JEROME BLANEY,

Grievant,

v.

DOCKET NO. 03-54-169

WOOD COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Jerome Blaney, filed this grievance against his employer, the Wood County Board of Education ("Board"), directly to level four on June 10, 2003:

> On June 10, 2003, the Wood County Board of Education suspended Grievant without pay due to his indictment by the Wood County Grand Jury on four felony counts and two misdemeanor counts, effective May 16, 2003.

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

> A board may suspend . . . any person in its employment at any time for: . . ., the conviction of a felony or a guilty plea or a plea of *nolo contendre* to a felony charge.

> Grievant was indicted on May 16, 2003, but has not been convicted or plead guilty or *nolo contendre* to the charges. In fact, Grievant has pled not guilty and has a Motion to Dismiss all of the charges involving students which is set for a hearing before the Circuit Court of Wood County, West Virginia, on July 10, 2003. Therefore, the Board violated W. Va. Code § 18A-2-8 by suspending Mr. Blaney without pay.

On May 13, 2003, Grievant, though his Counsel, and Superintendent Curry agreed in writing, to continue the Grievant's suspension with pay, from May 23, 2003 to June 23, 2003. A copy of said Agreement is attachedhereto as Exhibit A. The Board violated and breached this Agreement by suspending Grievant without pay.

On April 9, 2003, Grievant, through his Counsel, and Superintendent Curry, agreed, in writing, to continue his suspension, with pay, from April 23, 2003 to May 23, 2003. The Board breached this Agreement by suspending Grievant without pay effective May 16, 2003. A copy of said Agreement is attached hereto as Exhibit B.

The Grievant is entitled to a presumption of innocence regarding the charges against him. The Board has never held a hearing to determine the truth or falsity of the charges against Grievant and have washed their hands of any responsibility to do so. Accordingly, Grievant's suspension without pay is arbitrary, capricious and an abuse of discretion.

The Board's actions were malicious.

RELIEF SOUGHT:

Grievant seeks reinstatement of his agreed upon suspension with pay plus any back wages and benefits due him from May 16, 2003, forward, plus attorney fees.

Following several continuances for good cause, a level four hearing was held in the Grievance Board's Charleston, West Virginia, office on December 11, 2003. Grievant was represented by Joseph P. Albright, Jr., Esq., Bradley & Albright, PLLC, and the Board was represented by Dean Furner, Esq., Spilman, Thomas & Battle. This matter became mature for decision on January 6, 2004, upon receipt of the parties' proposed findings of fact and conclusions of law.

SUMMARY OF EVIDENCE

Level Four Joint Exhibits

Ex. 1 -

June 11, 2003 letter from Daniel D. Curry to Jerome Blaney; June 10, 2003 Board minutes; Board Meeting Notice; May 19, 2003 letter from Daniel D. Curry to Jerome Blaney; May 13, 2003 memorandum from Dan Curry to Joseph P. Albright, Jr.; April 9, 2003 memorandum from Dan Curry to Joseph P. Albright, Jr.; March 20, 2003 memorandum from Dan Curry to Joseph P. Albright, Jr.; February 25, 2003memorandum from Dan Curry to Joseph P. Albright, Jr.; January 27, 2003 letter from Daniel Curry to Jerome Blaney.

Ex. 2 -

August 25, 2003 Indictment filed in the Circuit Court of Wood County, Case No. 03- F-161W; September 11, 2003 Order from the Circuit Court of Wood County, Case No. 03-F-161®).

Testimony

The Board presented the testimony of William Niday. Grievant presented no additional witnesses.

The material facts of this grievance are not in dispute, and are set forth in the following Findings of Fact.

FINDINGS OF FACT

1. Grievant was employed by the Board as a teacher's aide at Williamstown High School during the 2002-2003 school year.

2. By letter dated January 27, 2003, then-Superintendent Daniel Curry, temporarily suspended Grievant with pay for up to thirty (30) days pending action by the Wood County Board of Education. The suspension was based “upon the request of the Department of Health and Human Resources, Child Protection Services, which is investigating an alleged incident reported to their department.” See LIV Jt. Ex. 1. The letter specified Superintendent Curry “reserve[d] the right to convert this suspension to one without pay.” See LIV Jt. Ex. 1.

3. By Agreement dated February 25, 2003, the parties agreed to extend the suspension with pay another thirty (30) days beyond February 25, 2003. See LIV Jt. Ex. 1.

4. By Agreement dated March 20, 2003, the parties agreed to extend the suspension with pay another thirty (30) days beyond March 25, 2003. See LIV Jt. Ex. 1. 5. By Agreement dated April 9, 2003, the parties agreed to extend the suspension with pay another thirty (30) days beyond April 23, 2003. See Jt. Ex. 1.

6. By Agreement dated May 13, 2003, the parties agreed to extend the suspension with pay another thirty (30) days beyond May 23, 2003. See Jt. Ex. 1.

7. Grievant was indicted by the Grand Jury in and for Wood County, West Virginia, on May 16, 2003, on six (6) felony charges. All of those charges were subsequently dismissed.

8. By letter dated May 19, 2003, Superintendent Curry informed Grievant he would recommend to the Board that Grievant be suspended without pay for an indefinite period, effective May 16, 2003, pending conclusion of the criminal proceedings against him or his resignation. See LIV Jt. Ex. 1. This letter did not advise Grievant of his right to request a hearing before the Board.

9. On June 10, 2003, the Board approved Superintendent Curry's recommendation and suspended Grievant without pay. There was no pre-suspension hearing before the Board. See LIV Jt. Ex. 1.

10. Grievant filed this grievance over the suspension without pay on June 10, 2003. Since the pending charges were eventually dismissed, the parties resolved that grievance when the Board agreed to pay Grievant through the 2002-2003 school year.

11. Grievant was re-indicted by the Grand Jury in and for Wood County, West Virginia, on or about August 25, 2003, and charged with nineteen (19) felony counts alleging sexual misconduct with two (2) students. See Jt. Ex. 2. 12. Grievant's suspension was converted to one without pay at the commencement of the 2003-2004 school year, and continues to this date pending conclusion of the criminal charges.

13. Grievant's suspension is indefinite as it cannot be known when the criminal proceedings will be concluded.

14. Grievant amended his grievance on October 8, 2003, to include the period of suspension being served without pay during the 2003-2004 school year.

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; 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). 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).

W. Va. Code § 18A-2-8 provides, 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 guilty plea or a plea of nolo contendre to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee evaluation pursuant to section twelve of this article. met its burden. Id.; See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

Grievant has not been convicted of any of the pending charges nor has he plead guilty or *nolo contendre* to any of the pending charges. By its clear and unambiguous language, W. Va. Code § 18A-2-8 does not permit a suspension for the mere charge of a felony. Nevertheless, this Grievance Board has previously held that 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. Balis v. Braxton County Bd. of Educ., Docket No. 98-04-094 (Jan. 22, 1999); 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 Brown v. Dept. of Justice, 715 F.2d 662 (D.C. Cir. 1983). When an employee has been indicted, the suspension is based upon the indictment itself, not the conduct alleged therein, because the formal charge itself establishes reasonable cause to believe the employee engaged in the conduct. Kitzmiller, supra; Snodgrass v. Wetzel County Bd. of Educ., Docket No. 97-52-384 (Dec. 15, 1997). Thus, a board is not obligated to present preponderant evidence that Grievant, in fact, committed the offenses for which he has been indicted. See Lemery, supra; Kitzmiller, supra. Hurley v. Logan County Bd. of Educ., Docket No. 97-23-024 (Apr. 14, 1997).

In this matter, Grievant does not question the validity of his suspension. Rather, Grievant contends that his suspension should be with pay, and the Board's act of suspending him without pay is arbitrary, capricious, and an abuse of the Board's lawful discretion. Generally, an action is considered arbitrary and capricious if the board did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a

decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16., 1996). While a searching inquiry into the facts is required to determine if an action is arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the board of education. See generally Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

Grievant challenges the legality of his indefinite suspension without pay. W. Va. Code § 18A-2-7 provides that a superintendent's authority "to suspend school personnel shall be temporary only pending a hearing upon charges filed by the superintendent with the board of education and such period of suspension shall not exceed thirty days unless extended by order of the board." Neither this Code Section or Code § 18A-2-8 make any mention of whether suspensions can be with or without pay.

The Grievance Board has not addressed squarely the issue of whether a board can impose an indefinite suspension without pay, although it is noted that the cases dealing with suspensions based on indictment cited above all dealt with indefinite suspensions without pay. Addressing first the "indefiniteness" of suspensions, they have been upheld in the Federal employment law arena. In Martin v. Customs Serv., 12 MSPR 12, 10 MSPB 568 (1982), the Merit Systems Protection Board explained:

> The most essential criterion of an action, if it is to meet the definition of "suspension" ... is that it be "temporary." Accordingly, while the exact duration of an indefinite suspension may not be ascertainable, such an action must have a condition subsequent such as the completion of a trial or investigation which will terminate the suspension.

Another reason the federal courts have upheld indefinite suspensions based upon examinations into criminal charges is to avoid subjecting an employee to an administrative hearing while the criminal action is pending where evidence could be disclosed long in advance of the criminal trial thus prejudicing the employee's defense. See Polcover v. Dept. of Treasury, 477 F.2d 1223, 1231-1232 (D.C. Cir.), *cert. denied*, 414 U.S. 1001 (1973), citing Silver v. McCamey, 221 F.2d 873, 874-875 (D.C. Cir. 1955).

Next is the issue of the indefinite suspension *without pay*. Grievant contends it is arbitrary and

capricious, and even malicious, for the Board to suspend him indefinitely without pay. W. Va. Code § 18A-2-8 does not specify whether suspensions are to be with or without pay, and both courses of action have been taken by boards when suspending their employees. Turning again to the area of Federal employment law for guidance, the courts have consistently upheld indefinite suspensions without pay. See Engdahl v. Dept. of Navy, 900 F.2d 1572 (Fed. Cir. 1990), *aff'd, Engdahl v. Dept. of Navy*, 40 MSPR 660 (1989); Brown v. Dept. of Justice, 715 F.2d 662 (D.C. Cir. 1983); Jankowitz v. United States, 533 F.2d 538 (Ct. Cl. 1976).

In Engdahl, it was recognized that:

> No doubt, Engdahl has significant interests that were substantively affected. Suspension for cause without pay is likely to cut off subsistence income and to prevent one from obtaining other gainful employment. Although temporary, such a suspension has great practical impact on the employee.

Nonetheless, the Court went on to say that the government's interests were far more substantial and upheld the suspension without pay.

The West Virginia Supreme Court of Appeals has also upheld an indefinite suspension without pay in the case of a judge who was indicted, pending the final disposition of the criminal charges, or until the underlying disciplinary proceeding had been completed. See In Re Atkinson, 193 W. Va. 358, 456 S.E.2d 202 (1995).

Therefore, based upon the holdings at the Federal and State levels, as well as previous Grievance Board decisions which have upheld suspensions without pay, the undersigned finds that Grievant's suspension without pay pending the outcome of the criminal charges is not a violation of statute, arbitrary, capricious, or an abuse of discretion.

CONCLUSIONS OF LAW

1. In disciplinary matters, the employer bears the burden of establishing 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. 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).

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. Balis v. Braxton County Bd. of Educ.,Docket No. 98-04-094 (Jan. 22, 1999); 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 Brown v. Dept. of Justice, 715 F.2d 662 (D.C. Cir. 1983).

4. Based upon Federal and State case law, and previous Grievance Board decisions, Grievant's indefinite suspension without pay is neither a violation of statute, nor arbitrary, capricious, or an abuse of discretion.

Accordingly, this grievance is **DENIED**.

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

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MARY JO SWARTZ

Administrative Law Judge

Dated: January 16, 2004