THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ROBERT FULMER,

Grievant,

v. **DOCKET NO. 05-20-244**

KANAWHA COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant Robert Fulmer filed this grievance directly at Level IV (See footnote 1) on July 13, 2005, challenging Respondent Kanawha County Board of Education's termination of his employment. His stated relief sought is “[R]einstatement, back pay with 10% interest, attorney fees, and any and all benefits to which entitled.”

This case has a long and convoluted procedural history. Following a Pre- Termination hearing held before the Kanawha County Board of Education, Grievant appealed the decision to terminate his employment directly to the Grievance Board at Level IV. Before the grievance hearing was held, the West Virginia Commission for Professional Teaching Standards proceeded to a hearing on whether to revoke Mr. Fulmer's teaching certificate. Meanwhile, the accusing student filed a civil action against both Grievant andRespondent in Kanawha County Circuit Court, and several evidentiary depositions were held in that matter.

The Level IV hearing was held in the Grievance Board's Charleston office on February 5 and 6, 2008. Grievant was represented by counsel, William L. Mundy and James A. Spenia. Respondent was represented by counsel, James W. Withrow. The case had been assigned to Administrative Law Judge Thomas J. Gillooly, but he was ill on the first day of hearing, and by agreement of the parties, Administrative Law Judge Janis Reynolds conducted day one of the hearing. Day two was conducted by ALJ Gillooly.

Following the hearing, the parties agreed to submit their proposed Findings of Fact and Conclusions of Law, and Grievant's Motion for a directed verdict, no later than March 5, 2008. Subsequently, ALJ Gillooly issued an Order Reopening Grievance at Level IV on May 16, 2008, stating therein that he was “inclined to reconsider the decision permitting the BOE to rely on the student testimony adduced at the pre-termination hearing.” A conference on that Order was held June 16, 2008, and on June 27, 2008, ALJ Gillooly ordered the parties to brief “(1) whether and to what extent the doctrine of issue preclusion now applies in this case by virtue of the June 6, 2008, Order of the State Superintendent of Schools . . . and if the doctrine has application, how it should be applied; and (2) the applicability of the constitutional provisions and court decisions discussed in [ALJ Gillooly's] May 16, 2008 Order Reopening Grievance at Level IV, or of any related authority, to the sequestration of the Grievant from certain testimony at the lower level hearing, including specifically the question of the Grievant's right to confront the witnesses against him.” ALJ Gillooly further ordered that the parties submit to mediation in this case. The parties failed to reach a resolution at the mediation, which the previous ALJ ordered apparently in the belief that the West Virginia Commission for Professional Teaching Standards decision, which had in the intervening time been issued, would change the position of the parties, because that panel found in favor of Mr. Fulmer. Following the mediation session, Grievant filed a motion for sanctions against Respondent, as no representative from Respondent had appeared at the mediation with any authority to settle the case, in contradiction of ALJ Gillooly's Order.

Synopsis

Grievant's employment was terminated by Respondent on the basis of an accusation by a student of inappropriate, immoral conduct. Respondent failed to meet its burden of proving that Grievant engaged in such conduct. Respondent's accusing witness was not credible, and it provided no corroborating evidence from a credible source. Accordingly, the grievance is Granted.

Findings of Fact

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

1. Grievant was employed by Respondent as a classroom teacher at Nitro High School beginning in 1999. He has no history of prior disciplinary actions.

2. On April 21, 2005, Respondent informed Grievant that he was entitled to a pre-disciplinary hearing based on allegations that:

a. You made sexual advances to female student M.M. (See footnote 2) in your room on March 18th, including kissing her, pulling her hair, lifting up her shirt to kiss her stomach and nipple, and asking M.M. to take off her pants and to touch you in the genital area.

b. You struck M.M. on the buttocks with your hand.

c. You told student M.M. that “her butt looked good” in a pair of jeans she was wearing.

d. You listed things you were going to do for M.M. and A.H. on graduation night, including getting a hotel room with wet bar and room service.

3. On June 17, 2005, Respondent's hearing examiner issued her decision recommending Grievant “being guilty of the charges alleged, should be dismissed from Kanawha County Schools.” The school board adopted her decision, and terminated Grievant's employment.

4. At the pre-disciplinary hearing before the School Board, student M.M. testified by closed-circuit television regarding the acts alleged.

5. M.M., during her senior year, served as a classroom aide to Grievant during the last period of the day.

6. On Friday, March 18, 2005, M.M. was present in Grievant's classroom during the last period of the day, in her capacity of aide.

7. At some time during the class period, the students in Grievant's class left for an assembly, leaving Grievant and M.M. in the room alone together. 8. The door to Grievant's classroom automatically locks when it is closed, and was closed and locked while they were in the room together. It is a normal practice for most teachers to keep the classroom door closed.

9. A short while later, one of the students returned from the assembly and tried to open the door. Grievant opened the door for the student and left the room to check on the remaining students.

10. The student who returned early noticed nothing untoward in the demeanor of either

Grievant or M.M.

11. M.M. filed a civil action in Kanawha County Circuit Court against Grievant and Respondent, containing the same allegations of inappropriate sexual conduct.

12. Respondent filed a verified Answer to the complaint denying that Grievant engaged in any inappropriate conduct.

13. Both M.M. and A.H. admitted certain of their allegations were false, specifically, M.M. untruthfully stated that Grievant requested that M.M. perform oral sex, that he offered to buy her lingerie, and that he smacked A.H. on the buttocks.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. (See footnote 3) "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 orcapriciously." (See footnote 4) 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.

Respondent's charges against Grievant, according to its decision to terminate, are that his actions toward student M.M. were immoral and insubordinate.

Respondent's evidence in this matter consists almost entirely of the transcripts of the testimony of the accusing student and another witness taken at the hearing before the Board. The only witnesses who can testify to the acts alleged are Grievant and a student, and their versions of events are diametrically opposed. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. (See footnote 5) The undersigned is charged with assessing the credibility of the witnesses,

and where the evidence has been submitted on the record, this is an especially difficult task, as the undersigned has not had theopportunity to observe the witnesses' demeanor. Nevertheless, demeanor is only one of the factors to be considered in assessing the credibility of a witness.

"The fact that [some of] this testimony is offered in written form does not alter this responsibility." (See footnote 6) Relevant hearsay is admissible in administrative hearings. (See footnote 7) In assessing the credibility of witnesses, some factors to be considered . . . are the witness': 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. (See footnote 8) Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. (See footnote 9)

The undersigned does not find the complaining witness, M.M., to be credible. Both M.M. and Grievant agree that on March 18, 2005, they were for some period of time alone together in Grievant's classroom, behind locked doors. The agreement ends there, though, and M.M.'s allegation that Grievant made sexual advances are not believable.

In assessing the credibility of M.M.'s allegations, the undersigned was provided no way in which to observe her demeanor while testifying. Like demeanor, it is difficult to assess M.M.'s attitude toward the action without having directly observed her. In theabsence of reliable demeanor and attitude evidence, less direct sources of information regarding M.M.'s truthfulness were given great weight.

M.M. does not appear able to accurately perceive or communicate the events to which she testified. She did not make her allegation that Grievant solicited oral sex until late in the investigation of the matter. This allegation, one would presume, is so inflammatory or serious that a rational accuser would state it immediately. In attempting to justify her lack of specifics on this accusation, M.M. testified that she believed touching below the waist was “oral sex.”

M.M. also admitted to lying about some allegations. She accused Grievant of smacking A.H. on the buttocks, and later retracted that accusation by saying she never saw it happen. A.H. also testified that Grievant had never touched her inappropriately, contrary to both M.M.'s accusation and her prior confirmation of that accusation. M.M. accused Grievant of having offered to buy her lingerie upon graduation, and later admitted he did no such thing.

M.M. also lacks a reputation for truthfulness. Tracy Hall, a teacher at Nitro High School who is familiar with M.M., testified that she had been lied to by M.M. and that she had cheated on an assignment. B.C., a student at Nitro High School who spoke to M.M. about the incidents alleged in this case, testified that M.M. admitted lying about Grievant's conduct and stated it was just rumor and never happened. She further characterized M.M. as a “compulsive liar,” base on her experience and knowledge of M.M.

M.M.'s motive for making the initial accusations are unknown. She certainly has a motive for continuing her allegations, given she has filed a civil claim for monetary damages against both Respondent and Grievant, based on her allegations. Grievant hasjust as strong a bias for his denial, given the potential destruction of his career should he be found to have committed the acts of which he is accused. Nevertheless, the reputation M.M. has built for herself of dishonesty and attention-seeking tips the scales against her.

The inconsistency of M.M.'s and A.H.'s prior statements has previously been discussed. Respondent provided no rebuttal to explain or justify those inconsistencies. Respondent also failed to provide material evidence to support some of M.M.'s testimony, and this lack of supporting evidence casts a cloud of brumous doubt over essential facts. M.M. claimed Grievant wrote a note describing things he would get her and A.H. after graduation, but the note was never produced. M.M. claims to have left messages on A.H.'s phone regarding Grievant. These messages would have been useful present sense impressions of M.M., but no record was produced that they were even sent, let alone of their content.

In addition to the lack of credible evidence to support its allegations, the undersigned takes note of Respondent's subsequent conduct of its defense in the pending civil action filed by M.M. Rather than admitting the conduct took place and filing a cross claim against Grievant, Respondent filed a verified denial that any improper acts took place. Under Rule 11(b)(4) of the West Virginia Rules of Civil Procedure, Respondent's Answer is a certification that “the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.” This denial, by itself, would seem to be a sufficient basis for finding in favor of Grievant.

Grievant produced evidence on an incident that occurred after M.M. was graduated from high school, while she was a student at West Virginia University (WVU). Thisevidence was offered as

proof that Grievant was not truthful. The allegation was that M.M. made a false report of a sexual assault while she was a student at WVU. However, the evidence does not support a finding that M.M. claimed to have been sexually assaulted. Instead, she appears to have simply responded to the investigator's questions with a truthful and open account of what happened. She was told by various representatives of WVU that what occurred amounted to sexual assault, but she never used that term herself. Even if she told at least one person she was “raped” rather than “sexually assaulted,” there is no reason to believe a young student would recognize a difference in the legal definitions associated with those criminal acts. I found no deception by her in the handling of that affair.

Respondent's sole live witness in the Grievance Proceeding, Child Psychologist Sherry Crowder, provided no useful testimony. She had never examined any of the students, and had never spoken to Grievant. She did not know what the allegations at issue were. Her testimony that children who are sexually abused usually tell the truth is so vague as to be unreliable in this case.

It is not necessary to delve into Grievant's credibility, given the lack of credible evidence against him and Respondent's failure to meet its burden of proof. Because the outcome of this case is in favor of Grievant, any procedural and evidentiary irregularities, if any, are harmless error and Grievant's motions regarding a directed verdict or inadmissibility are moot. The authority of the Grievance Board to order relief in a grievance proceeding derives from statute, and there is no statutory authority to issue sanctions against Respondent for lack of good faith in complying with the mediation order; thereforethat Motion is denied. Likewise, the Grievance Board may not enter an order awarding attorney's fees.

The following conclusions of law support this discussion:

Conclusions of Law

1. Respondent 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).” *Graham*

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

3. A school employee may be dismissed for insubordination or immorality. W. Va. Code §18A-2-8.

4. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Resources*, Docket No. 96-HHR- 371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health and Human Resources*, Docket No. 95- HHR-066 (May 12, 1995). "The fact that [some of] this testimony is offered in written formdoes not alter this responsibility." *Browning v. Mingo County Bd. of Educ.*, Docket No. 96- 29-154 (Sept. 30, 1996).

5. Neither M.M. nor A.H. were credible witnesses.

6. A verified Answer filed in a civil action is a certification that “the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.” W. Va. R. Civ. P. 11(b)(4).

7. Respondent certified that the allegations against Grievant were false.

8. Respondent did not prove the allegations against Grievant by a preponderance of the evidence.

For the foregoing reasons, this grievance is hereby **GRANTED**. Respondent is **ORDERED** to reinstate Grievant to his previous position, and to compensate him for lost wages and benefits to which he would have been entitled had he remained in his position, with legal interest on any back pay.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty days of receipt of this decision. W. Va. Code § 18-29-7. (See footnote 1) Neither the West Virginia Public 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.

October 29, 2008

Figure

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

In 2007, the Legislature in S.B. 442 abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are being decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. Any references in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 2

Consistent with prior Grievance Board practice, the initials only of students or former students are used herein.

Footnote: 3

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).

Footnote: 4

Graham v. Putnam County Bd. of Educ., Docket No. 99-40-206 (Sept. 30, 1999).

Footnote: 5

Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health and Human Resources, Docket No. 95- HHR-066 (May 12, 1995).

Footnote: 6

Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996).

Footnote: 7

Gunnells v. Logan County Bd. of Educ., Docket No. 97-23-055 (Dec. 9, 1997).

Footnote: 8

Harold J. Asher and William C. Jackson. Representing the Agency before the United States Merit Systems Protection Board 152-153 (1984).

Footnote: 9

Id., Burchell v. Bd. of Trustees, Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).