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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

GASTON CAPERTON
Governor

MARIE JANE KITZMILLER

v.

DOCKET NO. 13-88-189

HARRISON COUNTY BOARD OF EDUCATION

DECISION

Grievant, Marie Jane Kitzmiller, has been employed for seven years as a teacher by the Harrison County Board of Education (Board). Ms. Kitzmiller filed a grievance directly to level four on October 4, 1988 in which she alleged that she had been suspended without pay in violation of her contract rights and without providing a reasonable or rational nexus between a pending criminal charge and her ability to perform the functions of her job. An evidentiary hearing scheduled for October 28 was continued and rescheduled by the parties for November 3. That hearing was continued upon a Motion by the grievant in which she asserted that her criminal trial had been scheduled for November 21 which would force her to choose between giving up her right of silence and testify at the grievance hearing, possibly impairing her rights at the criminal trial, or maintain her silence to the detriment of the grievance hearing. The Board did not oppose the Motion which was

granted. Counsel for the grievant advised the examiner by letter dated November 22 that the criminal trial had been postponed and the grievant wished to have the hearing rescheduled. The level four hearing was subsequently held on December 21, 1988. A video deposition was submitted on January 10, 1989 and final written statements were filed by February 17, 1989.¹

The facts in this matter are undisputed. The grievant was arrested on July 30, 1988 and charged with conspiracy to commit murder.² Magistrate Mable Matko entered a Judgment Order on August 15 in which she found probable cause and bound the matter over to the Circuit Court. The grand jury later returned an indictment against the grievant. By letter dated September 28 Superintendent Robert Kittle notified the grievant that the Board had voted to suspend her without compensation effective August 25 until such time that the judicial process had made a final disposition of

¹Ms. Deann Davis had been subpoenaed for the December 21 hearing but did not appear. The examiner was notified that she was suffering from a migraine headache and had been given medication to induce sleep. The video deposition was suggested by the parties as an alternative to reconvening the hearing at a later date.

²The object of the alleged conspiracy was Nancy Kitzmiller, the former wife of the grievant's husband and an employee of the Board assigned as a secretary at Wyatt Elementary School.

the crime for which she was charged, the Board reviewed that determination and changed her state of employment.³

The Board argues that the suspension was properly imposed under the requirements of W.Va. Code §18A-2-8 and Golden v. Board of Education of Harrison County, 285 S.E. 2d 665 (W.Va. 1981). In support of its position the Board presented the testimony of Joseph Loretta and Sgt. Jerry Brown to establish the grievant had acted in an immoral manner. Mr. Loretta testified that the grievant had contacted him to seek his assistance in locating a "hit man". He described his contacts with the grievant and his cooperation with the authorities after he had reported the incident to U.S. Attorney William Kolibash. Sgt. Brown described his efforts in the investigation and subsequent arrest of the grievant.

The Board asserts that not only did the grievant act in a manner contrary to the moral code of the community but also that a rational nexus exists between the conduct and her duties as a teacher. Rosalie Dolan, principal of Wilsonburg Elementary and James Eakle, principal of Adamston Elementary, grievant's assigned schools for the 1987-88 school term, both testified that they believed the grievant

³Although no document was entered into the record both parties indicate the grievant was initially suspended by Superintendent Kittle on August 9.

would be impaired in the performance of her duties as a teacher as a result of the pending criminal charges. Their concerns included the grievant's ability to provide a positive role model or instill desirable morals and values, her ability to adequately perform while under tremendous stress and her anticipated absenteeism necessitated by ongoing legal proceedings. Both principals stated that they had not received any parental calls of concern but attribute the lack of reaction to the fact that the grievant had earlier been placed on the transfer list and was not scheduled to return to their schools.⁴ Both also stated that they would anticipate parental reaction if the grievant was returned to a teaching position at this time.

Superintendent Robert Kittle testified that he had initially imposed the suspension pending grand jury action. At that time his decision had been made after discussing the matter with two assistants and was based upon the information contained in the complaint and the warrant for the grievant's arrest. He opined that the alleged action of the grievant was inconsistent with the policies and philosophies of the school system; that the impending charge would impede her in the performance of her duties and that to have allowed her return to the classroom would have resulted in a

⁴Grievant's placement on the transfer list had been motivated by enrollment changes and had occurred long before her arrest. As of August 9 she had not yet been assigned a position for the 1988-89 school term.

major public uproar. Superintendent Kittle stated that he did not conduct an investigation following the suspension of August 9 but after considering the magnitude of the charge, the returned indictment, supplemental indictment, five or six telephone calls from parents, media coverage and his concern for the safety and welfare of staff and students he determined that the matter should not be taken lightly and recommended the indefinite suspension. He further stated that he would recommend the grievant's reinstatement if and when she is cleared of all charges.

The grievant argues that the suspension is improper for two reasons. First, a mere criminal charge does not constitute immoral conduct. She has not pled guilty and as of this time there has been no adjudication of guilt, therefore an act of immorality has not been established. Second, the Board has failed to show a rational nexus between the charges which were brought for alleged activities outside of her job and the duties she is required to perform.

The grievant asserts that the Board has failed to demonstrate either that the charges have directly affected her ability to perform the occupational responsibilities of a teacher or that the charges have become the subject of such notoriety as to impair her capacity to teach. In support of her position the grievant argues that prior to her arrest her evaluations had been satisfactory and since that time no administrator has had the opportunity to

evaluate her performance. Four co-employees (a Coordinator, two teachers and a teacher's aide) gave their opinion that the pending charges would not affect the grievant's ability to perform her duties as a teacher. Six parents of grievant's former students testified that they would have no qualms regarding her return to the classroom.

Based on her contention that the Board has failed to prove either that she acted in an immoral manner or established a rational nexus between the indictment and her ability to perform the duties of a teacher she requests to be reinstated to her position and to be awarded backpay.

This matter raises two issues which must be addressed in order to reach a decision: may a board suspend an employee based upon an indictment alone and does a rational nexus exist between the indictment and the grievant's ability to perform her duties as a teacher. See: Susser v. Kanawha County Board of Education, Docket No. 20-85-002 (Jan. 8, 1986).

The precise issue of whether a board may suspend an employee following her indictment on charges which, if committed, would constitute immorality has not been addressed by the W.Va. Supreme Court of Appeals or the Education and State Employees Grievance Board. Guidance has been provided by the federal courts in the matter of Brown v. Department of Justice, 715 F.2d 662 (1983) which upheld the suspensions of two border guards following their indictments on charges of conspiracy to defraud the government.

The Court in Brown addressed two additional alternatives which the agency may have chosen, but found neither appropriate. No action by the agency was unacceptable as the indictments were a matter of public record and public knowledge that employees formally accused of a crime were still on duty would erode public confidence in the agency. The second alternative was to require that the agency base the suspensions on the alleged unlawful conduct and to prove independently that the conduct actually occurred. Citing the dangers of possible improper interference with pending criminal proceedings, this option was dismissed. In determining that the suspensions were proper the Court noted that the disciplinary actions were based only upon the indictments, not on the conduct alleged therein, and were conditioned on the outcome of the employees' involvement in the criminal justice system. The Court reasoned that while an indictment is not an act of the employee and is not evidence of the employee's acts, it does provide sufficient evidence to establish reasonable cause to believe the employee has committed the alleged criminal conduct. The Court concluded that the interests of both the employees and the public are better protected by allowing suspension based on an indictment alone rather than permitting no action or requiring administrative inquiry into the alleged unlawful conduct.

This reasoning of the Court in Brown is easily and reasonably applied to the instant grievance. The indictment of the grievant on the charge of conspiracy to commit

murder establishes reasonable cause to believe that she engaged in the action. Allowing her to remain on duty would undoubtedly undermine the integrity of the school system, yet it would be improper for the Board to conduct its own adjudication of the criminal charges. Therefore, a board may suspend an employee based upon an indictment alone if a rational nexus can be shown to exist between the indictment and the duties the employee is to perform.⁵

In West Virginia a board may suspend or dismiss an employee at any time for immorality, incompetency, cruelty, insubordination, intemperance or willful neglect of duty W.Va. Code §18A-2-8. However, before such disciplinary action may be taken regarding acts committed outside the workplace a board must establish a "rational nexus" between the conduct and the duties the employee is to perform Golden v. the Board of Education of the County of Harrison, 169 W.Va. 63, 285 S.E.2d 665 (1981). This nexus may be shown if the conduct directly affects the occupational responsibilities of the teacher or if, without contribution by school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the particular teacher to discharge the responsibilities of the teaching position. Rogliano v.

⁵In Brown it was unnecessary to independently establish a rational nexus as the alleged conduct was work-related i.e., interfering with the functions of the Border Patrol.

Fayette County Board of Education, 347 S.E.2d 220 (W.Va. 1986).

The Board asserts that rational nexus does exist between the indictment and the grievant's ability to perform the duties of her position. Principals Dolan and Eakle and Superintendent Kittle concluded that in their professional opinions the most serious nature of the charge against the grievant would interfere with her ability to perform her professional duties. They characterized the alleged actions as inconsistent with the policies and philosophy of the school system and believe that she would be unable to provide a positive role model or to instill desirable morals and ethical values.

The administrators surmise that because the incident occurred during summer break and prior to the grievant being assigned to a school there has been no protest regarding her resuming work. However, witnesses for both parties have established that the grievant was named and identified as a teacher in television and newspaper coverage, that she has been the topic of conversations for staff, parents and members of the community and has become the subject of much notoriety in Harrison County. If she were reinstated the administrators agree that parents would protest their children being placed in her classroom. As these administrators are familiar with the citizens of their county great weight must be given to their assessment of public reaction. Conversely, the testimony of the grievant's rebuttal

witnesses, parents who stated they had no reservations about having their children in the grievant's classroom, is not persuasive as none currently have children in kindergarten.

As the grievant's ability to perform her occupational duties has been impaired by the criminal charges/indictment brought against her and with the reasonable expectation of parental complaints upon her assignment to a position, the Board has established a rational nexus between the indictment and the duties the employee is to perform.

The affirmation of the Board's decision to suspend in this instance follows numerous other holdings which recognize that a teacher works in a sensitive area in a schoolroom for there he shapes the attitude 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 may 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 offensive conduct. Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 92 L.Ed 2d 549, 558 (1968). 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).

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. Grievant is employed as a teacher by the Harrison County Board of Education.

2. In July 1988 the grievant was arrested and charged with conspiracy to commit murder. She was later indicted by the grand jury of Harrison County on this charge and a trial remains pending.

3. The grievant was initially suspended from employment by Superintendent Robert Kittle on August 9. The Board voted to suspend her effective August 25 pending a final disposition of the criminal charges and Board action changing her state of employment.

Conclusions of Law

1. A teacher works in a sensitive area in the schoolroom and in this the state has a vital concern. School authorities have the right and the duty to screen officials, teachers and employees as to their fitness to maintain the integrity of the schools as a part of ordered society.

James v. W.Va. Board of Regents, 322 F. Supp. 217. (S.D. W.Va.) aff'd 448 F.2d 785 (4th Cir. 1971).

2. A board may suspend any person in its employment at any time for immorality. W.Va. Code §18A-2-8. However, the authority of a board to suspend or dismiss a teacher must be based upon just cause and exercised reasonably, not arbitrarily or capriciously. DeVito v. Board of Education, 317 S.E. 2d 159 (W.Va. 1984); Beverlin v. Board of Education, 158 W.Va. 1067, 216 S.E. 2d 554 (1975); Webb v. Mason County Board of Education, Docket No. 26-88-206 (Jan. 5, 1989); Carden v. Boone County Board of Education, Docket No. 03-87-056-4 (June 13, 1987).

3. A board of education may conditionally suspend an employee based upon an indictment alone if it can establish a rational nexus between the indictment and the employee's ability to perform the duties of her position. Susser v. Kanawha County Board of Education, Docket No. 20-85-002 (Jan. 8, 1986).

4. To establish a rational nexus between the employee's conduct complained of and the duties to be performed a board of education must show that the alleged immoral conduct directly affects the performance of her occupational responsibilities or if, 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 particular teacher to discharge the responsibilities of the teaching position. Rogliano v.

Fayette County Board of Education, 347 S.E. 3d 220 (W.Va. 1986); Golden v. Board of Education of the County of Harrison, 285 S.E. 2d 665 (W.Va. 1981).

5. The Board has established by a preponderance of the evidence that as a result of the indictment the grievant's ability to perform the responsibilities of a teacher has been impaired.

Accordingly, the grievance is DENIED.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Harrison County and such appeal must be filed within thirty (30) days of receipt of this decision. (W.Va. Code §18-29-7) Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court

DATED: March 31, 1989

Sue Keller

SUE KELLER

HEARING EXAMINER