WADE BALIS,

Grievant,

v. **Docket No. 98-04-094**

BRAXTON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

On March 24, 1998, Wade Balis (Grievant) submitted a grievance directly to Level IV, in accordance with W. Va. Code § 18A-2-8, challenging his continued suspension without pay by Respondent Braxton County Board of Education (BCBE), based upon a criminal indictment which had been dismissed subsequent to his suspension. After this matter was set for hearing, Grievant was notified that he was to be terminated for unsatisfactory performance. Grievant also appealed his termination, requesting that the two matters be consolidated. BCBE concurred, and a Level IV hearing was held in this Board's office in Charleston, West Virginia, on August 21, and September 8 and 9, 1998. (See footnote 1) As agreed at the conclusion of the hearing, this matter became mature for decision on October 20, 1998, following receipt of post-hearing briefs submitted by the parties.

DISCUSSION

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code § 18-29-6; 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. It may not be determined by the number of witnesses, but by the greater weight of all evidence presented, which means that such factors as opportunity for knowledge, information possessed, and manner of testifying determines the

weight accorded to testimony rather than the greater number of witnesses. Maxey v. McDowell County Bd. of Educ., Docket No. 97-33-208 (Apr. 30, 1998). See Black's Law Dictionary 1344-45 (4th ed. 1968); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). Moreover, the authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, as amended, 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).

Grievant challenges two disciplinary actions, a continued suspension based upon a dismissed indictment for felony sexual misconduct, and a termination grounded in allegations of unsatisfactory performance. The suspension will be discussed first.

A. GRIEVANT'S SUSPENSION W. Va. Code § 18A-2-8 provides:

> dismissal for the conviction of a felony or a plea of nolo contendere to a felony charge is not by itself a grievable dismissal. An employee charged with the commission of a felony may be reassigned to duties which do not involve interaction with pupils pending final disposition of the charges.

Consistent with the foregoing language, this Grievance Board has concluded that a board of education may conditionally suspend an employee based upon an indictment alone. Lemery v. Monongalia County Bd. of Educ., Docket Nos. 91-30-477/494 (Apr. 30, 1992); Kitzmiller v. Harrison County Bd. of Educ., Docket No. 13-88-189 (Mar. 31, 1989). See Susser v. Kanawha County Bd. of Educ., Docket No. 20-85-002 (Jan. 8, 1986). Accordingly, in early October 1995, after learning of Grievant's felony indictment, BCBE's Superintendent, Dr. Kenneth Seal, recommended to BCBE that Grievant be suspended without pay. Grievant was afforded a hearing regarding his suspension before BCBE on October 17, 1995. See G Ex G. The indictment included felony charges of sexual misconduct involving children of the same age as the students Grievant was then teaching. BCBE elected to suspend Grievant without pay, pending the resolution of the criminal charges. G Ex G at 19.

Ultimately, all criminal charges against Grievant were dismissed sometime before March 24, 1998. (See footnote 2) At that time, the employer could have initiated action to dismiss Grievant on the basis of the conduct which led to the indictment. See Hurley v. Logan County Bd. of Educ., Docket No. 97-23-394 (Dec. 11, 1997) (hereinafter "Hurley II"). However, BCBE made no effort to establish

the substance of those allegations, opting to initiate a new andseparate termination action for unsatisfactory performance. This Grievance Board has previously noted that a suspension stemming from an indictment is conditional, and a county board may condition ultimate forfeiture of pay upon the employee being convicted.

This Grievance Board has previously determined that a county board properly suspended a substitute Bus Operator without pay pending resolution of driving under the influence charges, and the employee was not entitled to recover any lost wages when the charges were ultimately dismissed. Stewart v. Marion County Bd. of Educ., Docket No. 96- 24-151 (July 23, 1996). This same issue has arisen in cases involving federal civil service employees where employees were suspended following criminal indictment, and the charges were ultimately resolved in favor of the employee. Although the outcome of those cases may be controlled by the specific language in applicable federal statutes, (See footnote 3) the prevailing federal rule is that suspended federal employees may only recover back pay from the date the employee is acquitted, or the charges are dismissed, to the date the employee is reinstated. Richardson v. U.S. Customs Serv., 47 F.3d 415 (Fed. Cir. 1995); Jankowitz v. United States, 533 F.2d 538, 209 Ct. Cl. 489 (1976). See Jones v. Dep't of Navy, 978 F.2d 1223 (Fed. Cir. 1992). Contra, Brown v. Dep't of Justice, 715 F.2d 662 (D.C. Cir. 1983). (See footnote 4) Consistent with this Board's decision in Stewart, and the absence of any controlling provision in the statutes governing employment of school personnel, an employee suspended due to pending criminal charges, where there is a nexus between the criminal charges and the employee's ability to perform his or her assigned duties, is limited to recovering back pay from the date the employee is acquitted, or the charges are ultimately dismissed. See Richardson, supra; Jankowitz, supra. See generally, Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991); Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

Under West Virginia law, in addition to establishing that a suspended employee is under indictment for a felony, the county board must also demonstrate that there is a rational nexus between the indictment and the employee's ability to perform his assigned duties. Hurley v. Logan County Bd. of Educ., Docket No. 97-23-024 (Apr. 14, 1997) (hereinafter "Hurley I"). See Susser, supra. See generally, Rogliano v. Fayette County Bd. of Educ., 176 W. Va. 700, 347 S.E.2d 220 (1986); Golden v. Bd. of Educ., 169 W. Va. 63, 285 S.E.2d 665 (1981). Unlike the situation in Susser, BCBE established a nexus between the off-duty conduct for which Grievant was indicted and

Grievant's duties as a middle school teacher by showing that Grievant's students were of the same age as his alleged victims, and significant notoriety regarding Grievant's indictment had arisen in the community. Thus, Grievant's suspension, while felony charges were pending, was proper. Hurley I, supra. See Woo v. Putnam County Bd. of Educ., Docket No. 93-40-420 (June 2, 1994); aff'd, 504 S.E.2d 644 (W. Va. 1998).

However, when the felony charges were dismissed in early 1998, BCBE did not pursue charges which related back to those criminal charges. Instead, BCBE elected todismiss Grievant for unsatisfactory performance, the facts and circumstances of which in no way relate to the charges for which Grievant was indicted. In these circumstances, the condition on which Grievant's suspension was properly based, potential commission of a felony, ceased to exist as of the time the indictment was dismissed, and he is entitled to reinstatement from that date to June 5, 1998, when he was terminated for unsatisfactory performance. See Susser, supra.

B. GRIEVANT'S DISMISSAL

Having determined that Grievant's suspension was proper until the criminal charges were resolved, Grievant's subsequent termination may now be discussed. After learning that Grievant's indictment had been dismissed, BCBE Superintendent Seal elected to initiate action to terminate Grievant for unsatisfactory performance. Unsatisfactory performance is one of the causes in W. Va. Code § 18A-2-8 for which an education employee may be disciplined. Further, that Code Section specifies that "[a] charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article." The extensive Level IV hearing in this matter focused on charges stated in Grievant's dismissal letter from BCBE Superintendent Seal on May 5, 1998, as follows:

> This is official notification that I am recommending your dismissal as a teacher. You are being charged with unsatisfactory performance as outlined in WV code 18A-2-8 as a result of performance evaluations performed under WV code 18A-2-12. The unsatisfactory performance was documented in evaluations dated October 13, 1994, October 14, 1994, November 14, 1994, March 6, 1995, and June 2, 1995.

R Ex 33.

Consistent with the foregoing dismissal letter, a pre-termination hearing was conducted before BCBE on June 5, 1998. At the conclusion of that hearing, the board voted to approve Superintendent Seal's dismissal recommendation, prompting this appeal.

BCBE hired Grievant in 1973 to teach band and music following his graduation from Salem College with a Bachelor of Arts degree in music. As of the 1995-96 school year, Grievant had been employed by BCBE for over twenty years. Prior to the 1992-93 school year, Grievant had been teaching band and music at Gassaway Middle School where Virginia Chapman was the Principal. For the 1992-93 year, Gassaway Middle School and two other schools were combined into newly-constructed Braxton County Middle School (BCMS). BCBE selected Ms. Chapman to be Principal of BCMS and she, in turn, recommended Grievant for the band and music teacher position at BCMS. BCBE approved Grievant's selection, and he began teaching at BCMS in the fall of 1992, conducting band classes in a rehearsal room specifically configured for such classes.

After the beginning of the 1992-93 school year, Carolyn Hoover became Assistant Principal at BCMS. Ms. Hoover became aware of some problems Grievant was having in maintaining discipline in his band classes. Although Ms. Chapman testified that she normally rotated evaluations of staff from year to year with her Assistant Principals, only Ms. Chapman evaluated Grievant's teaching performance for his first two years in the new school. Thus, Grievant received a “satisfactory” evaluation in all rated categories on his teacher evaluation for the 1993-94 school year. See G Ex C.

During the 1993-94 school year, BCBE Superintendent Seal began receiving oral and written complaints from parents and students regarding Grievant's teaching performance in band classes. He wrote to Ms. Chapman on June 9, 1994, summarizingthose complaints, and soliciting her assistance in resolving the situation. See R Ex 32. Dr. Seal offered the possibility of extending Grievant's contract to cover marching band practice during August to deal with some concerns about the band's lack of marching practice.

Following this correspondence, there was no indication that the situation had improved. (See footnote 5) Further, Dr. Seal continued to receive complaints from parents, including some who themselves worked for BCBE as teachers. (See footnote 6) After more complaints were submitted to the school board, on September 13, 1994, Dr. Seal appointed Morna Greene, BCBE's Supervisor of Instruction in its Central Office, Ms. Hoover, and Ms. Chapman to observe and evaluate Grievant's performance. See R Ex 31.

In accordance with Dr. Seal's directive, Ms. Hoover conducted an observation of Grievant's 7th grade general music class on October 11, 1994. See R Ex 11. On October 13, 1994, Ms. Hoover met with Grievant to discuss her observations, evaluating him as “unsatisfactory” in the areas of

"Classroom Climate" and "Instructional Management Systems." (See footnote 7) See R Ex 13. Likewise, on September 28, 1994, Ms. Greene observed Grievant's advanced band class. She noted a number of deficiencies in the areas of"Classroom Climate" and "Instructional Management Systems," which she discussed with Grievant on October 3, 1994. See R Ex 25. More particularly, Ms. Greene testified at Level IV that she found Grievant's classroom "chaotic" on her initial visit to the band class.

Subsequently, on October 5, 1994, Ms. Greene observed Grievant's general music class, noting some improvement in "Classroom Climate," while significant problems persisted with "Instructional Management Systems." See R Ex 26. Ms. Greene discussed her observations with Grievant on October 10, 1994. Ms. Greene observed Grievant's advanced band class a second time on October 10, 1994, once more noting problems in the areas of "Classroom Climate" and "Instructional Management Systems" during her discussion with Grievant on October 12, 1994. See R Ex 27. On October 14, 1994, she issued a teacher evaluation to Grievant, rating him "unsatisfactory" in the areas of "Programs of Study," "Classroom Climate," and "Instructional Management Systems." See R Ex 28.

Ms. Chapman conducted a separate observation of Grievant's advanced band class on September 30, 1994, noting no significant problems with his teaching. (See footnote 8) See G Ex D. Thereafter, on October 12, 1994, she issued an evaluation of Grievant which found him "satisfactory" in all categories. (See footnote 9) See G Ex E. After completing their independent observations and evaluations, Ms. Hoover, Ms. Greene, and Ms. Chapman met and reached a consensus evaluation of Grievant. That evaluation was discussed with Grievant on November 14, 1994, finding him "unsatisfactory" in the area of "Instructional Management Systems." (See footnote 10) See R Ex 14. As a result of that evaluation, Grievant was placed on an Improvement Plan in accordance with West Virginia Department of Education Policy 5310, 126 C.S.R. 142 § 11 (1993), effective November 28, 1994. See R Ex 17.

Consistent with his Improvement Plan, Grievant was further observed and evaluated by Ms. Greene and Ms. Hoover. (See footnote 11) See R Exs 15, 16, 29 & 30. These observations generally noted some improvement in Grievant's teaching performance. Another evaluation was issued on March 6, 1995, which nonetheless found Grievant "unsatisfactory" in two of the six rated areas: "Classroom Climate" and "Instructional Management Systems." See R Ex 8. This evaluation, signed

by Grievant, Ms. Hoover, Ms. Greene, and Ms. Chapman, identified the following deficiencies:

> The classroom climate does not support learning. Communication is often negative and this results in a poor and negative relationship between you and your students. There is a lack of mutual respect between you and your students. This often creates situations which escalate into control problems.

R Ex 8. Accordingly, on March 23, 1995, Grievant was placed on a second Improvement Plan covering the remainder of the 1994-95 school year. See R Exs 9 & 18.

In accordance with the second Improvement Plan, Ms. Hoover and Ms. Greene jointly observed Grievant's advanced band class on May 5, 1995. See R Ex 19. Similarly, they jointly observed Grievant's general music class on May 22, 1995. See R Ex 21. In addition, Ms. Hoover observed Grievant's first period band class on May 18, 1995 (See R Ex 20), and Grievant's advanced band classes on May 25 and 30, 1995. See R Exs 22 & 23. These observations generally concluded that, although Grievant had made a noticeable effort to improve, his performance remained ineffective in certain areas. (See footnote 12) Accordingly, he was issued an evaluation on June 2, 1995, which found him “unsatisfactory” in three areas: “Classroom Climate,” “Instructional Management Systems,” and “”Communication.”

BCBE also presented testimony from a number of students who attended courses taught by Grievant during the time periods covered by his unsatisfactory performance evaluations. Their resulting anecdotal evidence generally supported the observations of the professional observers in regard to Grievant's poor classroom management. (See footnote 13) In addition, a parent of one of Grievant's students, coincidentally employed by BCBE as a School Psychologist, observed one of Grievant's band classes during the 1994-95 schoolyear with the consent of the Principal. From her perspective, the classroom climate was chaotic, and there was an obvious lack of mutual respect between the students and their teacher. Moreover, there was substantial probative evidence that Grievant's classroom deportment adversely affected a number of students who experienced various forms of stress, as well as students who either dropped band as an elective, or elected not to continue in band while Grievant remained as the instructor.

West Virginia Department of Education Policy 5310 requires that “[a]n employee whose performance evaluation is rated unsatisfactory shall be given an opportunity to correct the deficiencies.” 126 C.S.R. 142 § 7.3 (1993). Grievant was afforded two opportunities to improve his teaching performance to meet acceptable standards. His designated evaluators twice determined

that Grievant had not improved to a satisfactory level in all rated categories, although they acknowledged he had improved certain aspects of his performance, at least temporarily. Nonetheless, although Grievant failed to remediate the problems which led to his being placed on an Improvement Plan, no action was taken to terminate Grievant's employment for unsatisfactory performance. Rather, aft er the beginning of the 1995-96 school year, Grievant was placed on a third Improvement Plan on October 2, 1995. See G Ex F. The Improvement Plan was to be completed on January 5, 1996. Shortly after the new Improvement Plan became effective, Grievant was suspended based on a criminal indictment.

As a result of these intervening events, BCBE's Superintendent did not pursue Grievant's termination for unsatisfactory performance until faced with the question of whether to reinstate Grievant after the criminal indictment was dismissed over a year later. Superintendent Seal testified that he did not want to unduly burden Grievant with the lossof his employment while he was fighting serious criminal charges. However, once he was faced with the issue of returning Grievant to his teaching position, with no reason to expect that his performance would improve above the unsatisfactory level observed prior to the intervening suspension, Superintendent Seal determined that Grievant's dismissal was in the best interests of the school system.

Grievant contends that under W. Va. Code § 18A-2-12, BCBE was precluded from proceeding with his termination once he was placed on a new Improvement Plan. Grievant cites the following language in that statute:

> Any professional personnel whose performance evaluation includes a written improvement plan shall be given an opportunity to improve his or her performance through the implementation of the plan. If the next performance evaluation shows that the professional is now performing satisfactorily, no further action shall be taken concerning the original performance evaluation. If the evaluation shows that the professional is still not performing satisfactorily, the evaluator shall either make additional recommendations for improvement or may recommend the dismissal of such professional in accordance with the provisions of section eight [§ 18A- 2-8] of this article.

The language in the forgoing statute is clear and unambiguous. If an employee on an Improvement Plan improves his performance to a satisfactory level, the county board has no basis for termination. However, if an employee on an Improvement Plan fails to improve his performance to a satisfactory level, the evaluator can either recommend dismissal, or make additional recommendations for improvement. In this instance, after Grievant's performance failed to improve on

his second Improvement Plan for the 1994-95 school year, neither Ms. Greene nor Ms. Hoover recommended Grievant's dismissal. Instead, they made additional recommendations for improvement, placing Grievant on another Improvement Plan after the beginning of the 1995-96 school year. Once Grievantwas placed on this new Improvement Plan, there were no further observations or evaluations by Ms. Greene or Ms. Hoover. Indeed, Grievant was suspended immediately thereafter, and has not returned to the classroom since October 1995.

W. Va. Code § 18A-2-8 provides that "[n]otwithstanding any other provision 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, [or] unsatisfactory performance . . . ." Although it could be argued that Grievant may be dismissed for incompetency at any time, the West Virginia Supreme Court of Appeals has stated that "it is improper for a school board to dismiss an employee for incompetency without an evaluation by someone qualified to render an opinion on such a question." Mason County Bd. of Educ. v. State Superintendent of Schools, 165 W. Va. 732, 274 S.E.2d 435 (1980). See Trimboli v. Bd. of Educ., 163 W. Va. 1, 254 S.E.2d 561 (1979).

W. Va. Code § 18A-2-12, enacted in 1990 well after the Mason County and Trimboli decisions, appears to codify some of the protection provided to tenured teachers by those court decisions and Policy 5300. Although the record in this matter established that Grievant had a significant problem controlling and managing his classroom, his conduct was "correctable" within the meaning of Policy 5300. Thus, BCBE was obligated to follow the requirements of W. Va. Code § 18A-2-12, as well as State Board of Education Policies 5300 and 5310, when it dismissed Grievant. See Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). In these circumstances, once Grievant was formally placed on another Improvement Plan by the evaluators duly designated by the Superintendent to monitor his performance, BCBE violated W. Va. Code § 18A-2-12, by terminating Grievant forunsatisfactory performance before he was given the opportunity to improve his performance under that Improvement Plan.

Consistent with the foregoing discussion, the following Findings of Fact and Conclusions of Law are made in this matter.

FINDINGS OF FACT

1. Grievant was employed by Respondent Braxton County Board of Education (BCBE) as a classroom teacher at Braxton County Middle School (BCMS). Grievant was first employed by BCBE

during the 1973-74 school year. After a number of assignments teaching band and music, at the beginning of the 1992-93 school year, Grievant was selected for a position teaching band and music to sixth, seventh and eighth grade students at newly-consolidated BCMS.

2. Virginia Chapman was Principal of BCMS from the 1992-93 school year until she retired on July 1, 1996. Ms. Chapman had been Grievant's Principal and immediate supervisor at his immediate previous assignment, Gassaway Middle School. Ms. Chapman evaluated Grievant's teaching performance as “satisfactory” for the 1992-93 and 1993-94 school years. See G Exs B & C.

3. Dr. Kenna Seal was BCBE's Superintendent during all times pertinent to this grievance. In the course of the 1993-94 school year, he received a number of verbal and written complaints from students and parents regarding Grievant's teaching performance. On June 9, 1994, Dr. Seal wrote to Ms. Chapman, summarizing these complaints, and soliciting her assistance in resolving the problem. See R Ex 32.

4. Dr. Seal received no response from his correspondence to Ms. Chapman. Instead, students and parents, including parents who were themselves teachers employedby BCBE, continued to complain to BCBE and the Superintendent regarding Grievant's teaching. On September 13, 1994, in response to these complaints, Dr. Seal appointed Morna Greene, BCBE's Supervisor of Instruction, BCMS Assistant Principal Carolyn Hoover, and Ms. Chapman to formally observe and evaluate Grievant's teaching performance. See R Ex 31.

5. Consistent with Dr. Seal's directive, Ms. Hoover, Ms. Greene, and Ms. Chapman independently observed Grievant's classroom teaching performance during September and October of 1994. See R Exs 11, 13, 25, 26, & 28; G Exs D & E. Ms. Greene and Ms. Hoover determined from their observations that Grievant's performance was deficient in the areas of “Classroom Climate” and “Instructional Management Systems.” Ms. Chapman found no significant problems with Grievant's performance.

6. After completing their independent observations and evaluations, Ms. Greene, Ms. Hoover, and Ms. Chapman met and discussed their respective observations. They arrived at a “consensus” evaluation of Grievant which rated him “unsatisfactory” in the area of “Instructional Management Systems” and “satisfactory” in the five remaining areas evaluated. See R Ex 14.

7. As a result of receiving an “unsatisfactory” rating, Grievant was placed on an Improvement Plan, effective November 28, 1994. See R Ex 17.

8. In accordance with his Improvement Plan, Grievant's teaching performance was further observed by Ms. Greene and Ms. Hoover. See R Exs 15, 16, 29, & 30. Although some improvement was noted during this observation period, on March 6, 1995, Ms. Greene, Ms. Hoover and Ms. Chapman rated Grievant's performance during the improvement period as “unsatisfactory” in the areas of “Classroom Climate” and“Instructional Management Systems.” See R Ex 8. As a result of these unsatisfactory ratings, on March 23, 1995, Grievant was placed on a second Improvement Plan for the remainder of the 1994-95 school year. See R Exs 9 & 18.

9. Ms. Greene and Ms. Hoover conducted additional observations of Grievant's teaching performance during the remainder of the 1994-95 school year. See R Exs 19, 21, 22 & 23. Again, some improvement in Grievant's teaching performance was noted, and some areas improved to “satisfactory” during certain observations. However, on June 2, 1995, Grievant's overall performance during the second improvement period was evaluated as “unsatisfactory” in the areas of “Classroom Climate,” “Instructional Management Systems,” and “Communication.” See R Ex 24.

10. Following Grievant's unsatisfactory evaluation in June 1995, neither Ms. Hoover, Ms. Greene, nor Grievant's Principal, Ms. Chapman, recommended Grievant's dismissal. After the beginning of the 1995-96 school year, on October 2, 1995, Grievant was placed on a third Improvement Plan. See G ex F. This plan was to be completed on January 5, 1996.

11. On October 4, 1995, Dr. Seal became aware that Grievant had been indicted for felony sexual misconduct involving his own children, including children of the same age Grievant was then teaching. See G Ex G at 6-8. Grievant's indictment was reported in newspapers circulated in the Braxton County area, and Dr. Seal and the school Principal received calls from parents inquiring if Grievant would continue teaching their children. In Dr. Seal's opinion, the parents would have attempted to “boycott” the schools if Grievant were not kept away from their children while the charges were pending. 12. On October 4, 1995, Dr. Seal notified Grievant that he was being suspended, pending the outcome of the criminal charges. See G Ex F at 6. A hearing was conducted before BCBE on October 17, 1995, and BCBE voted to indefinitely suspend Grievant witho ut pay, pending resolution of the criminal charges by the courts. See G Ex F at 19.

13. By March 24, 1998, the criminal charges pending against Grievant had been dismissed with prejudice. On May 5, 1998, Dr. Seal notified Grievant that he was proposing his termination under W. Va. Code § 18A-2-8 for unsatisfactory performance. See R Ex 33.

14. After a hearing before BCBE on June 5, 1998, BCBE voted to dismiss Grievant for unsatisfactory performance.

CONCLUSIONS OF LAW

1. The employer must establish the charges in a disciplinary matter by a preponderance of the evidence. W. Va. Code § 18-29-6; Froats v. Hancock County Bd. of Educ., Docket No. 91-15-159 (Aug. 15, 1991); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

2. In order to discipline a school employee for acts performed at a time and place separate from employment, the employer must demonstrate a "rational nexus" between the conduct performed outside the job and the duties the employee is to perform. Rogliano v. Fayette County Bd. of Educ., 176 W. Va. 700, 347 S.E.2d 220 (1986); Golden v. Bd. of Educ., 169 W. Va. 63, 285 S.E.2d 665 (1981); Woo v. Putnam County Bd. of Educ., Docket No. 93-40-420 (June 2, 1994), aff'd, 504 S.E.2d 644 (W. Va. 1998). See Thurmond v. Steele, 159 W. Va. 630, 225 S.E.2d 210 (1976). 3. A Board of Education may conditionally suspend an employee based upon an indictment alone, provided there is a rational nexus between the indictment and the employee's ability to perform his assigned duties. Hurley v. Logan County Bd. of Educ., Docket No. 97-23-024 (Apr. 14, 1997); Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Lemery v. Monongalia County Bd. of Educ., Docket No. 91-30- 477 (Apr. 30, 1992); Kitzmiller v. Harrison County Bd. of Educ., Docket No. 13-88-189 (Mar. 31, 1989). See Susser v. Kanawha County Bd. of Educ., Docket No. 20-85-002 (Jan. 8, 1986).

4. In the circumstances of this grievance, the Braxton County Board of Education established a rational nexus between Grievant's indictment for felony sexual misconduct with school-age children and the duties of his position as a middle school teacher. See Hurley, supra; Woo, supra.

5. Once Grievant's felony indictment was dismissed with prejudice, the county board no longer had a valid basis to continue his suspension, and Grievant is entitled to reinstatement with back pay from the date his indictment was dismissed to the date he was terminated by the county board for other reasons. See Richardson v. U.S. Customs Serv., 47 F.3d 415 (Fed. Cir. 1995); Jankowitz v. United States, 533 F.2d 538, 209 Ct. Cl. 489 (1976). See also Susser v. Kanawha County Bd. of Educ., Docket No. 20-85-002 (Jan. 8, 1986). However, Grievant is not entitled to any recovery for the time period while the felony criminal charges remained pending against him. Stewart v. Marion County Bd. of Educ., Docket No. 96-24-151 (July 23, 1996). See Richardson, supra; Jankowitz,

supra.

6. When grounds for a school employee's dismissal include charges relating to unsatisfactory performance or conduct which is deemed correctable, the county boardmust establish that it complied with provisions of West Virginia Department of Education Policy 5300 requiring it to inform the employee of his deficiencies and afford him a reasonable period to improve. Policy 5300 contains provisions that an employee must be assisted in this goal and not thwarted from achieving objectives set forth in an Improvement Plan. Baker v. Fayette County Bd. of Educ., Docket No. 94-10-427 (Jan. 24, 1995); Perkins v. Greenbrier County Bd. of Educ., Docket No. 94-13-019 (Aug. 12, 1994). See Mason County Bd. of Educ. v. State Supt. of Schools, 165 W. Va. 732, 274 S.E.2d 435 (1987).

7. Grievant's performance was observed and evaluated from September 1994 through October 1995 in substantial compliance with the requirements of West Virginia State Board of Education Policies 5300 and 5310.

8. When an employee who has been given an opportunity to improve his performance through an Improvement Plan is still not performing satisfactorily at the time of his next performance evaluation, the “evaluator shall either make additional recommendations for improvement or may recommend the dismissal of such professional” in accordance with W. Va. Code § 18A-2-8. W. Va. Code § 18A-2-12. When the evaluators make additional recommendations for improvement, and the employee is placed on another Improvement Plan, absent intervening cause for dismissal in accordance with W. Va. Code § 18A-2-8, the employee must be given another reasonable period for remediation of the identified deficiencies. See W. Va. Code § 18A-2-12; Trimboli v. Bd. of Educ., 163 W. Va. 1, 254 S.E.2d 561 (1979). See generally, Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979); Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977).

Accordingly, this grievance is **GRANTED**, **IN PART**. BCBE is hereby **ORDERED** to rescind Grievant's suspension without pay from the date his criminal indictment was dismissed through June 5, 1998, when Grievant was dismissed for unsatisfactory performance, and Grievant is to receive appropriate back pay and benefits, plus interest, for that period. Further, BCBE is **ORDERED** to reinstate Grievant to his former position as a classroom teacher, with appropriate back pay, and benefits, plus interest, from June 5, 1998, to the date his reinstatement becomes effective, and to expunge any record of this termination from his personnel records.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court

of Braxton 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: January 22, 1999

Footnote: 1

Grievant was represented by counsel, George P. Surmaitis, with Crandall Pyles Haviland & Turner. Respondent was also represented by counsel, Erwin L. Conrad.

Footnote: 2

The record does not indicate the specific date when the indictment was dismissed. However, it is apparent that Grievant made BCBE aware of this outcome sometime prior to March 24, 1998, when this appeal was filed.

Footnote: 3

Awarding back pay to federal employees is governed by provisions in the Back Pay Act, 5 U.S.C. § 5596. Suspensions pending resolution of criminal charges are generally sanctioned in 5 U.S.C. § 7513(b).

Footnote: 4

The exclusive forum for judicial review of adverse action decisions involving federal civil service employees is the United States Court of Appeals for the Federal Circuit. See 5 U.S.C. §§ 7703 and 7121(f). Thus, the District of Columbia Circuit no longer has jurisdiction over these matters, and their precedents do not control. See Richardson, supra.

Footnote: 5

Indeed, there was no evidence that Ms. Chapman took any action to deal with Superintendent Seal's concerns.

Footnote: 6

Ms. Chapman acknowledged at the Level IV hearing that this was the only time during her tenure as a Principal, that she had received complaints about a teacher from parents who were teachers themselves.

Footnote: 7

Several forms employed by BCBE for documenting observations and evaluations use the term "Instructional Management System." The correct terminology, according to Policy 5310, is "Instructional Management Systems." See 126 C.S.R. 142 § 14.3 (1992). That terminology will be applied in this decision without noting where it is in conflict with the language in

the forms.

Footnote: 8

Virtually all of the student witnesses agreed that Grievant's classes were on their best behavior when there was an observer present, particularly Ms. Chapman.

Footnote: 9

Although Ms. Chapman neglected to check either "satisfactory" or "unsatisfactory" in the Instructional Management Systems category, there was no indication in her narrative comments on the evaluation form, or her testimony at the Level IV hearing, that she intended to rate Grievant other than "satisfactory" at that time.

Footnote: 10

Ms. Greene and Ms. Hoover testified that they would have rated Grievant "unsatisfactory" in "Classroom Climate," but Ms. Chapman would not agree with that rating. Ms. Chapman testified that, although she would not have recommended Grievant's termination, based upon his teaching performance up to the time she retired at the end of the 1995-96 school year, she concurred with the "unsatisfactory" evaluation issued Grievant in November 1994.

Footnote: 11

After the initial cycle of observations and evaluation resulted in Grievant being placed on an Improvement Plan, Ms. Chapman ceased observing Grievant's performance.

Footnote: 12

Ms. Greene observed that student misconduct and lack of respect for Grievant was most pronounced in the advanced band class, which had the students with the most experience with Grievant as a teacher.

Footnote: 13

None of this testimony, including descriptions of Grievant yelling at the students and throwing his director's baton in frustration, described conduct that would not be "correctable" in accordance with Policy 5300.