JOHN C. (See footnote 1) **,**

Grievant,

v. **Docket No. 95-DPS-497**

DEPARTMENT OF PUBLIC SAFETY,

Respondent.

D E C I S I O N

Grievant, John C., grieves his indefinite suspension stating:

Suspension was wrongful. Col. Kirk knew I was on sick leave (See footnote 2) and would be for a long time[.] I have been indi[c]ted on charges in Logan County.

Grievant requested the suspension be lifted until the Circuit Court had ruled on his eight count felony indictment. As this grievance involved an indefinite suspension, Grievant filed directly at Level IV pursuant to W. Va. Code §29-6A-4(e). (See footnote 3) A Level IV hearingwas held on December 8, 1995, and the case became mature for decision on January 10, 1996, the deadline for submission of proposed findings of fact and conclusions of law.

The material facts in this grievance are not in dispute and are stated below. Pursuant to W. Va. Code §29-6A-6, Grievant chose not to testify at these administrative proceedings. (See footnote 4)

Findings of Fact

1. Grievant is employed by the Department of Public Safety ("DPS") as a drivers' examiner. In this position, Grievant gives the written test, eye exam, and driving test to individuals applying for their operators license. During the driving test, Grievant is alone in the car with the applicants. These applicants are usually teenage males and females.

2. In June 1995, DPS received a complaint that Grievant had sexually abused his teenage daughter.

3. On June 14, 1995, Respondent issued Special Order 223 ordering the West Virginia State Police Professional Standards Unit ("PPS") to conduct an administrative investigation of the charges.

All civilian complaints are referred to PPS as one of this unit's function is to perform internal investigations.

4. Sgt. Sharen Deitz investigated the complaint and questioned both Grievant and his daughter. Sergeant Deitz found Grievant's daughter to be credible, and her story to be consistent with the information she had given Child Protective Services.

5. On September 12, 1995, prior to the completion of this administrative investigation, the Logan County Grand Jury indicted Grievant on eight felony counts as follows: 1) four counts of Sexual Abuse in the First Degree in violation of W. Va. Code §61-8B-7; and 2) four counts of Sexual Abuse by a Parent in violation of W. Va. Code §61-8D-5. PPS suspended its investigation at that time.

6. On September 15, 1995, Colonel Kirk wrote Grievant notifying him he would be suspended with pay for a period of ten days beginning September 18, 1995. Resp. Exh. 3. Col. Kirk noted that Grievant, in his position as a Civilian Drivers Examiner, had "daily unsupervised contact with both young males and young females." Colonel Kirk also stated "because of this contact, there is a direct nexus between the criminal charges and your performance." In this same letter, Colonel Kirk informed Grievant he would be suspended without pay on September 28, 1995, for "an indefinite time", and this suspension would "continue until resolution of the criminal charges which have been filed." Id.

7. On September 28, 1995, Colonel Kirk issued Special Order 438 suspending Grievant without pay until the resolution of the felony charges. This order informed Grievant he would be allowed to utilize his accrued annual leave during this suspension. Resp. Exh. 4.

8. Grievant is an at-will employee, and as such is not afforded the same statutory protection as classified employees. Grievant was not hired from a West Virginia Division of Personnel Register, but was hired pursuant to DPS's own hiring policies. (See footnote 5)

9. Grievant has been employed by DPS since that time and has a good work history. DPS has never received a complaint concerning Grievant and any type of sexual impropriety.

Issue

The primary issue before this Board is whether Respondent had the legal authority to suspend Grievant, an at-will employee, without pay pending resolution of the criminal charges. Additionally,

this Board considered whether there is a rational nexus between the felony charges, Grievant's alleged behavior, and his employment.

Respondent stated Grievant is an at-will employee, and because his suspension violates no public policy, it was within its authority to suspend Grievant. Further, Respondent argues there is a rational nexus between the conduct cited in the indictment, sexual abuse by Grievant of his teenage daughter; and his employment, giving driving exams, and thus being alone in a car in a position of authority with individuals who are typically teenagers.

Grievant argues that Colonel Kirk is "denying [him his] Constitutional Rights." Grievant's post-hearing letter. Grievant further argues the rights of the "accused in Criminal Proceedings . . . [are] safeguards for life[,] liberty[,] and property" and these rights were ignored by his suspension. Id. At hearing Grievant frequently stated he should be innocent until proven guilty, and he feels like Colonel Kirk has already judged him and found him guilty.

Discussion

Grievant, as an at-will employee, may be discharged from his employment for good cause, bad cause, or no cause unless this termination contravenes some substantial public policy. Williams v. Precision Coal, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995); Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1993). Grievant did not allege any violation of substantial public policy, other than stating Respondent violated his constitutional rights "in criminal proceedings." Since Respondent could discharge Grievant at any time for no reason, it is clear he can be suspended without pay while he is under felony indictment.

Further, this Board ruled in Kitzmiller v. Harrison County Bd. of Educ., Docket No. 13-88-189 (Mar. 31, 1989), that 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 [his] position." See also Golden v. Bd. of Educ. of County of Harrison, 285 S.E.2d 665 (W. Va. 1981). While it is noted that school personnel are not at-will employees, this case further supports Grievant's suspension. The fact is Grievant has been indicted for sexual abuse of his teenage daughter, and Grievant, in a position of authority, is frequently alone with teenage females. The combination of these two facts presents a rational nexus between the alleged behavior and the duties of his position. Golden, supra. See also Boyd v. Wood County Bd. of Educ., Docket No. 93-54-

003 (June 30, 1993); Kidd v. W. Va. Dept. of Tax and Revenue, Docket No. 91-T-127 (Dec. 12, 1991).

The above discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. In suspension cases involving classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause for suspending an employee. W. Va. Code §29-6A-6. Davis v. W. Va. Dept. of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 22, 1990); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). In cases involving the suspension of classified-exempt, at- will employees, state "agencies do not have to meet this legal standard." Logan v. W. Va. Regional Jail and Correctional Auth., Docket No. 94-RJA-225 (Nov. 29, 1994).

2. Respondent had the legal authority to suspend Grievant until the resolution of the charges in the indictment, as he is an at-will employee.

3. Although not necessary in this instance, Respondent established a rational nexus between "the conduct performed outside of the job and the duties the employee is to perform." Syl. Pt. 2, in part, Golden v. Bd. of Educ. of County of Harrison, 285 S.E.2d 665 (W. Va. 1981).

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-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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JANIS I. REYNOLDS

Administrative Law Judge

Dated: January 31, 1996

Footnote: 1

At the beginning of the Level IV hearing, Respondent moved this Board to use only first names and last initials of the Grievant and his family members. Grievant did not object. This motion was granted pursuant to the practice of the W. Va. Supreme Court of Appeals in State ex rel. Billy Ray C. v. Skaff, 190 W. Va. 504, 438 S.E.2d 847 (1993), and Nancy Viola R. v. Randolph W., 177 W. Va. 710, 356 S.E.2d 494 (1987).

Footnote: 2

No evidence was presented on Grievant's status at the time of his suspension other than this reference on the grievance form.

Footnote: 3

Grievant was offered the opportunity to meet with Colonel Thomas L. Kirk, Superintendent, West Virginia State Police. Grievant was late for this appointment, and did not meet with Colonel Kirk. However, Grievant did meet that day with Lieutenant Colonel Gary N.Griffith, Deputy Superintendent. Grievant did not choose to discuss the facts surrounding his suspension at this meeting.

Footnote: 4Both during the hearing and in his post-hearing submissions, Grievant attempted to offer testimony. He was repeatedly advised that unless he gave up his right not to testify and was sworn in, these statements could not be considered.

Footnote: 5Grievant, pro se, did not contest this testimony in any way. It may be that Grievant did not understand the import of having no statutory protection; however, this does not change the fact that Grievant is an at-will employee. Test. Lt. Col. Griffith - Level IV Hrg.; W. Va. Code §§15-2-4, 7 and 21. See Burchett v. Taylor, 150 W. Va. 702, 149 S.E.2d 234 (1964); Setzer v. DPS, Docket No. 89-DPS- 476 (Nov. 24, 1989).