MATTHEW REED,

Grievant,

v. **DOCKET NO. 06-45-002**

SUMMERS COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant Matthew D. Reed filed this grievance on January 4, 2006, challenging his termination from employment by Respondent, Summers County Board of Education (SCBOE). He seeks reinstatement and back pay.

A level four hearing was held in the Grievance Board's Beckley office on January 24, 2006. Grievant was self-represented, and Respondent was represented by Superintendent Vicki S. Hinerman. The matter became mature for decision at the conclusion of the hearing.

Issues and Arguments

Grievant alleges his termination was not for one of the reasons permitted by W. Va. Code § 18A-2-8, in that the conduct for which he was terminated does not amount to immorality. Respondent terminated Grievant for immorality based on two convictions in Summers County Magistrate Court, one for impersonating a conservation officer and one for worthless checks.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant was employed by SCBOE for the 2005-2006 school year on a 200- day probationary contract as a substitute custodian.

2. Grievant's contract contained a provision stating, “The employee may be dismissed at any time for immorality, incompetency, cruelty, insubordination, intemperanceor willful neglect of duty pursuant to the provision of Section 8, Article 2, chapter 18A of the code of West Virginia, as amended.”

3. Superintendent Hinerman learned of Grievant's criminal history in Summers County, and on December 13, 2005, suspended him from work until the next board meeting, at which she planned to recommend dismissal.

4. Grievant responded to this letter with a request for a pre-termination hearing before the Board at its next meeting, which was granted.

5. On December 21, 2005, the SCBOE unanimously voted to terminate Grievant's contract.

6. In Grievant's position as Custodian, he was given keys to the schools in which he worked, and often worked alone in the evenings at the school.

7. On November 18, 2005, Grievant plead guilty in Summers County Magistrate Court to a misdemeanor charge of impersonating a conservation officer, in violation of W. Va. Code § 20-7-7. He was fined $150 and sentenced to ten days in jail.

8. On December 13, 2005, Grievant plead guilty to nine counts of passing worthless checks, totaling $643.92.

Discussion

"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, andmust be exercised reasonably, not arbitrarily or capriciously." (See footnote 1) West Virginia Code §18A-2-8 identifies the types of action 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 disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. (See footnote 2) In this case, Respondent's charge is that Grievant's criminal conduct amounts to immorality, for which he may be dismissed without regard to his performance in his position.

"Immorality is an imprecise word which means different things to different people, but in essence it also connotes 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." (See footnote 3) "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." (See footnote 4) Grievant argues that "immorality" refers only to sexual misconduct, of which he has never been accused. However, Respondent correctly points out that the concept is not limited to that area, but instead covers any conduct outside the bounds of "accepted principles of right and wrong behavior, contrary to the moral code of the community." (See footnote 5)

In order to discipline a school employee for acts performed at a time and place separate from his employment, the board must demonstrate a "rational nexus" between the conduct performed outside the job and the duties the employee is to perform. (See footnote 6) A rational nexus exists if the conduct performed outside of the job directly affects the performance of the occupational responsibilities of the employee. (See footnote 7) Misdemeanor criminal acts directly involving a school board employee's occupational responsibilities constitute a rational nexus for which an employee may be dismissed. (See footnote 8)

Here, Respondent claims a nexus exists because Grievant's custodial position is one of trust, since while working he has keys to the entire building and works alone in the school unsupervised. Grievant's convictions are for offenses that call into question his honesty and trustworthiness, eroding Respondent's ability to place significant trust in Grievant. Respondent's rationale is not unreasonable, nor is it arbitrary and capricious. Grievant has, on more then one occasion, demonstrated a willingness to deviate from accepted societal standards of honesty. His duties with Respondent require a significant element of trustworthiness and honesty, but his convictions show he does not possess those traits in sufficient measure that may be relied upon.

Given that Grievant was not convicted of theft of property, a danger Respondent obviously foresees as a logical possible outcome of placing continued trust in Grievant, another person may not leap to that conclusion based on the same past history of misconduct. "[The Supreme Court of Appeals of West Virginia] has advised that a circuit court may not reverse a decision of an administrative agency simply because it would have decided the case differently." *Berlow v. West*

Virginia Bd. of Medicine, 193 W. Va. 666, 672, 458 S.E.2d 469, 475 (1995). That amount of disagreement with the decision, in and of itself, is not enough to override the judgment of the employer who must work with the employee. There is a rational basis for Respondent's reasoning and its decision, and it considered all the relevant factors.

Respondent has met its burden of proving Grievant's immorality, and has established a rational nexus between his off-duty immoral conduct and his position with SCBOE.

The following conclusions of law support this discussion:

Conclusions of Law

1. "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)." *Graham v. Putnam County Bd. of Educ.*, Docket No. 99-40-206 (Sep. 30, 1999).

2. W. Va. Code §18A-2-8 identifies the types of action 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. 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).

4. "Immorality is an imprecise word which means different things to different people, but in essence it also connotes 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.' [Citation omitted.]" *Kennard v. Tucker County Bd. of Educ.*, Docket No. 01-47-591/628 (Mar. 12. 2002); *Harry v. Marion County Bd. of Educ.*, 203 W. Va.

64; 506 S.E.2d 319 (1998); *Golden v. Bd. of Educ. of County of Harrison*, 169 W. Va. 63, 67, 285 S.E.2d 665,668 (1981). See also *Snodgrass v. Wetzel County Bd. of Educ.*, Docket No. 97-52-384 (Dec. 15, 1997).

5. In order to discipline a school employee for acts performed at a time and place separate from his employment, the board must demonstrate a "rational nexus" between the conduct performed outside the job and the duties the employee is to perform. Syl. Pt. 2, *Golden, supra*.

6. Respondent has proven Grievant engaged in immoral conduct that is connected by a rational nexus to the duties he performs for Respondent.

For the foregoing reasons, this grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Summers County. Any such appeal must be filed within thirty 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.

January 26, 2006

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

Graham v. Putnam County Bd. of Educ., Docket No. 99-40-206 (1999).

Footnote: 2

W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (1994).

Footnote: 3

Kennard v. Tucker County Bd. of Educ., Docket No. 01-47-591/628 (2002).

Footnote: 4

Kennard, supra; Wahl v. Mineral County Bd. of Educ., Docket No. 98-28-175 (1998).

Footnote: 5

Id.

Footnote: 6

Syl. Pt. 2, Golden v. Bd. of Educ., 169 W. Va. 63, 285 S.E.2d 665 (1981)(rational nexus does not exist between misdemeanor conviction for shoplifting and duties as high school guidance counselor/teacher).

Footnote: 7

Rogliano v. Fayette County Bd. of Educ., 176 W. Va. 700, 347 S.E.2d 220 (1986)(rational nexus does not exist between misdemeanor charges for possession of marijuana and duties as teacher).

Footnote: 8

Bledsoe v. Wyoming County Bd. of Educ., 183 W. Va. 190, 394 S.E.2d 885 (1990)(guilty plea to charges of conspiracy to extort money from supplier directly affects the performance of occupational responsibilities of maintenance supervisor in charge of purchasing materials).