WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LENNIE DALE ADKINS,

Grievant,

v. **Docket No. 2012-0085-CabED**

CABELL COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

_____Grievant, Lennie Dale Adkins, filed this expedited Level Three grievance against his employer, Respondent Cabell County Board of Education, on July 22, 2011, challenging his suspension without pay from his employment, as a result of pending felony charges.[1] As relief, Mr. Adkins seeks, "[t]o be placed on administrative leave with pay or in the alternative Grievant should have been placed in a position without contact to students, Cabell County schools bylaw and policies 3139.01 require a conviction, nollo, or guilty.[sic]" Also, pending is the Grievant's Motion to Reinstate with Back Pay which was filed with the Grievance Board by letter dated July 22, 2011.[2]

A Level Three grievance hearing was held at the West Virginia Public Employees

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[1] WEST VIRGINIA CODE § 6C-2-4(a)(4) allows an employee to proceed directly to Level Three when there has been a suspension without pay.

Further, this grievance was submitted to the Grievance Board by letter dated July 22, 2011. However, the filing date listed on the statement of grievance above Grievant's signature is July 28, 2011. The Grievance Board received the statement of grievance on July 25, 2011.

[2] In this motion, Grievant makes, essentially, the same arguments he has raised at Level Three, and asks that his suspension be set aside as a matter of law, and that he be reinstated with back pay. The undersigned will rule on the motion herein.

Grievance Board Office in Charleston, West Virginia, on November 1, 2011, before the undersigned administrative law judge. Grievant appeared in person and by counsel Dennis E. Kelley, Esquire, and Donald R. Jarrell, Esquire. Respondent appeared by counsel Howard E. Seufer, Esquire. At this hearing, the parties stipulated to certain facts which were then placed on the record. Further, the parties jointly moved the admission of two exhibits into evidence. Joint Exhibit 1 contained the following collection of documents:

1. Letter dated July 20, 2011, from Superintendent William A. Smith to Grievant advising him that the Cabell County Board of Education ratified his administrative leave with pay from May 26, 2011 through July 8, 2011, ratified his suspension from employment without pay, and extended his suspension without pay until all pending felony criminal charges are resolved;

2. Letter dated July 8, 2011, from Superintendent William A. Smith to Grievant advising him that he would be suspended without pay until the July 19, 2011, meeting of the Cabell County Board of Education.

3. Letter dated June 29, 2011, from Dennis E. Kelley, Esq. to William A. Smith in which Kelley, on behalf of Grievant, asks to be heard by the Cabell County Board of Education on June 15, 2011 [sic].

4. Letter from Superintendent William A. Smith to Grievant informing him that Smith intended to recommend that the Cabell County Board of Education approve his suspension with pay from May 26, 2011 until June 6, 2011, and that the Board terminate Grievant's employment as of July 6, 2011.

5. Letter dated June 6, 2011, from Superintendent William A. Smith to Grievant informing him that he had received the criminal complaints pending against him and that he had a right to a hearing before Smith, then scheduled to be held on June 13, 2011.

6. Letter dated May 26, 2011, from Superintendent William A. Smith to Grievant placing him on administrative leave with pay until further notice.

Joint Exhibit 2 contained copies of the criminal complaints filed against Grievant in the Magistrate Court of Cabell County in the following cases: 11F-746; 11F-747; 11F-748; 11F-

749; 11F-750; 11F-751; 11F-752; 11F-753; and, 11F-754.[3] Also included in this exhibit were copies of Grievant's Initial Appearance for cases 11F-746 through 11F-753, his Initial Appearance for case 11F-754, and Grievant's Criminal Bail Agreement in cases 11F-746 through 11F-756.

Neither party presented any additional evidence, agreeing that the issue to be decided was a question of law. This matter became mature for decision on December 5, 2011, upon the receipt of the last of the parties' proposals.

Synopsis

Grievant was suspended indefinitely without pay from his employment because he was charged with eleven felonies. Grievant argues that Respondent lacked the statutory authority to suspend him as a result of the criminal charges because "being charged with a felony" is not one of the grounds for suspension listed in WEST VIRGINIA CODE § 18A-2-8. Respondent asserts that it has the authority to suspend Grievant indefinitely without pay pending resolution of his criminal charges. Respondent has met its burden of proof; therefore, this grievance is DENIED.

Stipulations

The parties stipulated to the following facts at the Level Three hearing:

1. Grievant, Lennie Dale Adkins, has been changed with the felonies described in Joint Exhibit 2. Three of these felony charges had been dismissed as of the date of the

[3] Copies of the criminal complaints issued in cases 11F-755 and 11F-756 were not included in the joint exhibits submitted at the Level Three hearing.

Level Three hearing.[4]

2. Respondent, Cabell County Board of Education, suspended Grievant from his employment without pay because Grievant was charged with eleven felonies.

3. Respondent takes no position as to Grievant's guilt or innocence of the charges pending against him.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed as a teacher or librarian by Respondent Cabell County Board of Education.[5]

2. On May 26, 2011, Grievant informed Superintendent William A. Smith that he expected to be arrested on May 27, 2011, following a State Police investigation into allegations of possession of child pornography. Accordingly, on that same day, Superintendent Smith placed Grievant on administrative leave with pay until further notice.[6]

3. On May 27, 2011, eleven felony criminal complaints were filed against Grievant in the Magistrate Court of Cabell County. In each, probable cause was found,

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[4] The record is unclear as to whether two or three of the eleven charges had been dismissed as of the date of the Level Three hearing. At the Level Three hearing, the parties agreed that three of the charges had been dismissed; however, in its proposed Findings of Fact and Conclusions of Law, Respondent asserts that two charges had been dismissed. Neither party identified which of the charges had been dismissed.

[5] The record is unclear as to Grievant's actual job title. In the parties' proposed Findings of Fact and Conclusions of Law, Respondent refers to Grievant as a teacher; Grievant, a librarian. Neither party has indicated the name of the school at which Grievant works. However, documents contained in Joint Exhibit 2 reference the name of a school.

[6] *See*, letter dated May 26, 2011, included in Joint Exhibit 1.

thereby initiating criminal proceedings.

4. Grievant was arrested on or about May 27, 2011, on the eleven criminal complaints. On that same day, Grievant was released on bail which was set at $10,000 per criminal charge.

5. On June 13, 2011, Superintendent Smith conducted a hearing with Grievant regarding the criminal charges prior to making any recommendations about Grievant's employment to Respondent.

6. By letter dated June 15, 2011, Superintendent Smith advised Grievant that he intended to recommend to the Board that it approve Grievant's suspension with pay from May 26, 2011 to June 6, 2011, and that it terminate his employment contract effective July 6, 2011.

7. By letter dated July 8, 2011, Superintendent Smith informed Grievant that at its July 19, 2011, meeting, he would not be asking the Board to approve Grievant's paid suspension or his termination. Instead, by this same letter, Superintendent Smith suspended Grievant without pay, effective immediately. Smith further advised that at the July 19, 2011, meeting, he would be asking the Board to ratify Grievant's original administrative leave with pay and his suspension without pay, and to extend Grievant's suspension without pay until all the felony charges were resolved.

8. The July 8, 2011, letter further advised Grievant that if "you would like to appear at the Board meeting to be heard, you must deliver written notice to me by noon on July 15, 2011. You are hereby authorized to come to my office to deliver this notice. At any such hearing, you would have the right to present evidence on your own behalf and be represented by an attorney." This letter was mailed to both Grievant and his attorney,

Dennis E. Kelley, Esq. Grievant received this letter by certified mail on July 12, 2011. *See,* Joint Exhibit 1.

9. Neither Grievant nor his counsel appeared at the July 19, 2011, meeting of the Cabell County Board of Education.

10. By letter dated July 20, 2011, Superintendent Smith informed Grievant that the Board ratified Grievant's administrative leave with pay from May 26, 2011, through July 8, 2011, his suspension without pay, and extended Grievant's suspension without pay until all felony charges pending against him were resolved.

11. Grievant filed this grievance July 22, 2011, challenging the decision of the Board.

12. As of November 1, 2011, three of the criminal complaints filed against Grievant had been dismissed. In eight of the criminal complaints included in Joint Exhibit 2, Grievant is charged with the distribution and exhibiting of material depicting minors engaged in sexually explicit conduct. In the ninth criminal complaint included in Joint Exhibit 2, Grievant is charged with the employment or use of a minor to produce obscene matter or assist in doing sexually explicit conduct.[7]

13. As of November 1, 2011, Grievant had not been indicted on the pending felony criminal charges.[8]

14. The pending criminal complaints allege that two minors involved had been

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[7] *See,* the criminal complaints contained in Joint Exhibit 2 for additional details on the charges pending against Grievant.

[8] No further evidence or information on the issue of the indictment has been submitted to the undersigned.

students at the school where Grievant worked, and that one was Grievant's former student.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employee Grievance Bd. 156 C.S.R. 1 § 3; *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). "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). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

WEST VIRGINIA CODE § 18A-2-7 provides that "[t]he superintendent, subject only to approval of the board, shall have the 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-2-7. Further, WEST VIRGINIA CODE §18A-2-8 states, in part that,

> (a) 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. . . .

W. VA. CODE § 18A-2-8(a). 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. *See, Bell v. Kanawha County Bd. of Educ.,* Docket No. 91-20-005 (Apr. 16, 1991); *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).

At the time of the Level Three hearing in this matter, Grievant had not been indicted on the felony charges, and three of the charges pending against him had been dismissed. Grievant has not been convicted of any of the pending criminal charges, nor has he plead guilty or *nolo contendre* to any of the pending charges. Grievant argues that Respondent lacks the statutory authority to suspend him without pay because "being charged with a felony" is not listed as a basis for suspension listed in WEST VIRGINIA CODE § 18A-2-8. Grievant further argues that because Respondent has not specified any other grounds for his suspension pursuant to WEST VIRGINIA CODE § 18A-2-8, his suspension was improper. Respondent, however, asserts that it properly suspended Grievant without pay from his teaching position pending the resolution of the criminal charges filed against him.

Grievant's arguments have been previously raised before the Grievance Board 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 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, Kemery, supra; Kitzmiller, supra. Hurley v. Logan County Bd. of Educ.,* Docket No. 97-23-024 (Apr. 14, 1997).

Clark v. Kanawha County Bd. of Educ., Docket No. 2011-0987-KanED (Aug. 17, 2011) (quoting *Hicks v. Monongalia County Bd. of Educ.,* Docket No. 04-30-183 (Aug. 13, 2004)). *See also, Blaney v. Wood County Bd. of Educ.,* Docket No. 03-54-169 (Jan. 16, 2004).

However, Grievant has not been indicted; he has only been *charged* with the felonies. Certainly, Grievant is presumed innocent of the pending criminal charges until proven otherwise. Nonetheless, this Board has previously upheld the right of a board of education to indefinitely suspend an employee without pay while criminal proceedings are conducted so long as some particular event will eventually bring a conclusion to the suspension (such as completion of a criminal trial). *See, Blaney v. Wood County Board of Educ.*, Docket No. 03-54-169 (Jan. 16, 2004); *Hicks v. Monongalia County Bd. of Educ.,* Docket No. 04-30-183 (Aug. 13, 2004); *Dobbins v. Nicholas County Bd. of Educ.,* Docket No. 04-34-396 (Mar. 9, 2005). Therefore, the fact that Grievant has not been indicted is of no consequence. For these reasons, the undersigned cannot find that Respondent exceeded its statutory authority by suspending Grievant indefinitely without

pay pending the resolution of the criminal actions.

Grievant next argues that his felony charges arise from alleged acts occurring away from work; therefore, no rational nexus exists between the alleged conduct and his employment. In order to discipline a school employee for acts performed at a time and place separate from his employment, a board must demonstrate a "rational nexus" between the conduct performed outside the job and the duties the employee is to perform. *See, 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; or, (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 the teaching position. *See*, *Id.* at 69, 669.

Grievant has pending against him possibly eight felony charges of distribution and exhibiting of material depicting minors engaged in sexually explicit conduct, and one charge of employment or use of a minor to produce obscene matter or assist in doing sexually explicit conduct.[9] Further, it is alleged that two minors involved were students at a Cabell County school, one being Grievant's former student. *See,* Joint Exhibit 2. Teachers hold positions of trust and are expected to protect, and to be role models for, their students. The activities with which Grievant is charged, if proved, are inherently inconsistent with the duties and responsibilities of a teacher. *See*, *Hurley v. Logan County*

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[9] Again, the record is not entirely clear as to which of the charges have been dismissed. *See*, Joint Exhibit 2.

Bd. of Educ., Docket No. 97-23-024 (Apr. 14, 1997). Certainly, there is a rational nexus between the criminal charges pending against Grievant and his job duties as a teacher/librarian in the Cabell County school system.

Grievant briefly argues that instead of suspending him from his employment, Respondent should have placed him in a position in which he would have no unsupervised contact with children. Grievant argues that such would have been the least restrictive alternative that would have served to protect his rights. WEST VIRGINIA CODE § 18A-2-8(c) provides, in pertinent part, that " . . . [a]n 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." *Id.* This statute allows a board to reassign an employee who has been charged with a felony, but does not require a board to do so. Any such reassignment is discretionary, not mandatory.[10] *See, Clark v. Kanawha County Bd. of Educ.,* Docket No. 2011-0987-KanED (Aug. 17, 2011). Therefore, Respondent was not required to reassign Grievant during the pendency of the criminal charges.

Respondent has proved by a preponderance of the evidence that it properly suspended Grievant without pay pending the resolution of the criminal charges with which Grievant has been charged. Grievant's Motion to Reinstate with Back Pay shall be DENIED. Accordingly, this grievance is DENIED.

The following Conclusions of Law support the decision reached:

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[10] "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).

Conclusions of Law

1. As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989).

2. An employee of a county board of education may be suspended or dismissed only for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a *nolo contendere* to a felony charge. *See*, W. VA. CODE § 18A-2-8.

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 WEST VIRGINIA CODE § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. *See, Bell v. Kanawha County Bd. of Educ.,* Docket No. 91-20-005 (Apr. 16, 1991); *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. A board of education may indefinitely suspend an employee without pay while criminal proceedings are conducted, so long as some particular event will eventually bring a conclusion to the suspension (such as completion of a criminal trial). Further, the employee need not have been indicted on the criminal charges. *See, Blaney v. Wood County Board of Educ.*, Docket No. 03-54-169 (Jan. 16, 2004); *Hicks v. Monongalia County Bd. of Educ.,* Docket No. 04-30-183 (Aug. 13, 2004); *Dobbins v. Nicholas County Bd. of Educ.,* Docket No. 04-34-396 (Mar. 9, 2005).

5. In order to discipline a school employee for acts performed at a time and place separate from his employment, a board must demonstrate a "rational nexus" between the conduct performed outside the job and the duties the employee is to perform. 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; or, (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 the teaching position. *See, Golden v. Bd. of Educ.*, 169 W. Va. 63, 285 S.E.2d 665 (1981).

6. Grievant has been charged with possibly eight felony criminal charges of distribution and exhibiting of material depicting minors engaged in sexually explicit conduct, and one charge of employment or use of a minor to produce obscene matter or assist in doing sexually explicit conduct. The alleged conduct, as stated in the charges pending against Grievant, directly affects the performance of the occupational responsibilities of a teacher. Therefore, a rational nexus exists between Grievant's position as a teacher and his pending felony charges.

7. The provision of WEST VIRGINIA CODE § 18A-2-8 that allows a 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. *See, Clark v. Kanawha County Bd. of Educ.,* Docket No. 2011-0987-KanED (Aug. 17, 2011). The Respondent does not have a mandatory duty to reassign Grievant to such a position while his criminal charges are pending.

8. Respondent proved by a preponderance of the evidence that it properly suspended Grievant without pay pending the outcome of the felony charges pending against him.

Accordingly, this 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 (eff. July 7, 2008).

DATE: April 26, 2012.

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Carrie H. LeFevre
Administrative Law Judge