THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JONATHAN DARBY,
Grievant,

v. **Docket No. 2009-0763-KanEd**

KANAWHA COUNTY
BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Jonathan Darby, filed a grievance against his employer, Kanawha County Board of Education, on December 8, 2008. The statement of grievance reads:

> The Respondent has terminated Grievant's employment for a violation of Respondent's sexual harassment policy on the grounds that the Grievant allegedly attempted to cultivate an improper relationship with a student.

For relief, Grievant seeks "reinstatement to employment, reimbursement of all lost wages, benefits, and regular employment seniority, removal of all references to this action from Grievant's employment records, and interest on all monetary sums."

A level three hearing was held on March 2, 2009, at the Grievance Board's Charleston office. Grievant was represented by John Roush, Esquire, WV School Service Personnel Association, and Respondent was represented by James W. Withrow, Esquire, Kanawha County Schools. This case became mature on March 30, 2009, upon receipt of the parties' Findings of Fact and Conclusions of Law.

Synopsis

Grievant, a bus operator, was terminated based on allegations that he had a sexual relationship with a student who rode his bus.[1] Grievant asserts he did talk to the

---

[1] The letters Grievant received from Respondent concerning his suspension and termination all allege a violation of the sexual harassment policy. However the Hearing

student on his cell phone, as she was having personal problems and he was attempting to help her through it. However, he has consistently denied there was an inappropriate sexual relationship between the student and himself. Respondent did not prove Grievant violated its sexual harassment policy.[2] Respondent terminated Grievant based on allegations, conjecture, and rumors. Therefore, this grievance is hereby granted.

Findings of Fact

1. Grievant was employed by Respondent as a Bus Operator.

2. During the 2007-2008 school year, Grievant's bus route served Herbert Hoover High School.

3. In the spring of 2008, A.J.[3], a 17 year old female student at Herbert Hoover High School, began riding Grievant's bus. Grievant knew A.J. and her family and considered himself a family friend.

4. On several occasions, Grievant has allowed students on his bus to use his cell phone.

5. A.J. acquired Grievant's cell phone number and began contacting him frequently. The two participated in a number of lengthy telephone calls, discussing A.J.'s problems with her mother, step-mother, and boyfriend.

Examiner who heard the Predisciplinary Hearing found Grievant was also insubordinate. Because Respondent never put Grievant on notice of that reason for suspension or termination, that issue will not be addressed.

[2] Respondent did not introduce its sexual harassment policy in either the Predisciplinary or the level three hearing.

[3] Because A.J. was a juvenile at the time of the allegation, the undersigned will follow Grievance Board procedure and refer to her by initials. A.J. has since married, and currently her initials are A.B. However, for consistency sake, she will be referred to as A.J.

6. Grievant would also speak with A.J. at Herbert Hoover High School prior to his evening run. He would enter the building for various reasons, and A.J. would come and speak to him. On one occasion, she boarded his bus to speak with him.

7. Grievant talked to A.J. in an attempt to help her deal with her personal issues.

8. Grievant did not feel as if he could refer her to an adult in her family, given A.J.'s family history.[4]

9. Grievant did not have any counseling experience, and did not refer A.J. to a school counselor.

10. The contact between A.J. and Grievant ended sometime in or before early May, 2008, when A.J. and her boyfriend reconciled.

11. In June, 2008, Marcie Webb, a parent whose daughter rode Grievant's bus, complained to George Beckett, Director of Pupil Transportation, that Grievant was having an inappropriate relationship with A.J.

12. Respondent investigated the matter, and also reported it to the West Virginia State Police.[5]

13. By letter dated December 2, 2008, Grievant was notified that he had been terminated by Respondent.

---

[4] A.J. was sexually abused by her mother's live-in boyfriend. This resulted in both her mother and the boyfriend being incarcerated. Grievant lived with her father and step-mother, but from the testimony it appears as if she also lived with friends and other relatives throughout this time period.

[5] The West Virginia State Police took a statement from A.J., and referred the case to the Kanawha County Prosecuting Attorney's Office who declined to prosecute the case.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *Hoover v. Lewis County Board of Education*, Docket No. 93-21-427; *Landy v. Raleigh County Board of Education*, Docket No. 89-41-232. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Black's Law Dictionary* (6th ed. 1991); *Leichliter v. West Virginia Department of Health & Human Resources*, Docket No. 92-HHR-486. Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Grievant was terminated based on allegations that he had a sexual relationship with a female student at Herbert Hoover High School. The authority of a county board of education to suspend an employee must be based upon one or more of the causes listed in W. VA. CODE § 18A-2-8, and must be exercised reasonably, not arbitrarily or capriciously. *Parham v. Raleigh County Board of Education*, 192 W. Va. 540, 453 S.E.2d 374 (W.Va. 1994); *Bell v. Kanawha County Board of Education*, Docket No. 91-20-005; *Beverlin v. Board of Education*, 216 S.E.2d 554 (W.Va. 1975). W. VA. CODE § 18A-2-8 provides, in pertinent part, the following:

> 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 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 terminated Grievant after conducting an investigation into the allegations that he had a sexual relationship with A.J., a 17 year old female student who rode his bus. However, no one from the Kanawha County Board of Education was able to speak with A.J. until the level three grievance hearing.[6] Instead, Respondent relied on information from Marcia Webb, whose daughter was friends with A.J.; Melissa Jarvis, A.J.'s step-mother; Alice Thomas, who works at Herbert Hoover as a clerk; and Sally Shaffer, where A.J. lived for some time. This case must be determined by the witnesses' credibility.

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 Res.*, Docket No. 96-HHR-371; *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066. An Administrative Law Judge is charged with assessing the credibility of the witnesses. *Lanehart v. Logan County Board of Education*, Docket No. 95-23-235; *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050.

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior

---

[6] A.J.'s father would not give permission for the Respondent's investigator to speak with her.

statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Rodriques v. Grant County Board of Education and Berg*, Docket No. 2008-0960-GraED.

Ms. Webb's testimony was based on information she received from her teenage daughter and A.J.'s step-mother. Ms. Webb decided to call and report her concerns to Respondent when A.J.'s step-mother called her about an unsigned note she found in A.J.'s wallet. These notes were never presented as evidence against the Grievant. According to Ms. Webb's testimony, the note apologized for not being able to call A.J. back due to a bus accident. Ms. Webb testified she then called the bus garage and confirmed Grievant had to deal with a bus accident on that day. However, Respondent presented no evidence of a bus accident during Spring 2008.

Ms. Thomas, the clerk at Herbert Hoover High School, testified that she saw Grievant and A.J. talking several times in the commons area of the school, and on one occasion, she saw them talking on Grievant's bus. Grievant and A.J. were always in sight of others.

Ms. Jarvis, A.J.'s step-mother, testified A.J. came to her inquiring about whether it was appropriate for one of A.J.'s friends to date a twenty-one year old, to which Ms. Jarvis responded no. After that, A.J. moved out of Ms. Jarvis's house and began to stay with a friend. Ms. Jarvis testified that while A.J. was staying with her friend, rumors were swirling that A.J. was flirting with the bus driver. Based on those rumors, Ms. Jarvis obtained her cell phone bill and discovered the numerous conversations between A.J. and Grievant.

Ms. Jarvis testified that A.J. returned to her home in May 2008. It was during this time that she found the unsigned notes from someone discussing a bus wreck and saying he was going to leave his wife. Ms. Jarvis placed those letters back in A.J.'s wallet because she did not want A.J. to know she had been snooping. Because of the information about the bus accident, Ms. Jarvis assumed Grievant was the author of these notes.

Ms. Jarvis testified she confronted A.J. about whether she was having any sort of relationship with Grievant. A.J. denied it and said they were just friends.

Lastly, Ms. Shaffer testified she saw a silver truck with a picture across the back glass in her driveway while A.J. was staying at her house. She testified A.J. told her it was Grievant's truck. Grievant denies this, and testified that in fact his truck was a dark grey, almost black and could not be mistaken for silver.

These witnesses were understandably very concerned about the rumors swirling around A.J. and Grievant. However, this fear has affected their ability to perceive information. Their fear also creates a personal interest in the outcome of this case. Ms. Webb's daughter rode Grievant's bus, and as a parent, she wants to ensure her daughter's safety. Ms. Jarvis and Ms. Shaffer likewise want to make sure A.J. is in a safe environment while traveling to and from school.

The undersigned is also required to look at the existence or nonexistence of any fact testified to by a witness. It would be remiss to ignore the testimony concerning the letters found in A.J.'s wallet. However, no notes were admitted into evidence. The notes, according to the testimony, were unsigned. While both Ms. Webb and Ms. Jarvis indicate these notes had to come from Grievant because of a

reference to bus accident, there is no evidence, testimonial or documentary, to confirm an accident during that time period.

With respect to the testimony of A.J., when looking at her capacity to perceive information, it is important to note her background. Clearly A.J. has had a traumatic childhood. It may be easy for her to misconstrue kindness from the opposite sex as affection. However, it is equally likely that she could be a victim.

However, there has been very little consistency in her prior statements and the testimony of Respondent's witnesses in general. As stated earlier, when Ms. Jarvis confronted A.J. about whether there was an inappropriate relationship between her and Grievant, she denied it. Her initial version of what occurred matched Grievant's consistent denials. Also, at the level three hearing, A.J. testified that she had moved from Ms. Jarvis's home to a friend's. Then she moved from her friend's home to her grandmother's house and remained at her grandmother's until sometime in July. She testified that it was during the time she was staying with her grandmother that she and Grievant had a sexual relationship. Yet, she was unable to provide specific information as to the time frame in which the sexual encounter occurred.

This is inconsistent with the testimony provided by Ms. Jarvis. Ms. Jarvis testified that A.J. moved out of her house and was gone through the month of April, at which time she lived with a friend. Ms. Jarvis testified that upon A.J.'s return in May 2008, she found the unsigned notes, but she also testified that she found notations in A.J.'s handwriting that had the date April 30th, labeled as the first sexual encounter.

Grievant's testimony is judged by the same standards as the other witnesses. While it must be noted that Grievant has a great stake in the outcome of this case, it

must also be said that his denials have remained consistent. He has admitted to spending time talking to A.J. on the phone. Grievant has claimed that these conversations were only to assist her in dealing with her current situation. However, he has readily admitted he has no training as a counselor.

During his testimony he made reference to being on the phone with her while she engaged in "teenage things like listen to music," and he wanted to get off the phone. Yet, he provided no explanation as to why he did not terminate the phone calls. The undersigned finds it difficult to believe that Grievant could not terminate the calls if he had truly wanted. After all, on one occasion, he and A.J. were on the phone for 115 minutes. This is absolutely unacceptable.

Grievant has continually explained that he believed A.J. would feel better if she could talk to someone. He also continually testified that he was a nice person who would listen to anyone to help them. He has readily admitted he did not possess the skills necessary to help her deal with family problems. While, given A.J.'s family history, the undersigned can understand not referring her to a family member, Grievant could have referred her to a school counselor who is much better equipped to deal with the problems teenagers face. Instead, Grievant put himself in a compromising position. Because he did not handle this situation appropriately, the undersigned highly encourages Respondent to provide him with training on how to effectively deal with situations such as this.

The evidence clearly establishes there was a friendship between Grievant and A.J. Unfortunately, whether it involved an inappropriate sexual relationship cannot be definitively discerned based on the testimony of the witnesses. The grievance board

has previously held, “Where a definitive credibility determination cannot reliably be made from the evidence related to material facts in a disciplinary hearing, the employer cannot meet its burden of proof.” *Martin v. Kanawha County Board of Education*, Docket No. 05-20-220 (Aug. 26, 2005). Respondent has failed to meet its burden of proof in this matter.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *Hoover v. Lewis County Board of Education*, Docket No. 93-21-427; *Landy v. Raleigh County Board of Education*, Docket No. 89-41-232.

2. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Black's Law Dictionary* (6th ed. 1991), *Leichliter v. West Virginia Department of Health & Human Resources*, Docket No. 92-HHR-486. Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

3. The authority of a county board of education to suspend an employee must be based upon one or more of the causes listed in W. VA. CODE § 18A-2-8, and must be exercised reasonably, not arbitrarily or capriciously. *Parham v. Raleigh County Board of Education*, 192 W. Va. 540, 453 S.E.2d 374 (W.Va. 1994); *Bell v. Kanawha County Board of Education*, Docket No. 91-20-005; *Beverlin v. Board of Education*, 216 S.E.2d 554 (W.Va. 1975).

4. W. VA. CODE § 18A-2-8 provides, in pertinent part, the following:

> 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 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.

5. 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 Res.*, Docket No. 96-HHR-371; *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066. An Administrative Law Judge is charged with assessing the credibility of the witnesses. *Lanehart v. Logan County Board of Education*, Docket No. 95-23-235; *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050.

6. The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge 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. *Rodriques v. Grant County Board of Education and Berg*, Docket No. 2008-0960-GraED.

7. Where a definitive credibility determination cannot reliably be made from the evidence related to material facts in a disciplinary hearing, the employer

cannot meet its burden of proof." *Martin v. Kanawha County Board of Education*, Docket No. 05-20-220 (Aug. 26, 2005).

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 the position, with legal interest on any back pay.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: April 9, 2009

_____

Wendy A. Campbell

Administrative Law Judge