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ALLEN McCROSKEY

v.

DOCKET NO. 51-88-116

WEBSTER COUNTY BOARD OF EDUCATION

DECISION

Grievant, Allen McCroskey, was employed as a teacher by the Webster County Board of Education until June 27, 1988 when the board voted to dismiss him from employment. A level four appeal was filed on June 27 and an evidentiary hearing was held on August 31 and September 1. Briefs were submitted by September 27.

The grievant was first employed by the Webster County Board of Education as a substitute teacher in 1982. He was awarded a full-time position teaching seventh and eight grade science at Webster Springs Elementary School in 1986 and held that position until his dismissal.

Superintendent Martha Dean recommended the grievant's dismissal to the board on March 28, 1988 based upon the charge of immorality. Two specific actions were cited to constitute the charge. First, that the grievant kept his hands in his pockets and appeared to play with his genitals and second, that the grievant was observed to have an erection on several occasions while conducting class. Superintendent Dean indicated the source of the information to have been students in the grievant's classroom.

Evidence presented at the level four hearing establishes that reports of similar conduct by the grievant had been filed with the Department of Human Services during the 1986-87 school year. Following an investigation the department issued a report on April 14, 1987 which indicated the grievant had been accused of misconduct in becoming sexually aroused as evidenced by erections occurring during classes. Upon interviewing twelve students the investigator determined that there was no indication of the grievant approaching the children in a manner which would appear to be of a sexual nature. She did determine that his clothing was too tight and that the children noticed a bulge which was present "...almost on a daily basis...during the entire classroom period..." and that the students perceived the grievant

to be in a state of erection. (Grievant's Exhibit 1) The investigator concluded that the only action necessary at that time was for the principal to assist the grievant in taking corrective measures regarding his manner of dress.¹

The grievant's behavior again became an issue in February 1988 when Assistant Principal Sue Anderson received complaints from a student and her mother that the grievant was teaching with an erection, was playing with himself and had been staring down the blouses and up the skirts of his female students. Ms. Anderson testified that when she questioned another student who confirmed the report she brought the matter to the attention of Principal Geoff Ezell. The testimony of Principal Ezell was that he spoke with the grievant who denied the allegations and explained that he had a tendency to keep his hands in his pockets jingling his change which the students might perceive as playing with himself.

Later that month the parent who had earlier complained of the grievant's alleged actions presented her concerns to the board of education and Superintendent Martha Dean was directed

¹There is no indication of whether the investigator spoke with or observed the grievant or did anything other than interview the twelve children.

to investigate the charges. She and Assistant Superintendent James Durham questioned approximately 90 of the 110-120 seventh and eighth grade students. Superintendent Dean stated that of the 42 girls who were generally questioned about "a teacher" 26 indicated that they had observed the grievant "playing pocket pool" or with an erection. The students characterized the action as "gross" and stated that they did not like to watch. Superintendent Dean indicated that by the end of the day on February 24 she determined that enough students had observed the behavior to warrant the grievant's suspension. When Superintendent Dean discussed the matter with the grievant he denied the charges and indicated that he had sewn his trouser pockets shut and had not worn tight or a certain pair of white trousers since the complaints were earlier brought to his attention. As the parents indicated the conduct was considered immoral, the rumors had effectively disrupted the learning process² and acted to diminish the public's respect for school officials who are charged with providing the best education possible, the superintendent

²The disruption of the learning process in the grievant's classroom was substantiated by Principal Ezell who testified that on or about February 23 (the day after the parents appeared before the board) the grievant came to his office complaining that he could not teach as the students were disruptive and calling him "crotch".

determined that it was necessary to recommend the grievant's dismissal.

The board did not submit a transcript of the interviews but did call as witnesses approximately nine students who testified that they had either observed the grievant in a state of erection or with his hands in his pockets manipulating himself.

The grievant denies that he engaged in self-stimulation or that he experienced erections while teaching. He argues that the evidence presented does not support the charges but rather establishes his innocence as indicated by the following. First, that the investigation conducted by the Department of Human Services had shown the earlier complaints to be not well-founded. Similarly, the actions taken in February 1988 were based primarily on rumors. Second, that the stated number of students who had indicated to Superintendent Dean in the interviews that they had observed the complained of actions must be unfounded as they did not testify at the level four hearing. Further, a number of those students who did testify on the board's behalf had experienced discipline problems. Some testimony was conflicting while other students indicated that the alleged actions caused them little or no distress. Still others did not offer testimony which could be construed as supportive of the charge.

Third, the testimony of the grievant's fellow faculty members and other school personnel had been that they had not observed any immoral conduct on his part. Fourth, character witnesses indicated the grievant to possess a good reputation. Fifth, in excess of thirty students called as witnesses by the grievant testified that they had not observed any immoral, improper or suggestive actions by the grievant.³ Sixth, testimony from medical experts established the grievant to suffer from a condition which was conducive to misinterpretation by the students.

To explain his medical condition the grievant offered the testimony of Jeffery Bowers, M.D., whom he had consulted in May 1988. Dr. Bowers diagnosed the grievant as experiencing a condition known as varicocele which, because of a dilated vein, causes the grievant's left testicle to be significantly more elevated than the right and the penis to be held in a more elevated position than normal. Dr. Bowers indicated that while the size of the penis was average the different angle caused the grievant to have a more noticeable bulge than the

³The grievant indicated that many more students were available to testify on his behalf; however, the number actually called was limited due to scheduling on the first day of school and the repetitive nature of the testimony.

average male. Dr. Bowers referred the grievant to Dr. Chua, a urologist, who confirmed the diagnosis. Dr. Jack Hunter also testified that the findings were consistent with acceptable medical theory. The grievant argues that the students, most of whom are sexually naive, misperceived his condition to be an erection.

The controlling issue in this matter is whether the grievant acted in an immoral manner by engaging in conduct not in conformity with accepted principles of right and wrong behavior and contrary to the moral code of the community. It is the determination of this examiner, based upon all available evidence and information, that the dismissal must be upheld.

Although the grievant offered a response to each and every accusation, the following points are persuasive. A considerable number of students indicated that they witnessed one or both of the complained-of actions. In its brief the board indicates that during the investigation conducted by Superintendent Dean 39 students stated they had observed the behavior. While less than ten of those students testified at the level four hearing the number was significant as it establishes that this was not a conspiracy of a few to get "rid of" or "even with" the grievant.

While a greater number of students testified that they had not observed the behavior this would be expected in a group of approximately 120 and does not lessen the impact of the testimony of those who did observe the actions.

Second, the reports of the grievant's behavior occurred during two separate school terms. There appears to be no motivation for the children to do the grievant harm and according to Principal Ezell they are not part of a clique who may be acting together. Although the students are at an age where sexual inexperience may still be the norm they were all familiar with the terms "pocket pool" and "erection" and seemed to be reasonably comfortable in their discussion.

Third, the self-described behavior of the grievant supports the conclusion that the cited events took place and raises questions as to the veracity of his denial. The grievant admits that he wore white trousers to school without benefit of underclothing on one occasion. He states that he did not have on undershorts as he was experiencing some discomfort from his varicocele but that he had worn an athletic supporter. This comment raises questions of how he could tolerate an athletic supporter if undershorts could not be worn. One must also wonder why, if he had been afflicted with this condition since

the age of 13 as he indicated, he had not consulted with a physician until after he was suspended. Other actions, such as sewing his trouser pockets shut to keep his hands out of his pockets, wearing trousers several sizes too large, moving his desk to the back of the room and requiring girls dressed in a certain manner to sit facing the wall to avoid charges of looking up their skirts, may have been attempts to stop the accusations; however, such overreactions may also be interpreted as guilt. These actions certainly did not silence the accusations but seemed to have fanned the flames.

Finally, great weight is accorded to the testimony of Principal Ezell. As the person who was familiar with the students, parents and the grievant and based upon all of the information available to him, Mr. Ezell responded that it was his belief that the grievant engaged in the activities constituting the charge of immorality.

As the charged behaviors occurred in the classroom the testimony of the students clearly demonstrated how it interfered with the ability of the grievant to perform his duties. When the students were distracted by his actions learning was not taking place and discipline was rapidly deteriorating.⁴

⁴A secondary question of whether the grievant had attained tenure need not be addressed due to the outcome of this decision.

In addition to the foregoing narration it is appropriate to make the following specific findings of fact and conclusions of law.

Findings of Fact

1. The grievant was first employed by the Webster County Board of Education as a substitute teacher in 1982. He was employed under a regular probationary contract in 1986.

2. The grievant was assigned as a seventh and eighth grade science teacher at Webster Springs Elementary School from 1986 until his suspension in February, 1988.

3. In early February Principal Geoff Ezell received a parental complaint that the grievant was sexually stimulating himself and was observed to have an erection during class.

4. At a meeting on February 22 the parent presented her concerns to the Webster County Board of Education which directed Superintendent Martha Dean to investigate the allegations.

5. Approximately 92 of the 120 seventh and eighth grade students were interviewed by Superintendent Dean and Assistant Superintendent Durham. Superintendent Dean determined that 39 of the students confirmed that the grievant had been "playing with himself" or was observed with an erection on various occasions.

6. Based upon the student interviews Superintendent Dean suspended the grievant, without pay, effective February 24 and presented the charge of immorality to the board on March 28. Following a hearing held by the board on June 7 the recommendation for dismissal was unanimously approved on June 13.

7. The board of education presented numerous students who testified that they had observed the grievant to have engaged in self-stimulation or with an erection while teaching.

8. Principal Geoff Ezell testified that, based upon his familiarity with the students and the grievant, he believes that the alleged actions occurred.

9. Similar charges had surfaced during the 1986-87 school year when, as a result of a private complaint, an investigation was conducted by the Department of Human Services.

10. The actions interfered with the grievant's ability to teach as evidenced by the students' distraction from the subject matter, his loss of classroom control and the respect of the students.

11. The grievant presented the testimony of more than 30 students who indicated that they had not observed him engaging in improper, immoral or suggestive behavior.

12. The grievant has been diagnosed as having a condition known as varicocele which causes one testicle to be somewhat elevated and the penis to be held at a more elevated angle.

13. The grievant's own testimony regarding his condition and actions are of such an absurd nature that they cause one to question the veracity of his denial of the alleged actions.

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, incompetence, cruelty, insubordination or willful neglect of duty.

2. The authority of a board to dismiss a teacher must be based upon the just causes stated supra and must be exercised reasonably, not arbitrarily or capriciously. Beverlin v. Board of Education, 158 W.Va. 1067, 216 S.E. 2d 554 (1975); Devito v. Board of Education, 317 S.E. 2d 159 (W.Va. 1984).

3. The preponderance of the evidence is the standard of proof to apply in dismissal proceedings. Copenhaver v. Raleigh County Board of Education, Docket No. 42-86-175-1; Allison v. Kanawha County Board of Education, Docket No. 20-86-273-1.

4. The term "immorality" is an imprecise word which means different things to different people, but in essence connotes

conduct which is not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; and especially not in conformity with the accepted standards of proper sexual behavior. Golden v. Board of Education the County of Harrison, 285 S.E.2d 665 (W.Va. 1981); Rovello v. Lewis County Board of Education, Docket No. 21-86-081.

5. A teacher may be dismissed without direct proof of an adverse effect of the alleged misconduct where the 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 the school. Allison v. Kanawha County Board of Education, Docket No. 20-86-273-1; Grob v. Taylor County Board of Education, Docket No. 48-86-349.

6. Masturbating or engaging an erection during class time 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.

7. 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 Webster 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 or to the Circuit Court of Webster 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 31, 1988

Sue Keller

SUE KELLER
HEARING EXAMINER