

**REPLY TO:**

401 Davis Avenue
Suite 315
Elkins, WV 26241
Telephone: 636-1123

Offices

240 Capitol Street
Suite 508
Charleston, WV 25301
Telephone: 348-3361

Members

James Paul Geary
Orton A. Jones
David L. White

**WEST VIRGINIA EDUCATION
EMPLOYEES GRIEVANCE BOARD**

ARCH A. MOORE, JR.
Governor

GRACE WIGAL

v.

DOCKET NO. 38-86-069-2

POCAHONTAS COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, Grace Wigal, was employed by the Pocahontas County Board of Education as a teacher assigned to Pocahontas County High School when she was dismissed by the board of education on April 15, 1986. The basis for dismissal was immorality related to the cultivation and manufacture of a controlled substance, namely marijuana. In accordance with W.Va. Code, 18A-2-8 a grievance was filed directly at level four on April 21, 1986. Evidentiary hearings were held on May 6 and July 25, 1986 and April 13, 1987. A brief was filed by the grievant on July 15, 1987.¹

¹Hearings were also scheduled for this matter on June 30, July 7, December 18, 1986 and January 12, 1987. Delays were attributed to schedule conflicts, the taking of depositions, two changes in grievant's counsel and transcript requests. At the hearing conducted on April 13 the board indicated that it would call a rebuttal witness who presently resides in Florida.

(footnote continued)

On September 23, 1983 a warrant for the arrest of the grievant was issued charging her with the felonious possession of and the intent to deliver marijuana.² On September 26, 1983 the grievant was suspended without pay based upon a charge of immorality as evidenced by the cultivation and manufacture of marijuana. She was advised of her right to a hearing which would be conducted at the meeting of her choice on October 10 or 17. By letter of the same date the grievant notified Superintendent B. R. Bailey that she wished to waive her right to an immediate hearing to contest the suspension but reserved the right to petition for reinstatement upon acquittal of the criminal charges or other final disposition of her case.

(footnote continued)

Further hearings were to be scheduled to accomodate this individual. The hearing examiner was informally notified of the decision not to call this witness by Superintendent Carl Holland in June and both parties were requested to submit a brief by July 1. Grievant's counsel asked for and received a fifteen day extension. The board did not submit a brief or ask for an extension within the designated period of time. The opportunity to submit a reply brief in September was denied.

²Although this matter will be later discussed in more detail the account of events by Mr. Wigal was that he had surrendered himself to the prosecuting attorney who asked that he make a statement of his involvement. On the recommendation of counsel he declined to do so at which time Mr. Hunter indicated that if he did not make a statement the grievant would be arrested which in fact occurred.

On December 9, 1983 the grievant entered into an agreement with the Department of Justice in which she agreed to provide information, grand jury and trial testimony relative to the sale and cultivation of marijuana on property located in Pocahontas County, that she would cooperate in future investigations, pay \$25,000.00 to the United States, which amount represented profits obtained through any alleged illegal drug activity, cooperate with the Internal Revenue Service in determining tax liability and identifying assets of all individuals derived from monies received through the sale of the marijuana and that she would forfeit the acreage upon which the marijuana was growing. In return, the grievant would not be charged with any violation of state laws arising out of the sale and cultivation of the marijuana.

By letter dated December 13, 1983 grievant's counsel advised the board that all criminal charges had been dismissed and requested that she be reinstated to her position. At a meeting held on December 19 the board voted to continue the suspension "...until such time as there is established by evidence, either through a court of law and/or judicial decision or a decision of the Pocahontas County Board of Education, that her involvement is such that it would not impair her effectiveness as a teacher."

Ongoing negotiations not fully reflected in the record were apparently conducted regarding the grievant's employment status. Letters dated February 6 and February 13, 1984 indicate the possibility of the grievant submitting a retroactive resignation for which Superintendent Bailey would provide her a recommendation for future employment.³ A settlement was never reached and following another meeting between the grievant and Superintendent, the board of education once again voted to extend the suspension on April 23, 1984. Neither the minutes of the board meeting nor the superintendent's letter of notification to the grievant offered any explanation for the action.

By letter dated August 3, 1984 David A. Jividen, Assistant U.S. Attorney, advised Robert Martin, the grievant's attorney, that having resolved the matter "...the U.S. did not intend to charge Mrs. Wigel for any violation of federal law...". Mr. Martin forwarded that letter to the board of education on August 9 in another attempt to gain the grievant's reinstatement. On

³The grievant had at this point relocated to Colorado and was attempting to negotiate a settlement which would allow her to seek employment there without the suspension clouding her previous employment record.

August 15, 1984 Mr. Jividen notified J. Steven Hunter, Prosecuting Attorney and counsel for the board of education, that the grievant had fully complied with the terms of the agreement which she entered on December 9, 1983. This letter also referred to an attached affidavit regarding this matter signed by Assistant U.S. Attorney Thomas Mucklow.⁴ In this document dated June 20, 1984, Mr. Mucklow stated that an ongoing investigation was being conducted of possible federal violations committed by Gary and Grace Wigal and that a determination of whether or not they would be prosecuted would be made at a future time. The prosecuting attorney of Pocahontas County was requested to defer any prosecution of the Wigals until the federal investigation was completed.

By letter dated September 25, 1984 Superintendent Carl Holland directed Mr. Hunter to notify Mr. Haese that he would recommend that the grievant be dismissed from her position if

⁴This affidavit was not attached to the letter as submitted into evidence; however, such a document was included as an exhibit to the transcript of a deposition of Mr. Martin taken on February 7, 1987.

a letter of resignation was not received within two weeks.⁵

Superintendent Holland also stated his belief that he could convince the board to reinstate the grievant "...if we had a letter of resignation on hand."

By letter of January 18, 1985 Superintendent Holland notified the grievant of his intent to recommend to the board that she be dismissed. A hearing scheduled for February 14, 1985 was evidently never held as the grievant filed a petition for writ of mandamus in the Circuit Court of Pocahontas County, the matter being heard on March 25, 1985. The petition was denied by Judge Frank Jolliffe apparently on the basis of the Mucklow affidavit.⁶

⁵Although not positively identified Mr. Haese appears to have been grievant's representative while she was residing in Colorado.

⁶No order or decision of the court regarding this petition was submitted into the record. This conclusion is based upon information provided by Prosecuting Attorney Simmons during the questioning of Robert P. Martin. See deposition page 52.

Superintendent Holland again notified the grievant on April 11, 1986 that he would recommend her dismissal as a teacher. He notified her by letter dated April 16, 1986 that on the previous day the board had unanimously voted for her dismissal for reason of immorality, specifically for the cultivation and manufacture of marijuana.

At the level four hearing the board of education offered the testimony of former prosecuting attorney Steven Hunter, who reviewed the events relating to the arrests of Mr. and Mrs. Wigal, and that of Superintendent Holland, who provided a review of the board's action. Five present and past members of the board of education stated that the grievant could not return to Pocahontas County High School as an effective teacher due to the community response to her arrest. Eight citizens expressed their disapproval of her as a teacher and stated that if reinstated they would not allow their children to be assigned to her class. A guidance counselor at Pocahontas County High School indicated that several parents had notified him that their children were not to be assigned to the grievant's class and while problems could potentially occur, her return would not affect a large

portion of the student body. Kenneth Vance, principal at Pocahontas County High School, stated his belief that if returned to her position the grievant would continue to do a good job although some parents may create some disruption in the community.

The grievant admits that she knew of her husband's involvement with the other individuals in their cultivation of the marijuana, although she was not aware of the extent of his involvement at the time. She did not participate in the activities and strenuously disapproved of her husband's role but did not report him or the others to the authorities. She was co-owner of the land on which the marijuana was cultivated and had unknowingly benefited from the profits of the crop through money given to her by her husband.

The grievant's husband testified that his wife was so upset about his involvement with the marijuana crop that she had moved in with her mother for a period of time and had threatened him with divorce. To avoid further provocation he intentionally did not tell her of the extent to which he had become involved and he retained the profits in safety deposit boxes for which she had no key. It was he who paid the sum required in the agreement made between the Department of Justice and the grievant.

Mr. Wigal confirmed that he and the grievant owned two tracts of land, the farm on which they were residing in September, 1983 and an eighty acre farm approximately one mile from their residence. This farm had been sold to those other individuals involved in the cultivation of the marijuana for a sum to be paid in three installments. The grievant and her husband had retained the deed of trust pending final payment, which was never received. He also stated that he had given the grievant money received from his participation in the cultivation of the marijuana although he did not believe she was aware of its source, as they had been dealing with a large amount of cash from the sale of the property.

Throughout the grievant's employment with the Pocahontas County Board of Education there is no indication that her teaching performance has ever been less than satisfactory. Many of those witnesses called by the board commented that the grievant had been a good teacher and this fact is supported by her evaluations, the final two of which were rated at the highest possible level. The grievant also offered the testimony of a number of witnesses who testified that they believed the grievant to be a good teacher and that they would have no concerns about their children being assigned to her classes.

Citing the leading cases of Golden v. Board of Education, 285 S.E. 2d 665 (W.Va. 1981) and Rogliano v. Fayette County Board of Education, 347 S.E. 2d 220 (W.Va. 1987), the grievant argues that dismissal on the ground of immorality was improper when there was not substantial or reliable evidence proving that she had actually committed the acts of which she had been accused or when there was no showing of a rational nexus between the alleged conduct and the duties which she performs. The grievant requests that she be reinstated as a teacher at the Pocahontas County High School and be awarded lost wages from the date of her suspension.

W.Va. 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. 2d 546 (W.Va. 1983), Copenhaver v. Raleigh County Board of Education, Docket No. 41-86-175-1. 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. 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) and Rosenburg v. Nicholas County Board of Education, Docket No. 34-86-125-1.

As there is no evidence that the grievant's alleged misconduct had directly affected her performance of occupational responsibilities the board relies upon indirect nexus, i.e., when, without contribution on the part of school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the grievant to discharge her responsibilities. As evidenced by transcripts of several radio news reports and testimony of the witnesses, the grievant did achieve a certain degree of notoriety in the community following her arrest.⁷ It further appears from the testimony that the community interest subsided and would resurface only when official meetings were held to determine her employment status.

⁷Several witnesses "knew of" many others who shared their opinion that the grievant should not be reinstated. One witness who no longer has children at Pocahontas County High School conducted a poll in which he asked, "Do you approve of Grace Jane Wigal being rehired as a teacher in Pocahontas County?" While the responses were overwhelmingly "no" the participants did not indicate their belief that the grievant could not fulfill her responsibilities or that they would prohibit their children from being assigned to her class.

While it is difficult to determine the extent of the contribution of school officials in creating the notoriety it is noted that all of the board members indicated that they had discussed the issue with members of the community. A transcript of a radio report dated December 17, 1984 included a quote from Board of Education President Howell who stated, "I don't want to reinstate her... if it goes to court, the court will tell us what to do. It is a shame that people get away with these things." The board may have also indirectly contributed to the notoriety through its failure to take any definitive action regarding her employment status thus requiring that the matter be periodically raised thereby repeatedly bringing it to the attention of the community.

Findings of Fact

1. On September 23, 1983 the grievant was arrested for the felonious possession of and intent to deliver marijuana. As a result of this arrest she was suspended from her position as teacher at Pocahontas County High School without pay. At that time she waived her right to a hearing pending resolution of the criminal charges made against her in the warrant for her arrest but retained her right to petition for reinstatement upon the resolution of the matter.

2. In December, 1983 the grievant entered into an agreement with the Department of Justice, the terms of which are set forth in the body of this decision. The grievant fully complied with the terms of the agreement and was never indicted by either federal or state authorities.

3. Despite numerous attempts to gain reinstatement including the filing of a petition for writ of mandamus in the Circuit Court of Pocahontas County in 1985 the suspension remained in effect until April 16, 1986 when the board approved the recommendation for her dismissal.

4. The evidence suggests that the grievant's role in the criminal activities was created entirely through her relationship with her husband who was actively involved in the production of the marijuana. The only contact shown was her ownership of the land on which the marijuana was cultivated and the receipt of an unspecified amount of cash from her husband, the origin of which was unknown to her.

5. While a small group of individuals have stated their opposition to the reinstatement of the grievant it appears that the protest exists primarily at times of administrative or judicial adjudication. Another portion of the community expresses support

for the grievant while the majority of the community expresses no opinion whatsoever.

6. The notoriety attained by the grievant as a result of her arrest was in part attributable to actions of board members who discussed the matter with citizens, made comments to the press and were responsible for the unnecessary protraction of the proceedings against her.

7 There is no evidence that the grievant's ability to satisfactorily perform her duties as a teacher has been directly affected by her arrest. There is no evidence that any students were directly involved in or affected by the activities of the grievant or her husband.

8. The prolonged suspension has deprived the grievant of an opportunity to pursue her career not only in Pocahontas County but elsewhere as the suspension and ultimate dismissal on a charge of immorality would remain a part of her employment record.

Conclusions of Law

1. The board of education has failed to establish a rational nexus between the events which occurred in private, did not directly involve any student or school personnel and did not result in any criminal charges being brought against the grievant

and the duties which she performed as a teacher. Golden v. Board of Education, supra, Rogliano v. Fayette County Board of Education, supra.

2. As noted in Maynard v. Board of Education of Wayne County, 357 S.E. 2d 246 (W.Va. 1987) courts have generally been reluctant to award retroactive monetary relief to public employees who have filed actions after a lengthy delay and where to grant such relief would cause substantial harm to the public's fiscal affairs. However, in this instance the grievant has exercised diligence in seeking reinstatement while suspended and promptly instituted grievance proceedings upon her dismissal. The board of education knew or should have known that if the suspension was determined to be improper that it would be liable for back wages. The grievant's good faith waiver of wages from the date of her suspension until the resolution of the matter in December was reasonable and will be upheld.

The evidence was insufficient to warrant the prolonged suspension and termination of this individual's employment; accordingly the grievance is **GRANTED** to the extent that the grievant is to be reinstated to her position as teacher at Pocahontas County High School and be awarded back wages from December 19, 1983 with any appropriate set off and is **DENIED** as to the award of back wages from September 26 to December 18, 1983.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Pocahontas County and such appeal must be filed within thirty (30) 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.

DATED

October 15, 1987

Sue Keller

SUE KELLER

Hearing Examiner