WILLIAM A. HAYES,

Grievant,

v. DOCKET NO. 94-20-1143

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, William A. Hayes, filed this grievance on December 23, 1994, pursuant to W. Va. Code §§ 18-29-1 et seq., protesting his dismissal from Respondent Kanawha County Board of Education by letter dated December 21, 1994. (See footnote 1) Following several continuances for good cause, a hearing was held on April 4, 1995, and the parties submitted proposed findings of fact and conclusions of law on or about May 9, 1995, at which time this case became mature for decision. The following narrative will be supplemented by appropriate findings of fact and conclusions of law.

Grievant has taught mathematics for Respondent for approximately 22 years. He has consistently been evaluated as "excellent" or as a teacher who "exceeds expectations." G. Ex. 3. Grievant had never been disciplined until his suspension andsubsequent dismissal from Sissonville Middle School in December 1994, for the allegations at issue in this case.

Sissonville Middle School is divided into several floors. The second floor contains seventh grade students, as does the third floor. Students are not permitted to mix with students on other floors during the academic portion of the school day. Grievant taught on the second floor with four other teachers. The teachers shared administrative duties for that floor. In November 1994, Grievant was responsible for collecting the absence and lunch counts from the "home base" or home room teachers in the morning and ensuring they were delivered to the office each day.

Grievant asked students to volunteer to help him collect the absence and lunch counts in the morning. Grievant rotated students each nine-week period to allow as many students to assist as possible. In November 1994, Brittany B. and Nicki V., seventh grade students, were responsible for the absence and lunch counts. (See footnote 2)

The teachers also divided responsibilities during a break period in the morning. Grievant remained in his classroom and supervised a snack table, while other teachers monitored the hallway. During this break period, approximately 115 students were permitted to roam the hallway, see to personal needs, and "buy a break". To "buy a break" means to buy snacks, which were in Grievant's classroom. A student collected the money at theteacher's desk in front of the classroom. Grievant sat in the back of the classroom at a table and monitored the break.

On November 14, 1994, Grievant oversaw the break period as he normally did, sitting in the back of the classroom while students bought their snacks. From his seat in the back of the classroom, Grievant could look out his classroom door directly into the classroom across the hall. The students would come in the door, turn right and proceed to the front of the room and buy snacks. From there, they would circle around the room, passing in front of Grievant and then out the classroom door. On that particular day, there were approximately 8 students, including Brittany B. and Nicki V., in the room buying snacks. LIV, Brittany B.; Hayes. (See footnote 3) As the girls began to leave the room, Grievant called them over to him, patted Brittany B. on the back, and thanked the girls for assisting in the absence and lunch counts in the morning. Grievant gave each girl a Jolly Rancher candy, telling them "[Y]ou can have jolly ranchers any time you want one because I appreciated the work you're doing for me." LIII Tr., p. 75. (See footnote 4)

After the break, Brittany B. attended her next two classes, Geography and Chorus. A substitute was teaching Geography that day and the class was unruly. LIV, Brittany B.; Hayes. Grievant's classroom was directly across from the Geography classroom. Hewent to the class to assist the substitute in getting the class under control. While he was there, a student flew a paper airplane at him. He engaged in throwing the airplane with the students, including Brittany B., for a few minutes until the class calmed down and then left. LIV, Brittany B.; Hayes.

After her Chorus class and before lunch, Brittany B. went to the school counselor, Doris DeMoss, with three of her friends, and told her that she had a problem with Grievant. LIV, Brittany B.; DeMoss. Ms. DeMoss asked the other girls to leave, and Brittany B. told her that Grievant had touched her on her buttocks. Ms. DeMoss testified that Brittany B. was upset. LIV, Brittany B.; DeMoss.

DeMoss informed Principal Tidquist, who informed the Area Superintendent, Rebecca Goodwin. Goodwin instructed Tidquist to call the Department of Health, Brittany B.'s parents, and arrange interviews the next day. LIV, Goodwin. The next day she interviewed Brittany B. and Rachel S. about

the incident in Grievant's classroom. Rachel S. was present in the classroom during the break period and observed Grievant touch Brittany B.

During the suspension hearing, Rachel S. testified that Grievant touched Brittany B. "on her behind." LIII Tr., pp. 17-18. However, at the Level IV hearing, on both direct and cross-examination, Rachel S. demonstrated where she saw Grievant touch Brittany B. Rachel S. placed her hand on her side, about waist level. When asked to demonstrate again on cross-examination, Rachel S. again put her hand on her side, at waist level. She thentestified that Grievant did not touch Brittany B. squarely on her behind, but on her side. LIV, Rachel S.

Another student, Tracy J., also came forth and alleged Grievant had also touched her inappropriately. Goodwin interviewed Tracy J. and a witness to that incident, Blair K. That incident occurred several weeks before the Brittany B. incident, but Tracy had not reported it to any school officials. LIV, Tracy J.

Tracy J. is a 14-year old seventh grader with an admitted history of discipline problems. LIV, Tracy J. In approximately mid-October 1994, while classes were changing and the hallway was full of students, Tracy J. approached Grievant and informed him she was in trouble again. Grievant put his arm around her and consoled her, and offered her a Jolly Rancher candy. LIV, Tracy J.; Hayes; Blair K. This encounter lasted only a few seconds. Tracy J. testified that Grievant put his arm under her jacket and "rubbed" her side. LIV, Tracy J. Blair K. testified that she had been waiting for Tracy J. in the hallway that day and observed Grievant put his arm around her, but did not hear their conversation. Blair K. testified that Tracy J. appeared upset afterwards. She also testified that Tracy J. had discipline problems and was often upset. LIV, Blair K.

Tracy J. also indicated that Grievant had inquired into her dating practices sometime prior to the Brittany B. incident. On this particular day, in one of the Grievant's math classes, Grievant heard the comment that a student on the third floor was considered superior to the students on the second floor, becauseTracy J. was dating him. Grievant indicated to the class that he thought kids on his floor were the "greatest people in the whole world" and "chided" Tracy for dating someone on the third floor. LIV, Hayes; Tracy J. Blair K. also testified regarding this incident and confirmed that the conversation occurred during class and that Grievant had told Tracy J. something to the effect that she should go for the guys on the second floor. Level IV, Blair K.

Eventually, Grievant was called to the Principal's office, informed of the accusations and told to

pack up his belongings and get out of the school. LIV, Grievant. Grievant inquired of Goodwin where it was he was supposed to have touched Brittany B., and Goodwin "pointed to her side almost, you might as well say, up to her waist." LIII Tr., p. 85. Grievant was suspended with pay on November 17, 1994, pending further investigation of the incidents. LIII R Ex. 1.

Respondent alleged that Grievant had been specifically warned about inappropriate conduct with female students in the past, and introduced a memorandum regarding an incident that had occurred in December, 1993. R Ex. 2. A parent had called Ms. Goodwin to charge Grievant with making inappropriate remarks to her daughter, Michelle A. Goodwin interviewed the student, a teacher, two students whom Michelle A. said could verify the remarks, Principal Tidquist and Grievant regarding the alleged incident. Grievant denied making any inappropriate comments to Michelle A. The students would not corroborate Michelle A.'s story. It also was determined that Michelle A. had a history of discipline problems,attempted to seek out Grievant, and called him on the telephone. Ms. Goodwin concluded there was insufficient evidence to proceed with the matter and the action was dropped at that time. Ms. Goodwin and Principal Tidquist cautioned Grievant to avoid putting himself in a position where such things could occur and to maintain a professional relationship with his students. Specifically, the memorandum stated that "Mr. Tidquist should direct Mr. Hayes to avoid inappropriate personal contact to students by phone and to be professional at all times in his relationships with students." R Ex. 2.

Grievant did not perceive this to be a "warning" but merely a suggestion which would apply to all teachers. LIV, Hayes. Principal Tidquist testified that they were generalized comments to a teacher about maintaining a professional relationship with students and to avoid situations which could lead to problems. Tidquist did not characterize this conversation as a "warning." LIII Tr., p. 35. More importantly, there is no evidence that this memorandum was meant to or did serve as a reprimand to Grievant.

Based on the two touchings, the foregoing discussion of dating practices, and the previous "warning", Grievant was terminated by letter dated December 21, 1994. R Ex. 1.

Arguments

Respondent alleges it has met its burden of proof that Grievant engaged in acts of "immorality" under W. Va. Code § 18A-2-8. Neither Respondent's suspension letter nor dismissal letter

specifically assigned a basis allowed by Code § 18A-2-8, but it isassumed it is relying on the ground of "immorality" based on the above alleged incidents.

Grievant does not deny that he touched Brittany B. and Tracy J. on the days indicated, but asserts that the touchings were not inappropriate or sexual in nature, and specifically denies touching Brittany B. on her buttocks. Grievant does not challenge the sufficiency of the notice of termination.

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

> . . . [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 contendre to a felony charge. . . .

The term "immorality" as used in the statute

> connotes 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 County of Harrison, 285 S.E.2d 665, 668 (W. Va. 1981).

Because this is a disciplinary action, Respondent must prove the allegations against Grievant by a preponderance of the evidence. W. Va. Code § 18-29-6. Respondent argues that it has met its burden of proving that Grievant placed his hand on Brittany B.'s buttocks. Respondent, relying on a recent decision of the West Virginia Supreme Court of Appeals in Board of Educ. of the County of Mercer v. Wirt, 453 S.E.2d 402 (W. Va. 1994), asserts that it has also proven the "nature" of the touching was other than some innocent or unintended physical contact. Respondent assertsthe age, physical maturity and reaction of Brittany B. to the touching, coupled with Grievant's remark that she could have candy anytime she wanted, "provide strong support to a conclusion that the nature of the physical contact in question is consistent with the disciplinary action taken . . . ". Memorandum in Support of the Disciplinary Action Taken Against the Grievant, p. 3.

Grievant asserts that Respondent has taken the fact that Grievant typically gave candy to his students, and colored an innocent act with "stereotypical sexual imagery." Brief of the Grievant, p. 16. In this case, the undersigned must agree with Grievant.

The witnesses, including Brittany B., and Grievant in this case did not appear to be anything other

than "forthright in their testimony." Wirt, p. 412. However, there are inconsistencies in their testimony that cannot be overlooked. Brittany B. testified that Grievant touched her on her buttocks. Grievant testified that he touched her on her side, about waist level. Rachel S. testified and demonstrated to the undersigned that she witnessed Grievant touch Brittany B. on the side, about waist level. During the suspension hearing, Grievant testified that when he asked Ms. Goodwin where he was supposed to have touched Brittany B., she indicated on the side, about waist level. At Level IV, Ms. Goodwin testified that he touched Brittany B. on her buttocks. Grievant's testimony regarding Goodwin's remark was not rebutted in the suspension hearing, and is admissible as a prior inconsistent statement by Ms. Goodwin.

> These discrepancies in testimony are not of the minor, insignificant type of differences in perception which are to be normally expected in the accounts of different witnesses to the same events. They are of the type which cannot be ignored.

Wirt, p. 412. It can be concluded that Grievant touched Brittany B. on November 14, 1994. It cannot be concluded, however, that the testimony portrays with certainty that the nature of that touching was "immoral".

> The common denominator to be gleaned from this case is that immoral conduct which goes beyond a matter of judgment such that the teacher may properly be assumed to have prior notice of its wrongful character and thus may be properly held responsible for his conscious disregard of established moral standards. Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires at least an inference of conscious intent.

Youngman v. Doerhoff, 890 S.W.2d 330 (Mo. 1994).

The Brittany B. incident occurred in a classroom with an open door, with other students present, and teachers monitoring the hallways. Grievant admits that he patted Brittany B. "on the back" and offered her a Jolly Rancher for helping him with his administrative duties. Other than this stereotypical scenario of a man offering a child candy, there is no evidence which has been presented, especially in light of the discrepancies in testimony, which supports Respondent's assertion that Grievant acted in an immoral or sexual way in touching Brittany B. This is not to say that Brittany B. did not believe Grievant touched her on her buttocks or was not upset about the touching. However, a determination that a teacher has engaged in "immoral conduct"cannot properly be predicated solely on the student's

reactions to the teacher's conduct.

> Experience suggests that individual reactions to the most well-intention displays of affection or comfort vary widely from person to person. . . . If Teacher's actions were undertaken for the purpose of sexual gratification, he would be guilty of immoral conduct regardless of whether [student] found it offensive or even solicited it. Conversely, a gesture perfectly innocent or even laudable in intent may nonetheless be misperceived by the recipient. Failure to appreciate the potential for such misperception may well be bad judgment, but it is not, without more, immoral conduct . . .

Youngman, p. 342.

Thus, the undersigned finds that Grievant did not act in an immoral manner when he patted Brittany B. on the back on November 14, 1994.

With regard to the Tracy J. incidents, while there are no discrepancies in testimony as to their occurrence, the undersigned finds that there has been no evidence presented that these events were "immoral" or even out of the ordinary. Grievant put his arm around Tracy J. in a crowded hallway to comfort her when she was in trouble. Grievant "chided" Tracy J. about dating a boy on the third floor in his attempts to boost the confidence of the students on the second floor. Add to this the fact that Tracy J. never reported any of these incidents until after the Brittany B. incident, and the undersigned finds that none of this conduct exemplifies "immorality".

Finally, the undersigned does not find that the December 22, 1993 memorandum regarding the Michelle A. incident can be construed as a "warning" to Grievant. There was no evidence to support thatthe "incident" ever occurred, and Grievant was never disciplined in any way. The memorandum contains nothing more than a generalized statement that teachers must be cautious in their relationships with their students.

Findings of Fact

1. Grievant was employed by Respondent as a mathematics teacher for 22 years.

2. On November 14, 1994, during break period, Grievant patted Brittany B. on her back and gave her a Jolly Rancher candy for helping him in his assigned administrative duties.

3. In mid-October 1994, Grievant put his arm around Tracy J. and offered her a Jolly Rancher to comfort her when she was in trouble at school.

4. During one of Grievant's math classes, the discussion turned to whether students on the third floor were better than students on the second floor. The comment was heard by Grievant that the third floor boys were better because Tracy J. was dating one of them. In an effort to boost the morale of his students, Grievant "chided" Tracy J. for not dating boys on the second floor, who were the "greatest people in the whole world".

5. In December 1993, a student made allegations that Grievant had made inappropriate remarks to her. It was determined by the Area Superintendent that there was no evidence to support the allegations and the incident was dismissed. In a memorandum summarizing the "investigation" a comment was made that Grievantneeded to be cautious in his dealings with his students and not put himself in a position where something like that could happen again.

6. Based on the two touchings, the discussion of Tracy J.'s dating practices, and the prior "warning", Respondent suspended and then dismissed Grievant for immorality on December 21, 1994.

Conclusions of Law

1. County boards of education must prove charges that are relied upon to support disciplinary action against its employees by a preponderance of the evidence. W. Va. Code § 18-29-6.

2. 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, nor arbitrarily or capriciously. Parham v. Raleigh County Bd. of Educ., 453 S.E.2d 374 (W. Va. 1994).

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

4. Respondent has not proven by a preponderance of the evidence that Grievant's conduct described above constitutes "immorality" within the meaning of W. Va. Code § 18A-2-8.

Accordingly, this grievance is **GRANTED** and Respondent is hereby **ORDERED** to reinstate Grievant to employment with full back pay and benefits from the effective date of his dismissal, and toremove the December 21, 1994 dismissal letter from Grievant's personnel file.

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: June 28, 1995

Footnote: 1 *A disciplinary hearing was held on December 9, 1994, before Joe Godish, Hearing Examiner for Respondent, the record of which was incorporated into evidence at the Level IV hearing.*

Footnote: 2 *As is our traditional practice, we avoid using the last names of the individuals in cases involving sensitive facts.*

Footnote: 3 *Grievant testified Nicki V. was present in the room. Brittany B. testified she was not with her. Nicki V. was not called as a witness.*

Footnote: 4 *Grievant testified that he would give students candy as a reward for good behavior or assisting in administrative duties. LIV, Hayes.*