JOSEPH HICKS,

Grievant,

v. **Docket No. 04-30-183**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Joseph Hicks ("Grievant") filed this grievance directly at level four on May 14, 2004, challenging his suspension without pay from his employment as a bus operator for Respondent Monongalia County Board of Education ("MCBOE"). He seeks reinstatement to his position, or, in the alternative, conversion of the suspension to a paid one. A hearing was held in Westover, West Virginia, on July 12, 2004. Grievant was represented by counsel, John E. Roush of SSPA, and Respondent was represented by counsel, Kelly J. Kimble. This matter became mature for consideration upon receipt of the parties' fact/law proposals on July 27, 2004.

The following findings of fact are made based upon a preponderance of the credible evidence of record.

Findings of Fact

1. Grievant has been employed by MCBOE as a bus operator for approximately six years. 2. On March 16, 2004, Grievant was suspended with pay, pending MCBOE's investigation of allegations that Grievant had inappropriately touched a third grade student on his bus on or about February 19, 2004. (See footnote 1)

3. This allegation was also reported to the Department of Health & Human Resources, which began its own investigation of the incident in March of 2004.

4. On April 12, 2004, the Department concluded its investigation, and issued a report finding that maltreatment of a child had occurred. Consequently, a warrant was issued for Grievant's arrest

for misdemeanor battery on April 26, 2004.

5. By letter dated April 27, 2004, Superintendent Michael Vetere notified Grievant that, due to the criminal charges against him, he would seek approval for Grievant's suspension with pay up to the date of the scheduled Board meeting on May 4, 2004, after which time he would recommend that Grievant be suspended without pay until the criminal matter was resolved.

6. After a hearing at which Grievant appeared and was represented by counsel, MCBOE approved Grievant's suspension with pay from March 16, 2004, through May 4, 2004, and an indefinite suspension without pay until the criminal proceedings against Grievant are concluded.

7. As of the date of the level four hearing in this matter, Grievant's criminal case was still pending.

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). 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).

W. Va. Code § 18A-2-8 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 contendre to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee evaluation pursuant to section twelve of this article. Id.; See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

Grievant has not been convicted of any charge nor has he plead guilty or *nolo contendre* to any charges. By its clear and unambiguous language, W. Va. Code § 18A-2- 8 does not permit a suspension for the mere charge of a crime. Nevertheless, this Grievance Board has previously held that 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 his

assigned duties. Balis v. Braxton County Bd. of Educ., Docket No. 98-04-094 (Jan. 22, 1999); 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. Dep't of Justice, 715 F.2d 662 (D.C. Cir. 1983). When an employee has been indicted, the suspension is based upon the indictment itself, not the conduct alleged therein, because the formal charge itself establishes reasonable cause to believe the employee engaged in the conduct. Kitzmiller, supra; Snodgrass v. Wetzel County Bd. of Educ., Docket No. 97-52-384 (Dec. 15, 1997). Thus, a board is not obligated to present preponderant evidence that Grievant, in fact, committed the offenses for which he has been charged. See Lemery, supra; Kitzmiller, supra. Hurley v. Logan County Bd. of Educ., Docket No. 97-23-024 (Apr. 14, 1997). There can be no question in the instant case that improper touching of a child on his school bus is an offense which would have a rational nexus to Grievant's ability to properly perform his duties as a bus operator entrusted with the care of young students.

Moreover, this Grievance Board has recently upheld the right of a board of education to indefinitely suspend an employee without pay while criminal proceedings are conducted. In Blaney v. Wood County Board of Education, Docket No. 03-54-169 (Jan. 16, 2004), after a discussion of numerous federal cases which have upheld such suspensions, the administrative law judge determined that, so long as some particular event will eventually bring a conclusion to the suspension (such as completion of a criminal trial), it is permissible. Also, in Blaney, supra, it was noted that federal courts have also upheld indefinite suspensions which are based upon criminal charges “to avoid subjecting an employee to an administrative hearing while the criminal action is pending where evidence could be disclosed long in advance of the criminal trial thus prejudicing the employee's defense. See Polcover v. Dep't of Treasury, 477 F.2d 1223, 1231-1232 (D.C.Cir.), *cert. denied*, 414 U.S. 1001 (1973), citing Silver v. McCamey, 221 F.2d 873, 874-875 (D.C. Cir. 1955).”

It is also of no moment that Grievant's misdemeanor charge is not actually a “felony indictment” as discussed in Kitzmiller and Lemery, supra, because the concern regarding conflicting proceedings is still the same:

> While it is true that Kitzmiller and Lemery involved felony indictments, the rule adopted therein is primarily founded upon avoiding the potential conflict that could arise from a government employer prosecuting its case in an evidentiary hearing while a state or federal prosecution is pending trial. Kitzmiller, supra, at 7-8. See Brown, [supra]. This interest in avoiding conflict is not eliminated by the fact that misdemeanor charges are at stake, rather than felony charges.

Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). Thus, MCBOE acted within its authority in suspending Grievant indefinitely without pay until the criminal charges against him are resolved.

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. 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).

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. A board of education may conditionally suspend an employee based upon an criminal charges alone, provided there is a rational nexus between the charge and the employee's ability to perform his assigned duties. See Balis v. Braxton County Bd. of Educ., Docket No. 98-04-094 (Jan. 22, 1999); 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); Brown v. Dep't of Justice, 715 F.2d 662 (D.C. Cir. 1983).

4. Based upon federal and state case law, and previous Grievance Board decisions, Grievant's indefinite suspension without pay is neither a violation of statute, nor arbitrary, capricious, or an abuse of discretion.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia 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: August 13, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The specific allegation was that Grievant placed the child on his lap, touched her upper right leg, and kissed her on the cheek while asking questions such as whether she had ever "made love" with her boyfriend.