EDUCATION EMPLOYEES GRIEVANCE BOARD

CHARLESTON DISTRICT

RE: GRIEVANCE OF
MS. JENNIFER J. SUSSER APPEAL NO. 20-85-002

OPINION

On September 16, 1985 grievant was arrested on warrants charging her with the commission of two felonies, i.e., third degree sexual assault by engaging in sexual intercourse with a thirteen year old juvenile in June and July, 1985. On September 17, 1985, grievant was advised by Superintendent of Schools David L. Acord that she was suspended with pay until such time as a preliminary hearing was held on the warrants; that if probable cause was found to hold grievant to the grand jury the suspension would be automatically converted to a suspension without pay pending a resolution of the charges. The letter also advised grievant that the suspension was subject to review by the Kanawha County Board of Education and that the superintendent reserved the right to conduct an independent investigation and, if warranted, to recommend some further disciplinary action to the Board of Education.

On September 19, the Board approved the suspension of the

grievant and on September 25, subsequent to the preliminary hearing and a finding of probable cause, grievant was notified that she had been suspended without pay effective September 24th pending a resolution of the criminal charges. By letter dated October 28th counsel for grievant demanded immediate reinstatement and by letter dated October 30th was advised by Board counsel that grievant had been suspended pursuant to Code, 18A-2-8, and that:

> ". . . the pendancy of felony criminal charges relating to sexual assault in the third degree amounts to an unacceptable disability having a direct bearing on fitness to teach. Furthermore, Ms. Susser's presence in the classroom at this time would present a significant probability of disruption in both the school system and the community."

On December 10, 1985, a Level Four hearing was conducted at which the Board presented evidence that the morning after the arrest of the grievant an associate superintendent, Carolyn Meadows, and the director of guidance and counseling, Dr. Mullett, called a meeting at Kanawha City Elementary School to respond to inquiries by the teaching staff and students regarding the arrest. In her opinion, from an administrative point of view, it would not have been appropriate to return grievant to the classroom because she believed there would be some disruption of the learning process in the classroom by the children asking questions about the incident; however, the morning she was at the school she was not aware of any disruption. She did not talk with any of the students or the parents but discussed the situation with

the superintendent and participated in the decision to suspend grievant.[1]

Dr. Mullett testified as an expert witness in the field of guidance and counseling and had spent about an hour with the principal, teachers and students the morning after the arrest of grievant. He was of the opinion that the learning ability of the students of a teacher in a similar situation as that of grievant would be adversely affected by the presence of the teacher in the classroom because the stress would reduce or inhibit the students' learning ability. He also stated that it would be quite difficult for this person to function within a classroom because of the adverse effects from parents and other teachers. He was not aware of any major problems at the school since his visit there and did not participate in any of the discussions leading to the suspension of grievant.[2]

Mr. Acord testified that grievant was initially employed at Alum Creek Elementary School in 1978 and thereafter transferred to the Kanawha City Elementary School as a sixth grade teacher.

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[1] She was of the opinion that there was a policy to suspend without pay whenever there was an arrest of this nature pending the outcome thereof but Superintendent Acord stated there was no such policy but it was normal procedure. Ms. Meadows was aware of another case involving an allegation of sexual abuse where the teacher had been placed on temporary assignment until the Department of Human Resources conducted an investigation.

[2] He had not reviewed grievant's personnel file and did not know of her teaching skills, etc., personally. There were people who could handle something of this nature and perform as a teacher but he was not in a position to say whether grievant had the ability to return to the classroom and do a good job.

Of the five evaluation reports received by grievant she had been rated from "commendable" to "outstanding" and it was acknowledged by Mr. Acord that she was an excellent teacher. He stated that he first learned of grievant's arrest from the news media and advised her by telephone on September 16th that he did not want her to return to school, that she would be suspended with pay.[3] She was suspended initially on the basis of his judgment that an employee charged with a felony should not be in the classroom; she was suspended without pay solely on the finding of probable cause by the magistrate.

Grievant presented the evidence of twenty two witnesses including parents of students taught by grievant both at Alum Creek Elementary and Kanawha City Elementary and past and present students who were very supportive and complimentary to grievant.[4] All of the witnesses stated that they had no objection to grievant's return to the classroom and that there had been no noticeable detrimental effect on the community or upon the school as a result of grievant's arrest and preliminary hearing.

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[3] He testified that it was normal procedure to suspend whenever a crime was charged and that each case was decided on its own merits. He did not conduct an independent investigation in the instant case.

[4] The thirteen year old student named in the warrants denied having sexual intercourse with grievant and his mother was highly supportive of grievant. Grievant's mother and husband testified that grievant had been ill and attended to by them on one of the dates of the alleged offenses and the transcript of evidence of the preliminary hearing was admitted into evidence. Counsel for the Board did not cross-examine any of these witnesses concerning the merits of the case and the hearing examiner only considered it in relation to the issues raised herein.

The basis of the Board's authority herein and the sole question to be decided arises under Code, 18A-2-8, which is, in pertinent part, as follows:

> ". . . a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination; intemperance or willful neglect of duty, but the charges shall be stated in writing served upon the employee within two days of presentation of said charges to the board. . ."[5]

Under the provision the causes for suspension are the same as those for dismissal, Totten v. Bd. of Educ. of Mingo Co., 301 S.E.2d 846 (W. Va. 1983) and it is important that these sanctions be imposed only upon a showing of just cause. DeVito v. Bd. of Educ., 317 S.E.2d 159 (W. Va. 1984). Any doubt must be resolved in favor of the employee in that school personnel regulations and laws are to be strictly construed in favor of the employee. Hedrick v. Bd. of Educ., 332 S.E.2d 109 (W. Va. 1985). Cf. Smith v. Bd. of Educ. of Logan Co., No. 16761, decided by the West Virginia Supreme Court on December 17, 1985, Justices Neely

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[5] Counsel for grievant also asserts that the grievant's constitutional rights to substantive and procedural due process have been violated because of the delay in granting her a hearing. Grievant filed a petition for mandamus in the Circuit Court of Kanawha County on November 15th and on December 2, 1985, Judge Harvey awarded the writ and directed that a hearing be held within ten days. At the time there were no hearing examiners employed, no office space or facilities for this newly created Board, etc., and the hearing on December 10, 1985, was held in the Capitol Building on short notice. For these reasons as well as for the reason that grievant has not shown any undue prejudice the claim is not well founded. Cf. Dolin v. Roberts, 317 S.E.2d 802 (W. Va. 1984); Johnson v. Dept. of Motor Vehicles, 318 S.E.2d 616 (W. Va. 1984).

and Brotherton dissenting.

In Golden v. Board of Ed. of County of Harrison, 285 S.E.2d 665 (W. Va. 1981) a high school guidance counselor was dismissed after being arrested for felony shoplifting and later pleading nolo contendere in a magistrate court to the misdemeanor of petty theft. At the hearing before the Board evidence was presented to support her professional competency and she contended on appeal that a misdemeanor conviction did not by itself constitute "immorality." The Court held that although the State may legitimately look into a teacher's conduct outside the classroom the conduct in question must indicate unfitness to teach or must impair or threaten the welfare of the school community. The Court concluded that the only evidence relating to "fitness to teach" was favorable and the Board therefore had no evidence from which it could conclude that the petitioner was unfit to teach.[6]

The Court, in Golden, referred to Morrison v. State Board of Education, 1 Cal.3d 214, 82 Cal. Rptr. 175, 461 P.2d 375 (1969) as the leading case in this area and at page 394 (416 P.2d) the California Court stated:

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[6] The Court noted that the only evidence submitted to the Board to support the charge of immorality were the records of the magistrate indicating the arrest and the plea of nolo contendere; that the Board apparently adopted the view that conviction on the misdemeanor charge was per se immoral conduct within the meaning of the statute or that it could dismiss Golden if the Board believed that her act was inconsistent with good order and proper personal conduct.

> "In deciding this case we are not unmindful of the public interest in the elimination of unfit elementary and secondary school teachers but petitioner is entitled to a careful and reasoned inquiry into his fitness to teach by the Board of Education before he is deprived of his right to pursue his profession. Our conclusion affords no guarantee that petitioner's life diplomas cannot be revoked. The Board can reopen its inquiry and has ample means to discipline for future misconduct."

In the instant case grievant was suspended with pay on the basis of her arrest upon felony warrants and thereafter suspended without pay on the basis of a finding of probable cause by a magistrate. The arrest, without more, would have very little, if any, probative value in showing the grievant's moral character, Schware v. Bd. of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L. Ed.2d 796 (1957) and the finding of probable cause was not sufficient evidence of "unfitness to teach" to justify a suspension without pay. Cf. Green v. Bd. of Educ., 133 W. Va. 356, 56 S.E.2d 100 (1949). Clarke v. Bd. of Educ. of Omaha, 215 Neb. 250, 338 N.W.2d 198 (1961), cert. denied 370 U.S. 720; Thompson v. Southwest School Dist., 483 F.Supp. 1170 (W.D. Mo. 1980).[7] It was incumbent upon the Board to satisfy the requirements of the Golden decision by a preponderance of the evidence and this it failed to

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[7] In the Thompson case a teacher had been suspended with pay on the basis of immorality and the evidence was similar to that in the instant case. The Court noted that even where there is a conviction of "immorality" the courts require a showing of harm to pupils, faculty, or the school itself. The Court granted an injunction restraining the Board from enforcing the suspension or terminating her contract.

do. Accordingly, the suspension of grievant without pay was not authorized under Code, 18A-2-8.

FINDINGS OF FACT

1. Grievant was a tenured teacher employed as a sixth grade teacher at Kanawha City Elementary School and has an excellent teaching record.

2. Grievant was arrested on two warrants charging her with the offense of engaging in sexual intercourse with a thirteen year old juvenile and was suspended with pay until such time as a preliminary hearing was held on the warrants.

3. Upon a finding of probable cause by a Kanawha County magistrate grievant was suspended on September 25, 1985 without pay effective September 24, 1985 pending a resolution of the criminal charge.

4. On September 26, 1985 counsel for the grievant requested a level four hearing in accordance with Code, Chapter 18, Article 29, effective July 1, 1985 and a court-mandated hearing was conducted on December 10, 1985.

5. There was an insufficient showing that the grievant was unfit to perform her duties or that her students and/or the

school community was or would be adversely affected as a result of her arrest and the subsequent finding of probable cause by a magistrate.

6. There was insufficient evidence of undue notoriety surrounding the arrest and preliminary hearing and the only evidence of any disruption of the regular affairs of the Kanawha City Elementary School occurred the day following the arrest of the grievant. The evidence of parents and students was highly supportive of grievant.

7. There was no evidence that the Superintendent and/or the Board of Education acted in any manner other than in a good faith effort and belief that suspension was necessary in order to protect the students and/or school community from any adverse effects resulting from the arrest and preliminary hearing of grievant.

CONCLUSIONS OF LAW

1. Grievant was not denied due process of law in failing to receive a requested hearing for approximately ten weeks in absence of a showing of prejudice.

2. Code, 18A-2-8 authorizes boards of education to dismiss or

suspend employees on grounds of immorality but when conduct outside the classroom is relied upon it must indicate unfitness to teach or impair or threaten the welfare of the school community.

3. When a teacher is suspended without pay on the basis of an arrest on warrants charging the commission of third degree sexual assult and the subsequent finding of probable cause thereon by a magistrate the burden is on the school board to establish by a preponderance of the evidence that sufficient cause existed for its action in light of the criteria set out in Golden v. Bd. of Educ. of County of Harrison, 285 S.E.2d 665 (W.Va. 1981). Each case must be examined on its own merits

4. The school board did not meet the evidentiary requirements of Golden and the suspension of grievannt without pay was not authorized.

DECISION

Upon the basis of the evidence presented it is the opinion and decision of the undersigned that the Kanawha County Board of Education did not carry its burden of proof that the arrest and finding of probable cause rendered grievant unfit to teach or impaired or threatened the welfare of the school community at Kanawha City Elementary School. It is accordingly ordered that grievant be reinstated with full back pay.

Either party may appeal this decision to the Circuit Court of Kanawha County by filing an appeal within thirty days of receipt of this decision in accordance with Code, 18-29-7. The record will be prepared for appeal upon request thereof and transmitted to the Circuit Clerk. Because the hearing of this matter necessitated employing a certified shorthand reporter by the Education Employees Grievance Board the costs of the transcript are allocated to both parties to this proceeding with the request that the Circuit Court review this allocation on appeal in light of Code, 18A-2-11 and Code, 18-29-5(b) and 8.

Dated: January 8, 1986

LEO CATSONIS
Hearing Examiner