THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MADELINE CLARK,
Grievant,

v. **Docket No. 2011-0987-KanED**

KANAWHA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Madeline Clark, is employed as a Custodian III for the Kanawha County Board of Education ("Board"). By letter from Superintendent Ronald E. Duerring, Ed.D., dated October 26, 2010, Grievant Clark was suspended without pay from her employment with the Board as a result of her indictment on felony charges in the Kanawha County Circuit Court. Ms. Clark requested a hearing related to the suspension and one was held before Hearing Examiner Rebecca Butler on December 8, 2010. Grievant Clark appeared at the hearing with her representative John E. Roush, Esq. The Respondent Board was represented by James W. Withrow, Esq., General Counsel. Hearing Examiner Butler issued a decision recommending that Grievant Clark's suspension be continued pending the outcome of the criminal charges. Superintendent Duerring adopted the decision the same day.[1] By letter dated January 4, 2011, Superintendent Duerring informed grievant that the Board had approved the conditional suspension of Grievant without pay pending the outcome of the criminal charges against her.

Madeline Clark filed a grievance dated January 12, 2011, contesting her suspension. As her statement of grievance, Ms. Clark wrote the following:

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[1] Letter from Superintendent Duerring to Grievant Clark dated December 21, 2010

> Grievant has been suspended without pay on the basis of Criminal charges related to off duty conduct. Grievant alleges a violation of W. VA. CODE 18A-2-7 & 18A-2-8.

As relief, Grievant Clark seeks the following:

> Grievant seeks reinstatement to her position or to an alternative assignment. Grievant seeks compensation for lost wages and all benefits with interest.

A level three hearing[2] was held at the Charleston office of the West Virginia Public Employees Grievance Board on April 11, 2011. Grievant participated in the hearing by telephone and was represented by John E. Roush, Esq., who appeared in person. Respondent was represented by its General Counsel, James W. Withrow, Esq. The parties agreed to submit the transcript of the hearing held on December 8, 2010, as the factual basis for this decision. Additionally, Respondent introduced one exhibit which contained the following documents:

1. Letter dated October 26, 2010, from Ronald E. Duerring to Madeline Clark advising her of her suspension;
2. Letter dated November 24, 2010, from Ronald E. Duerring to Madeline Clark setting a hearing on the suspension;
3. Transcript of the hearing held on December 8, 2010;
4. Letter dated December 21, 2010, from Ronald E. Duerring to Madeline Clark containing a copy of the recommended decision of Hearing Examiner Butler and adopting that recommended decision;
5. Letter dated January 4, 2011, from Ronald E Duerring to Madeline Clark advising her that the Board had upheld the suspension.

Respondent's Exhibit 1.

Grievant entered an exhibit which consisted of documentation of incidents where employees of the Respondent had been charged with crimes and the status of their

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[2] Because this matter involves a suspension without pay, Grievant filed directly at level three. *See,* W. VA. CODE § 6C-2-4(a)(4).

employment while their criminal charges were pending. Grievant's Exhibit 1. Brief testimony was taken from William Courtney, Director of Employee Relations for the Board, explaining the documents contained in Grievant's Exhibit 1. Thereafter, the parties agreed to submit proposed findings of fact and conclusions of law, both of which were received at the West Virginia Public Employees Grievance Board on May 17, 2011. This grievance became mature for decision on that date.

Synopsis

Grievant argues that she should not be suspended for conduct that is alleged to have occurred away from work. She also notes that "indictment on felony charges" is not one of the reasons set out in W. VA. CODE § 18A-2-8 for suspending or dismissing a school employee. Grievant argues that Respondent is without statutory authority to suspend her in this instance. In fact, the statute provides that an employee charged with a felony may be reassigned to duties where he/she has no contact with students. Finally, Grievant alleges that Respondent has discriminated against her by suspending her without pay even though Respondent has not done the same with other employees who were charged with drug-related offenses.

Respondent counters that the case law supports the authority of a school board to suspend an employee who has been charged with a felony. Respondent acknowledges that W. VA. CODE § 18A-2-8 grants authority for it to reassign Grievant rather than suspend her, but it argues that provision is discretionary. Finally, the Board alleges that it has consistently suspended employees charged with drug-related felonies pending the

outcome of the criminal proceedings. Respondent has met its burden of proof and the grievance is denied.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant, Madeline Clark, is employed as a Custodian III by the Respondent, Kanawha County Board of Education. Grievant has been so employed by the Respondent for twenty-six years.

2. Grievant had been assigned to work at the Ben Franklin Career Center for approximately a year when she was initially arrested for felony charges related to the manufacture of methamphetamine ("meth"). Upon the discovery of these charges, the Superintendent suspended Grievant without pay and Grievant contested that suspension.

3. The Ben Franklin Career Center is a vocational and technical school in which high school aged students receive educational instruction. The school also offers courses for adults seeking vocational education. The Career Center offers a daycare program for small children of students at the school.

4. Grievant's daily shift at the Career Center started at 6:00 a.m. and ended at 2:00 p.m. While Grievant was not assigned duties directly related to the students, she worked in the school while they were present. Additionally, as a Custodian III, Grievant supervised the work of the Custodian I assigned to the Center.

5. When the criminal charges at the school became public, the Principal of the Career Center, John Baird, was contacted by parents and grandparents of students and daycare participants with concerns about Grievant being around their children. Staff

members and adult students also expressed concerns that they might be exposed to meth or that it might be brought into the school. The employee in charge of the daycare and the Assistant Principal also received complaints and concerns.

6. Before a hearing could be held on the suspension, the charges against Grievant were dismissed and Grievant was reinstated to employment. Because of the concerns previously expressed by parents and students at the Career Center, Grievant was reassigned to work at the Crede Warehouse where she had no contact with students. Grievant was not formally transferred to the Crede Warehouse and her official assignment remained at the Ben Franklin Career Center.

7. On October 22, 2010, Grievant was indicted by a Kanawha County Circuit Court Grand Jury with the felony charge of operating or attempting to operate a clandestine drug laboratory for the purpose of manufacturing methamphetamine.

8. Superintendent Duerring issued a letter to Grievant dated October 26, 2010, informing her that she was conditionally suspended without pay as a result of the felony indictment. The suspension was effective the next day and would remain in effect pending a hearing.

9. When the indictment against Grievant became public, Principal Baird received renewed expressions of concerns from students' parents and grandparents, many of whom suggested that they would remove their children from the daycare if Grievant returned to the Ben Franklin Career Center.

10. On December 8, 2010, Grievant was given a hearing to contest the suspension before Hearing Examiner, Rebecca Butler.

11. On December 21, 2010, Hearing Examiner Butler issued a decision recommending that Grievant be suspended without pay pending the outcome of the criminal charges against her. Superintendent Duerring issued a letter to Grievant the same day adopting the recommended decision.

12. By letter dated January 4, 2011, Superintendent Duerring informed Grievant that the Board had voted at their meeting the previous night to suspend Grievant without pay pending the outcome of the felony charges against her.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "A preponderance of the evidence is evidence 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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

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); *Maxey v. McDowell County Board of Education*, 212 W. Va. 668, 575 S.E.2d 278 (2002). WEST VIRGINIA CODE § 18A-2-7 provides that "[t]he superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter." W. VA. CODE § 18A-2-8 provides in pertinent part:

> . . . [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.

Grievant correctly points out that she has not been convicted of nor entered a plea to a felony. Rather she has been indicted on felony drug charges and in the criminal proceedings she is presumed to be not guilty of those charges until proven otherwise. Grievant argues that since being charged with a felony is not specifically set out in W. VA. CODE § 18A-2-8 as a reason for suspension, the Board is without statutory authority to conditionally suspend her pending the outcome of her criminal charges. That particular argument has been previously raised and rejected. The Grievance Board has held on numerous occasions 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 [her] assigned duties. *Blaney v. Wood County Board of Education*, Docket No. 03-54-169 (Jan. 16, 2004); *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 [she] 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). The ruling in *Hicks, supra,* was affirmed in the Circuit Court of Kanawha County, Civil Action Number 04-11-113, and the West Virginia Supreme Court of Appeals rejected an appeal on July 5, 2005, in a unanimous order. [3]

Next, Grievant argues that her felony charges arise from acts which occurred away from her job and, therefore, there is no rational nexus between the charges and her employment which would allow her to be suspended for that conduct. Indeed the West Virginia Supreme Court of Appeals has held that:

> In order to [suspend or] dismiss a school board employee for acts performed at a time and place separate from employment, the Board must demonstrate a "rational nexus" between the conduct performed outside of the job and the duties the employee is to perform.

Golden v. Bd. of Educ., 169 W. Va. 63, 285 S.E.2d 665 (1981). The Supreme Court held that the conduct ceases to be private and a rational nexus exists in at least two circumstances:

> 1. The conduct directly affects the performance of the occupational responsibilities of the employee;
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> 2. If, without contribution on the part of the school officials, the conduct has become the subject of such notoriety as to significantly and

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[3] Since this issue is well settled, it will not be discussed further herein. For a more complete discussion of the issue go to *Blaney v. Wood County Board of Education*, Docket No. 03-54-169 (Jan. 16, 2004).

> reasonably impair the capability of the particular employee to discharge the responsibilities of his/her position.

Golden, supra.

Almost immediately after Grievant was charged with manufacturing meth, the school officials at the Ben Franklin Career Center were bombarded with complaints from parents and grandparents of participants in the Center's daycare program. Additionally, staff and students expressed concern with being exposed to Meth when Grievant was present. After Grievant was indicted, a number of people threatened to remove their children from the schools programs if Grievant was allowed to return. These problems were not caused by the school officials, but they could reasonably be expected to significantly affect the operation of the Center and Grievant's ability to perform her job.

Grievant points to the provision in W. VA. CODE § 18A-2-8 which authorizes the Board to assign Grievant duties away from children while her felony charges are pending. The statute specifically states:

> An employee charged with the commission of a felony **may** be reassigned to duties which do not involve direct interaction with pupils pending final disposition of the charges.

(Emphasis added) *Id.* In fact, Grievant was assigned to the Crede Warehouse for the brief period between when the initial charges against her were dismissed and she was indicted. However, after Grievant was indicted, the Board has decided not to exercise the authority granted to it pursuant to the statute. Respondent points out that the use of the word "may" in the statute denotes discretion[4] and the Board has routinely decided not to exercise their

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[4] "An elementary principle of statutory construction is that the word 'may' is inherently permissive in nature and connotes discretion." *In re Chevie V.*, 226 W. Va. 363, 373; 700 S.E.2d 815, 825 (2010).

authority to reassign employees who have been indicted on felony charges. Because the Legislature inserted the word "may" in this section of the statute, the Board does not have a mandatory duty to reassign Grievant while her criminal charges are pending.

Finally, Grievant argues that other employees who have been charged with a felony have been suspended with pay. She alleges that the Board is unlawfully discriminating against her by not treating her the same way. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant submitted several documents indicating instances where employees of the Board had been arrested for one reason or another.[5] The documents do not identify the employees and do not routinely state what positions the employees held with the Board. However, the documents do show that not all employees charged with drug-related offenses were suspended without pay. In fact, there was evidence that a school principal

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[5] *See,* Grievant's Exhibit 1.

who was charged with the misdemeanor of possession of cocaine was suspended with pay pending the outcome of his charges. Grievant believes that these employees were similarly situated to her and suspending her without pay constitutes discrimination. The Grievant is incorrect in this belief.

The Respondent focuses on the fact that Grievant is charged with a felony, not that the crime is drug-related. There were ten instances cited where an employee of the board had been charged with a felony in either state or federal court. In every one of those instances the employee was conditionally suspended without pay pending the outcome of their criminal charges.[6] Grievant is similarly situated with those employees who were charged with felonies. She was given the same treatment as those employees. Grievant failed to prove that Respondent unlawfully discriminated against her.

Ultimately, Respondent proved, by a preponderance of the evidence, that it properly suspended Grievant without pay pending the outcome of the felony charges for which Grievant was indicted. Accordingly, the grievance is DENIED.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence

[6] In a few instances, the suspension was initially with pay but was routinely converted to a suspension without pay in short order.

which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. WEST VIRGINIA CODE § 18A-2-7 provides that "[t]he superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter."

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 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); *Maxey v. McDowell County Board of Education*, 212 W. Va. 668, 575 S.E.2d 278 (2002).

4. The Grievance Board has held on numerous occasions 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. *Blaney v. Wood County Board of Education*, Docket No. 03-54-169 (Jan. 16, 2004); *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).

5. 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 she has been charged. See *Lemery, supra; Kitzmiller, supra. Hurley v. Logan County Bd. of Educ.*, Docket No. 97-23-024 (Apr. 14, 1997).

6. Grievant was indicted on the felony charge of operating, or attempting to operate, a clandestine drug laboratory for the purpose of manufacturing methamphetamine. That is sufficient grounds for the Board to conditionally suspend her without pay pending the outcome of the felony charges. *Hicks v. Monongalia County Bd. of Educ.,* Docket No. 04-30-183 (Aug. 13, 2004).

7. "In order to [suspend or] dismiss a school board employee for acts performed at a time and place separate from employment, the Board must demonstrate a "rational nexus" between the conduct performed outside of the job and the duties the employee is to perform. *Golden v. Bd. of Educ.,* 169 W. Va. 63, 285 S.E.2d 665 (1981). Conduct outside the workplace ceases to be private and a rational nexus exists in at least two circumstances:

> 1. The conduct directly affects the performance of the occupational responsibilities of the employee;

> 2. If, without contribution on the part of the school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the particular employee to discharge the responsibilities of his/her position.

Golden, supra.

8. Almost immediately after Grievant was charged with the felony of manufacturing meth, the school officials where Grievant was assigned were bombarded by citizens with complaints and concerns. This notoriety was sufficient to reasonably impair Grievant's capacity to perform her duties. Consequently, a rational nexus exists between Grievant's employment and her felony charge.

9. The provision of W. VA. CODE § 18A-4-8 that allows the Board to reassign an employee who has been charged with a felony to a position where the employee has no contact with pupils is discretionary. The Board does not have a mandatory duty to reassign Grievant to such a position while her criminal charges are pending. *In re Chevie V.*, 226 W. Va. 363, 373; 700 S.E.2d 815, 825 (2010).

10. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that she or he was treated differently from one or more similarly-situated employee(s);
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

11. Grievant was not treated substantially different than other employees of the Board who had been charged with a felony. Respondent did not unlawfully discriminate against Grievant.

12. Respondent proved, by a preponderance of the evidence, that it properly suspended Grievant without pay pending the outcome of the felony charges for which Grievant was indicted.

Accordingly, the grievance is DENIED.

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: AUGUST 17, 2011.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE