LARRY R. HYLTON,

Grievant,

v. Docket No. 04-24-126

MARION COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Larry R. Hylton ("Grievant"), employed by the Marion County Board of Education ("MCBE") as a principal, filed a grievance directly to level four, as is permitted by W. Va. Code § 18-29-4(c), following his dismissal. Grievant requests reinstatement with back pay. A level four hearing was conducted on September 2, 2004, at which time Grievant was represented by John R. Angotti, Esq., of Angotti and Straface, and MCBE was represented by Steven R. Brooks, Esq., of Flaherty, Sensabaugh & Bonasso. The grievance became mature for decision upon receipt of MCBE's Reply Memorandum of Argument on November 29, 2004.

The following facts are derived from a preponderance of the evidence made part of the record developed before MCBE and the level four grievance hearing.

Findings of Fact

1. Grievant was employed by MCBE as principal of Dunbar Middle School ("DMS") at all times pertinent to this grievance. In August 1996, Grievant signed an Educator Educational Internet Account agreement stating that failure to comply with State Board of Education ("WVBOE") Policy 2460 (which sets forth guidelines for using school computers), and any county or school policies could result in loss of access, personal payment of any fees incurred, and possible prosecution. 2. In January 2004, Grievant was on extended sick leave, and Charles Pitrolo had been appointed acting principal at DMS.

3. On or about January 30, 2004, Mr. Pitrolo discovered a black, three-ring, loose leaf notebook in a drawer in the principal's office. The notebook contained approximately two hundred pages of printed e-mail and downloaded internet web site information, dated 1997 and 1998, including pictures of Ms. Nude America (featuring full frontal nudity) and other females, not all of which were in a state of undress. The e-mail correspondence indicates

Grievant solicited adulterous relationships, and was successful in his endeavors on at least one occasion. Much of the correspondence included sexually explicit language.

4. Grievant used his own name in certain instances, but at least once, he used the name Richard Pellegrin, another principal in Marion County. (See footnote 1) Other aliases used were "Tigerboss" and "Keith Ryan." (See footnote 2) Grievant used his e-mail address provided by the West Virginia Department of Education, lhylton@access.k12.wv.us, on some of the correspondence. He also used tigerboss2@yahoo.com and dudley33us.@yahoo.com, an address associated with the address and telephone number of DMS.

5. Mr. Pitrolo transferred the notebook to Assistant Superintendent Dennis Edge the next school day. The computer from the DMS principal's office was immediately seized and delivered to the State Department of Education to determine whether improper usehad occurred. The evaluation was negative; however, it is uncertain how long that specific equipment had been at DMS.

6. MCBE Superintendent, Dr. James B. Phares, notified Grievant by letter dated February 27, 2004, that he was suspended immediately, and that a recommendation for termination of his employment would be made on March 22, 2004. Dr. Phares stated the basis for the recommended termination would be immorality, and specifically cited: (1) the possession of pornographic material on school property, and the violation of the Acceptable Use Policy for technology by downloading pornographic material; (2) using an alias in e-mail interactions with multiple female recipients for the purpose of engaging in adulterous relationships, and using another employee's profile to establish similar relationships and/or to contact multiple females on the internet over a period of years; and, (3) the violation of West Virginia Department of Education Policy 5902 and MCBE Policy 2.117, Employee Code of Conduct.

7. MCBE voted to terminate Grievant's employment following a hearing conducted on March 22, 2004.

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; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence of greater weight or more

convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by thegreater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993).

MCBE asserts that Grievant was properly dismissed for immorality as evidenced by the use of his State Board of Education access e-mail account to correspond with Ms. Nude America, to print nude pictures of her, and to discuss arrangements for a rendezvous with her. Further, the viewing and storing of pictures of nude females on school property, the use of another employee's identity, and the solicitation of adulterous relationships on school premises does not conform to accepted principles of right and wrong in the Marion County community. Finally, MCBE notes that Grievant does not deny any of the facts and evidence presented, nor has he offered any explanation for the contents of the notebook.

Grievant elected not to testify before MCBE or at level four, as is his right under W. Va. Code § 18-29-6, but argues that Golden v. Board of Education of County of Harrison, 169 W. Va. 63, 285 S.E.2d 665 (1981) is controlling, and that MCBE has failed to meet the test for dismissal set forth in that decision. First, Grievant asserts that MCBE failed to prove when or where the documents were printed and placed in the notebook. Second, MCBE has failed to prove the alleged actions were immoral. Third, the conduct did notaffect Grievant's performance of his duties as principal, and finally, any notoriety arising from this situation was the result of MCBE since Grievant did not publicize the matter.

W. Va. Code §18A-2-8 identifies the types of conduct that can result in disciplinary action and provides, in pertinent part:

Notwithstanding any other provisions of law, a board 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. A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article.

MCBE Employee Code of Conduct, 2.117,Section II.B.6 requires that employees demonstrate responsible citizenship by maintaining a high standard of conduct, self- control, and moral/ethical behavior.

State DOE Policy 2460 Section 3.3 provides specific examples of unauthorized computer use, including "creating, store, sending, or viewing pornographic material, using email identification other than one's own, misrepresenting an individual's identity or source of communication of data, or requesting that inappropriate material be transferred. The term "immorality" in W. Va. 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 acceptable sexual behavior." Golden v. Bd. of Educ., supra.

The Grievance Board has ruled in a number of cases that the use of a school or agency computer to access pornographic constitutes a sufficient basis for dismissal. Gorman v. Bureau of Emp. Programs, Docket No. 03-BEP-206 (July 16, 2004); Kennardv. Tucker County Bd. of Educ., Docket No. 01-47-591/628 (Mar. 12, 2002); Lanham v. Kanawha County Bd. of Educ., Docket No. 01-20-577 (Feb. 28, 2002); White v. Bureau of Emp. Programs, Docket No. 99-BEP-496 (May 22, 2000). This case is no exception.

Because Golden involved an employee's actions away from school, it is not on point in this case. Even if a similar test were to be applied, MCBE has established that some, if not all the activity occurred at school as evidenced by those documents sent to Grievant at his school e-mail address. Further, they were maintained at the school in an ordinary notebook and could have been discovered by anyone. Notwithstanding Grievant's perception of morality, generating and keeping nude pictures and correspondence with explicit sexual banter at school is not consistent with community standards of what is proper behavior for a middle school principal, and falls within the definition of immoral. Grievant's assertion that any such activity did not affect the performance of his duties as principal, is also beyond the

boundaries of acceptability. While he may have completed the basic requirements of the position, using time for which he was being paid to perform administrative duties to accumulate pornographic material and solicit adulterous relationships is not in conformity with acceptable standards and principles of right and wrong. MCBE has proven by a preponderance of the credible evidence that Grievant engaged in immorality by engaging in the acts with which he was charged, which led to his dismissal.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. LewisCounty Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064.

2. The authority of a county board of education 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).

3. W. Va. Code §18A-2-8 is the applicable statute and provides, in pertinent part: Notwithstanding any other provisions of law, a board 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 of nolo contendere to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article.

4. Immorality connotes conduct which is "not in conformity with accepted principles of

right and wrong behavior; contrary to the moral code of the community; wicked, especially, not in conformance with the acceptable standards of proper sexual behavior," as defined in Webster's Dictionary. Golden v. Bd. of Educ., 169 W. Va. 63, 285 S.E.2d 665 (1981). 5. Respondent met its burden of proof and has proven Grievant engaged in acts constituting immorality under W. Va. Code § 18A-2-8.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Marion County. Any 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

DATE: DECEMBER 10, 2004

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Mr. Pellegrin testified at level four that he became aware of a problem in fall 1998 when he began receiving calls of a sexual nature from women. He reported the matter to Assistant Superintendent Dennis Edge and the Marion County Sheriff's Department; however, they were unable to assist Mr. Pellegrin at that time.

Footnote: 2 The tiger is the DMS mascot.