Do you understand? The only problem is now you won't talk to me now so I'll never know.
>
> You cannot tell me to get lost, take a hike, I don't want to talk to you again, leave me alone or anything like that. As I have said before, if you can't say it,then enjoy the times we could have. There's something wrong when someone hangs around a person even though you don't always want to (N.) and you won't hang around a person you want to (Me). What am I doing wrong? I wish you could tell me or maybe I wish you would tell me.
>
> J., I don't know what else to say. I have been totally honest and quite open with you. You really haven't been with me. You know what I want, I have no idea either way what you want. Just incase [sic] you have forgotten, I would like to continue what we had before. You must admit, it was nice! If we see it won't work, so be it. If it does, then there would be 2 happy people. Think about that. Wouldn't it be great to be happy with each other or even on the down side as bad as it would be.
>
> Please, if you actually do feel the same way I do, then, let's enjoy it together sometimes!
>
> I don't know what else to say so I'll just close and go on thinking about things.

_____ _____ _____,

S

P.S. Your friend will be home soon and maybe you can tell him your thoughts.

KCS Ex. 5.

J.H. testified that she asked Grievant to leave her alone after she received this letter. Despite her request, Grievant gave J.H. a last, two-page letter around the third week of December, one page of which J.H. threw away:

> You're absolutely right! I don't like writing letters either and this will be the last!!!
>
> You have done everything just the way it should have been done. You are not selfish, but caring. As you said, we both have too much to lose. Me more than you! As I have said, I am backing off. But, there are a couple of three things that will happen and when they do, Look out! I will come after you hard! When this happens you will be with me or you will have to tell me to "go to ____".
>
> Just a couple of things. Come and sit down and talk to me occasionally if for no other reason but to say how things are or to let me know what's happening in your life. If you ever need a shoulder to cry on mine will be there. Thanks.
>
> As I have said, you mentioned that all of your friends know that I'm in love with you so would you please, just one time, somehow let me know how you feel or even felt!? I would feel so much more at ease if I knew. That hurts more than anything - not knowing.
>
> I won't see you again after I give you this so you have a very Merry Christmas!!!!!!

KCS Ex. 6.

J.H. testified that this letter scared her, and she again asked Grievant to leave her alone. During this approximately three-week time period from late November to mid-December, J.H. also received telephone calls from Grievant at home. J.H. also gave letters and poems to Grievant, sometimes through a fellow student, N.T. N.T. testified that J.H. told her she loved Grievant, and that Grievant talked of getting divorced. LIV, N.T. (See footnote 2)

J.H. was confronted about the relationship with Grievant by her step-mother sometime during the week before Christmas break. J.H.'s step-mother said she suspected something because Grievant had given J.H. a ride home from church one night and they stayed in his car and talked for quite a while. J.H. told her step-mother that they were friends, but that she was a little scared because he still tried to pursue the relationship. J.H.'s step-mother confronted Grievant over Christmas break and told him to stay away from J.H.

It was a few days later that Principal Clendenin received the anonymous letter. J.H. admits she would not have gone to thePrincipal on her own, nor did she harbor any ill-will towards Grievant.

Grievant admits attempting to cultivate a romantic relationship with J.H., and does not deny any of the events which have been described, except for throwing the C.D. player. He acknowledges that he was having marital difficulties, exercised poor judgment, and made a mistake for which he now must pay the consequences. However, it is Grievant's position that the punishment does not fit the crime. Further, Grievant opines that the allegation of "inappropriate conduct", even if proven, is not listed nor incorporated in any count or cause of action specifically required by W. Va. Code § 18A-2-8, that would subject Grievant to termination by the Board.

County boards of education must prove charges that are relied upon to support disciplinary action against its employees with specificity and by a preponderance of the evidence. W. Va. Code § 18-29-6. The authority of a county board of education to suspend or dismiss a teacher under W. Va. Code § 18A-2-8, must be based upon the causes listed therein and must be exercised reasonably, not arbitrarily or capriciously. Parham v. Raleigh County Bd. of Educ., 453 S.E.2d 374 (W. Va. 1994).

Grievant contends that because Superintendent Marple's February 13, 1995, letter to him only refers to "allegations of inappropriate conduct", Respondent has failed to allege with specificity any count or cause of action specifically required by W. Va. Code § 18A-2-8, which would warrant his termination fromemployment. Grievant's assertion that Respondent has not proven by a

preponderance of the evidence that his conduct as described above constitutes any count or cause of action required for termination within the meaning of Code § 18A-2-8 cannot be accepted.

W. Va. Code § 18A-2-8 states, in pertinent part:

> Notwithstanding any other provisions of law, 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 guilt plea or a plea of nolo contendere to a felony charge.

"Immorality" 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 Co. of Harrison, 285 S.E.2d 665 (W. Va. 1981).

While Grievant is correct that nowhere in Superintendent Marple's letters to him, nor in the findings and conclusions of Mr. Smith following the disciplinary hearing, was the actual word "immorality" used, it is clear from the evidence that Grievant's conduct falls squarely within that definition, and many references were made to Grievant's inappropriate conduct or "misconduct", both by Superintendent Marple and Mr. Smith. To find that a Grievant had engaged in the conduct contemplated by the definition of "immorality", but could not be disciplined because the Board did not specifically use the word "immorality", would result in a technical, tortured application of the statute, not to mention thesevere injustice which would be done to the innocent victims of such conduct, who "ought to be entitled to a safe environment in our public schools." Bd. of Educ. of Co. of Mercer v. Wirt, 453 S.E.2d 402, 415 (W. Va. 1995).

It is not the label the employer attaches to the conduct of the employee in the termination notice that is determinative. The critical inquiry is whether the conduct of the employee that formed the basis for the dismissal is such that, if proven by the employer, warrants dismissal. Any other rule would elevate form over substance. Davis v. W. Va. Dept. of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 22, 1990).

While there is no evidence that Grievant engaged in any sexual contact with the student, the contents of the letters which he wrote to her were unquestionably of an intimate nature. Grievant's treatment of J.H. as a peer to he could confide his marital problems to and could express his love:

> violated the most basic trust that society instills upon teachers to instruct and guide its children and not to abuse, corrupt, or otherwise take advantage of their innocence. Grievant clearly engaged in behavior which was not in conformity with accepted principles of right and wrong, and therefore, has acted immorally.
>
> . . .
>
> While Grievant's actions may have been uncharacteristic and in response to stress suffered as the result of his marital difficulties, this explanation cannot absolve him of the consequences of his action. While Grievant is to be commended for now seeking the appropriate help in dealing with his problems, the unfortunate fact is that irreparable damage has been done to his employment relationship with the Board. A teacher must have the respect and trust of school administrators, parents, and the students to satisfactorily perform hisduties. Because Grievant has lost that trust due to his immoral actions, he can no longer satisfactorily perform the responsibilities of his teaching position.

Graziani v. Monongalia County Bd. of Educ., Docket No. 92-30-082 (Nov. 19, 1992). Finally, Grievant met with Principal Clendenin to discuss the matter; Superintendent Marple's February 13, 1995 specifically refers to his attempts to establish an inappropriate relationship with J.H. Grievant's claim that he did not have notice of the charges being brought against him fails in light of the evidence to the contrary.

In addition to the foregoing narration it is appropriate to make the following specific findings of fact and conclusions of law.

Findings of Fact

1. Grievant was employed by the Kanawha County Board of Education for over ten years and was assigned as a special needs, band and civics teacher at East Bank High School.

2. In March 1995, the Board terminated Grievant's employment based upon a recommendation from Superintendent Jorea Marple. Grievant was charged with specific instances of "inappropriate conduct" toward a female senior high student. Grievant's actions were found to be "inappropriate, unprofessional and contrary to acceptable student-teacher behavior standards." Decision of Disciplinary Hearing, March 9, 1995.

3. Grievant did not deny the actions upon which the charge was based.

Conclusions of Law

1. A county board of education may suspend or dismiss any person in its employment at any time for immorality. W. Va. Code § 18A-2-8.

2. "Immorality" is defined as conduct not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior. Golden v. Bd. of Educ. of the Co. of Harrison, 285 S.E.2d 665, 668 (W. Va. 1981).

3. The conduct of a teacher involves immorality, and thus warrants dismissal, (1) if it directly affects the performance of the occupational responsibilities of the teacher; or (2) if, without contribution on the part of the school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the particular teacher to discharge the responsibilities of the teaching position. Golden, supra.

4. The Kanawha County Board of Education has proven by a preponderance of the evidence that Grievant engaged in "immorality" as contemplated by W. Va. Code § 18A-2-8.

5. Grievant received adequate notice of the charges being brought against him through his discussion with Principal Clendenin and the February 13, 1995 letter from Superintendent Marple.

6. The decision of the Kanawha County Board of Education to terminate Grievant's employment, rather than impose a lengthysuspension, was legally permissible and appropriate under the circumstances.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha 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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MARY JO SWARTZ

Administrative Law Judge

Dated: August 23, 1995

Footnote: 1 *It is the Grievance Board's traditional practice to avoid using the names of individuals in cases involving sensitive facts.*

Footnote: 2 *Testimony from the level four hearing is designated as "LIV, (name of witness).*