CLIFFORD GRAHAM, .

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Grievant, .

.

v. . DOCKET NO. 94-02-324

.

BERKELEY COUNTY BOARD OF .

EDUCATION, .

.

Respondent. .

.

D E C I S I O N

This is a grievance by Clifford Graham (hereinafter "Grievant"), who filed directly at Level Four of the grievance procedure pursuant to W. Va. Code § 18A-2-8 (1990), challenging his dismissal from employment by the Berkeley County Board of Education ("BOE"). An evidentiary hearing was conducted at the Grievance Board's branch office in Elkins, West Virginia, on August 22, 1994. (See footnote 1) Having carefully reviewed all matters of record and the arguments of the parties, the undersigned administrative law judge concludes that Grievant's dismissal cannot legally be upheld.

I.

Findings of Fact

The material facts revealed by the record are set forth below:

1. Grievant had been employed as a custodian by the BOE for more than fourteen years when he was discharged from employment in July 1994. At that time he served as the only day-shift custodian at Hedgesville Elementary School, a position he had held for the past nine or ten years.

Grievant had been evaluated as meeting or exceeding expectations in all categories on his performance evaluations for the previous six years ending with the 1992-1993 school year. Grievant's Exh. 1.

2. On or about November 13, 1993, Grievant was arrested on a charge of sexually molesting his thirteen-year-old daughter. Grievant was unable to secure his release from confinement and served eighty-three days in jail before being freed on bond in February 1994.

3. By letter dated February 3, 1994, Grievant was notified that the BOE's Superintendent, James Bennett, was recommending his suspension from employment without pay pending disposition of the criminal charges against him. The grounds stated in this letter were Grievant's (1) unauthorized absences from assigned duties since November 13, 1993, and (2) having been charged with sexual molestation of a minor. BOE Exh. 1.

4. By letter dated February 8, 1994, Grievant was advised that the BOE had approved the superintendent's recommendation at a regularly scheduled board meeting held on February 7. BOE Exh. 2.

5. On February 15, 1994, during the February 1994 term of the grand jury of Berkeley County, Grievant was indicted on a felony charge of sexual contact with a minor child in violation of W. Va. Code § 61-8D-5. (This criminal statute, entitled "Sexual assault in the third degree," is commonly referred to as statutory rape.) BOE Exh. 4.

6. On May 5, 1994, Grievant withdrew his plea of not guilty and entered a "plea of no contest to the lesser included offense of battery." The Circuit Court provisionally accepted Grievant's plea pending a presentence investigation and he was thereby "convicted of the misdemeanor of battery upon his plea of no contest." This was a binding plea that provided Grievant would receive an eighty-three day jail sentence with credit for time served, i.e., no further punishment would be imposed. Grievant was sentenced in accordance with this plea agreement on June 6, 1994. BOE Exhs. 5 and 6.

7. Thereafter, by letter dated June 29, 1994, Grievant was given notice, pursuant to W. Va. Code § 18A-2-8, that the acting superintendent would be recommending his dismissal from employment due to dereliction of duties (his absence from employment while incarcerated), immorality and cruelty.

8. At a meeting held on July 18, 1994, the BOE unanimously approved the acting

superintendent's recommendation to terminate Grievant effective immediately. Grievant did not testify at the BOE hearing.

Paul Tyson, the principal of the elementary school where Grievant had been employed, testified at both the hearing before the BOE and at Level Four, that he had received comments from about six parents expressing the opinion that Grievant should not be permitted to return to work at the school. Over objection, Mr. Tyson noted that Grievant had missed work for six months about four years earlier when he was charged with a similar criminal offense. On cross-examination, Mr. Tyson acknowledged that Grievant had been from suspended from employment after the previous charge and could not have returned to work even if he had not been incarcerated. Charles A. Fritsch, then the acting superintendent, testified that Grievant's absence due to his incarceration was not an authorized absence.

Grievant testified at the Level Four hearing, denying his guilt and asserting the charges against him were false and had been instigated by his ex-wife. He stated that his ex-wife had previously caused a similar charge to be leveled against him in Maryland in 1989 that culminated in a jury trial and a verdict of not guilty. Grievant stated that he was confined for about six months awaiting trial on those charges. Grievant further testified that subsequent to his acquittal on the first charge, his ex-wife sought to reconcile with him and when he refused she stabbed him in the back, and was subsequently convicted and sentenced to prison in Maryland on a charge arising from that incident. At the Level Four hearing, Grievant maintained that his ex-wife had caused false charges to be filed against him on both occasions.

Discussion

A county board of education has the authority to dismiss any employee for any of the just causes set forth in W. Va. Code § 18A-2-8 (1990), provided that it exercises its authority reasonably, rather than arbitrarily or capriciously. See e.g., Syllabus, Board of Educ. of the County of Gilmer v. Chaddock, 398 S.E.2d 120 (W. Va. 1990). The statutory grounds for dismissal are "immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge." In order to properly dismiss an employee, a county board of education must establish the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Froats v. Hancock County Bd.

of Educ., Docket No. 91-15-159 (Aug. 15, 1991); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

It appears from even a cursory review of the BOE hearing transcript that the primary basis for Grievant's discharge was his no contest plea to a battery involving his minor daughter. The BOE considered this plea to a battery to constitute either immorality or cruelty, or both. The only evidence introduced, however, to establish Grievant committed a criminal offense was his plea of no contest to a misdemeanor charge. No witnesses were called to controvert Grievant's testimony that he was innocent of the criminal charges. Grievant correctly contends the evidence is notsufficient to support his dismissal. (See footnote 2) Grievant's plea of no contest is legally equivalent to a plea of nolo contendere. It was ruled in Lough v. W. Va. Dept. of Health, Docket No. 90-H-240 (Aug. 31, 1990), that such a plea has no evidentiary value in a grievance proceeding. A nolo contendere plea is defined as an implied confession of guilt only, and cannot be used against an accused as an admission in any civil suit for the same act. Lough, quoting 22 C.J.S. Criminal Law § 425. In ruling the grievant's dismissal in Lough was unlawful, the administrative law judge concluded that a nolo contendere plea cannot be considered an admission that the grievant committed the underlying acts that constitute the criminal offense. It was noted that under Rule 11(e)(6) of the West Virginia Rules of Criminal Procedure and Rule 410(1) of the West Virginia Rules of Evidence a plea of nolo contendere is inadmissible against the defendant who made the plea "in any civil or criminal proceeding." Indeed, this attribute of non-admissibility in civil proceedings is the principal reason for such pleas. E. Cleary, McCormick's Handbook on Evidence, Ch. 26 at 636 (2nd ed. 1972). Under Lough, the BOE thus introduced no admissible evidence that Grievant committed any criminal offense.

Because the formal rules of evidence are not applicable in grievance proceedings, except for the law of privilege, W. Va. Code § 18-29-6 ¶5, the undersigned administrative law judge recognizes there is an argument that nolo contendere pleas can be consideredas factual admissions in a grievance proceeding. (See footnote 3) It is not necessary in this case to reconsider our precedent in Lough, because even if Grievant's plea were considered as evidence, it would only establish that Grievant committed a battery against his minor daughter. A battery is generally defined as a willful and unlawful use of force or violence upon the person of another. The slightest touching of another person can constitute a battery, if the act is done in an rude or angry manner. Black's Law Dictionary

(4th ed. 1968). A misdemeanor plea to a battery of a minor child thus proves little and, by itself, does not establish by a preponderance of the evidence that Grievant engaged in either immoral conduct or cruelty within the meaning of W. Va. Code § 18A-2-8. Hence, Grievant's dismissal on this ground cannot be upheld.

There is also another major evidentiary weakness with the BOE's case; grievant's alleged misconduct did not take place on the job. The Supreme Court of Appeals of West Virginia ruled in Syllabus Point 2 of Golden v. Board of Educ. of County of Harrison, 285 S.E.2d 665 (1981), that "[i]n order to dismiss a school board employee for acts performed at a time and place separate from employment, the Board must demonstrate a 'rational nexus' between the conduct performed outside of the job and the duties the employee is to perform." Although the Golden rule has been limited by the 1990 amendment to W. Va. Code § 18A-2-8, which authorizes, but does not require, a county board of education to dismiss anemployee for any felony conviction, whether by jury verdict, by guilty plea or by nolo contendere plea, it has not been completely eliminated from the law of this State. (See footnote 4)

Here, Grievant's plea was to a misdemeanor, not a felony, and, therefore, the BOE must satisfy the rational nexus requirement in order to dismiss Grievant from his employment. To satisfy the rational nexus requirement, the BOE argues that Grievant's conduct became such a subject of discussion and notoriety, to which it did not contribute, that it "substantially and detrimentally effects" his ability to perform his assigned duties as a custodian at the elementary school where he had been employed. BOE's Proposed Conc. of Law 5, in part. See Rogliano v. Fayette County Bd. of Educ., 347 S.E.2d 220 (1986) (discussing role of notoriety in establishing rational nexus). The simple and proper answer to this argument is that it is simply not supported by the evidence. The fact that a few parents have expressed concern about his return to employment or hold the opinion that Grievant should be not be permitted to return to employment does not constitute sufficient proof that he can no longer effectively perform the duties of his custodial position.

The BOE's second reason for Grievant's dismissal was his unauthorized absence from work. The BOE argues that although Grievant did not choose to be incarcerated, the charges that led tohis confinement were acts of his volition and, therefore, cannot be utilized to indicate that his absence was totally involuntary, "as the offending conduct was for voluntary acts." Grievant argues that his absence was involuntary and, therefore, cannot properly be considered as willful neglect of duty or

insubordination within the meaning of W. Va. Code § 18A-2-8.

The facts are that Grievant was arrested on a felony charge and, apparently due to his inability to obtain bail, was confined against his will for eighty-three days. About the time he was released on bail in February 1994, the BOE voted to suspend him from employment until disposition of the criminal charges. Thus, once he was freed from confinement, he was precluded from returning to work by the BOE's own action in suspending him pending the outcome of the criminal charges.

On these facts it cannot properly be concluded that the BOE has established by a preponderance of the evidence that Grievant willfully neglected his duties within the meaning of W. Va. Code § 18A-2-8. The BOE's strained logic cannot be accepted as proof of willful neglect of duty.

Conclusions of Law

1. A county board of education has the authority to dismiss any employee for any of the just causes set forth in W. Va. Code § 18A-2-8 (1990), provided that it exercises its authority reasonably, rather than arbitrarily and capriciously. See e.g., Syllabus, Board of Educ. of the County of Gilmer v. Chaddock, 398 S.E.2d 120 (W. Va. 1990) The grounds relied upon for dismissalmust be proven by a preponderance of the evidence. W. Va. Code § 18-29-6; Froats v. Hancock County Bd. of Educ., Docket No. 91-15-159 (Aug. 15, 1991); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

2. The BOE has failed to prove by a preponderance of the evidence that Grievant engaged in (1) immorality or cruelty, and (2) willful neglect of duty.

3. The BOE has failed to establish a rational nexus between Grievant's alleged off-duty misconduct and his job duties.

Accordingly, this Grievance is hereby **GRANTED**, and the BOE is hereby **ORDERED** to reinstate Grievant, with back pay and all attendant rights, privileges and benefits, including seniority, to which he is entitled by law, effective as of the date of his unlawful dismissal.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Berkeley 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 intent to appeal and provide the civil action number so

that the record can be prepared and transmitted to the appropriate court.

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RONALD WRIGHT

Administrative Law Judge

Dated: October 19, 1994

Footnote: 1 This case became mature for decision on September 12, 1994, upon receipt of the post-hearing briefs from the parties. In addition to the testimony adduced at the Level Four hearing, the parties submitted the transcript and the exhibits introduced at a hearing held by the BOE on July 18, 1994. Most of the BOE's evidence is documentary in nature.

Footnote: 2 Grievant does not contend that his suspension without pay pending the outcome of the criminal charge was unlawful.

Footnote: 3 Likewise, it could be argued that a county board of education can consider such pleas, as proof of facts, in determining whether grounds exist for imposing discipline.

Footnote: 4 By the 1990 amendment to W. Va. Code § 18A-2-8, the Legislature, in addition to authorizing a county board of education to dismiss an employee upon conviction of any felony, also provided that "dismissal for the conviction of a felony ... is not by itself a grievable dismissal."