CARLTON DOBBINS,

Grievant,

v. **DOCKET NO. 04-34-396**

NICHOLAS COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant filed this grievance against Respondent, directly at level four, on November 15, 2004, stating: “Grievant was suspended without pay based on charges of sexual abuse of a minor female.” Grievant stated the relief sought as: “Reinstatement to his job with back pay.”

The parties agreed to submit this matter for consideration at level four based on the record developed at a disciplinary hearing held before the Nicholas County Board of Education on November 8, 2004. Grievant was represented by counsel, Belinda S. Morton, and Respondent was represented by counsel, Erwin Conrad. This matter became mature for decision on February 14, 2005, the deadline for filing of the parties' proposed findings of fact and conclusions of law. By a preponderance of the credible evidence contained in the record, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant is employed by Respondent as a substitute custodian on long-term assignment at Summersville Junior High School. There was no evidence of the duration of Grievant's assignment.

2. In July 2004, Grievant was charged with six counts of felony sexual abuse of a minor female in 2000 and 2001. The matter was bound over for a January 2005 grand jury. (See footnote 1)

3. On October 18, 2004, shortly after receiving the information stated in Finding of Fact No. 2 above, Nicholas County Superintendent Gus E. Penix informed Grievant, by hand-delivered letter,

that he was suspended without pay for a period of thirty days, and that Superintendent Penix would recommend that the Board of Education ratify that suspension and continue it indefinitely until the charges were resolved.

4. The person Grievant is accused of abusing is not a student at SJHS, but will be in the 2005-2006 school year. At least two male family members of the person are students at SJHS now.

5. At a hearing before the Board of Education on November 8, 2004, the Board voted to uphold the suspension and to continue it, without pay, indefinitely, until the charges were resolved.

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).

There was very little evidence presented at the hearing before the Board. Superintendent Penix testified his decision was based on information provided by the Nicholas County Prosecuting Attorney, through the Board's counsel, that Grievant

> . . . was charged in mid-July, 2004, in the Magistrate Court of Nicholas County with six (6) counts of the felony offense of Sexual Abuse upon a minor female approximately eleven (11) years of age who, at the time, was residing in the same residence as Mr. Dobbins. The offense allegedly occurred in 2000 and 2001.
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> A hearing was held on July 19, 2004, in which probable cause was found by the Magistrate and the matter was bound over to Circuit Court for presentment to the Grand Jury. (The next term of the Nicholas County Grand Jury will be January 2005). Mr. Dobbins is currently free on $60,000.00 bond.

Administration's Exhibit No. 2. Superintendent Penix also was told by the principal at SJHS that the minor female was not a student at SJHS, but would be the following year. The principal also confirmed siblings of the minor female were SJHS students. Grievant's only evidence consisted of his wife testifying the minor female did not reside in Grievant's home, and that the magistrate court proceeding did not mention the minor's age.

Respondent argues it is justified in suspending Grievant based on the unproven criminal charges

because of the nature of the charges and the presence of the minor female's siblings at the school where Grievant was assigned. Grievant contends there is no nexus between Grievant's duties and the conduct outside his job with which he was charged. Grievant also argues the reason he was suspended is not one of the enumerated reasons contained in W. Va. Code § 18A-2-8 for which a school employee may be suspended or terminated. W. Va. Code §18A-2-8 identifies the types of conduct that can result in disciplinary action and 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 contendere to a felony charge. 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.

In a previous Grievance Board decision, it was held that, despite the express language of the statute, a board of education could nevertheless suspend an employee who has not been convicted or who has not pled to a felony charge. In *Hicks v. Monongalia County Bd. of Educ.*, Docket No. 04-30-183 (Aug. 13, 2004), the Administrative Law Judge noted,

> Grievant has not been convicted of any charge nor has he plead guilty or nolo contendre to any charges. By its clear and unambiguous language, W. Va. Code § 18A-2-8 does not permit a suspension for the mere charge of a crime. 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. [Citations omitted.] 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. [Citations omitted.]

However, in this case, Grievant has not been indicted, only charged. Even so, *Hicks* also addresses that point, albeit tangentially:

> [T]his Grievance Board has recently upheld the right of a board of education to indefinitely suspend an employee without pay while criminal proceedings are conducted. In *Blaney v. Wood County Board of Education*, Docket No. 03-54-169 (Jan. 16, 2004), after a discussion of numerous federal cases which have upheld such suspensions, the administrative law judge determined that, so long as some particular event will eventually bring aconclusion to the suspension (such as completion of a criminal trial), it is permissible.

Hicks, supra.

Grievant argues that even with the authority to suspend without an actual plea or conviction the establishment of a nexus between Grievant's work duties and the charges is critical before

Respondent would be allowed to suspend Grievant. Grievance Board precedent addresses the nexus between conduct outside the workplace and a Grievant's school-related duties.

> The conduct for which Grievant was indicted involved acts performed at a time and place separate from her employment. Thus, LCBE is obligated to establish a "rational nexus" between the alleged off-duty misconduct and the duties the employee performs. *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). A rational nexus for suspension of a teacher exists:
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> > (1) if the conduct directly affects the performance of the occupational responsibilities of the teacher; or (2) if, without contribution on the part of school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the particular teacher to discharge the responsibilities of the teaching position. (citations omitted)
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> *Rogliano, supra*, at 224.

Our prior cases requiring such a nexus, however, have been effectively made obsolete by the legislature's 1990 amendment to Code § 18A-2-8. Since then, county boards have had the authority to suspend or dismiss an employee based on *any* felony conviction, and such a suspension is not even grievable. (See footnote 2) Boards of education also havethe authority to summarily reassign an employee based on the charging of any felony, whether or not it is related to his job duties. “An employee charged with the commission of a felony may be reassigned to duties which [sic] do not involve direct interaction with pupils pending final disposition of the charges.” (See footnote 3)

As Grievant points out, the minor female is not a student at the school where Grievant works, the charges are that the incidents took place, most recently, approximately four years ago, and Grievant was charged in July but worked without incident until October. (See footnote 4) Additionally, Grievant is a substitute custodian, not a classroom teacher. Respondent's noted, however, that two siblings of the minor female go to school where Grievant was, at the time, assigned as a substitute. In addition, the minor female herself would be attending the school soon. The legislature has seen fit to expressly make this particular scenario grounds to separate the employee from the educational environment through reassignment. In the same way, however, that the express language of the W. Va. Code § 18A-2-8 could be stretched to encompass an indictment, in this particular situation, it makes sense to

stretch it even further for the pending indictment. There is no evidence that Grievant could have been reassigned to a long-term substitute position that involves no contact with students.

The following conclusions of law support this outcome:

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. W. Va. Code §18A-2-8 identifies the types of conduct that can result in disciplinary action and 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 contendere to a felony charge. 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.

3. West Virginia Code § 18A-2- 8 does not expressly permit a suspension for the mere charge of a crime.

> 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. Dep't 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 charged. *See Lemery, supra*; *Kitzmiller, supra*. *Hurley v. Logan County Bd. of Educ*., Docket No. 97-23-024 (Apr. 14, 1997).

Hicks v. Monongalia County Bd. of Educ., Docket No. 04-30-183 (Aug. 13, 2004).

4. In some cases, a board of education may nonetheless indefinitely suspend an employee without pay while criminal proceedings are conducted.

In *Blaney v. Wood County Board of Education*, Docket No. 03-54-169 (Jan. 16, 2004),

> after a discussion of numerous federal cases which have upheld such suspensions, the administrative law judge determined that, so long as some particular event will eventually bring a conclusion to the suspension (such as completion of a criminal trial), it is permissible. Also, in Blaney, supra, it was noted that federal courts have also upheld indefinite suspensions which are based upon criminal charges "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. Dep't 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)."

Hicks, supra.

5. A board of education no longer must establish a rational nexus between a felony and an employee's duties in order to suspend or dismiss the employee. *See Graham v. Berkeley County Bd. of Educ.*, Docket No. 94-02-324 (Oct. 19, 1994).

7. A board of education may take action against an employee charged with the commission of a felony, by reassigning the employee to duties that do not involve direct interaction with pupils pending final disposition of the charges. W. Va. Code § 18A-2-8.

8. Given the nature of the charges against Grievant, Respondent took appropriate action to remove Grievant from duties involving direct interaction with pupils. For the foregoing reasons, this grievance is hereby **DENIED**. It is strongly suggested, though, that Respondent consider exercising its authority to reassign Grievant to alternate duties as an alternative to continued indefinite suspension pending indictment. Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Nicholas 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.

March 9, 2005

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

The record has not been supplemented with the results of this grand jury investigation.

Footnote: 2

See Graham v. Berkeley County Bd. of Educ., Docket No. 94-02-324 (Oct. 19, 1994).

Footnote: 3

W. Va. Code § 18A-2-8.

Footnote: 4

There is no evidence of the date Grievant began in his assignment at SJHS.