fTHE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TIMOTHY MEADOWS,

Grievant,

v. **DOCKET NO. 2013-0255-NicED**

NICHOLAS COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

On August 27, 2012, Timothy Meadows ("Grievant") filed this grievance directly at Level Three, as authorized by W. Va. Code § 6C-2-4(a)(4), challenging his suspension without pay by Respondent Nicholas County Board of Education. A Level Three hearing on this grievance was held on November 28, 2012, in Beckley, West Virginia. Grievant was represented at the hearing by Brandon Tinney, Staff Representative for AFT-West Virginia, while Respondent was represented by Howard E. Seufer, Esquire. At the close of the hearing, the parties agreed to submit findings of fact and conclusions of law. This matter became mature for decision on December 10, 2012, upon receipt of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

On August 2, 2012, a criminal complaint was filed with a Magistrate for Nicholas County, West Virginia, charging Grievant with felony embezzlement and conducting a fraudulent scheme concerning over $30,000.00 he allegedly transferred from the account of the Deer Creek Wildlife Club, Inc., into his personal checking account, while serving as the Club's Treasurer. On August 8, 2012, the County Superintendent,

Beverly Kingery, directed Grievant to meet with her concerning his employment for the 2012-2013 school year. Following this meeting on August 15, 2012, Superintendent Kingery notified Grievant that she was suspending him without pay, effective immediately, based upon these charges. The Nicholas County Board of Education voted to approve the suspension on August 20, 2012. These felony criminal charges remain pending. The controlling issue is whether there is a sufficient nexus between the pending charges and Grievant's employment as a teacher to support an indefinite suspension. As a classroom teacher and assistant coach, Grievant's duties include handling class funds and athletic funds. Therefore, Respondent has asserted a rational nexus to support its suspension of Grievant pending the outcome of these criminal charges.

The following Findings of Fact are made based upon the record developed through the level three hearing.

Findings of Fact

1. Grievant is employed as a mathematics teacher by Respondent Nicholas County Board of Education.

2. Grievant also holds extracurricular positions as Head Baseball Coach and Assistant Boys' Basketball Coach.

3. On August 2, 2012, a criminal complaint was filed with a Magistrate in Nicholas County, West Virginia, alleging that, while Grievant was serving as Treasurer of the Deer Creek Wildlife Club, he transferred $30,000.00 from the Club's checking account to his own personal account, without proper authority. The Magistrate found

probable cause for the felony charges of embezzlement and fraudulent schemes and issued a warrant for Grievant's arrest. *See* J Ex 1. As of the date of the Level Three hearing on November 28, 2012, no further action had been taken on these charges.

4. Nicholas County Board of Education Superintendent Beverly Kingery issued a letter to Grievant on August 15, 2012, notifying him that he was being suspended, without pay, effective that date, pending resolution of the felony charges.

5. On August 20, 2012, the Nicholas County Board of Education met and approved the suspension imposed by the Superintendent. Grievant was provided notice of the Board's decision and his right to appeal to the Grievance Board.

6. As a teacher who serves as a class sponsor and athletic coach, Grievant's responsibilities include handling money. Superintendent Kingery concluded that because the charges against Grievant involved improperly taking funds, Grievant should not be handling public funds.

7. Nicholas County has no positions that do not involve direct interaction with pupils to which Grievant could be reassigned, pending resolution of these criminal charges.

8. Any Nicholas County school employee who is charged with a felony is suspended without pay, pending outcome of the criminal process.

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 Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R.

1 § 3 (2008). *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 & Human Resources*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

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 and capriciously. *Bell v. Kanawha County Bd. of Educ*., Docket No. 91-20-005 (Apr. 16, 1991). *See Maxey v. McDowell County Bd. of Educ*., 212 W. Va. 668, 575 S.E.2d 278 (2002); *Beverlin v. Bd. of Educ*., 158 W. Va. 1067, 216 S.E.2d 554 (1975). Grievant argues that simply being charged with a felony is not listed as a basis for suspension or termination contained in W. Va. Code § 18A-2-8. Further, Grievant notes that none of the other grounds for suspension listed in W. Va. Code § 18A-2-8 have been referenced by the Respondent as a basis for this disciplinary action.

This Grievance Board has previously held that a board of education may conditionally suspend an employee based upon an indictment, provided there is a

rational nexus between the indictment and the employee's ability to perform his assigned duties. *Clark v. Kanawha County Bd. of Educ*., Docket No. 2011-0987-KanED (Aug. 27, 2011); *Balis v. Braxton County Bd. of Educ*., Docket No. 98-04-094 (Jan. 22, 1999); *Hurley v. Logan County Bd. of Educ*., Docket No. 97-23-024 (Apr. 14, 1997); *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). Likewise, this Grievance Board has concluded that an employee who has only been charged with a criminal violation, but not indicted, may be suspended, so long as some particular event, such as completion of a criminal trial, will eventually bring a conclusion to the suspension. *Adkins v. Cabell County Bd. of Educ*., Docket No. 2012-0085-CabED (Apr. 26, 2012); *Hicks v. Monongalia County Bd. of Educ*., Docket No. 04-30-183 (Aug. 13, 2004). *See Dobbins v. Nicholas County Bd. of Educ*., Docket No. 04-34-396 (Mar. 9, 2005). In either situation, where the conduct with which Grievant is charged occurred at a time and place separate from his employment, the Board must establish a "rational nexus" between the alleged off-duty misconduct and the duties the employee performs. *Snodgrass v. Wetzel County Bd. of Educ*., Docket No. 97-52-384 (Dec. 15, 1997). *See Woo v. Putnam County Bd. of Educ*., 202 W. Va. 409, 504 S.E.2d 644 (1998); *Rogliano v. Fayette County Bd. of Educ*., 176 W. Va. 700, 347 S.E.2d 220 (1986); *Golden v. Bd. of Educ*., 169 W. Va. 63, 285 S.E.2d 665 (1981). *See also Powell v. Paine*, 221 W. Va. 458, 655 S.E.2d 204 (2007).

This Grievance Board has found a rational nexus between pending criminal charges and a school employee's job duties in such situations as felony sexual misconduct with children (*Balis*, *supra*), possession of child pornography (*Adkins*, *supra*), using a minor to film sexually explicit conduct (*Hurley*, *supra*), improper touching of a child on a school bus (*Hicks*, *supra*), manufacture of methamphetamine (*Clark*, *supra*), felony sexual abuse of a minor female (*Dobbins*, *supra*), and sexual misconduct with two students (*Blaney v. Wood County Bd. of Educ*., Docket No. 03-54-169 (Jan. 16, 2004). Obviously, where the victim is a student or a minor child, it is not difficult to find a rational nexus for separating the employee from additional potential victims. Not coincidentally, the Legislature included a proviso in W. Va. Code § 18A-2-8(c) which 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."

This Grievance Board has previously determined that this language gives the county board discretion to proceed with a suspension without pay without reassigning the employee to other duties. *Adkins*, *supra*; *Clark*, *supra*. In this matter, assigning Grievant to a position which does not involve interaction with pupils would not resolve the problem. According to Superintendent Kingery, the problem with Grievant involves not wanting him to have access to someone else's funds. There was no evidence as to whether a position that would involve interaction with pupils without involving any sort of financial responsibility existed in the county school system. However, because the school law does not contain an enforceable mandate requiring an employee facing

criminal charges to be assigned to another position unrelated to such charges, it does not matter whether or not such a hypothetical job exists.

Respondent has a policy or practice of suspending without pay every employee who faces felony criminal charges. If there is still a requirement for a rational nexus between an employee's off-duty misconduct and the employee's job duties, as the West Virginia Supreme Court of Appeals has indicated in deciding *Woo*, *supra*, then this policy should be reconsidered. However, in the instant matter, Respondent presented a rational nexus between the pending criminal charges involving improperly taking someone else's funds and Grievant's duties as a teacher and coach which involve handling certain public funds. There was no clarification of the Superintendent's explanation of this involvement, such as the amount of money in each fund, the presence of reasonable policies to insure security of these funds, whether Grievant had independent or sole access to the funds, or whether the duties involving responsibility for funds could be reassigned to one or more other employees. Respondent is not required to provide these specifics, only to show a rational nexus between the conduct charged and Grievant's job duties, which it established by a preponderance of the evidence. Accordingly, Respondent has met its burden of persuasion to support Grievant's suspension without pay pending resolution of these felony charges.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. Because 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 Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *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 plea of *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 Maxey v. McDowell County Bd. of Educ*., 212 W. Va. 668, 575 S.E.2d 278 (2002); *Beverlin v. Bd. of Educ*., 158 W. Va. 1067, 216 S.E.2d 554 (1975); *Bell v. Kanawha County Bd. of Educ*., Docket No. 91-20-005 (Apr. 16, 1991).

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. *Adkins v. Cabell County Bd. of Educ*., Docket No. 2012-0085-CabED (Apr. 26, 2012) *See Dobbins v. Nicholas County Bd. of Educ*., Docket No. 04-34-396 (Mar. 9, 2005); *Hicks v. Monongalia County Bd. of Educ*., Docket No. 04-30-183 (Aug. 13, 2004); *Blaney v. Wood County Bd. of Educ*., Docket No. 03-54-169 (Jan. 16, 2004).

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. *Adkins, supra*. *See Woo v. Putnam County Bd. of Educ*., 202 W. Va. 409, 504 S.E.2d 644 (1998); *Rogliano v. Fayette County Bd. of Educ*., 176 W. Va. 700, 347 S.E.2d 220 (1986); *Golden v. Bd. of Educ.*, 169 W. Va. 63, 285 S.E.2d 665 (1981).

6. Respondent established a rational nexus between the pending criminal charges that took place outside the job and the employee's job duties by demonstrating that the charges involve the wrongful taking of the funds of another and that Grievant's duties as a teacher and athletic coach involves handling public funds.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: December 19, 2012

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LEWIS G. BREWER
Administrative Law Judge