WALTER HANK

v. Docket No. 93-52-469

WETZEL COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant Walter Hank, who had been employed by Wetzel County Board of Education (WCBE) since 1969, served as the seventh and eighth grade music and choir teacher at New Martinsville School (NMS) during the 1992-93 and 1993-94 school years. WCBE dismissed Grievant on charges of immorality in November 1993, following a discovery that Grievant had recorded segments on a videotape in his classroom the prior school year which were of a questionable nature and had no educational pur pose. Grievant disputes the propriety of the termination and seeks reinstatement and an award of all back wages and benefits. For reasons more fully set forth below, WCBE's action in this matter must be upheld. (See footnote 1)

Findings of Fact

1. In conjunction with and as a part of his teaching duties, Grievant requisitioned and used NMS's video camcorder several times a year to film practice sessions and class produc tions for educational purposes. He usually practiced his camera techniques on some type of practice tape prior to actually filming something. In addition, Grievant had acquired a video tape "library" of music-related productions, movies and tele vised shows over the years. He would show these video films to his students on occasion.

2. Prior to April 1993 (the 1992-93 school year), Grievant had obtained a copy of a professionally produced videotape entitled "Santa's Frosty Follies" ("Follies") which he had previously shown to his students from time to time as an example of a professionally produced high school musical.

3. In October 1993 (the 1993-94 school year), Grievant's daughter, who was substituting for her father, decided to show "Follies" to one of her classes in preparation of their own production of a Christmas program.

4. While students were viewing the videotape, three separate instances occurred in which the "Follies" tape was interrupted with "overtaped" video segments of Grievant's classroom and students. The overtaped classroom segments on the videotape were film-dated April 6 and April 14, 1993;

thus, these particular shots depicted Grievant's seventh and eighth grade classes from the previous 1992-93 academic year.

5. The day after Grievant's daughter showed the "Follies"videotape, NMS Assistant Principal Robyn Fitzsimmons was ap proached by a group of eight to ten female students. The girls advised Ms. Fitzsimmons that during their choir class the previous day a tape had been shown which contained inappropriate videotaped segments of students from their shoulders to their knees.

6. Ms. Fitzsimmons obtained the "Follies" videotape from Grievant's daughter and viewed it. The next day, Friday, October 22, 1993, Ms. Fitzsimmons and NMS Principal Larry West met with Superintendent Martha Dean to advise her about the videotape incident. Ms. Dean viewed the tape and became very concerned about the content of the overtaped segments.

7. Most of the three overtaped segments, filmed on at least two separate occasions and of at least two separate classes, show what appear to be random shots of classroom scenes, including various shots of fully-clothed students mainly attired in the currently popular loose-fitting garb of the day, such as loose trousers or long walking shorts, bulky sweatshirts and oversized, patterned "T-shirts." However, some overtaped portions intentionally dwell on several females' chests, legs, knees, thighs, crotch or groin areas for a time; zoomed portions concentrate on bosom areas or areas under shorts or skirts worn by the female students. These particular shots clearly had no educational purpose.

8. Ms. Dean telephoned Grievant the following Monday morning about the videotape and told him she felt the incident was a "very serious matter." She asked him to meet with her toexplain the tape's existence and purpose.

9. Grievant and his wife met with Ms. Dean that after noon. After viewing the tape, Grievant admitted he had recorded the overtaped classroom segments on the "Follies" videotape. He told Ms. Dean that what he had done was wrong, but that he had stored the tape and had never viewed it again. Grievant assured Ms. Dean that he would not engage in such conduct again and, in fact, offered never to use the video recorder again.

10. Ms. Dean was not satisfied with Grievant's explanation and response. She then immediately suspended Grievant without pay pending her presentation of charges and a recommendation to WCBE that Grievant be terminated on the basis of immorality.

11. Following a November 9, 1993 meeting/hearing in which Ms. Dean, Grievant and Grievant's

counsel all appeared before WCBE to view the videotape and hear Ms. Dean's charges against Grievant, WCBE unanimously voted to accept Ms. Dean's recommen dation to terminate Grievant, concluding that Grievant's conduct constituted immorality under W.Va. Code §18A-2-8.

12. Following Grievant's termination, WCBE sent letters to the parents of all of the children who appeared in the overtaped segments taken by Grievant and apprised them of their right to view the videotape. A number of parents arranged to see the tape.

13. At the time of his dismissal, Grievant did not have an unblemished work record. In June 1991, during the tenure of another superintendent, Grievant had been suspended for three days for questionable conduct. On that occasion, he had shownsome students the movie "Pretty Woman," a Cinderella-type story about a prostitute who ultimately wins the heart of a wealthy executive who had paid her for sex and to stay with him for a few days while on an out-of-town business trip. (See footnote 2)

14. Three of the parents whose children were depicted in the videotape voluntarily appeared and testified at Grievant's level four hearing. Each of the parents had lived in New Martinsville or Wetzel County for over twenty years or, in the case of one parent, for all of her life. All three of the parents testified that they found Grievant's behavior in video taping the students in the manner in which he did to violate the moral standards of the community. One mother in particular testified that she was still very angry about the incident. See T.65-83.

15. Two of WCBE's members who were present at the November 9, 1993 Board meeting, President Edward M. Watson (See footnote 3) and Member Sandra T. Herrick, also testified at level four. They both testified that they were life-long residents of Wetzel County, and they likewise found Grievant's conduct to be contrary to the moral standards of the community. T.48-63. 16. Grievant testified that the three overtaped segments were practice shots, and that he had neither any sexual purpose when he began the taping session nor any sexual gratification during (or after) the actual filming. He said he did not know why he let the camera "wander" onto inappropriate body areas during the taping, but that, afterwards, he knew what he had done was "wrong." See T.107-108.

Argument

WCBE argues that it properly exercised its authority under W.Va. Code §§18A-2-7 and 18A-4-8 to immediately suspend and dismiss Grievant on the basis of immorality because he produced a

"completely inappropriate and sexually deviant [video] record ing of his unsuspecting students" during class sessions. WCBE also insists that Grievant's misconduct was not the type of behavior or professional incompetence subject to corrective action under State Board of Education Policy No. 5310. Accord ing to WCBE, Grievant's misbehavior in this case "clearly adversely affects his fitness to teach."

Grievant argues that WCBE's termination of him was arbi trary and capricious, basically because the punishment, an "overreaction" on WCBE's part, does not fit the offense. He argues that his conduct with respect to the videotaped segments did not rise to the level of immorality as contemplated by W.Va. Code §18A-2-8. He also maintains that the termination was excessive in light of his satisfactory twenty-four year work record, a record marred by only one prior disciplinary incident. Finally, Grievant argues that WCBE violated State Board of Education Policy No. 5310 when it failed to provide him with an evaluation and opportunity to improve, especially in a situation when the offensive conduct could be easily avoided by simply prohibiting him from ever operating a video camera in his classroom again.

Conclusions of Law

1. In disciplinary matters, a board of education bears the burden of proof. W.Va. Code §18-29-6 ¶5.

2. W.Va. Code §18A-2-8 provides in pertinent part, that "a board may suspend or dismiss any person in its employment at any time for. . .immorality." Furthermore, a superintendent of schools has authority to temporarily suspend school personnel pending a hearing before the board of education. W.Va. Code §18A-2-7.

3. Immorality, as contemplated by W.Va. Code §18A-2-8, refers to conduct "not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior." Golden v. Bd. of Educ. of the County of Harrison, 285 S.E.2d 665 (W.Va. 1982).

4. A board of education is not required to offer an employee an improvement period under West Virginia Board of Education Policy No. 5310 prior to dismissal when the offensive conduct is not merely ongoing professional incompetence but conduct or actions which rise to the level of immorality. See Rovello v. Lewis County Bd. of Educ., 381 S.E.2d 237 (W.Va. 1989); Mason County Bd. of Educ. v. State Supt. of Schools, 274 S.E.2d 435 (W.Va. 1981).

5. The record supports that Grievant's conduct in video taping the chest, leg, thigh, and crotch areas of his seventh and eighth grade female students was contrary to accepted moral standards in the community in which he served and, as such, constituted immorality.

6. Not every case of employee misconduct, even immorali ty, warrants termination if there is evidence that the school system suffered only minimal harm, and that the employee pos sessed an unblemished record of long and meritorious service and had not acted willfully at the time of the single, isolated infraction. See Rovello at 241.

7. The circumstances in this case warrants termination because Grievant's misconduct was willful and not an isolated incident. Grievant intentionally focused and "zoomed" a video camera on inappropriate body areas of adolescent female stu dents, not once but during at least two separate taping sessions and retained the resulting videotape; moreover, his service record was blemished from a prior incident involving matters of a sexual nature.

8. Grievant's termination also was justified because his conduct with the school's video recorder in April 1993 was sub stantially harmful to WCBE's efforts to provide a secure learn ing environment for its students and was furthermore violative of Grievant's students' right not to be the subject of theirteacher's sexual titillation.

9. Grievant's termination was proper because his misbe havior compromised his ability to successfully teach his music classes, an endeavor in which the video filming of student practice sessions and musical productions is an integral part of the learning process, especially when the only means to "cor rect" Grievant's behavior is to prohibit him from ever operating a video camera in his classroom again.

10. WCBE met its burden of proof in this case, and its decision to terminate Grievant must be sustained.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wetzel 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 Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the appeal and provide the civil action number so that the

record can be prepared and transmitted to the appropriate Court.

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NEDRA KOVAL

Administrative Law Judge

Date: March 30, 1994

Footnote: 1 A level four hearing was conducted December 14, 1993. The parties completed submissions of post-hearing, fact/law proposals by February 8, 1994.

Footnote: 2 WCBE did not present this information as part of the current charges against Grievant but rather to illustrate that Grievant did not have an unblemished work record. Grievant said he thought "Pretty Woman" was a "PG-13" movie and that he had not known it was an "R-rated" film. Grievant further explained that he did not protest the suspension because he was ultimately responsible for what happened in the classroom.

Footnote: 3 Dr. Watson, an orthodontist who has practiced in New Martinsville for over twenty years, has two of his four children currently enrolled in WCBE's schools. He essentially stated that students should not be subjected to actions by the staff "robbing them of any of their innocence," and that Grievant's actions were tantamount to robbing the affected students of their innocence.