THOMAS SNODGRASS,

Grievant,

v. **Docket No. 98-52-337**

WETZEL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Thomas Snodgrass, employed by the Wetzel County Board of Education (WCBE) as a teacher, filed a grievance directly to level four on August 28, 1998, following his dismissal. Grievant seeks reinstatement and back pay. This grievance was held in abeyance, at Grievant's request, pending the resolution of related criminal proceedings. A level four hearing was conducted at the Grievance Board's Wheeling office on November 1, 2001, at which time Grievant was represented by Wray Voegelin, Esq., of Cassidy Myers Cogan Voegelin & Tennant, while WCBE was represented by Larry W. Blalock of Jackson & Kelly. The matter became mature for decision upon receipt of WCBE's proposed findings of fact and conclusions of law on November 14, 2001. Grievant elected not to submit post-hearing proposals.

The facts of this matter are undisputed and may be set forth as the following formal findings of fact.

Findings of Fact

1. Grievant was first employed by WCBE in 1987, and held the position of science teacher at Valley High School at all times pertinent to this grievance.

2. On June 27, 1997, Grievant was involved in a dispute with his former wife and her present husband regarding Grievant's visitation with his six year-old son. Theincident, which occurred in Marion County, culminated with Grievant breaking a window of his ex-wife's car, causing cuts on the two adults, and one minor cut on Grievant's son's finger.

3. When officers attempted to arrest Grievant at the scene of the incident, a struggle ensued.

4. As a result of the June 27 incident, two criminal complaints were filed against Grievant charging him with assault on a police officer and felony child abuse.

5. Based upon the two criminal complaints, Superintendent Martha Dean recommended to the Board that Grievant be suspended indefinitely without pay until the criminal charges were resolved. At a meeting held on August 19, 1997, the Board accepted the Superintendent's recommendation and suspended Grievant for immorality and cruelty.

6. Grievant challenged the indefinite suspension, and prevailed at level four, at which time WCBE was ordered to reinstate him. (See footnote 1) WCBE filed a Petition for Appeal and Motion for Stay, which was subsequently granted by the Circuit Court of Wetzel County.

7. In February 1998, Grievant was indicted by the Marion County Grand Jury on the following charges: domestic battery; child abuse creating risk of injury; destruction of property; unlawful assault on a police officer; fleeing an officer; and battery.

8. Following a jury trial conducted by the Circuit Court of Marion County in July 1998, Grievant was found not guilty on the charges of domestic battery, unlawful assaulton a police officer, and battery. A verdict of guilty was delivered for the charges of child abuse creating a risk of injury, destruction of property, and fleeing an officer.

9. On August 18, 1998, Superintendent Dean notified the Board of the outcome of Grievant's trial, and recommended that he be dismissed on the charge of a conviction of a felony. WCBOE accepted the recommendation and terminated Grievant's employment on that date.

10. Also, by letter dated August 18, 1998, Superintendent Dean notified State Superintendent of Schools, Dr. Henry Marockie, that WCBE had terminated Grievant's employment based on his conviction of a felony, and noted that an investigation might be needed to revoke his teaching certificate.

11. Grievant appealed the verdict of the Circuit Court, and on July 11, 2000, the West Virginia Supreme Court of Appeals reversed and remanded the case to Circuit Court for a new trial. State v. Snodgrass, 207 W. Va. 631, 535 S.E.2d 475 (2000).

12. Upon return to the Marion County Circuit Court, Grievant and the office of the Prosecuting Attorney entered into an agreement in which Grievant pled no contest to the misdemeanor charges of destruction of property and fleeing an officer, and the State dismissed the charge of child abuse creating risk of injury.

13. As a result of the foregoing plea agreement, Grievant was sentenced to the Marion County Jail for one year, and fined $200 on the charge of destruction of property, and sentenced to one year

in the Marion County Jail on the charge of fleeing an officer. Credit was given for time previously served by Grievant in the Marion County Jail and Home Confinement, plus ninety days credit for good time, for a total of six hundred eighty-four days. Execution of the sentence was suspended, and Grievant was placed on probation for a period of six months.

14. By Order dated August 31, 2001, David Stewart, State Superintendent of Schools, accepted the recommended decision of the Professional Practice Panel and denied the request of the Department of Education to suspend Grievant's teaching license.

Discussion

In disciplinary matters, the employer bears the burden of proving the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). WCBE argues that it properly dismissed Grievant upon conviction of a felony, as is required by W. Va. Code § 18A-2-8, which also provides that such action is not by itself a grievable dismissal. Grievant asserts that to deny him the right to grieve the dismissal would leave him no remedy.

W. Va. Code § 18A-2-8 provides in 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 guilty plea or a plea of nolo contendere to a felony charge . . . dismissal for the conviction of a felony or guilty plea or 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 direct interaction with pupils pending final disposition of the charges.

(Emphasis added).

The general rule of statutory interpretation requires that when a statute is clear and unambiguous, and the legislative intent is plain, it will not be interpreted, but will be giventhe full force and effect. State v. Jarvis 199 W. Va. 635, 487 S.E.2d 293 (1997); State v. Epperly, 135 W. Va. 877, 65 S.E.2d 488 (1951). In the present matter, it is undisputed that Grievant was convicted of a felony; however, that conviction was overturned by the West Virginia Supreme Court of Appeals. To accept WCBE's argument would result in Grievant being dismissed with no felony conviction on his record. The undersigned administrative law judge does not believe the intent and purpose of this statute was to

prohibit reinstatement of an employee who grieved his dismissal for a felony conviction, where the conviction was reversed on appeal. The purpose of the 1990 amendment to the statute was to nullify rulings by the West Virginia Supreme Court of Appeals, such as contained in syllabus point two of Golden v. Harrison County Board of Education, 69 W. Va. 63, 285 S.E.2d 665 (1981): “In order to dismiss a school board employee for acts performed at a time and place separate from employment, the Board must demonstrate a "rational nexus" between the conduct performed outside of the job and the duties the employee is to perform.” Under the current statute, a school board can dismiss an employee for the conviction of a felony, regardless of whether this off-duty criminal misconduct demonstrates the employee cannot perform the duties of the position. Had Grievant's conviction been upheld, this grievance would have been dismissed as non-grievable. However, now that the criminal charges have reached final disposition, and Grievant has no conviction, or a plea of nolo contendere to a felony on his record, he must be reinstated.

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

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of proving the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

2. A county board of education may suspend or dismiss any person in its employment at any time for the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge. Dismissal under these circumstances is not by itself grievable. W. Va. Code § 18A-2-8.

3. The dismissal of an employee for the conviction of a felony or guilty plea or plea of nolo contendere to a felony charge may be taken upon the final disposition of the charges.

Accordingly, the grievance is **GRANTED**, and WCBE Ordered to reinstate Grievant to his teaching position, with back pay and benefits for those days he was available to teach, less appropriate set-off.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wetzel 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. However, the appealing party is required by W. Va. Code §29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: November 27, 2001 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Snodgrass v. Wetzel County Bd. of Educ., Docket No. 97-52-384 (Dec. 15, 1997), remains pending in the Circuit Court of Wetzel County.