WILLIAM D. HAYES,

Grievant,

v. **DOCKET NO. 96-20-179**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

William D. Hayes, Grievant, filed this grievance on May 9, 1996, protesting his dismissal from Kanawha County Board of Education ("Board"):

> The suspension of May 3, 1996 violates W. Va. Code 18A-2-8. Just cause has not been established. I ask for reinstatement, back pay and all appropriate relief. (See footnote 1)

Superintendent Jorea Marple suspended Grievant with pay on November 28, 1995, pending a hearing before the Board, on charges he had authored a sexually explicit note to a student in 1973. The hearing was originally scheduled for December 11, 1995. For reasons not stated, the disciplinary hearing before the Board was not conducted until May 2, 1996. (See footnote 2) Dennis Davis, Assistant Superintendent, issued a decision on May 2,1996, finding Grievant guilty of misconduct and recommending his termination from employment. (See footnote 3) By letter dated May 3, 1996, William H. Courtney, Director of Employer/Employee Relations, notified Grievant that the Board had voted to terminate his employment.

An expedited level four hearing was held before the Education and State Employees Grievance Board, pursuant to W. Va. Code § 18A-2-8, on June 11, 1996. This matter became mature for decision upon receipt of the parties' proposed findings of fact and conclusions of law on or about July 2, 1996.

Background

Grievant was employed as a teacher at Sissonville Junior High School. Grievant was subject to a termination action by the Board in 1994, which was reversed by this Board and affirmed by the Circuit Court of Kanawha County. The reversal was the subject of coverage by the local media.

A former student of Grievant, Drema Balser Blankenship, read a news article regarding the decision of the circuit court and contacted school officials with allegations of misconduct by Grievant dating back to her attendance at Marmet Junior High School in 1973. During the 1973-74 school year, Mrs. Blankenship (then Balser) was a 14 year- old ninth grade student at Marmet Junior High School. Grievant had been her mathematics teacher during the prior 1972-73 school year. Mrs. Blankenship related that on a certain day in the Fall of 1973, prior to getting on the bus, her friend, Diane Cunningham Pennington, gave her a note which Mrs. Pennington said was given to her by Grievant for delivery to Mrs. Blankenship. The note contained sexually explicit language and was signed with the single letter "B". Mrs. Blankenship was very upset about the note, showed it to a couple of boys on the bus, and then showed it to her parents and Diane Pennington (then Cunningham) that evening. (See footnote 4)

Mrs. Blankenship's mother, Catherine Balser, called the school principal that evening, advised him of the letter and said she would be taking her daughter out of the school. A meeting was arranged by the principal with Mr. and Mrs. Balser, and they shared the letter with the principal, indicating to him that the note allegedly came from Grievant.

The principal at the time, Gene Hedrick, undertook an investigation of the matter. He called the board of education office and inquired whether they had a handwriting expert there. They did not have an "expert" but sent a woman who was "well read in the situation." Jt. Ex. 1, Hedrick Dep., p. 5. Mr. Hedrick, the woman from the board office, and another teacher at the school, met with Grievant and explained the situation to him. (Mr. Hedrick could not remember the name of the woman from the board office.) Mr. Hedrick had gathered several written reports Grievant had submitted, and asked him tocopy the note, maybe four or more times, in their presence. Mr. Hedrick testified that it took an entire class period for this process. Following the copying of the note, Mr. Hedrick, the handwriting representative from the board office, and the teacher compared the writing of the note, the copies Grievant had made, and the written reports of Grievant, to determine whether Grievant authored the note.

Mr. Hedrick testified that it was pretty clear from a review of the handwriting samples that Grievant did not author the note, and whoever did it was pretty good at copying some letters, but would quickly fade back into their own handwriting. Jt. Ex. 1, Hedrick Dep., p. 8. Also, Mr. Hedrick testified that the type of sentence structure used was not that of an adult. Mr. Hedrick suspected it was one of the students who was known as a troublemaker, but does not recall whether he interviewed the student in connection with this affair. Jt. Ex. 1, Hedrick Dep., p. 24.

Following this process, Principal Hedrick and the woman from the board office determined that the note was not authored by Grievant and informed him of such. Mr. Hedrick put the original note in his "teacher" file that he kept in his office. Mr. Hedrick testified that he left all of his files for his successor when he left Marmet Junior High, including Grievant's file. Jt. Ex. 1, Hedrick Dep., p. 12.

Thereafter, an agreement was reached whereby Principal Hedrick changed Mrs. Blankenship's schedule so she would not be near Grievant's classroom or have any contact with him. This arrangement was satisfactory with the Balsers.

Grievant began his employment with the Board in 1972, a year earlier than the above-described incident. Grievant was still a probationary employee at the time of theincident. Following this incident, Grievant was given a satisfactory evaluation by Mr. Hedrick, and issued another probationary contract of employment. The following year he received a satisfactory evaluation by Mr. Hedrick's successor, Mr. William Milam. No mention was made on Grievant's evaluations regarding this incident. Grievant received his continuing contract of employment following three years and has received satisfactory or better evaluations during his entire 23-year tenure until the 1994 incident which spurred Mrs. Blankenship to call the Board.

Discussion

A board of education may suspend or dismiss any person in its employment 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 contendre to a felony charge. W. Va. Code § 18A-2-8. The authority of a board of education to dismiss a teacher under the dismissal statute must be based on just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously. Parham v. Raleigh County Bd. of Educ., 453 S.E.2d 374 (W. Va. 1994) .

Although neither the Superintendent's November 28, 1995 suspension letter to Grievant, nor the

decision of the Assistant Superintendent following the Board's disciplinary hearing on May 2, 1996, specifically identifies any of the grounds listed above as the reason for Grievant's disciplinary action, it is clear that the charge is immorality.

The term "immorality" as used in Code § 18A-2-8

> connotes 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, 668 (W. Va. 1981).

In any grievance involving disciplinary or discharge actions, the burden of proof is on the employer to prove the charges against the employee by a preponderance of the evidence. W. Va. Code § 18-29-7. The Board argues it has met its burden of proving that Grievant authored a sexually explicit note to Mrs. Blankenship in 1973. The Board presented the testimony of Mrs. Blankenship, Mrs. Pennington, and Mrs. Balser at level four, as well as the deposition testimony of then-Principal Hedrick. Mrs. Blankenship, Mrs. Pennington, and Mrs. Balser's testimony recounted the story that had been told 23 years earlier to Principal Hedrick. However, and most importantly, the note and the teacher's file kept by Principal Hedrick have vanished. There is no evidence that the Board ever failed to maintain control and possession of the note and the file. Mrs. Balser testified at level four that her husband had retained the note in his wallet until shortly before his death in 1989, when he took it out and burned it. However, this does not discredit Principal Hedrick's testimony that he kept the note in Grievant's file at the school. It is possible that the note in Grievant's file was a copy, or the note in Mr. Balser's possession was a copy. Unfortunately, we will never know, because Mr. Balser is deceased, and the entire file on Grievant kept by Principal Hedrick is missing.

The Board maintains that it is not barred from renewing these charges against Grievant 23 years later, because "no satisfactory response was forthcoming" following Principal Hedrick's investigation. R. Ex. 1. Grievant responds that the Board should be barred from renewing the charges against him based on theories of estoppel, laches,and lack of evidence to support the charges. Specifically, Grievant cannot now avail himself of the one piece of evidence, the note, which was in the possession of the Board, and which was instrumental in exonerating him of the charges. Respondent is now attempting to resurrect the charges without the note, without which Grievant cannot properly defend himself.

Although this Board has reviewed numerous cases involving dismissal or suspension of a teacher for alleged sexual misconduct involving a student, research indicates it has only heard one case involving the allegations by a school board of past acts of misconduct as a basis for dismissing an employee. In Clemont v. Ohio County Bd. of Educ., Docket No. 90-35-366 (Apr. 30, 1991), a guidance counselor was dismissed for, among other things, immorality based on incidents which had occurred years earlier. The school board had knowledge of these incidents, but had apparently not deemed them significant, because no action was taken against the grievant at the time of their occurrence. The Administrative Law Judge held that it was capricious and unreasonable of the school board to resurrect past alleged acts of misconduct as examples on which to base a dismissal on grounds of immorality.

This is the first time this Board has reviewed a case involving alleged past acts of misconduct of which the board of education not only had knowledge, but exonerated the teacher of the alleged misconduct, subsequently rehired him and granted him continuing contract status, and is now attempting to dismiss him based solely upon the same alleged acts of past misconduct. The Board has offered no new evidence to support theallegations; indeed, it has lost crucial evidence, and merely asserts that the previous investigation did not result in a "satisfactory response."

The Board argues it cannot be barred from investigating alleged acts of misconduct on the part of its teachers which arise years later. The undersigned Administrative Law Judge agrees. However, this is not a case of an allegation of misconduct arising years after its occurrence, wherein the board of education or other authorities had no knowledge of its occurrence at the time. The Board investigated this incident when it occurred and exonerated Grievant based upon the evidence it had before it at the time. While the current board of education may not agree with that conclusion or may have reached a different one today, that does not dismiss the fact that the principal and board, looking at more evidence than is before us today, exonerated Grievant of any wrongdoing. While it is certainly first and foremost the duty of a board of education to protect the safety and well-being of its students, it also has a duty to act fairly in disciplinary matters, and not arbitrarily or capriciously.

Because this is a case of first impression before this Board, the undersigned has looked to other jurisdictions which have addressed this issue for guidance. In the case of Roberson v. Bd. of Educ. of City of Santa Fe, 459 P.2d 834 (N.M. 1969), the Supreme Court of New Mexico held that evidence related solely to known conduct during prior periods of employment cannot furnish a basis for

cancellation of a contract for the future, and was improperly admitted and considered by the board of education in its conclusion to terminate the teacher's contract. Roberson was followed in Kleinberg v. Albuquerque Public Schools, 751 P.2d 722 (N.M. App. 1988), wherein the court found that prior misconduct evidence may notbe considered as the sole basis to terminate a teacher if the local school board was aware of the misconduct and nevertheless rehired the teacher.

In the instant case, not only did the school board know of the alleged misconduct of the teacher, the school board exonerated him, rehired him as a probationary teacher, and subsequently awarded him continuing contract status. To now attempt to resurrect this prior incident, without any new evidence, amounts to an arbitrary and capricious act on the part of Respondent. See Clemont, supra. While the current Board may have handled the investigation differently today than was done 23 years ago, the undersigned is not inclined to find that Principal Hedrick's investigation was so flawed that the Board is justified, without additional evidence, or even the original evidence, to dismiss Grievant 23 years later based upon that incident.

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.

2. The authority of a county board of education to suspend or dismiss a teacher under W. Va. Code § 18A-2-8, must be based upon the causes listed therein and must be exercised reasonably, not arbitrarily or capriciously. Parham v. Raleigh County Bd. of Educ., 453 S.E.2d 374 (W. Va. 1994).

3. The Board's attempt to resurrect prior alleged acts of misconduct against Grievant as the sole basis to dismiss him from employment, of which it had knowledge, exonerated him, and subsequently granted him continuing contract status, is arbitrary,capricious and unreasonable. See Clemont v. Ohio County Bd. of Educ., Docket No. 90- 35-366 (Apr. 30, 1991).

Accordingly, this grievance is **GRANTED** and the Board is hereby **ORDERED** to reinstate Grievant to employment with all full back pay and benefits to which he is entitled, and to remove the November 28, 1995, suspension letter, and the May 3, 1996, dismissal letter from Grievant's personnel file.

Any party may appeal this decision to the Circuit Court of Kanawha 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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MARY JO SWARTZ

Administrative Law Judge

Dated: July 31, 1996

Footnote: 1

Although the grievance statement mentions "suspension", it is clear from a review of the record that Grievant is protesting his dismissal by Respondent.

Footnote: 2

It is unclear from the record what Grievant's status was during this time period, i.e., whether he continued to be suspended with pay.

Footnote: 3

The record of the disciplinary hearing was not made a part of the record herein.

Footnote: 4

Pennington testified she did not read the note before she gave it to Blankenship. The note was written on standard notebook paper and folded three times, but not sealed. Pennington testified she had carried the note around with her almost the entire day before giving it to Blankenship.