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**WEST VIRGINIA EDUCATION  
EMPLOYEES GRIEVANCE BOARD**

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WILLIAM ROSENBERG

v.

Docket No. 34-86-125-1

NICHOLAS COUNTY BOARD OF EDUCATION

DECISION

On May 31, 1985 grievant, William M. Rosenberg, was suspended from his job as school bus driver for immorality by Bernard Poole, Superintendent of Schools of Nicholas County. The notice to grievant scheduled a hearing before the board of education on June 26th and specifically charged grievant:

"...with immoral conduct in that he entered into an immoral and extramarital sexual relationship with a minor female student at Richwood High School, age 16, who was transported to and from school on Bus Number 6 and Bus Number 79 in which said William Rosenberg (sic) was driver and on which said bus the relationship began. Said immoral relationship took place from September 1980 until May 1984 and

resulted in an illegitimate child being born of said student."<sup>1</sup>

A hearing was scheduled by the board of education on the suspension for June 26th but this hearing was continued upon the motion for counsel for the grievant; the hearing was rescheduled for August 14th, the suspension remaining in full force and effect. At the hearing on August 14th, the parties agreed to pursue appeal of the suspension in accordance with the newly enacted grievance procedure, i.e., Code, 18-29-1, et seq., and to continue the suspension in effect. On February 11, 1986 counsel for grievant requested a level four hearing and an evidentiary hearing was conducted on May 1, 1986.<sup>2</sup>

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<sup>1</sup> On May 2, 1985 Cynthia Trescott and Steve Trescott, her father, had instituted a civil action in the circuit court of Nicholas County alleging seduction and seeking back pay and child support in the total amount of \$553,120.00 against grievant and his wife. (Grievant's Exhibit No. 3). Thereafter, on May 29, 1985 an assistant prosecuting attorney representing the board of education deposed Ms. Trescott and her father concerning the allegations in the complaint; this suspension followed on May 31, 1985. Superintendent Poole was not aware of this situation until the civil action was instituted. (Aug. 14 hearing, pp. 22, 28).

<sup>2</sup> Grievant waived any defect in the grievance procedure to that point (August 14, T. 58), and no error is alleged in any of the procedural steps prior to or at level four. A level four hearing was first scheduled for March 6th and continued by the parties, rescheduled for April 3rd and again continued by the parties. The hearing was conducted in Summersville at the request of the parties because of the inordinate number of witnesses subpoenaed by the parties, i.e., thirty-three for the grievant and five for the board of education. At the request of the parties submission of proposed findings of fact and conclusions of law was deferred until the court reporter transcribed the evidence, which transcript was filed on June 16th. These findings and conclusions were submitted on June 27th and July 2nd; the foregoing accounts for the delay in disposition of this case.

Cynthia Brown, nee Trescott, testified that she first met grievant in 1980 when she commenced riding the school bus he operated; she was sixteen years of age at the time. She had baked a birthday cake for grievant and he requested that she come to his home and assist in painting some political posters to be used in his campaign for election to the House of Delegates. While she was at grievant's home she stated that grievant's wife told her they were contemplating hiring someone because their home was very large and they needed help to take care of it. Ms. Trescott was allegedly informed that she would be paid \$40.00 per week if she moved in with them; at that time she was seventeen years of age and still in school. Her parents assented and about a month after she moved in grievant commenced pinching her on the buttocks and engaging in "horseplay" with her. Grievant would also pinch her on the "bottom" as she exited the school bus and on several occasions she met him behind the Vo-Tec building where he parked his bus after completing his run and they would engage in petting, with grievant kissing her and fondling her breasts. While she was still in school she commenced having sexual relations with grievant in his home and this allegedly resulted in her pregnancy. She stated that grievant acknowledged that he was the father and requested that she have an abortion.<sup>3</sup>

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<sup>3</sup> She stated that grievant's wife was aware that she was having sexual relations with grievant and that they took showers together, etc. The child was born on December 12, 1984 and conceived in March, 1984 while she was with the Rosenbergs.

James D. Chapman is a school bus operator and has known grievant for five or six years. He rode in a carpool with grievant and Ms. Trescott and had observed grievant engaging in "horseplay" with her; he concluded that grievant was "crazy" because all of the drivers had been instructed to not have any sort of physical contact with the students. In his opinion, grievant engaged in flirtatious conduct with Ms. Trescott and on one occasion the two of them went behind the Vo-Tec building and remained there much longer than was necessary to park grievant's bus.

Lee S. Tuckwiller holds a Ph.D. in microbiology and medical microbiology from West Virginia University and is employed by Roche Biomedical Laboratories in Burlington, North Carolina. Over objection, he was permitted to testify to the blood testing results for paternity evaluation done by his firm, concluding that the alleged father, William Rosenberg, and the child, Tristan Trescott, shared common genetic factors; that using the HLA system the probability of paternity was 99.87 as compared to the random unrelated North American Caucasian population; that the alleged father (grievant) was practically proven to be the biological father of the child.<sup>4</sup>

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<sup>4</sup> The test had been ordered by the circuit court and was conducted on November 12, 1985. Counsel for grievant objected to its admissibility on the grounds that the results could only be used in a paternity suit pursuant to Code, 48-7-4, that the test violated grievant's constitutional rights and that the integrity of the evidence had not been established by a proper chain of custody showing. The accuracy and reliability of this test is

(footnote continued)

Grievant and his wife denied that grievant had engaged in acts of "immorality" and testified that it was Cindy's mother who requested that Cindy move in with them; that they had treated her as a daughter. They denied that they had agreed to pay her \$40.00 a week for doing housework for them but acknowledged that they had given her an allowance. Mrs. Rosenberg testified that Cindy had told her that she had engaged in acts of sexual intercourse with other men and that she (Mrs. Rosenberg) had taken her to the Welfare Office and obtained birth control pills for her (T. 204). Grievant presented the testimony of several witnesses who testified concerning Ms. Trescott's character and sexual activity and contended that Ms. Trescott had fabricated the entire story in order to enhance her chances of obtaining a money judgment against

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(footnote continued)

widely accepted, State ex rel. Oldaker v. Fury, 317 S.E.2d 513, 515 (W.Va. 1984) and the results are admissible in criminal cases, State v. Evans, 342 S.E.2d 684 (Ga. 1986), as a business record exception; the chain of custody goes to the weight and not admissibility. State v. Miller, 342 S.E.2d 553 (N.C. App. 1986). Moreover, the HLA test is not a blood test but a tissue test not excluded by the statute and is not a violation of grievant's Fifth Amendment rights. Commonwealth v. Beausoleil, 490 N.E.2d 788 (Mass. 1986). This evidence was given only slight weight and then as to the credibility of Ms. Trescott and not on the question of paternity, which was not an issue to be decided by the hearing examiner.

grievant in the pending civil action.<sup>5</sup>

Mr. Steven Trescott, Cindy's father, is also a school bus driver and pastor of a church in Craigsville, and corroborated much of his daughter's testimony concerning the arrangement under which Cindy had gone to the Rosenberg home to live; he had intercepted and listened in on two telephone calls from the Rosenbergs attempting to persuade Cindy to return to their home. (T. 260)<sup>6</sup>

Code, 18A-2-8 authorizes a board of education to suspend or dismiss any person in its employment at any time for immorality and under this provision the causes for suspension are the same as those for dismissal. Totten v. Board of Education of Mingo County, 301 S.E. 846 (W.Va. 1983). It is important that these sanctions be imposed only upon a showing of just cause, DeVito v. Board of Education, 317 S.E.2d 159 (W.Va.

<sup>5</sup> Mrs. Rosenberg testified as to one occasion in her home that she found her son and Ms. Trescott in bed together while he was visiting with her. Testimony by teachers indicated that grievant was a good bus driver and got along well with the children.

<sup>6</sup> Cindy had left the Rosenberg home in July, 1983, and returned to her parents' home. She was allegedly enticed to return to the Rosenberg home in October by the promises of a car and of being included in the Rosenberg will to receive the Rosenberg home. (T. 262). The testimony of Mr. Trescott at the level four hearing was consistent with the testimony he had given on May 29, 1985, alluded to in footnote 1, supra.

1984), and any doubt must be resolved in favor of the employee.

Hedrick v. Board of Education, 332 S.E.2d 109 (W.Va. 1985).

The term "immorality" is an imprecise word which means different things to different people but in essence it connotes conduct "not in conformity with accepted principles of right and wrong behavior and contrary to the moral code of the community...;

"... not in conformity with the acceptable standards of proper sexual behavior." Moreover, the situs of the alleged conduct

is highly significant, i.e., if the alleged immoral conduct occurred on or off the job.<sup>7</sup> Golden v. Board of Education

of Harrison County, 285 S.E.2d 665, 668 (W.Va. 1981) Cf. Rogliano

v. Fayette County Board of Education S.E.2d (W.Va.

1986), decided June 24, 1986, Justices Neely and Brotherton dissenting.

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

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<sup>7</sup> For examples of decisions of the Education Employees Grievance Board involving "on the job" conduct and "off the job" conduct involving dismissals, see Rovello v. Lewis County Board of Education, Docket No. 21-86-081 decided June 16, 1986 and Susser v. Kanawha County Board of Education, Docket No. 20-85-002, decided January 8, 1986. Although there is sufficient evidence of "on duty" conduct to uphold the suspension the writer is also of the opinion that there is a rational nexus between the "off duty" conduct and grievant's duties to cause school officials serious concern.

## FINDINGS OF FACT

1. On May 31, 1985 grievant was suspended from his position as school bus operator on the grounds of immorality pursuant to Code, 18A-2-8. At that time he had been so employed for approximately five years.

2. The alleged immoral conduct involved an extramarital sexual relationship by grievant with a sixteen year old female student at Richwood High School who was transported to and from school on a bus driven by grievant.

3. The grounds of the suspension was ostensibly uncovered by the filing of a civil action by the student and her father in May, 1985 setting forth the alleged seduction and the resulting birth of an illegitimate child. To investigate the matter, counsel for the school board deposed the student and her father concerning the allegations of the complaint and the suspension followed a few days later.

4. The evidence of the student was that grievant pinched her on the buttocks on several occasions as she exited the school bus and also engaged in other sexually oriented activity with grievant on school property and on school time. Grievant knew or should have known that it was definitely contrary to school policy for a bus driver to make physical contact with a student. The student also testified that she had engaged

in sexual intercourse with grievant on several occasions but these encounters occurred other than on school property or on school time -- primarily at grievant's home, where she stayed.

5. The evidence of the student was corroborated in pertinent part by another bus driver who observed the sexually suggestive and flirtatious conduct of grievant and the student and corroborated in part by her father. During this period of time she was seventeen years of age and still enrolled in school. The student became pregnant, delivered a child and testified that grievant acknowledged paternity thereof. This is denied by the grievant.

6. The school board also presented scientific evidence consisting of a blood testing procedure which measured genetic factors of the grievant and the child and concluded that the probability of paternity was 99.87; that the grievant was practically proved to be the biological father of the child. This evidence was considered primarily in relation to the credibility of the ex-student and not as to paternity.

7. Grievant denied the allegations of sexually oriented conduct, of having sexual intercourse with the student and of fathering her child and contended that the ex-student and her father were fabricating these charges in an effort to

obtain a money judgment against grievant in the civil action they had instituted against grievant and his wife.

8. Although the action of the school board was taken some considerable time subsequent to the commission of the acts for which grievant was suspended, the board acted within a reasonable time after learning of the incidents to preclude repetition thereof which it had a duty to do.

9. There is no showing that the superintendent or the board of education acted with an ulterior motive in suspending grievant to assist the Trescotts in the prosecution of their civil action or that their action in so doing was otherwise arbitrary or capricious.

10. The preponderance of the evidence is that grievant did, in fact, engage in immoral conduct as that conduct is defined in law and that the suspension of the grievant was warranted.

#### CONCLUSIONS OF LAW

1. Code, 18A-2-8 authorizes a board of education to suspend or dismiss any person in its employment at any time for immorality and such charges must be proven by a preponderance of the evidence.

2. The term "immorality" is an imprecise word connoting conduct not in conformity with accepted principles of right and wrong behavior and contrary to the moral code of the community.

3. Conduct involving the pinching and/or touching of the buttocks and/or breasts of a high school student by one who is charged with the safe keeping and transportation of said student to and from school is "immoral" conduct warranting suspension or dismissal of such employee, pursuant to Code, 18A-2-8. This and other conduct of the grievant is not in conformity with accepted principles of right and wrong behavior and is contrary to the moral code of the community.

4. There is a rational nexus between grievant's conduct with the student both on and off the job and the duties grievant performed as a bus driver and the interest of the public; hence the school board had a duty to protect the students from exposure to such conduct.

For the foregoing reasons the grievance is denied and the suspension of the grievant for immorality is affirmed.

Either party may appeal this decision to the Circuit Court of Kanawha County or Nicholas County and such appeal must be filed within thirty days of receipt of this decision. (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: August 4, 1986