WEST VIRGINIA EDUCATION EMPLOYEES GRIEVANCE BOARD
ARCH A. MOORE, JR.
Governor

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DAVID R. ALLISON, JR.

v. Docket No. 20-86-273-1

KANAWHA COUNTY BOARD OF EDUCATION

DECISION

Grievant, David R. Allison, Jr., was employed by the Kanawha County Board of Education as a classroom teacher and choral music instructor at Dunbar High School. He had been employed by Kanawha County Schools for six years when he was suspended without pay by Superintendent of Schools Trumble by letter dated August 20, 1986, pending a hearing upon a possible recommendation to the board of education that grievant be dismissed on the grounds of immorality.[1] On September 4 a level two hearing was conducted by Superintendent Trumble, who issued a written

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[1] The letter advised grievant that an allegation had been made by a minor, a student of Dunbar High School who had accompanied grievant to Pittsburgh, Pennsylvania, between July 18 and 20, 1986, that grievant had performed oral sex upon the student; that it had been further alleged that grievant supplied the minor with alcoholic beverages and exposed him to adult reading materials while on said trip. (Employer's Exhibit No. 2).

decision dated September 18, 1986, recommending to the board of education that grievant's employment be terminated on the grounds of immorality; the board approved the action of the superintendent the same day. Grievant appealed to level four on September 23 and evidentiary hearings were conducted on October 21 and November 21, 1986.[2]

TR was sixteen years of age on April 23, 1986 and presently attends Dunbar High School. He first met grievant when he was in the band two years ago and grievant was the band director; last school year TR joined the Sounds of Life and grievant was director.[3] After TR joined Sounds of Life his mother became active in the booster club and grievant became a friend and frequent visitor to TR's home. Sometime in June, during a one day trip to a drum and bugle show in Canton, Ohio, grievant invited TR to Pittsburgh in July to attend a drum and bugle show with him. TR's mother consented and on Friday, July 18, grievant and TR departed for Pittsburgh in grievant's car. About twenty miles from Charleston grievant pulled over to the

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[2] The hearing was initially scheduled for October 3 and continued on the motion of counsel for the grievant. The hearing on November 21 was on the motion of the grievant to reopen the hearing, which was granted without objection by the board. This evidence was related solely to the credibility of the complaining witness, TR, the juvenile, and perhaps not appropriately admissible as newly or after discovered evidence.

The grievance was submitted to the hearing examiner on the level two transcript (T. __), the evidence taken at level four and the findings of fact and conclusions of law submitted by the board on November 28 and by the grievant on December 12, 1986.

[3] Sounds of Life is a show choir at Dunbar High School which puts on Broadway type shows; the group has won several awards over the four years grievant has been director. (T. 64).

berm and asked TR if he wanted to drive; TR told grievant he didn't have a license and grievant responded that it didn't matter. The two stopped briefly in Morgantown to let TR see the stadium and then resumed their trip to Pittsburgh.

Upon arrival in Pittsburgh about 5:00 p.m. they went to the stadium to pick up their tickets for the drum and bugle show the following night and grievant began looking for a motel. TR states that grievant stopped at the University Inn but left because grievant felt it was located in an undesirable part of town; another motel was full and grievant finally obtained a single room at a Best Western motel. Grievant instructed TR to wait five minutes in the car and then come upstairs to the room. Later, they went out to eat and grievant attempted to buy some beer and wine at a 7-11 and was advised that he would have to go to Weirton, about thirty five miles, to obtain it. Grievant and TR drove to Weirton, bought a gallon of wine and a six pack of beer and returned to the motel room.

They were on the bed drinking the beer and wine watching television when grievant gave TR a Forum magazine, a sexually oriented adult magazine, and directed TR's attention to a story about a young boy who had been raped by a man and by a woman. TR states that while he was reading the article grievant was rubbing his stomach and crotch and subsequently performed oral sex on him. TR testified that he ejaculated three times in a period of approximately twenty minutes and finally grievant rolled over and went to sleep.

TR testified that he was extremely upset, cried for a while and thought about how "...I could kill him and get away with it." (T. 30). TR remained awake that night and the following night and did not sleep in the bed with grievant either night; he considered leaving but was afraid grievant would awaken and "catch" him.

On Saturday morning grievant and TR went shopping in downtown Pittsburgh and later went to an ABC store, where grievant bought a fifth of Jim Beam whiskey. Returning to the motel, they drank some of the whiskey and went out to eat; grievant returned to the ABC store at TR's request to purchase a bottle of Peachtree Schnappes. About 5:30 p.m. they went to the stadium and remained until the show was over about 12:30 p.m.; they returned to the motel and consumed quite a bit of the alcoholic beverages. TR again watched TV all night and no sexual advances were made by grievant that night.[4]

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[4] Counsel for grievant had made a preliminary motion that Dr. Hawey A. Wells, Jr., an expert witness, be permitted to be present during TR's testimony for the purpose of evaluating his testimony for impeachment and the motion was denied. Dr. Wells subsequently testified that it was medically improbable that TR had ejaculated three times in twenty minutes or had remained awake for two days as he had testified. He did state, however, that "anything was possible with a juvenile."

Dr. Wells opined that TR was lying, an opinion which was stricken and given no weight by the hearing examiner for, unless inherently incredible, the uncorroborated testimony of TR is competent to sustain the charge, State v. Dolin 347 S.E. 2d 208 (1986); the testimony of Dr. Wells that TR was lying is clearly inadmissible as expert testimony or otherwise. United States v. Azure, 801 F.2d 33 (8th Cir. 1986). Cf. State v. Clark, 297 S.E.2d 849, 853 (W.Va. 1982).

The next morning, Sunday, the two ate at McDonald's and TR drove from outside of Pittsburgh to about a mile from Dunbar. On the way home TR states that grievant had his hand on his leg and otherwise maintained physical contact with him during the entire trip. (T. 17). They arrived in Dunbar about 3:15 p.m. and grievant dropped TR off at the family reunion at Dunbar City Park; TR did not tell his mother about the incident until the following afternoon.

TR's mother observed that he was very upset on Sunday afternoon but he did not discuss anything with her that day. The following morning about 10:00 a.m. grievant telephoned and he and TR's mother talked about the trip to Pittsburgh, the Sounds of Life costumes and about TR's girlfriend, grievant appearing to be preoccupied with telling her that TR was an adult but perhaps not ready for a boy-girl relationship. About 1:00 p.m. that day after TR returned from his grandmother's she asked him what happened and he began crying, stating "the worst" that "Allison ... really is a queer." (T. 42).[5] Over a period of time TR told her of the drinking, the Forum magazine and other details but wrote out the details of the oral sex act because it was difficult for him to relate. (T. 42, 43).

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[5] His response to his mother's inquiry varies somewhat, i.e., that grievant was a "goddamn queer" or "a goddamn faggot."

It was established on cross-examination that TR was not sexually naive, having engaged in sexual intercourse with his girlfriend and having had her perform oral sex on him. TR and his mother have a close relationship and they had discussed the possibility that TR's girlfriend was pregnant prior to the Pittsburgh trip (T. 23) and on the Sunday night he returned.

A lawyer in Dunbar advised Mrs. R. to contact Joe Beavers, a school official, and she conferred with Mr. Beavers on Friday afternoon. On Monday morning a representative of the child abuse division of the Department of Human Services was consulted and thereafter the matter was investigated by Detective R. L. West of the Kanawha Sheriff's Department.[6]

Grievant's account of the Pittsburgh trip is factually consistent with that of TR and he does not deny that he permitted TR to drive his car to and from Pittsburgh or that he purchased the beer, wine and whiskey he and TR consumed but denies that he gave TR the Forum magazine and performed oral sex on him.[7] He states that he purchased the alcoholic beverages in anticipation that his friends would visit at his motel but they didn't appear; that during the weekend he and TR had engaged in deep conversations

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[6] Detective West took written statements from TR and his mother and interviewed grievant on August 14. The written statements were admitted into evidence at the level two hearing.

Detective West stated that grievant did not know of any reason that TR would make these allegations and wanted to speak with an attorney. The local investigation was terminated and referred to the Allegheny County, Pennsylvania, authorities. (T. 57).

[7] Detective West testified that grievant felt that it had been poor judgment - a mistake - to buy the alcoholic beverages for TR (T. 57). Grievant stated he did not drink any of the whiskey that weekend, only wine (T. 95); that TR drank about four beers and five glasses of wine on Friday night and some whiskey, a couple of glasses of wine and three or four beers on Saturday night.

Grievant admitted that there had been a Forum magazine in his car when they went to Canton, Ohio in June and he had discussed it with TR, (T. 100-103), but asserts that he threw it away.

about TR's personal affairs with his girlfriend and TR was saying some bizarre things. Accordingly, grievant states, he telephoned Mrs. R on Monday morning and informed her of these conversations and she became upset. He acknowledged that he had not, however, advised TR that he intended to tell TR's mother of their conversations but concluded that TR felt that grievant had betrayed his confidence and fabricated the tale of the sexual assault in Pittsburgh.[8]

Over objection, grievant introduced the evidence of numerous witnesses who testified that grievant was a well liked and respected member of the community of Dunbar and was a good teacher. Several parents testified that grievant had taught their children and they would have no inhibition about grievant teaching or traveling with their children; that he is a fit person to teach

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[8] To develop this theory counsel for grievant was permited, over objection, to adduce the testimony of Dr. Hawey A. Wells, Jr., a medical doctor specializing in occupational pathology. Dr. Wells had some limited experience in counseling and group therapy and concluded, generally, that "hell hath no fury as a juvenile betrayed by a trusted adult", also known as a "rage reaction." However, it is unclear but it appears that TR was not aware of the details of the telephone conversation between grievant and his mother at the time TR informed his mother Monday afternoon and the connection is vague. (See e.g., T. 49, 134).

This evidence was not given much weight for that reason and because the qualifications of the witness as an expert in that field were dubious. (See footnote 4, supra.)

children.[9]

Counsel for grievant contends that the proceedings should be dismissed on the basis the termination notice given to grievant dated September 19, 1986 contained no specific charges and it was not possible to determine if grievant was discharged for permitting TR to drive his automobile, read a Forum magazine, drink alcoholic beverages or grievant's act of engaging in sexual misconduct.[10] Further, grievant contends that in order for

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[9] Counsel for the board objected that grievant's character was not in issue and that this evidence was therefore inadmissible. However, evidence of a teacher's general reputation in the community is generally admissible in a proceeding such as this when the character of the teacher becomes a crucial issue. Rogliano v. Fayette County Board of Education, 347 S.E.2d 220, 225 (W.Va. 1986).

It was also admissible for "truth and veracity" evidence and one witness testified that she would not believe that grievant would give a juvenile alcoholic beverages unless she heard grievant admit it.

[10] Counsel had made a similar motion at the outset of the level four hearing which was denied, subject to renewal at any stage counsel represented to the hearing examiner an inability to proceed due to lack of specificity and/or "surprise." At that point counsel had participated in a level two hearing and defended very vigorously all of the issues set out in the letter from Superintendent Trumble dated August 20, 1986. Counsel acknowledged that had the termination letter been as specific as the suspension letter, there would be no objection.

Admittedly, grievant is entitled to specificity of the charges, Guine v. Civil Service Commission, 149 W.Va. 461, 141 S.E.2d 364 (1965), to prepare a defense thereto. There was no indication that grievant was surprised by any of the evidence of the employer and the notice is similar to that given in Arnett v. Kennedy, 416 U.S. 134, 161 (1974), where a teacher had been given the names of the pupils to whom he allegedly made improper sexual advances. In the final analysis, no prejudice is apparent or has been shown in the form of termination notice given grievant, Fox v. Board of Education of Doddridge County, 160 W.Va. 668, 236 S.E.2d 243 (1977), and the ruling denying the motion to dismiss is affirmed.

the school board to terminate grievant's employment as a teacher it must establish by clear and convincing evidence that some act of misconduct of grievant rises to the level of "immorality" as defined in Golden v. Board of Education of the County of Harrison, 285 S.E.2d 665 (W.Va. 1981); that the "immorality" must bear some "rational nexus" to grievant's employment and render grievant unfit to carry out his responsibilities or impair or threaten the welfare of the school community. (Grievant's proposed conclusions of law, pp. 13-20).

Counsel for the board of education contends that sexual misconduct as evidenced in the instant grievance is inherently harmful to the student/teacher relationship and thus to the school district; that school officials have a duty to remove teachers from the classroom who are under an unacceptable disability directly bearing on their fitness to teach; that Golden v. Board of Education of Harrison County, supra, authorizes school officials to look at a teacher's conduct outside the classroom and there is a rational nexus between grievant's conduct with the male student and the duties grievant performs as a teacher and the interest of the public. (Employer's proposed conclusions of law, pp. 6,7).

A teacher works in a sensitive area in a schoolroom for there he shapes the attitudes of young minds towards the society in which they live. In this the State has a vital concern and must preserve the integrity of the school. Adler v. Board of Education, 342 U.S. 485, 493 (1952). Schools must teach by

example the shared values of a civilized social order and teachers, like parents, are role models. The schools, as instruments of the State, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent or offensive conduct. Bethel School Dist. No. 403 v. Fraser, 478 U.S.___, 92 L.Ed 2d 549,558 (1986). A teacher is held to a standard of personal conduct which does not permit the commission of immoral or criminal acts because of the harmful impression made on the students; the teacher has traditionally been regarded as a moral example for the students. Board of Education of Hopkins County v. Wood, 717 S.W.2d 837 (Ky. 1986).

The leading case in this State on the issues involved in this grievance is Golden v. Board of Education of Harrison County, 285 S.E.2d 665 (W.Va. 1981), which adopted the rule enunciated in Morrison v. State Board of Education, 1 Cal. 3d 214, 461 P.2d 375 (1969).[11] While it is generally agreed that Morrison

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[11] The principles set forth in Golden have been applied in several grievances decided by the Education Employees Grievance Board, e.g., Susser v. Kanawha County Board of Education, Docket No. 20-85-002, Rovello v. Lewis County Board of Education, Docket No. 21-86-081, Rosenburg v. Nicholas County Board of Education, Docket No. 34-86-125-1 and Copenhaver v. Raleigh County Board of Education, Docket No. 41-86-175-1. All of these grievances involved dismissals of employees for "immorality" in "off" and "on" the job situations. Susser was an alleged sexual assault by a teacher upon a student but the dismissal was based upon the pending criminal charges. Rosenburg involved a bus driver dismissed for alleged sexual misconduct with a student both "on" and "off" the job.

The precise issues involved in the instant grievance have not been addressed by the West Virginia Supreme Court of Appeals or the Education Employees Grievance Board.

stands for the proposition that conviction of a crime, without more, is not cause for teacher dismissal without a showing that the misconduct has materially affected the teacher's performance, it is also recognized that disciplinary action may be taken against a teacher without a showing of "adverse effect" where the teacher's conduct involves students and is patently inappropriate. Miller v. Grand Haven Board of Education, 151 Mich. App. 412, 390 N.W.2d 255 (1986); Coupeville School District No. 204 v. Vivian, 36 Wash. App. 728, 677 P.2d 192 (1984); Clark v. Ann Arbor School District, 344 N.W.2d 48 (Mich. App. 1983).[12] The preponderance of the evidence standard is the proper standard of proof to apply in teacher dismissal proceedings, including those in which conduct that might be considered a crime is charged.

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[12] Miller involved a teacher who had exposed his genitals to students and was dismissed; Vivian is analogous to the instant case in that the teacher was dismissed for permitting two sixteen year old students to consume alcohol on his premises.

Morrison involved two consenting adults and the Morrison principles were not applied in Board of Trustees v. Stubblefield, 16 Cal. App. 3d 820, 94 Cal. Rptr. 318 (1971), when the teacher was found in a parked car with a student. The clear import is that a teacher may be discharged on evidence that either his conduct indicates a potential for misconduct with a student or that his conduct, while not necessarily indicating such a potential, has gained sufficient notoriety so as to impair the student relationship. There appears to be no requirement that both the potential and the notoriety be present in each case.

In addition to the foregoing discussion the following specific findings of fact and conclusions of law are appropriate.

FINDINGS OF FACT

1. Grievant was employed by the Kanawha County Board of Education as a classroom teacher and choral music instructor at Dunbar High School; he had been employed for six years.

2. On Friday, July 18, 1986 grievant and TR, a sixteen year old male student at Dunbar High School, departed from Charleston in grievant's car to attend a drum and bugle corps competition in Pittsburgh, Pennsylvania, to be held on the evening of Saturday, July 19, 1986. The competition was not related to a school function but was an extended part of the marching band program. Grievant had taught drum corps for two years with a Canton, Ohio, group and frequently traveled to such shows.

3. The trip to Pittsburgh was at grievant's invitation and with the permission of TR's mother. About twenty miles from Charleston grievant permitted TR to drive his car with knowledge that TR did not have an operator's permit. The two stopped in Morgantown to permit TR to see the football stadium and proceeded to Pittsburgh, arriving about 5:00 p.m.

4. Grievant picked up the tickets at the stadium and began to look for lodging. While TR remained in the car grievant registered for a single room at a Best Western motel; the room had one bed.

5. Grievant and TR left the motel to eat and grievant drove to Weirton, West Virginia, to purchase a gallon of wine and six pack of beer. They returned to the motel room and commenced consuming the wine and beer.

6. Grievant and TR were on the bed and grievant gave TR a Forum magazine, a sexually explicit magazine, to read, directing his attention to a story about a young boy who had been raped by a man and woman. During this time grievant began rubbing TR's stomach and crotch and subsequently performed oral sex on TR; TR offered no resistance but was extremely upset. TR did not attempt to leave because he feared that grievant would awaken and "catch" him.

7. Grievant and TR remained in Pittsburgh as planned and attended the drum and bugle show Saturday evening. Grievant had purchased a fifth of Jim Beam whiskey and Peachtree Schnappes on Saturday and they drank some before going to the stadium. After the show was over at about 12:30 p.m. Saturday they returned to the motel room and thereafter consumed quite a bit more of

the alcoholic beverages. Both of them became intoxicated that night; TR did not sleep in the bed either night with grievant but remained awake in a chair.

8. The two left Pittsburgh Sunday morning and TR drove from just outside Pittsburgh to within a mile from Dunbar, grievant maintaining physical contact with TR during the entire trip. Grievant dropped TR off at Dunbar City Park, where TR's family was having a family reunion.

9. TR related parts of the oral sex episode to his mother on Monday afternoon, July 21, after she had talked with grievant that morning by telephone. TR's mother consulted a lawyer and then a school official; Detective R.L. West of the Kanawha County Sheriff's Department took written statements of TR and his mother and interviewed grievant. In the interview grievant admitted he permitted TR to drive his car and to consume the alcoholic beverages but denied that he provided TR with a Forum magazine or that he performed oral sex on him. With the exception of those denials grievant's testimony is largely consistent with TR's testimony. With slight variation, TR's testimony is consistent with the written statement and the testimony he gave at the level two hearing.

10. Based upon the demeanor of the witnesses, the consistency of TR's testimony in the material matters involved in this grievance, his account of the incident to his mother shortly thereafter and the lack of any credible explanation for such a false accusation against grievant, the conflict of evidence is resolved against grievant.

11. The evidence of the witnesses seeking to impeach and/or discredit TR's testimony is not persuasive for several reasons. First, the "rage reaction" theory was not substantiated by the evidence and its admissibility is questionable. The "rage" evidenced by TR is as readily explained as a reaction to grievant's act of oral sex upon him as by grievant's alleged breach of confidentiality. The testimony of Julie Yeager upon the motion to reopen the hearing is substantially contradicted by another witness and denied by TR. Moreover, it is not the type of evidence generally admissible on a motion to reopen on the basis of newly or after discovered evidence.

12. The type of sexual misconduct as described herein and giving and permitting TR to consume large quantities of alcoholic beverages is, at best, the maintenance of an unprofessional relationship with grievant's student and a total disregard for his responsibility as an educator. At worst, it is conduct constituting a criminal offense or offenses and there is no basis upon which the conduct can be either justified

or excused. This type of conduct is inherently harmful to the student/teacher relationship and to the school district and renders the grievant unfit to teacher.

13. The type of conduct engaged in by grievant with TR is "immoral" conduct warranting suspension or dismissal and is not in conformity with accepted principles of right and wrong behavior; it is contrary to the moral code of the community. There is a rational nexus between grievant's conduct with TR and the duties grievant performs as a teacher and the interest of the public. The conduct indicates a potential for future misconduct with a student or students and school officials have an interest and duty to protect minor students from exposure to this type of conduct.

CONCLUSIONS OF LAW

1. W.Va. Code, 18A-2-8 authorizes a county board of education to dismiss or suspend a teacher on the grounds of immorality, incompetency and/or intemperance. The preponderance of the evidence is the proper standard of proof to apply in a teacher dismissal proceeding, including those in which conduct that might be considered a crime is charged. Copenhaver v. Raleigh County Board of Education, Docket No. 41-86-175-1.

2. Disciplinary action may be taken against a teacher without proof of an adverse effect of the alleged misconduct where the teacher's conduct directly involves minor students and is patently inappropriate. Such conduct is presumed to have an adverse effect on the students, teachers and staff of a school.

3. Engaging in oral sex with a minor student or furnishing said student with alcoholic beverages constitutes "immorality" as a matter of law and directly affects a teacher's fitness to teach. Proof of either charge by a preponderance of the evidence will justify dismissal of the teacher. Coupeville School District No. 204 v. Vivian, 36 Wash. App. 728, 677 P.2d 192 (1984); Miller v. Dean, 430 F. Supp. 26 (D. Neb. 1976), affirmed, 552 F.2d 266.

4. The board of education has satisfied the burden of proof set out in Golden v. Board of Education of Harrison County, supra, and acted in good faith in attempting to preserve the integrity of the school system in Kanawha County.

For the foregoing reasons it is ORDERED that the grievance is DENIED.

Either party may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed within thirty days of receipt of this decision. (W.Va. Code, 18-29-7). Please advise this office of your intent to do so in order that the record can be prepared and transmitted to the Court.

LEO CATSONIS

Chief Hearing Examiner

Dated: December 30, 1986