JEFFREY SHAFFER

v. Docket Nos. 94-39-1127

95-39-030

PRESTON COUNTY BOARD OF EDUCATION

DECISION

Grievant, Jeffrey Shaffer, employed by the Preston County Board of Education (Board), filed a level four grievance on December 19, 1994, in which he alleged violations of W.Va. Code §18A-2-7 and 18A-2-8 when he was suspended without pay from his position as teacher and band director at Preston High School (PHS). A second grievance was filed on January 23, 1995, after the Board terminated Grievant's employment. A level four hearing was held on April 24 and 25, and May 18, 1995. The case became mature for decision on July 10, 1995, with the completion of post-hearing briefing.

The suspension and termination were based upon a charge of immorality. The specific complaints underlying the charge were set forth by Superintendent Ted Mattern in the dismissal letter dated January 13, 1995, as follows: (See footnote 1)

- During the time that Amanda was a member of the PHS band but prior to the 1994-95 school year, Grievant while at PHS, placed his hand on her breast against her will.

- During the Fall of 1994, while at the Band Spectacular at Mountaineer Field, Grievant stood close behind Amanda, rubbed his stomach and penis against her buttocks against her will, while making sexual comments including that when she got married, she would want that every night.

- During the Fall of 1994, while Amanda was at PHS in an office alone with Grievant, he grabbed her from behind, put his finger on her pelvis (See footnote 2) **, and fondled her against**

her will as she struggled to get away. Grievant made comments of a sexual nature to Amanda at such time.

- Grievant placed his hands on the breasts of student and band member Leah against her will.

- Grievant placed his hand on the breast of Rachael against her will at PHS sometime near the end of the 1993-94 school year.

- On or about September 1994, at PHS, Grievant grabbed Rachael's buttocks against her will.

- During Summer 1994, at band camp, Grievant placed his hands on the breasts of Stacy against her will.

- During Fall 1994, in the band room at PHS, Grievant grabbed the thigh, hip and buttocks of Stacy against her will.

- Grievant touched his body against the breast of Kelle, against her will.

- During Fall 1994 Grievant advised Heather that he had always wanted to have sex with a girl who looked like her.

- In Spring 1994, Grievant made sexually suggestive remarks to Amanda about how she walked.

- During the 1993-94 school year Grievant told Stacy that he had nicknamed her "SG" and, after using the nickname on numerous occasions, told her that "SG" stood for "sperm gulper." Grievant referred to Kelle as "half dollar" but toldher that he could not tell her what it meant until she was eighteen. In reference to the movie "Indecent Proposal" Grievant asked Kelle how much it would take for her to sleep with somebody. At approximately the same time Grievant asked Stacy what it would take for her to follow through with an indecent proposal while withdrawing money from his pocket and advising, "I've got a million dollars here baby." Grievant told Stacy that she had a nice "butt."

- During Fall 1994, Grievant asked Leah if she was pregnant and "If your are, is it mine? I hope it's mine." During the same semester Grievant remarked to Leah "if I had a body like that . . . ."

When Leah asked what he would do with it, Grievant replied, "I'd give it to the Band Director."

- On numerous occasions Grievant has remarked to female students, including Amanda, Jaclyn, Jennifer, and Kelle, "If I had a body like yours . . . " or "If I had a body like that . . . ."

- During the 1993-94 school year, Grievant asked a male student if he was "getting a piece of her yet?" in reference to female student Courtney. During the 1994-95 school year, at PHS, Grievant asked Courtney five to ten times why she didn't wear tight red dresses and told her she should wear more makeup to make her look sexier.

- Grievant assigned the nickname "TT" to Debbie, a member of the PHS band. Debbie interpreted the comment to be a reference to her chest.

- In September or October of 1994, Grievant commented to Brandy, "What a body, what a woman."

- Grievant made sexual gestures describing Rachael's breasts as he talked with another male.

- During the 1994-95 school year, while at PHS, Grievant was observed by a student teacher to be making sexual hand gestures as he spoke to a female student.

- Grievant advised Jennifer and Alisha that he picked majorettes by braille, and during the conversation used hand gestures to indicate that he was fondling breasts.

- In the hallway at PHS, Grievant advised Jaclyn that her nickname "TB" could mean "tight butt" or tiny boobs."

- When Paula was on her knees retrieving her band instrument, Grievant said to the junior, "While you're down there. . . ."

- During the Fall 1994, Grievant advised Paula that when she turned eighteen in a few weeks that she would be allowed "todo you know what and not get in trouble for it" and that he would be able to pick on her without getting in trouble.

- Grievant asked Irene during the 1992-93 school year if she was posing for Playboy or hat

he'd seen her in Playboy. **(See footnote 3)**

It is the Board's position that the termination of Grievant's employment was the appropriate disciplinary action because sexual comments and sexual touching constitute immorality. Grievant disputes the evidence presented by the Board and cites several due process violations. Those procedural violations will first be addressed.

Due Process Issues

Grievant alleges that he was deprived of the due process to which he was entitled when the Board failed to advise him of the accusations which led to his dismissal and when it failed to provide any discovery prior to the level four hearing. The claim that the accusations "were not forthcoming until after a law suit was filed in Preston County Circuit Court on January 28, 1994 [sic], to compel disclosure" is somewhat unclear.

The record reveals that Superintendent Mattern met with Grievant on November 16, 1994. The Superintendent's notesindicate that the purpose of the meeting was to "discuss allegations made against him dealing with sexual harassment and sexual abuse." The specific charges, as set forth above, were provided to Grievant by letter dated December 30, 1994, in which Superintendent Mattern advised that he would recommend that Grievant's employment be terminated.

The charges were again recited in the January 13, 1995, letter advising Grievant that the recommendation to terminate his employment had been approved by the Board. It is unclear what information regarding the accusations, in addition to the three and one-half pages of charges, Grievant believes he was denied. In any event, it appears that this issue was resolved either informally or through the Circuit Court in Preston County and warrants no further consideration at level four.

Board counsel Virginia Hopkins advised the undersigned on April 24, that she had not provided the documentation requested by Grievant based upon her concern that he was improperly attempting to obtain disclosure relevant to possible criminal proceedings. The Board complied with a verbal directive on April 24 to provide the requested information, i.e., the statements given by Grievant and the students during the investigation.

It is noted that the statements contain essentially the same information presented in the charges listed in the dismissal letter, and that the delay in receiving the documentation did not

appear to impede Grievant's ability tocross-examine the Board's witnesses on April 24 and 25. The production on April 24 allowed ample time for Grievant to prepare for the presentation of his case on May 18. Although the Board's failure to disclose was contrary to W.Va. Code §18-29-6, Grievant did not appear to suffer any harm from the delay in this case. Therefore, the violation is determined to be harmless error.

Grievant next asserts that during the January 11, 1995, meeting Superintendent Mattern, by and through counsel, prejudiced the Board with inflammatory hearsay and with the presentation of false and misleading information. Grievant further charges that the Superintendent actively concealed exculpatory and contradictory evidence, particularly through his failure to expose a known conspiracy theory.

Grievant does not cite the inflammatory hearsay or the false and misleading information to which he refers. Further, while Grievant espouses a conspiracy theory, the Board does not. While Grievant is correct that the case should be presented in a fair and objective manner, he has failed to offer any evidence that it was not. Grievant intentionally did not attend the January 11 hearing prior to his termination and the Board is not obligated to present any theories advanced by Grievant in his absence.

Grievant complains that his due process rights were violated when the Board failed to include findings of fact and conclusions of law in their decision to terminate hisemployment. The letter of January 13, 1995, does not include specifically identified sections entitled findings and conclusions; however, the letter does convey that the Board found Grievant had engaged in the specific allegations set forth and that the actions constituted immorality. Based upon these findings, it was concluded that his employment should be terminated. Grievant's claim that he had no knowledge of what the Board specifically ruled on, and was thus prevented from adequately responding to the charges, is incredible.

Grievant next alleges that the Board and the level four hearing were contaminated with prejudicial and blatantly improper evidence. A reference to polygraph examinations, when the results were not made a part of the record, was improper, Grievant asserts, because he had no opportunity to respond to that "evidence." The testimony of Dr. Sandra Wales, principal at another school in Preston County where Grievant previously was assigned, was cited as inflammatory and unsupported. The record is silent as to what, if any, weight the Board

placed on the Superintendent's reference to the polygraph results. Certainly, the Board did not attempt to place the results into the level four record, and any reference thereto was not considered. Addressing the testimony of Dr. Wales, no weight will be given to her testimony inasmuch as it did not directly relate to thecharges leading to the termination. (See footnote 4) Because there is no jury to prejudice or inflame at level four, and improper evidence was not considered, Grievant has failed to prove any violation of due process at this level.

Disciplinary Issue

The events which led to the termination of Grievant's employment began on November 14, 1994, when Martha Phillips, Attendance Director for Preston County Schools, reported to Superintendent Mattern allegations that Grievant had sexually harassed a student. He directed that she further investigate the matter and on November 15 she reported the results of interviews with four female students. Superintendent Mattern met with Grievant on November 16. Based upon the results of that interview and the information provided by Ms. Phillips, Superintendent Mattern determined that the students were telling the truth and the matter was reported to the Prosecuting Attorney of Preston County.

Pending investigation by the Prosecutor, Grievant was suspended, with pay, on November 22. The suspension was changed to without pay effective December 8, 1994. On December 30, Prosecutor Hopkins provided Superintendent Mattern with the investigative report and, by letter of thesame date, Grievant was advised that the Superintendent would recommend that his employment be terminated.

At the level four hearing, Deputy Sheriff Joseph Stiles stated that he was assigned the investigation and received a packet of information from the Prosecuting Attorney, specifically, notes of four students. He contacted Grievant at his home that evening and secured a written statement. At that time, Grievant advised Deputy Stiles that one of his students had reported to him that the students were going to try and cause him trouble over a "donut incident." This incident arose when Grievant left a box of donuts in the band room. Grievant believed that one or more students, particularly Nick, ate the donuts.

Grievant reportedly told the students that he was going to call the police and have the box fingerprinted so that the culprit could be identified and prosecuted. The gist of the rumor provided to Grievant was that if he caused Nick any trouble certain students, including Nick's

girlfriend Heather, would "get him for sexual harassment." After administering the polygraph examination to four of the alleged victims, Deputy Stiles stated that he determined they were truthful and he perceived no conspiracy in retribution over the donut incident.

Ten female students testified regarding the language and behavior exhibited by Grievant. It is unnecessary to review their testimony individually because it either restates thecharges set forth in the suspension and dismissal letters or provides further examples of similar behavior. The student testimony as a whole indicated the behavior had been ongoing for approximately two years and that while they may have found the language and touching embarrassing, they initially ignored or even played along with Grievant; however, the frequency and duration finally became intolerable. When one student finally told her mother of the situation, and the mother pursued the issue, the girls related the improper behavior Grievant had directed toward them.

Mark Palmer, a student teacher supervised by Grievant, and later a substitute teacher for Grievant, testified that he regularly heard Grievant make inappropriate comments and sexual innuendo to faculty and students. Mr. Palmer recollected that on one occasion, when he was playing with keys in his pocket, Grievant inquired if he "[had] a home game going on there Palmer?" Mr. Palmer's concern led him to report Grievant's behavior to his college supervisors out of concern for future female student teachers assigned to Grievant's classroom.

In addition to the previous recitation of the chronological events, Superintendent Mattern testified that prior to recommending dismissal, he discussed Grievant's behavior with PHS principal Patricia Spangler. Ms. Spangler confirmed that Grievant had problems of this nature and that she had spoken to him previously about his behavior. Afterfully considering all the information made available to him, the Superintendent concluded the statements and touching constituted immorality and proceeded to terminate Grievant's employment.

Grievant elected not to testify at level four but introduced the following testimony and evidence in his behalf. Matching the Board, Grievant also introduced the testimony of ten students. These students, male and female, stated comprehensively that Grievant had made no untoward comments to them or to others in their presence nor had he touched them in any inappropriate manner. Several of the students suggested that it was the complainants who

had put a sexual connotation on Grievant's comments. Other statements indicated the complaining students were uncooperative and manipulative.

Kelly and Alicia stated that they spoke with Heather after the donut incident. Heather allegedly told Kelly that if Grievant went through with his threat regarding the missing donuts, she would gather as many girls as possible to complain about Grievant's behavior. Kelly declined Heather's invitation to join in that effort.

James and Shelly both recollected that in mid-October Rachael stated that someone else might be allowed to play piano in the jazz band, a position she had previously held. Allegedly, Rachael continued to state that if the position was given to another, she would charge Grievant with sexual harassment.

Tami stated that she heard Heather warn that if her boyfriend (Nick) got into trouble, she would get Grievant into trouble. Tenille heard Amanda say "I'll get him" referring to Grievant, after an incident during band practice.

In addition to the students, seven adults were called to testify on Grievant's behalf. James Taylor, a parent who attended band camp, stated he observed no inappropriate contact during the week-long experience but that he had heard girls making sexually oriented comments, regarding breasts, etc., which he did not believe was appropriate, to Grievant.

Dennis Ullman, a judge at band tournaments and volunteer assistant, estimates that he attends ninety percent of rehearsals, performances, and band camp. Mr. Ullman opined that Grievant performs his duties professionally and is a good band director. He stated that he had not observed any sexual touching or comments while at band camp.

Franklin Brubaker, a volunteer instructor with the band, opined that Grievant is a very good band director, ranking him 9.5 on a scale of 10. Mr. Brubaker stated that he had never observed Grievant engage in any of the alleged behavior, but admitted that he had heard Grievant make comments which he would not make himself, of such a nature they could be misconstrued. Expressing this to Grievant, Mr. Brubaker stated that he advised him "sometimes the mouth works and then the mind engages."

Principal Spangler, Grievant's supervisor at PHS twoyears, opined that he did a good job from her general observation. Ms. Spangler stated that the PHS faculty was provided sensitivity training in November 1994, and she had previously spoken with Grievant and

others regarding their conduct. This communication was apparently general in nature because she continued to state that she had observed no changes, but had not been looking for any. Contrary to Superintendent Mattern's testimony, the general content of Ms. Spangler's testimony indicates that she was unaware of any improper language or actions engaged in by Grievant until the current allegations were brought to light. She was aware of "rumors of a counter nature" and provided that information to Deputy Stiles.

Assistant Band Director Debra Westbrook testified that she spent a large block of time with Grievant and had observed no inappropriate sexual contact with the students. In a somewhat contradictory direction, Ms. Westbrook also commented that it was common for Grievant to be alone with students and that the only class they co-taught was symphonic band. (See footnote 5) Ms. Westbrook stated that she felt uncomfortable when she heard Grievant make the "If I had a body. . ." statement, which she characterized as a standing joke.

Dean Newcomer, a businessman, and Greg Hardman, a drilldesigner, attended the Band Spectacular cited in the charges. It is not clear whether Grievant was in attendance with either or both witnesses. Both claimed that while they knew Grievant they were not close personal friends and did not socialize. However, both men indicated that they were with or near Grievant throughout the day and neither observed any improprieties with a student.

Grievant concedes through counsel that he made bad jokes, that comments in poor taste were made, and that he used poor choice of expression and/or phraseology. He denies any intent to be sexually suggestive or harassing and characterizes his actions as "puerile behavior." Grievant suggests that this behavior was seized upon by the accusing students and massaged into something that it was not for their own ulterior purposes. Grievant suggests the following.

By all accounts Grievant is a strict disciplinarian when on the field. He observed that several of the senior musicians had developed bad attitudes and were not fulfilling their leadership roles during the 1994-95 school year. Adding to this friction was the donut incident. Grievant suggests that Amanda, Heather, Leah, and Rachael, to whom he refers as a clique or a circle of friends, concocted a story of sexual harassment as retaliation for his expectations regarding performance and discipline, and to protect Nick from further discipline after the donut incident. Grievant surmises that the students did not originally intend for the

matter to gooutside PHS but that all control was lost when one of the girls used the story to explain her changed behavior to her mother.

Discussion

Although Grievant's explanation is viable, it is not persuasive. When the evidence is reviewed in its entirety, it must be concluded that Grievant engaged in the complained of behavior and that said behavior constituted immorality. An evaluation of the testimony offered by the ten female students who complained of Grievant's behavior establishes that all of the girls complained of similar comments and actions. All of the girls appeared nervous and apprehensive to varying degrees but all responded to counsels' inquiries in a direct, firm matter. The girls were subject to vigorous cross-examination and several were stressed to the point of tears, yet none changed her story or backed down from the charges.

Some minor inconsistency in the testimony of the complaining witnesses, noted by Grievant, does not establish that the complaints were fabricated or false. On the contrary, had their testimony been perfectly consistent, it would be reasonable to suspect that they had developed a scenario, or at the very least, were rehearsed. Certainly, the testimony of the complaining students is consistent regarding the language and behavior exhibited by Grievant. Overall, the testimony of the complaining students lacks any serious flaws and is deemed credible.

It is also determined that the student and adult witnesses called by Grievant were credible. Several of the students were defensive of Grievant, and many claimed that they had not heard any offensive comments. That, of course, is possible. More persuasive were the students who heard the comments, but were not offended. This response is also valid; however, it does not lessen the serious nature of the action or the impact it had on the complaining students. Finally, even Mr. Brubaker and Ms. Westbrook confirmed hearing Grievant make inappropriate comments.

While no adults observed any inappropriate physical touching, this is not unusual because such activity would not typically be openly displayed. Those girls who complained of the touching indicated that it was, in fact, surreptitious. Most of the complaints involved a glancing touch to the breast area, although some involved Grievant placing his hands on their rib cage below the breast area and some involved their hips, thighs, and posterior. Several of

the girls opined that the touching was intentional because after "accidently" touching their breasts Grievant would frequently react by asking if he touched them and/or instantaneously deny that he meant to touch them, claiming any contact to be accidental.

Evidence supports Grievant's assertions that some of the students were upset over their participation in band and the donut incident. However, with so much testimony definitively establishing that the improper language was used, it cannot bedetermined that the complaints were fabricated as a result of these incidents. Evidence also supports that Heather may well have asked other girls to join in the complaint. Again, this does not diminish the fact that Grievant engaged in the behavior and there is no evidence that Heather asked the girls to lie.

Grievant has also established that at least some of the girls had not always taken offense at his behavior and had in fact, gone along with it. For example, Kelle had identified herself on a sign-up sheet as "1/2 dollar." Rachael, Heather, Leah, and Amanda had also made Grievant a "Cheer Up" card with a balloon at some point. Some testimony indicates that the girls did not say anything because they were embarrassed or did not know what to do since Grievant was a teacher. In any event, even if the girls had played along with Grievant to a certain point, that does not exonerate him from his responsibilities as a teacher.

Having found that Grievant engaged in the complained of behavior, it must be determined whether that behavior was immoral. The test for immorality remains that set forth in Golden v. Bd. of Educ. of County of Harrison, 285 S.E.2d 665, 668 (W.Va. 1981), in which the Court defined immorality as 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.

The Board argues that under W.Va. Code §61-8b-7, it is a felony for a person to touch the breast of another person when the other person does not consent thereto. The Board also asserts that Grievant committed battery when he held Amanda in his office, not allowing her to escape without a struggle. Acknowledging that immoral conduct need not be criminal, the Board argues that such criminal conduct directed toward the students in his responsibility, renders Grievant's conduct immoral.

Grievant argues it cannot be concluded that the evidence submitted by the Board accurately portrays the nature of the contact and the conversation between the students and himself, and that the uncertainty must be resolved in Grievant's favor. Based upon a review of the evidence in its entirety, the Board's decision to terminate Grievant's employment must be upheld.

The relationship between teacher and student is one which must be carefully developed and maintained. It is not clear what motivated Grievant, or what his objectives may have been. It is clear that Grievant's language and actions were not in conformity with the moral code of the community. It is not acceptable for an adult male teacher to engage in sexual innuendo with female students. It is not acceptable for an adult male teacher to touch female students on or near their breasts or pelvic area. What occurred in this instance was not a group of "dirty-minded" students misconstruing andplacing a sexual spin on everything a teacher said, as Grievant would have us believe. That possibility is shattered by his own witnesses who heard him make the same comments about which the girls complained.

Neither does the touching engaged in by Grievant meet acceptable standards of proper sexual behavior. While there is no indication that Grievant blatantly groped any student's breast or posterior, the casual brushing of his hand on or near the breast area, lifting girls by placing his hands under their breasts, holding them by the hips, and even slow dancing in a posture which placed his leg between the legs of a female student, are all improper acts for a teacher.

The complaints articulated in the letter of dismissal may not be attributed to horseplay or students overreacting. Grievant was a teacher with approximately ten year's experience. It was his responsibility to set the tone with his students in and out of class. Apparently, he failed to understand his role as a teacher or the appropriate relationship between a teacher and his students. He was working with students who were at an age when they were no longer children, but were not yet adults. They had developed bodies of young adult women but were not emotionally mature enough to deal with such sexual matters. The overwhelming amount of evidence regarding the ongoing sexual innuendo used by Grievant and frequency in which he engaged in inappropriate touching compels a conclusion that the Board has proven by apreponderance of the evidence that the "nature" of the touching was other than innocent or

unintended physical contact, but rather, was intentionally, and/or knowingly, salacious and immoral. See Board of Educ. of the County of Mercer v. Wirt, 453 S.E.2d 402 (W.Va. 1994).

(See footnote 6)

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

FINDINGS OF FACT

1. Grievant has been employed by the Preston County Board of Education as a teacher and band director since approximately 1985.

2. Throughout the 1993-94 school year, and during the Fall 1994 semester, Grievant made numerous comments to female students involving sexual innuendo. During the same period of time, Grievant touched the students' breasts and other sensitive areas without their consent.

3. The sexual banter was observed by several adults including a student teacher, the assistant band director, and a volunteer who worked with the band.

4. Grievant was suspended pending an investigation conducted by a Deputy Sheriff. Subsequent to the conclusionof that investigation, the Board voted to terminate Grievant's employment effective January 11, 1995.

CONCLUSIONS OF LAW

1. County boards of education must prove charges that are relied upon to support disciplinary action against its employees by a preponderance of the evidence. W.Va. Code §18-29-6; Hayes v. Kanawha County Bd. of Educ., Docket No. 94-20-1143 (June 28, 1995).

2. A board of education may suspend or dismiss any person it its employment at any time for 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. W.Va. Code §18A-2-8.

3. "Immorality" is defined as "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 County of Harrison, 285 S.E.2d 665 (W.Va. 1981).

4. The Board has proven by a preponderance of the evidence that Grievant's conduct was not in conformity with accepted principles of right and wrong behavior, was contrary to the moral code of the community, and was not in conformity with the acceptable standards of proper sexual behavior, butrather, constituted immorality as contemplated by W.Va. Code §18A-2-8.

Accordingly, the grievance is DENIED.

DATED 8/25/95 SUE KELLER, SENIOR ADMN. LAW JUDGE

Footnote: 1Although the students were specifically identified by both first and last names in the disciplinary letters, consistent with Grievance Board practice, these students, all of whom were minors at the relevant time herein, will be addressed by their first names only.

Footnote: 2The January 13, 1995, letter actually stated that Grievant put his finger on her vagina. The correction was made by Board counsel Virginia Hopkins at the level four hearing.

Footnote: 3The complaints were edited to combine some overlapping matters. The substance of the allegations has not been affected.

Footnote: 4Dr. Wales was principal at Bruceton High School from 1985-1991 and Grievant's supervisor prior to his transfer to PHS. Dr. Wales testified that Grievant exhibited similar behavior at BHS. This testimony was not a basis for the termination but establishes an ongoing problem, raising the issue of why some corrective action had not been taken by the Board earlier.

Footnote: 5Upon further questioning Ms. Westbrook stated that the time she worked with Grievant included hall duty, symphonic band, marching band two days a week, attending ball games and competitions.

Footnote: 6Citing Wirt, Grievant argues that the burden of proof in this case should be "sufficient certainty" or even "clear and convincing" evidence. The undersigned does not interpret any such directive by the Court and retains the proof "by a preponderance of the evidence" standard.