GEORGIANNA HURLEY,

Grievant,

v. **Docket No. 97-23-024**

LOGAN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

On January 10, 1997, Georgianna Hurley (Grievant) submitted this grievance directly to Level IV, in accordance with W. Va. Code § 18A-2-8, challenging her indefinite suspension without pay by Respondent Logan County Board of Education (LCBE). Following a continuance, which was granted for good cause shown, a Level IV hearing was held in this Board's office in Charleston, West Virginia, on March 19, 1997. As agreed at the conclusion of the hearing, this matter became mature for decision on April 1, 1997, upon receipt of Grievant's post-hearing submission.

DISCUSSION

In disciplinary matters, the employer bears the burden of establishing 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); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). Moreover, the authority of a county board ofeducation to discipline an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

Grievant is employed by LCBE as a classroom teacher at South Man Grade School. On January

5, 1997, LCBE Superintendent John D. Myers notified Grievant that she was being suspended indefinitely with pay, as follows:

> Because of information that has reached this office concerning you and some incriminating materials, I am suspending you indefinitely and with pay, pending further investigation. The suspension will be effective January 6, 1997 until final resolution of the questioned material.
>
> This suspension is based on violation of WV Code 18A-2-8 "...may suspend or dismiss any person in 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." The suspension is also based on County Policy VI. 5 Disciplinary Action and specifically Policy VI 5.2 Causes relating to Personal Conduct.
>
> You are further advised that in accordance with West Virginia Code 18A-2-8, you are entitled to request a Level IV hearing before the West Virginia State and School (sic) Employees Grievance Board within five days of receipt of this letter.

J Ex 3.

On January 13, 1997, Grievant was indicted by a Grand Jury in the Circuit Court of Logan County for violating W. Va. Code § 61-8C-2, use of a minor in filming sexually explicit conduct, and W. Va. Code § 49-7-7, contributing to the delinquency of a minor through the conduct alleged under § 61-8C-2, and by providing alcohol to the same minor. A conviction under W. Va. Code § 61-8C-2 is a felony with an authorized punishment of imprisonment for up to ten years, and a fine of not more than ten thousand dollars. W. Va.Code § 61-8C-2(b). Contributing to the delinquency of a minor is a misdemeanor punishable by imprisonment in a county jail for up to one year, and a fine of fifty to five hundred dollars. W. Va. Code § 49-7-7(a).

Subsequently, on January 21, 1997, Superintendent Myers notified Grievant that she was being suspended without pay as follows:

> Because of the indictments against you involving charges that are considered immoral by community standards and have resulted in bringing notoriety upon the school system, I am suspending you indefinitely without pay pending further resolution of this matter. The suspension without pay will be effective January 21, 1997 until further notice.

J Ex 1.

The notice went on to repeat, verbatim, the last two paragraphs of the earlier suspension letter as set forth above. On February 18, 1997, a hearing was conducted before the Logan County Board of Education to consider Superintendent Myers' recommendation. Grievant appeared with counsel. The only evidence presented to support the proposed suspension was a copy of the indictment and the testimony of Logan County Prosecuting Attorney John Sims. Mr. Sims testified that Grievant appeared in photographs with an unidentified 17-year-old minor female. Both Grievant and the minor were unclothed and appeared to be necking or petting, with the minor's genital region exposed. Neither the photographs nor a copy of the police report which led to the indictment were presented.

The only other evidence before the school board was the parties' stipulation that Grievant has a master's degree plus 15 hours, and has received satisfactory evaluations over the last five years of her employment with LCBE. No additional evidence waspresented at Level IV, the parties agreeing that the issue to be decided was primarily a question of law.

This Grievance Board has previously held that a board of education may con ditionally suspend an employee based upon an indictment alone, provided there is a rational nexus between the indictment and the employee's ability to perform her assigned duties. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Lemery v. Monongalia County Bd. of Educ., Docket No. 91-30-477 (Apr. 30, 1992); Kitzmiller v. Harrison County Bd. of Educ., Docket No. 13-88-189 (Mar. 31, 1989). See Brown v. Dept. of Justice, 715 F.2d 662 (D.C. Cir. 1983). Thus, Respondent was not obligated to present preponderant evidence that Grievant, in fact, committed the offenses for which she has been indicted. See Lemery, supra; Kitzmiller, supra.

The conduct for which Grievant was indicted involved acts performed at a time and place separate from her employment. Thus, LCBE is obligated to establish a "rational nexus" between the alleged off-duty misconduct and the duties the employee performs. Rogliano v. Fayette County Bd. of Educ., 176 W. Va. 700, 347 S.E.2d 220 (1986); Golden v. Bd. of Educ., 169 W. Va. 63, 285 S.E.2d 665 (1981); Woo v. Putnam County Bd. of Educ., Docket No. 93-40-420 (June 2, 1994). A rational nexus for suspension of a teacher exists:

> (1) if the conduct directly affects the performance of the occupational responsibilities of the teacher; or (2) if, without contribution on the part of school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the particular teacher to discharge the responsibilities of the teaching position. (citations omitted)

Rogliano, supra, at 224.

In this matter, Grievant is a classroom teacher at the elementary school level. She has been indicted on a felony charge of using a minor to film sexually explicit conduct. Such activity, if proven, is inherently inconsistent with the teacher's position as a "role model" expected to set a moral example for her students. See Kitzmiller, supra. See generally, Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Adler v. Bd. of Educ., 342 U.S. 485, 493 (1952); Bd. of Educ. v. Wood, 717 S.W.2d 837 (Ky. 1986). Accordingly, the undersigned finds that the alleged conduct "directly affects the performance of the occupational responsibilities of the teacher." See Rogliano, supra; Golden, supra.

LCBE also contends that the notoriety from this indictment has impeded Grievant's ability to perform her duties as a classroom teacher. While common sense indicates that some notoriety might result in these circumstances, the record in this matter is devoid of any evidence which would establish that any notoriety exists. Thus, LCBE did not satisfy this alternative requirement. Id.

Grievant complains that she was denied due process in that the charges against her were too vague to allow her to prepare a meaningful defense. The Supreme Court of Appeals of West Virginia has declared the extent of due process protections in such circumstances to include a pre-termination hearing as provided in W. Va. Code § 18A-2-6. Bd. of Educ. v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994). The court further noted:

> It is not necessary for a pre-termination hearing to be a full adversarial evidentiary hearing; however, an employee is entitled to a written notice of the charges, an explanation of the evidence, and an opportunity to respond prior to a Board of Education's decision to terminate the employee.

Id. at Syl. Pt. 3. (See footnote 1)

As to Superintendent Myers' letter of January 5, 1997 (J Ex 3), Grievant is correct. "Information that has reached this office concerning you and some incriminating materials" with a further recitation of the text of W. Va. Code § 18A-2-8 does not meet the Wirt standards requiring written notice of the charges and an explanation of the evidence. Grievant was not challenging her suspension with pay at Level IV. However, Grievant contends that the same defect remained, even after Superintendent Myers issued his suspension letter of January 21, 1997 (J Ex 1).

To the extent that LCBE makes reference to County Policy VI.5, without making a copy of that policy a matter of record before the County Board or at Level IV, Grievant's claim is sustained. The

undersigned is without knowledge of what is contained in the county policy, and it will not be further considered in this decision. However, the undersigned finds that Superintendent Myers' reference to "indictments against you involving charges that are considered immoral by community standards" (J Ex 3), provided adequate notice to Grievant that the indictment of January 13, 1997, was being incorporated by reference, and that "immorality" was the particular W. Va. Code § 18A-2-8 ground which was being alleged to warrant her suspension. See Wirt, supra. The record in this matter does not demonstrate that Grievant was unable to respond to these charges because of any confusion over the nature of the allegations. The fact that Grievant faced a dilemma in regard to testifying or presenting either mitigating or exculpatory evidencebefore the School Board, thereby generating evidence which would be admissible in her pending criminal proceeding, does not create a due process issue. See Brown, supra.

Finally, Grievant alleges that she should have been reassigned to a non-teaching position, pending resolution of the charges, or, at worst, suspended with pay. As this Grievance Board noted in Lemery, the language in W. Va. Code § 18A-2-8 makes such alternatives discretionary on the part of the school board. See Weimer-Godwin v. Bd. of Educ., 179 W. Va. 423, 369 S.E.2d 726 (1988). There was no evidence that LCBE had any non-teaching positions vacant to which Grievant could have been assigned pending resolution of the criminal charges. The undersigned is unable to conclude that LCBE abused its discretion under the circumstances presented. See Lemery, supra.

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate in this matter.

FINDINGS OF FACT

1. Grievant is employed by the Logan County Board of Education (LCBE) as a classroom teacher at South Man Grade School.

2. On January 5, 1997, LCBE Superintendent John D. Myers notified Grievant that she was being suspended indefinitely with pay "[b]ecause of information that has reached this office concerning you and some incriminating materials . . . ." J Ex 3.

3. On January 13, 1997, Grievant was indicted by a Grand Jury in the Circuit Court of Logan County for one count of violating W. Va. Code § 61-8C-2, use of a minor in filming sexually explicit conduct, and two counts of violating W. Va. Code § 49-7-7, by (1) contributing to the delinquency of a

minor through the conduct alleged under § 61-8C-2, and (2) by providing alcohol to the same minor. 4. On January 21, 1997, Superintendent Myers notified Grievant that she was being suspended without pay "[b]ecause of the indictments against you involving charges that are considered immoral by community standards and have resulted in bringing notoriety upon the school system . . . ." J Ex 1.

5. A pre-termination hearing was conducted by the Logan County Board of Education on February 18, 1997, and the board voted to approve Grievant's indefinite suspension without pay.

CONCLUSIONS OF LAW

1. The employer must establish the charges in a disciplinary matter 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. Immorality is one of the causes listed in W. Va. Code § 18A-2-8 for which an education employee may be disciplined. Woo v. Putnam County Bd. of Educ., Docket No. 93-40-420 (June 2, 1994). See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

3. In order to discipline a school employee for acts performed at a time and place separate from employment, the employer must demonstrate a "rational nexus" between the conduct performed outside the job and the duties the employee is to perform. Rogliano v. Fayette County Bd. of Educ., 176 W. Va. 700, 347 S.E.2d 220 (1986); Golden v. Bd. of Educ., 169 W. Va. 63, 285 S.E.2d 665 (1981); Woo, supra. See Thurmond v. Steele, 159 W. Va. 630, 225 S.E.2d 210 (1976).

4. A rational nexus for suspension of a teacher exists:

> (1) if the conduct directly affects the performance of the occupational responsibilities of the teacher; or (2) if, without contribution on the part of school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the particular teacher to discharge the responsibilities of the teaching position. (citations omitted)

Rogliano, supra, at 224.

5. A Board of Education may conditionally suspend an employee based upon an indictment alone, provided there is a rational nexus between the indictment and the employee's ability to perform her assigned duties. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994);

Lemery v. Monongalia County Bd. of Educ., Docket No. 91-30-477 (Apr. 30, 1992); Kitzmiller v. Harrison County Bd. of Educ., Docket No. 13- 88-189 (Mar. 31, 1989).

6. Grievant's indictment for use of a minor in filming sexually explicit conduct, a felony prohibited by W. Va. Code § 61-8C-2, and contributing to the delinquency of a minor by providing alcohol, a misdemeanor prohibited by W. Va. Code § 49-7-7, involves alleged conduct which "directly affects the performance of the occupational responsibilities of the teacher." See Rogliano, supra; Golden, supra.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Logan 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 ofthe intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: April 14, 1997

Footnote: 1

Although Wirt involved a termination, the same due process considerations apply to a suspension without pay.