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PAUL LANDY

v.

Docket No. 89-41-232

RALEIGH COUNTY BOARD OF EDUCATION

DECISION

Grievant, Paul Landy, was employed by the Raleigh County Board of Education (Board) as a substitute bus driver until his dismissal on May 19, 1989. Pursuant to W.Va. Code §18A-2-8, he filed an appeal of that dismissal with the West Virginia Education and State Employees Grievance Board and a hearing was held July 24, 1989. The parties submitted proposed findings of fact and conclusions of law by August 24, 1989.

Beginning March 6, 1989, grievant began substituting for a Mr. Greg Daniels, whose assignment entailed picking up and returning students along Rock Creek Hollow. Normal completion of the morning run required the driver to drive up the hollow, turn around at a designated stop and await the arrival of students. Once these students boarded, the driver would proceed out of the hollow and pick up other students along the way. It was Mr. Daniels' practice to pick up the latter on the initial drive up the hollow if they were present at that time. On the morning of

March 8, 1989, grievant followed this practice and picked up Michelle Dick, a fifteen-year-old student at Marsh Fork High School (MFHS). No other students were on the bus at that time. Later that day another student at MFHS, Tina Cantley, reported to the principal, Mr. Ronald Cantley, that Ms. Dick was upset. In his initial conversation with Ms. Dick, during which she was crying, Mr. Cantley was only able to discern that she was upset about something which had occurred on the bus. He arranged for her to talk to Ms. Webb, a home economics teacher at the school, as she requested. Ms. Webb talked to Ms. Dick and the following day both met with Mr. Cantley; Mr. Richard Mann, Transportation Director, and Julie Nipper, another student at MFHS. During this meeting, Ms. Dick made an allegation that grievant had made sexual advances toward her the preceding morning. Ms. Nipper corroborated at least part of the events related by Ms. Dick. Mr. Mann subsequently informed the grievant that allegations of sexual misconduct had been made by a student and that he was not to make the evening bus run. Mr. Mann had another discussion with the students on March 16 and on March 17 he and Mr. John Hartsog, Assistant Superintendent, met with grievant and his father, at which time the exact nature of the students' charges were explained.

By letter dated April 5, 1989, Superintendent of Schools Dr. Tom McNeel informed grievant he was suspended for "immorality related to your misconduct with one or more female students". Dr. McNeel's letter further advised grievant that he would make recommendation for dismissal for the same reason. He also

informed grievant that he was entitled to a hearing before the Board. Grievant appeared with counsel at a Board meeting on April 27, 1989, at which time a hearing was held in which Mr. Cantley, Mr. Mann, Michelle Dick, Julie Nipper, grievant and grievant's mother testified. By letter dated May 19, 1989, Dr. McNeel informed grievant that the Board voted on May 16, 1989, to accept his recommendation for dismissal.

At the Level IV hearing the Board offered a certified transcript of the April 27, 1989, hearing and declined to offer further evidence in support of the charges against the grievant. Grievant and his parents testified. Grievant stated he had picked up Ms. Dick as he made his morning run up Rock Creek hollow on the morning in question as he had been directed by Mr. Daniels but that he had made no advances of any kind toward her. He essentially testified that nothing unusual whatsoever had occurred during the run. Grievant's parents, with whom he lived at the time, testified that Ms. Dick had made several calls to their home on the night of March 5, 1989 and asked to speak to the grievant but refused to leave messages when told he was not in.

Grievant disputes the sufficiency of the evidence adduced at the April 27 Board hearing and contends the testimony of the two students involved was inconsistent. He also maintains the failure of the Board to call the students to testify at the Level IV hearing prevented observations of their demeanor and conclusions as to their credibility. The Board contends it was the responsibility of the grievant to subpoena the students. For

reasons hereinafter discussed, the undersigned agrees with the grievant's second assertion.

It is a well-settled principle that, upon an education employee's appeal of a disciplinary action, pursuant to W.Va. Code §18A-2-8, the county board of education has the burden of proving by a preponderance of the evidence the charge(s) against said employee. Kirk v. Mingo County Board of Education, Docket No. 89-29-99 (September 12, 1989); Putnam v. Braxton County Board of Education, Docket No. 04-88-022-4 (May 13, 1988); Garcia v. Marshall County Board of Education, Docket No. 25-87-274-3 (December 29, 1987). Transcripts of testimony adduced before the disciplinary action is taken can and should be afforded some probative value upon an employee's appeal. Much of the foregoing recitation of the steps taken by administrative personnel prior to the presentation of charges to the Board were derived from the transcript of the April 27 hearing. Determinations concerning the credibility of those persons are not of great importance as their testimony was not offered as proof that the actions for which grievant was dismissed actually occurred. Their involvement was of an investigative nature only. The testimony of the two students, however, is crucial.¹ A review of the transcript reveals that Michelle Dick claimed that, on the morning in

¹The undersigned advised counsel for the Board at the Level IV hearing that a previous review of the transcript revealed the outcome of the case might depend upon conclusions as to the veracity of the two girls. Counsel acknowledged this concern but declined to proceed otherwise.

question, grievant stopped in front of her home and waited for her to board the bus even though she was inside her home at the time. She further stated that, upon their arrival at the designated stop at the end of the hollow, he left his seat and kissed her. She also testified that he pushed her to the middle of the bus and onto one of the seats whereupon he got on top of her and attempted to unbuckle her belt. According to Ms. Dick, grievant only stopped when he realized another student, Ms. Nipper, had approached the bus and was waiting to board. Ms. Dick claimed she called grievant's home the previous night in order to tell him she would not be boarding the bus on his way up the hollow. She stated she had informed him the previous morning that she would be boarding early but later decided she would not. Ms. Dick did not explain why she did not leave a message with grievant's parents when told he was not at home.

Ms. Nipper testified that as she approached the bus that morning a car passed and, as its headlights shone on the bus, she saw Ms. Dick and grievant toward the back of the bus. She stated Ms. Dick was in a reclining position in one of the seats and grievant was "hunched in front of [her]" (T.92,93). Ms. Nipper further testified that she could not discern what they were doing. On cross-examination she stated she just "figured they were talking and stuff" (T.109,110). She also stated grievant came to the front of the bus when the car passed and, upon opening the door, inquired as to why she was early.

Grievant's testimony at the Board and Level IV hearings was essentially a denial of the charges. He stated nothing unusual

occurred on the morning in question and when Ms. Dick boarded his bus he merely asked her not to call his home again. He maintained he was unaware why she had called on the evening of March 5, 1989.

Ms. Nipper's account of what she saw is generally consistent with Ms. Dick's account of what occurred and, if consistency were the only criteria necessary to judge their veracity, the Board's burden would be met. The circumstances of the case, however, are such that conclusions concerning the credibility of witnesses should not and could not be made simply on a review of a transcript. Even if Ms. Nipper's testimony were accepted as entirely credible, the question of what actually occurred on the bus would remain. Grievant's testimony at Level IV was consistent with that which he gave before the Board and he exhibited no physical signs either on direct or cross-examination which would lead the undersigned to believe he was not being honest. Without the same observations of the testimony of Ms. Dick and Ms. Nipper, a finding as to their credibility is not possible and the Board has thus failed to meet its burden of proof.

In addition to the findings of fact and conclusions of law made in the foregoing discussion and analysis, the following findings and conclusions are made.

FINDINGS OF FACT

1. Grievant, a substitute bus driver employed by the Raleigh County Board of Education, was filling in for a Mr. Greg Daniels on the morning of March 8, 1989. On that date Michelle

Dick, a fifteen year old student at Marsh Fork High School (MFHS), was the first student to board grievant's bus.

2. After receiving a report that Ms. Dick was emotionally distraught, Mr. Ronald Cantley, principal at MFHS, arranged for her to talk to Ms. Webb, a teacher at the school.

3. After meeting with Ms. Dick, Julie Nipper, Ms. Webb and Mr. Cantley on March 7, 1989, Mr. Richard Mann, Transportation Director, informed grievant that a student had made charges of misconduct against him. Grievant was relieved of his duties and subsequently suspended by Dr. Tom McNeel, Superintendent of Schools.

4. After an April 27, 1989 hearing in which grievant was afforded the opportunity to testify and cross-examine witnesses called by the administration, the Board accepted Dr. McNeel's recommendation to dismiss him on grounds of immorality.

5. Grievant appealed the Board's decision pursuant to the provisions of W.Va. Code §18A-2-8. A Level IV hearing was held July 24, 1989 at which time the Board offered a certified transcript of the April 27 hearing, which had been forwarded prior to hearing, as its entire case. Counsel for the Board was advised by the undersigned that certain questions concerning the credibility of witnesses might be not possible by resort to the transcript, but declined to present further evidence.

CONCLUSIONS OF LAW

1. A county board of education may dismiss an employee at any time for immorality. W.Va. Code §18A-2-8.

2. Upon an employee's appeal of his or her dismissal to the West Virginia Education and State Employees Grievance Board, the board of education has the burden of proving the charges against said employee by a preponderance of the evidence. Kirk v. Mingo County Board of Education, Docket No. 89-29-99 (September 12, 1989); Garcia v. Marshall County Board of Education, Docket No. 25-87-274-3 (December 29, 1987).

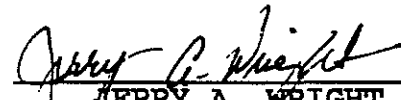
3. The Raleigh County Board of Education failed to call two essential witnesses to testify at Level IV thereby preventing determinations as to their credibility.

4. While the transcript of the April 27, 1989 hearing before the Board is of some probative value, it is not sufficient to meet the Board's burden of proof.

Accordingly, the grievance is **GRANTED** and the Raleigh County Board of Education is hereby **ORDERED** to reinstate the grievant to

his position of substitute bus driver and compensate him for any loss of wages or other employment he may have incurred.

Either party may appeal this decision to the Circuit Court of Raleigh County or the Circuit Court of Kanawha 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 Examiner is a party to said 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.


JERRY A. WRIGHT
Chief Hearing Examiner

Dated: December 14, 1989