

LARRY STEWART, JR.

v. Docket No. 96-24-151

MARION COUNTY BOARD OF EDUCATION

DECISION

Grievant, Larry Stewart, Jr., employed by the Marion County Board of Education (Board) as a substitute bus operator, filed a level four grievance appeal on April 2, 1996, in which he complained: On Feb. 22, 1995, I was suspended without pay pending the outcome of my magistrate hearing. As of Dec. 28, 1995, the case was dismissed by the DMV. I was never convicted of DUI, license and certification was not revoked and I am entitled to all back pay from 2-22-95. I was allowed to return to work on 1-22-96. I am seeking all wages I would have received as if my name was not passed over on the substitute list.

An evidentiary hearing was conducted at level four on May 15, 1996, and the matter became mature for decision with the submission of proposed findings of fact and conclusions of law by the Board on May 27 and a post-hearing statement by the Grievant on May 30, 1996.

The undisputed facts of this matter are as follows.

1. Grievant was initially employed by the Board on or about October 4, 1994, as a substitute bus operator.
2. On February 20, 1995, Grievant was arrested for driving under the influence of alcohol.
3. Grievant had previously been assigned as a long-term substitute for a regularly employed bus operator. On February 21, 1995, Grievant remained incarcerated and could not complete his assignment that day.
4. By letter dated February 22, 1995, Assistant Superintendent Dennis Edge advised Grievant that as a result of the arrest, he was suspended immediately, without pay, pending the outcome of a magistrate hearing. Grievant was further advised that the suspension would be taken to the Board for action on March 20, 1995, and that he had the right to a hearing. Assistant Edge warned that if he did

not appear at this hearing, the Board would decide the matter based upon the information presented by the superintendent.

5. Grievant waived his right to appear before the Board which voted to continue the suspension pending resolution of the DUI charges.

6. By letter dated May 24, 1995, to Director of Transportation Don Schultz, Grievant requested, through counsel, reinstatement, noting that the suspension penalized him when he had yet to be convicted.

7. On December 28, 1995, Jane L. Cline, Commissioner of the Division of Motor Vehicles, issued a Dismissal Order finding that the State failed to present sufficient evidence to prove that Grievant was driving while under the influence of alcohol.

8. In January 1996, the Board reinstated Grievant who reported back to work on January 22, 1996. 9. On February 6, 1996, Grievant filed a level one complaint seeking reimbursement of any pay lost during the suspension.

10. The grievance was denied at levels one and two.

At level four the Board argued that the grievance was not timely filed at levels one or two, that it had demonstrated good cause for the suspension, and that Grievant could not establish that he lost any assignment during the period of the suspension. Grievant asserts that he did not attend the Board meeting or file a level one grievance in February because he was unable to present a case while the DUI charge was pending. Since his exoneration; however, Grievant claims entitlement to compensation for those assignments which he lost during the suspension.

Grievant's representative at level four, Russ Stacey, assumed the blame for any delay in filing at level two, stating that he could not find Grievant representation. Addressing the merits of the suspension, Grievant argues that he was never convicted, and never lost his drivers license or certification as a bus operator. Because he was always licensed and certified, he claims that the suspension left him penalized for a charge for which he was never convicted. Grievant does not present a specific showing of lost wages but suggests they could be calculated by determining which assignments he would have been offered in the rotational process.

Although Grievant did not file a level one complaint until approximately eleven months after he was suspended, and the level two appeal was not filed until approximately eight days after the level one decision was issued, the Board's claim of timeliness may not defeat the grievance at level four.

W.Va. Code §18-29-3 specifically provides “[a]ny assertion by the employer that the filing of the grievance at level one was untimely must be asserted by the employer on behalf of the employer at or before the level two hearing.” Trickett v. Preston County Bd. of Educ., Docket No. 95-39-413 (May 8, 1995). The Board did not raise the issue of timeliness regarding the initial filing at either levels one or two and is now prohibited by statute from doing so.

W.Va. Code §18-29-4(b) provides that “[w]ithin five days of receiving the decision of the immediate supervisor, the grievant may appeal the decision to the chief administrator” The level one decision was dated February 12, 1996; however, the record does not reflect what day Grievant actually received the decision. The level two appeal was not date stamped by the Board, but a handwritten note in the upper corner states “[a]ppeared in Mr. Edge's mailbox morning of February 26, '96.” Additionally, President's Day, Washington's Birthday, and Martin Luther King day were the following week. Although it is unlikely the Board observed all three holidays, the evidence does not establish the actual number of work days that week. Lacking this evidence, the Board failed to prove the second claim of timeliness.

In a disciplinary grievance, the board of education bears the burden of proving the charges by a preponderance of the evidence. W.Va. Code §18-29-6; Nicholson v. Logan County Bd. of Educ., Docket No. 95-23-129 (Oct. 18, 1995). In order to discipline a school employee for acts performed at a time and place separate from his employment, the board must demonstrate a “rational nexus” between the conduct performed outside the job and the duties the employee is to perform. Golden v. Bd. of Educ., 169 W.Va. 63, 285 S.E.2d 665 (1981). A rational nexus exists if the conduct directly affects the performance of the occupational responsibilities of the employee, or, if without contribution on the part of the school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the employee to discharge the responsibilities of the his position. Rogliano v. Fayette County Bd. of Educ., 176 W.Va. 700, 347 S.E.2d 220 (1986). Criminal acts directly involving the employee's occupational responsibilities constitute a rational nexus. Bledsoe v. Wyoming County Bd. of Educ., 183 W.Va. 190, 394 S.E.2d 885 (1990).

In the present matter, an arrest for DUI is clearly related to Grievant's assignment as a bus operator. Although guilt was not established, the arrest established a valid basis for concern by the Board, and the suspension, pending the outcome of the charge, was not an arbitrary or capricious act. By Grievant's own admission, the only information available at the time was the arrest and based

on this information, the Board's action was in the best interest of the children.

Even if it should be determined that the suspension was improper, it would be impossible to determine any amount of lost wages. Substitute bus operators are offered assignments on a rotational basis. For any number of reasons, substitutes do not always accept or receive the assignment next in order. Because this procedure is by nature indeterminate, any award would be speculative at best. Therefore, Grievant has failed to prove that he has lost any wages during the suspension. [\(See footnote 1\)](#) In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. The Board failed to assert at or before the level two hearing that the grievance was not timely filed at level one, and is therefore barred from making the claim at level four. W.Va. Code §18-29-3(a); Trickett v. Preston County Bd. of Educ., Docket No. 95-39- 413 (May 8, 1995).

2. The Board failed to establish, by a preponderance of the evidence, that the appeal to level two was not filed within five days of Grievant's receipt of the level one decision, as required by W.Va. Code §18-29-4(b).

3. In order to discipline an employee for acts performed at a time and place separate from his employment, the board of education must demonstrate a "rational nexus" between the conduct performed outside of the job and the duties the employee is to perform. Golden v. Bd. of Educ., 169 W.Va. 63, 285 S.E.2d 665 (1981).

4. The Board has proven the existence of a rational nexus between the arrest for DUI and Grievant's duties as a school bus operator. Based upon this nexus and a reasonable concern for the safety and welfare of the students, the Board's decision to suspend Grievant prior to a resolution of the criminal offense was not arbitrary or capricious. 5. Even had the suspension been improper, it is impossible to calculate the amount, of lost wages incurred by Grievant.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Marion 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.

Date: July 23, 1996 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

[Footnote: 1](#)

Because Grievant was incarcerated and unable to report to work on February 21, 1995, the long-term assignment was awarded to another employee. When asked by the undersigned whether the lost wages could be computed, Grievant did not cite this assignment. Due to the holding on the merits of this case, further speculation on this issue is not warranted.