JOHN NOLAND,

Grievant,

v. **Docket No. 02-37-402**

PLEASANTS COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

John Noland ("Grievant") filed this proceeding at level four on December 11, 2002, challenging his termination as a teacher and coach for the Pleasants County Board of Education ("PCBOE"). He contends that his termination was arbitrary and capricious and an abuse of discretion, and seeks reinstatement to his position with full back pay and benefits. A level four hearing was held in the Grievance Board's office in Westover, West Virginia, on February 5, 2003. Grievant was represented by counsel, Joseph P. Albright, Jr., and Respondent was represented by counsel, Gregory W. Bailey. This matter became mature for consideration on March 28, 2003, the deadline for the parties' final fact/law proposals. (See footnote 1)

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been a professional educator for approximately 30 years. Prior to his termination, Grievant had been employed by PCBOE as a special education teacherand coach for basketball, football, track and wrestling for seventeen years. He was most recently assigned to Pleasants County Middle School.

2. Grievant had good evaluations as both a teacher and coach throughout his seventeen years of employment, and no prior disciplinary action had been taken against him. He had coached both boys' and girls' sports, and no prior allegations of misconduct had been made.

3. During the 2001-2002 school year, N.C. (See footnote 2) was a special education student

assigned to assist Grievant as an aid in his classroom.

4. N.C. went to high school at the beginning of the 2002-2003 school year and was fifteen years old at that time.

5. Grievant continued to have contact with N.C. after she went to high school, because she assisted with scorekeeping during wrestling matches (a position known as a “mat maid”), as she had done in the past.

6. On May 9, 2002, Grievant sent the following email message to N.C.:

> [N.], I told you that you looked great with your hair down. Yesterday in the breakfast line I went wow, if I were a bit younger I would be giving you [sic] boyfriend a run for his money. You look so much: WOW!! The boys at the high school will be looking at you all the time . . .

7. No further contact occurred between Grievant and N.C. during the summer months of 2002.

8. Beginning in September of 2002, Grievant again initiated email contact with N.C. The text of the pertinent messages is set forth below.

> [Date: September 10, 2002]
>
> [To N.C. from Grievant]
>
> [N.], though I would drop a line to say hi. Hope you are doing ok. I haven't seen you yet. You should see me. Have you heard about my hair . . . take a look sometime if you are late at school. The blond will not last long . . . maybe one week, then back to normal. Write when you can. John
>
> [N.C.'s response]: hey how r u? well I'll have to se u r hair . . lol srry i haven't wrote in a while I've been busy well write back soon luv [N.]
>
> [Date: September 30, 2002]
>
> [To N.C. from Grievant]
>
> [N.], It was nice to see ya at the parade. I hadn't seen you for some time. Once at the ballgame and now at the parade. Hope you are going to be a mat-maid. That way you would be around a lot. Take care and write when you can. Luv, John

[Date: October 11, 2002]

[To Grievant from N.C.]

Hey whats up? Ye I miss talking to ya 2 do u wanna meet at the park sumtime and we can talk and “stuff” i haven't seen u in a long time so hopefully u'll wanna go hang out and do sumthing

[A few moments later, also to Grievant from N.C.]

Hey i was just wondering if when we met if u could help me out with sumthin . . . . .i have never had sex before and I was just wondering if u would like to show me like how to do it and this is between me and u plz don't tell.

[To N.C. from Grievant, undated, but in response to above message]

[N], I could not believe my eyes. You asking me!!! I would love to but I don't know how to arrange it yet. This is new to me, and you are so sweet and I think it would be great . . . Let me think about it a while. I am getting excited just thinking of you. Let me know more of what you want or just talk to me about it. When wrestling comes, who know [sic] what could happen . . . luv ya.

By the way, I have a more private email address, you are the only one that knows it: [omitted].

[October 14, 2002]

[To N.C. from Grievant]

I wanted to write to find out when you are using the computer. Is it at school or at home? I would hate someone else reading our very private messages. Do you know what I mean? I love writing these special messages . . . . use this email address if you can. This is more private . . . beside, we can talk about anything that comes to you [sic] mind . . . .luv ya.

[October 15, 2002]

[To Grievant from N.C.]

John, I was just wondering if u would have sex with me.....by the way i am using the computer at home but don't worry bc no one even has ne idea that i write u all the time so . . . gotta go

[October 21, 2002]

[To N.C. from Grievant]

Hey babe, just saying hi. Thought of you this weekend and how things might work...write when you can. Luv ya.

[October 28, 2002]

[To N.C. from Grievant]

[N.], I am having a hard time getting my email to send. Hopefully, you have gotten some of my mail. I have not heard from you and am afraid that I have made you mad or something. I sure hope that you are not mad at me. I love hearing from you. Hope we can work something out between us. Write when you can to let me know you got this. I will be on instant messenger late Friday nite. I will be home alone and if you try [omitted] that would be me. Hope to hear from you....Love ya.

[October 29, 2002]

[To Grievant from N.C.]

Hey are u gonna have sex with me or not??? What are u gonna do about ur wife??

[October 30, 2002]

[To N.C. from Grievant]

[N.], I really do and the wife is a problem as well as you [sic] dad if he finds out. We just need to find a time and place that no one will know about and a time when we can get together. We have time and I want to very badly. We can not go to fast because we do not want to get caught. Do you know what I mean? Like I said, the wife is out of town on Friday nite if you can and I will let you know about Sat. Lets just take our time. I will be great!! Love ya,

[Same date--N.C.'s response]

How are you going to get some place to have sex if we can find the right time and place without getting caught? I think about it a lot.

9. On November 1, 2002, Grievant and N.C. had an online conversation through “Instant Messaging.” At some point during this discussion, N.C. made a statement to the effect of “why are you sending me these messages” and used foul language toward Grievant, giving the impression that she was no longer interested in pursuing a relationship with him. This comment also gave the impression that other individuals may have been present with N.C. during the online discussion. In response, Grievant told N.C. that he wasn't going to go through with it, and he was just trying to “keep her from making a mistake.” At that point, N.C. “signed off”, because Grievant's screen went “blank.”

10. In response to the online discussion, Grievant sent N.C. the following email at 10:42 p.m. on November 1, 2002:

> [N.], I am writing to let you know that I only wanted to stop you from making a mistake. I was hoping to talk to you about not doing something you would regret. Life is full of many things that are to be enjoyed and I was hoping to talk you into waiting for the right time and the right person. I don't get to see you and I was hoping that we could talk at some point. I just didn't want you to make a mistake as a lot of girls do. You are too good of a girl to make that mistake. Sorry. I was only thinking of some way to tell you to wait for that special person. I felt bad the way you talked to me, but I think I understand.

11. Grievant's statement in the November 1 email that “I felt bad the way you talked to me . . . “ referred to N.C.'s statements during the online discussion to the effect that she no longer was interested in Grievant.

12. Shortly after the November 1 online discussion, N.C.'s parents discoveredthe “relationship” which had transpired between their daughter and Grievant, and they reported his conduct to the prosecuting attorney's office. On November 6, 2002, the prosecuting attorney's office brought the matter to the attention of Superintendent David Perine. Grievant was suspended pending an investigation.

13. Upon receiving copies of all of the emails, Superintendent Perine recommended to PCBOE that Grievant's employment be terminated.

14. As a result of the above events, Grievant entered into psychotherapy with Jane Gainer, a licensed counselor. After eight sessions with Grievant, from November 13, 2002, until February 5, 2003, Ms. Gainer concluded that Grievant was remorseful, accepted responsibility, and would behave differently in the future under similar circumstances. She described his conduct as a “serious lapse in judgment” and believed his actions were a result of his unhappiness in his marriage and being

flattered by the student's attraction to him.

15. At a meeting on December 5, 2002, where Grievant was represented by counsel, PCBOE voted to terminate Grievant's employment.

Discussion

In a disciplinary matter the burden is upon the Board to prove the charges against the employee by a preponderance of the evidence. W. Va. Code § 18A-2-8. Perkins v. Greenbrier County Bd. of Educ., Docket No. 94-13-019 (Aug. 12, 1994). 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. Rovello v. Lewis County Bd. of Educ., 181 W. Va. 122, 381 S.E.2d 237 (1989); Bell v. Lincoln County Bd. of Educ., Docket No. 91-20-005(Apr. 16, 1991); Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995). Code § 18A-2-8 provides that an employee may be suspended or dismissed at any time for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, a felony conviction, entry of a guilty plea or a plea of nolo contendere to a felony charge.

Respondent has dismissed Grievant due to its belief that his conduct constitutes immorality within the meaning of the statute. Immorality has been defined by the West Virginia Supreme Court of Appeals 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, 169 W. Va. 63, 67, 285 S.E.2d 665, 668 (1981). "'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.' " Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997) (citations omitted).

Grievant admits that he engaged in the actions of which he is accused, and it does not appear that he disputes that they would constitute immorality. Interestingly, although Grievant testified at the Board hearing that he never intended to go through with it and was merely trying to help the girl avoid making a mistake, (See footnote 3) his therapist testified at level four that he was flattered by the girl's attraction to him and was unhappy in his marriage,resulting in a lapse of judgment. However,

regardless of how Grievant chooses to characterize his actions or motivations, there can be no dispute that they constitute immorality. Although Grievant has argued that consideration should be given to the fact that the first mention of having sex was made by the student, that is irrelevant when it is blatantly obvious that he encouraged and actively participated in “the plan” to have a sexual encounter with a fifteen-year-old girl. Moreover, Grievant's testimony regarding the online discussion between him and N.C., which was followed by the November 1 email in which he suddenly decided they should not have sex, lends credibility to Respondent's contention that he was merely “covering his tracks” in the November 1 message, after it became clear N.C. was no longer interested in pursuing the relationship. While Grievant's therapist testified that her conclusion that he would never commit similar acts in the future was based largely upon the fact that he “policed” himself by deciding not to go through with it, she also admitted it was possible he was engaging in damage control as a result of the online discussion.

The original grievance form contained an allegation that Grievant was entitled to an improvement plan to correct his conduct. It was not specifically argued at the level four hearing, and, because no brief was submitted by Grievant's counsel, it is unclear whether this is still a part of Grievant's argument. Nevertheless, improvement plans are only required for correctable conduct, which involves professional incompetency, and not actions which directly and substantially affect the morals, safety, and health of the system in a permanent, non-correctable manner. Mason County Bd. of Educ. v. State Supt. of Schools, 165 W. Va. 732, 739, 274 S.E.2d 435, 439 (1980). As recently observed by the West Virginia Supreme Court in Maxey v. McDowell County Board of Education, 575S.E.2d 278, 2002 W.Va. LEXIS 226 (2002), “where it is clear that the underlying complaints regarding a teacher's conduct relate to his or her performance as a teacher . . . Policy 5300 . . . require[s] an initial inquiry into whether that conduct is correctable.” Sexually inappropriate behavior toward a student is not a performance issue and does not fall within the definition of correctable conduct.

Grievant argues that, because he has admitted his conduct was wrong and has received treatment to understand and correct his wrongdoing, termination is an excessive penalty. He also points to his thirty years in the teaching profession with no prior allegations of misconduct or discipline against him. In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in

question and any mitigating circumstances, all of which must be determined on a case by case basis." McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995) (citations omitted). "[M]itigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996). "Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall not substitute her judgement for that of the employer. Tickett v. Cabell County Bd. of Educ., Docket No. 97-06-233 (Mar. 12,1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997)." Meadows v. Logan County Bd. of Educ., Docket No. 00-23-202 (Jan. 31, 2001).

In finding that termination was appropriate for a teacher who asked a thirteen-year- old student to kiss him, this Grievance Board stated as follows regarding such conduct:

> Teachers may become very close to the students they see every day. However, teachers must always exercise restraint, and control their emotions, as they are the adults, acting in place of the parents. When a teacher demonstrates a lack of control in any situation with a student, it is a matter of concern. When a teacher can no longer control his feelings . . . [for a student], even when . . . it is the only time this has ever occurred, it is time for that teacher to move to another profession.

Bell v. Mingo County Bd. of Educ., Docket No. 97-29-172 (Mar. 10, 1998). As stated in Graziani v. Monongalia County Board of Education, Docket No. 92-30-082 (Nov. 19, 1992), another case involving an inappropriate relationship between teacher and student which involved similar circumstances to the instant case:

> 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 his duties. Because Grievant has lost that trust due to his immoral actions, he can no longer satisfactorily perform the responsibilities of his teaching position.

Accordingly, the undersigned finds that Respondent has proven by a preponderance of the

evidence that Grievant's termination for immorality was appropriate.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In a disciplinary matter the burden is upon the Board to prove the chargesagainst the employee by a preponderance of the evidence. W. Va. Code § 18A-2-8. Perkins v. Greenbrier County Bd. of Educ., Docket No. 94-13-019 (Aug. 12, 1994).

2. 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. Rovello v. Lewis County Bd. of Educ., 181 W. Va. 122, 381 S.E.2d 237 (1989); Bell v. Lincoln County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991); Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995).

3. Immorality is “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, 169 W. Va. 63, 67, 285 S.E.2d 665, 668 (W. Va. 1981). "'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.' " Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997) (citations omitted).

4. "[M]itigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996). 5. Improvement plans are only required for correctable conduct, which involves professional incompetency and performance as a teacher, and not actions which directly and substantially affect the morals, safety, and health of the system in a permanent, non- correctable manner. Mason County Bd. of Educ. v. State Supt. of Schools, 165 W. Va. 732, 739, 274 S.E.2d 435, 439 (1980); See also Maxey v. McDowell County Board of Education, 575 S.E.2d 278, 2002 W.Va. LEXIS 226 (2002).

6. Respondent has proven by a preponderance of the evidence that Grievant's termination was justified.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Pleasants 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: April 9, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant's counsel had asked for an extension of the original briefing deadline, so that he could submit his proposals by March 28, 2003, but did not submit a brief.

Footnote: 2

Per Grievance Board practice in these types of cases, the privacy of students will be protected by using their initials in lieu of full names.

Footnote: 3

Grievant claimed that, if the student was planning to have sex with him, she would presumably avoid having sex with someone else while he and she were having ongoing discussions about arranging a rendezvous.